

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

UNITED CORPORATION,)	
)	Case No.: 2013-CV-101
Plaintiff,)	
)	ACTION FOR DAMAGES
v.)	
)	
WAHEED HAMED,)	<u>JURY TRIAL DEMANDED</u>
(a/k/a Willy or Willie Hamed),)	
)	
Defendant.)	
<hr/>		

**UNITED’S BRIEF IN SUPPORT OF ITS RULE 59(e) MOTION
FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT**

INTRODUCTION

The Court’s September 2, 2014 Opinion (the “Opinion”) and Order (the “Order”) granting Waheed Hamed (“Waheed” or “Hamed”) summary judgment in this case found two declarations submitted by FBI agents in the criminal case brought against United Corporation (“United”) to be “dispositive” on the statute of limitations issue. See Opinion, p. 6. Those affidavits addressed the criminal defendants’ access to hundreds of thousands of pages of documents¹ that were seized by the FBI in the October 2001 raid of the grocery stores and homes of the Hameds and Yusufs² and obtained from third parties. Specifically, the Court accepted the truthfulness of the representations in those declarations that “Plaintiff’s defense

¹ The Government launched coordinated raids on the stores and on the homes of six of the defendants in October 2001, and “seized substantially all of the Defendants’ business, financial and person records.” See Exhibit A, Defendants’ Motion for Specific Relief, p. 3, ¶ 2. They then obtained Defendants’ documents from a “a variety of other third-party sources, including “financial institutions, outside accounting firms, [and] family members. . . .” Id. at ¶ 3. All told the Government obtained more than “five hundred banker boxes of the Defendants’ documents from these and other sources.” Id. at ¶ 3. A bankers box will accommodate 4,000 pages of neatly organized material. See <http://www.thecrowleycompany.com/imagingservices/faqs.html>, September 18, 2014. Even assuming conservatively that each box was filled only to one-half capacity, and that there were exactly 500 banker boxes (and no more), the Government had in its possession approximately 1,000,000 pages of documents.

²Fathi Yusuf and Hamed’s father, Mohammed Hamed, formed what has been conceded in other pending litigation to be a partnership that operates three “Plaza Extra” grocery stores in the Virgin Islands (two in St. Croix and one in St. Thomas). See August 12, 2014 Declaration of Fathi Yusuf, ¶¶ 1 and 3 filed in Hamed v. Yusuf and United Corporation, Civil No. SX-12-CV-370, as an attachment to Defendants’ Motion for Partial Summary Judgment in that case.

team was granted ‘unfettered’ access to discovery” and made a finding to that effect. *Id.* at 5-6. On the basis of that finding, and the Court’s assumption that the 1992 tax returns of Hamed were among the documents in the FBI’s possession in 2003, the Court found that United “should have discovered Defendant’s alleged conduct by at least 2003 by exercising reasonable diligence,” because by that time “all documents – including Defendants’ tax returns from 1992 and later – . . . were made available to Plaintiff for review.” *Id.* at p. 8.

What the Court did not know at the time it made these findings is that the FBI affidavits were submitted by the U.S. Government in response to a motion signed by Waheed’s attorney in the criminal case and attorneys for other defendants which argued that the defendants had been denied access to documents so severely as to deprive them of due process and warrant dismissal of the criminal case. See Exhibit A, Dkt. No. 1038.³ The Honorable Raymond L. Finch, who presided over the case, ruled in an order dated July 16, 2009 that full access had been denied, and ordered the Government at its expense to copy every single document in their possession and furnish those copies to the Defendants in the criminal case. See Exhibit F, Dkt. No. 1152. The Government argued in a motion for reconsideration that copying those voluminous documents would cost at least \$125,000 and consume 3-4 months. See Exhibit G, Dkt. No. 1177. Not long afterwards, plea negotiations began, and the parties agreed to a stay of Judge Finch’s order during those discussions. The negotiations culminated in a plea agreement filed on February 26, 2010, Dkt. No. 1248. The fact that Hamed took a contrary position in a prior case which opposes the “unfettered access” position taken in this case presents the classic scenario for application of the doctrine of judicial estoppel, which would bar any reliance on

³ See the filings in the criminal case pending in the District Court of the Virgin Islands, Division of St. Croix, entitled USA v. Yusuf, et al., Criminal No. 2005-0015 (the “Criminal Case”) relating to the lack of access issues are attached hereto as Exhibits A through L and denoted by their Federal Docket Number (“Dkt. No. _____”).

the FBI affidavits. And even apart from judicial estoppel, Judge Finch's order necessarily rejected the "unfettered access" assertions in the FBI affidavits as untruthful, and the affidavits are entitled to no deference for that reason.

Since the lynchpin of the Court's Opinion and Order are affidavits that Hamed is estopped to rely upon and that in any event are entitled to no weight at all, United respectfully asks this Court to reconsider that ruling and, upon reconsideration, reinstate the claims that were dismissed by the Order. In addition, since the analysis in the Opinion has some overlap with that of the June 24, 2013 ruling granting in part Hamed's motion for judgment on the pleadings, United also respectfully asks this Court to reconsider that prior order, pursuant to its power to revisit any interlocutory order under Rule 54. United respectfully asks that the Court grant reconsideration and vacate that order, which dismissed United's claims on statute of limitations grounds to the extent they rely on an alleged \$70,000 conversion by Hamed.

ARGUMENT

I. The Standard for Granting a Rule 59(e) Motion.

United's motion to reconsider the Court's September 4, 2014 Opinion and Order granting Hamed summary judgment on all remaining claims is brought under Fed.R.Civ.P. 59(e). The case law establishes that a Rule 59(e) motion to alter or amend may be granted on the basis of any of the following three grounds: "1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." Wiest v. Lynch, 710 F.3d 121, 128 (3d Cir. 2013). This test is identical to that for granting a motion for reconsideration under LRCi 7.3, and Rule 59(e) motions are treated as motions for reconsideration. See Id. at 127.

In granting a motion under the third ground, the Court has discretion to consider

arguments and evidence that could have been presented earlier, if doing so will correct a clear error of law or to avoid manifest injustice. See Gutierrez v. Gonzales, 2005 U.S. App. LEXIS 4502, pp. *29-*30 (3d Cir. 2005) (affirming district court's grant of motion for reconsideration "on the basis of evidence "known to [the movant] prior to the entry of the . . . order" and presented for the first time on reconsideration, because the district court relied on "the need to prevent manifest injustice" prong of the federal rule); Whitford v. Boglino, 63 F.3d 527, 530 (7th Cir. 1995) (district judge had discretion to reconsider its denial of a summary judgment motion by allowing a party to file a second one that in the court's view "presented a new and . . . more convincing legal argument" than the first motion); Ortiz v. City of Chicago, 2011 U.S. Dist. LEXIS 53206, p. *11 (N.D. Ill. 2011) (denying motion for reconsideration where the defendant identified "no injustice that would result absent the Court's consideration of their new argument"); Ford Motor Credit Company v. Bright, 34 F.3d 322, 324 (5th Cir. 1994) (a court has discretion to consider "materials . . . that were not presented to the trial court for consideration" in deciding a Rule 59(e) motion for reconsideration); U.S. Home Corporation v. Settlers Crossing, LLC, 2012 U.S. Dist. LEXIS 101778, p. *15 (D. Md. 2012) ("[b]ecause it was within [Magistrate-Judge's] discretion to consider previously available new evidence in [granting a motion for reconsideration], the Reconsideration Order cannot be challenged on this ground"); Church & Dwight Co., Inc. v. Abbott Laboratories, 545 F. Supp. 2d 447, 450 (D. N.J. 2008) ("the Court does have discretion to consider evidence raised for the first time in the motion for reconsideration if such evidence may lead to a different decision").

In addition, courts will be especially inclined to consider evidence or argument on a motion for reconsideration of an order that might have been presented earlier in situations like the instant one in which the Plaintiff is asserting judicial estoppel as a ground for

reconsideration, because that doctrine protects the integrity of the judicial process. See Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F. Supp. 2d 1152, 1163 (C.D. Cal. 2008) (exercising “discretion to consider the newly presented evidence” in support of judicial estoppel argument because that doctrine “concerns protection of the integrity of the courts and the judicial process”).⁴

II. The Court Should Grant Reconsideration of its Opinion and Order and Vacate the Order Dismissing All Remaining Claims.

A. The Doctrine of Judicial Estoppel Precludes Any Reliance by Hamed on the FBI Affidavits and their Assertions that Defendants were Given Unfettered Access to Documents.

The Third Circuit Court of Appeals explained the doctrine of judicial estoppel succinctly in Mintze v. American General Financial Services, Inc., 434 F.3d 222 (3d Cir. 2006):

The doctrine of judicial estoppel prevents a party from asserting inconsistent claims in different legal proceedings. Judicial estoppel is an equitable doctrine, within the Court’s discretion. The doctrine was designed to prevent parties from playing fast and loose with the courts.

Id. at 232 (internal quotations and citations omitted). Three requirements must ordinarily be satisfied before a court may properly apply the doctrine of judicial estoppel:

First, the party to be estopped must have taken positions that are *irreconcilably inconsistent*. Second, judicial estoppel is unwarranted unless the party *changed his or her position in bad faith* – i.e., with intent to play fast and loose with the Court. Finally, a district court may not employ judicial estoppel unless it is tailored to address the harm identified and *no lesser sanction would adequately remedy the damage* done by the litigant’s misconduct.

⁴The undersigned counsel for United regrets not bringing to the Court’s attention matters raised in this motion that could have been raised in the prior briefing on this motion. He did not believe that the Court would attach dispositive significance to affidavits submitted by the U.S. Government in an adversarial criminal proceeding brought against United and Hamed (among others). He also regrets not advising the Court of what efforts he made to comply with the Court’s April 25, 2014 directive to obtain an affidavit from the U.S. Attorney’s Office rebutting FBI Agent Petri’s affidavit. The undersigned counsel did in fact discuss with Assistant U.S. Attorney Ishmael Meyers the prospect of obtaining an affidavit in what is still an ongoing criminal case (among other things, United has not been sentenced), and concluded on the basis of that conversation that it would be impossible.

Krystal Cadillac Oldsmobile GMC Truck, Inc. v. General Motors Corp, 337 F.3d 314, 319-320 (3d Cir. 2003) (internal quotation marks omitted) (*italics in original*).

In this case, Hamed quoted extensively from the FBI affidavits submitted in the Criminal Case, and on the basis of that quoted material made the following representations to the Court regarding United's access to the documents that had been seized by the FBI from Defendants' homes and the Plaza Extra stores, and obtained by subpoena and otherwise from third parties:

United Corporation had full, unfettered access to all of these documents beginning in 2003, as detailed in the Declaration (dated July 8, 2009 of FBI Special Agent Thomas L. Petri, in U.S.A. v. Fathi Yusuf, Mohammed Yusuf, et al . . . (Hamed's Memorandum in Support of Motion for Summary Judgment, p. 4).

This unfettered access for United continued over many years, as noted by FBI Special Agent Christine Zieba. (*Id.* at 4).

Thus, it is undisputed that Plaintiff had full, unfettered access to the information it now claims gives rise to this cause of action in 2003 and thereafter. (*Id.* at 5).

...[T]wo sworn FBI affidavits . . . state that plaintiff and their counsel **absolutely and positively had access to ALL of the documents in the government's possession.** . . . (Hamed's Reply Brief at 5) (*emphasis in original*).

No material fact exists as to whether plaintiff either had "unfettered access" to the documents in 2003, or that such access has been thoroughly exercised since 2003. (*Id.* at 8).

Hamed concluded from the affidavits in his Motion for Summary Judgment (at paragraph 2) that "there is no dispute as to the *sole operative fact* that, contrary to what Plaintiff previously represented to the Court, it had full and complete access to all of the documents in possession of the U.S. Government for many years prior to the physical return of the documents . . ."

What Hamed failed to tell the Court was that these affidavits were submitted by the

Government in response to a motion filed by him and the other defendants in the Criminal Case on February 5, 2009. In that motion, which was entitled “Motion for Specific Relief Due to the Government’s Destruction of the Integrity, Organization and Sourcing of Material Evidence,” Hamed and all the other defendants in the Criminal Case asserted that the Government had allowed “only limited supervised review of the evidence” and for a two-year or more period did not permit any visits by defense counsel to the office where documents were kept. “The defense team’s last permitted visit to the FBI offices was in 2006,” the Motion asserted, and from then “until November of 2008, the Government denied the Defendants access to their documents despite numerous requests.” See Exhibit A at ¶¶ 9 and 13. The Motion described in detail the various other ways in which Defendants had been denied access to their own documents. For example, when defense team visits resumed in November 2008, the FBI agent at the site “initially denied the team access to the records,” and placed new restrictions on the Defendants’ “access and ability to review and examine the Defendants’ own documents.” Id. at ¶¶ 14-15. Among these restrictions were that “the Government agents – not defense counsel – would decide which boxes the team would be permitted to review.” Id. at ¶ 18.

The Motion also represented that the Government had impaired access to documents in another way, which was to “reorganize[] and rearrange[] 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.” Id. at ¶ 23. This severely compromised Defendants’ access to their documents because the defense team “relied on the box numbers” to identify what was contained in them. Id. at ¶¶ 25-27. The defense team then insisted on being given the opportunity to review boxes of documents in this reshuffled form to determine the extent of the reshuffling and outright removal of documents from boxes. Id. at ¶¶

31, 37, 43. At various points during their review of documents, FBI agent Petri, who submitted one of the affidavits relied upon by Hamed in this case, told the defense team “that they were misinformed if they believed the documents seized and maintained by the government belonged to the defendants,” because in fact they “belonged to the Government, and that he would do with them as he pleased.” *Id.* at ¶ 45. The Motion asserted that the defense team concluded its review of the integrity of the boxes, and “found that some boxes were entirely missing,” and that “numerous documents” were “now missing from the boxes.” *Id.* at ¶ 48.⁵ The denial of access was serious enough that Defendants sought dismissal of the case and a return to them of all of the hundreds of thousands of pages of Defendants’ documents.

The Government responded to the Motion on February 24, 2009, and Defendants filed their reply to the Government’s response on March 17, 2009. *See Exhibit B*, Dkt. No. 1067; *Exhibit C*, Dkt. No. 1076.⁶ Then, on July 8, 2009, more than 3½ months later, and the day before a hearing on the motion, the Government filed its “Response to Defendants’ Motion Reply Memorandum in Support of the Motion for Specific Relief,” which attached as exhibits the FBI affidavits relied upon by Hamed and by this Court as dispositive of the discovery rule, claim accrual issues in this case.⁷ *See Exhibit D*. On July 9, 2009, a hearing on the motion was held before the Honorable Raymond L. Finch, and on July 16, Judge Finch entered an

⁵The Motion also asserted that rather than copying what it needed and returning original documents to the rightful owners, as it should have done under its own internal protocols, “the Government deliberately held [Defendants’] property for more than seven years.” *Id.* at ¶ 70. Further, the Government “never compiled an inventory of the specific items and documents seized in the October 2001 raid.” *Id.* at ¶ 69.

⁶ The Defendants’ Reply, which was signed by Waheed’s attorney, asserted, *inter alia*, that the Government “does not dispute the factual allegations [in Defendants’ Motion], and the only controversy is whether the requested relief is warranted.” *Exhibit C*, p. 2.

⁷On that same day, July 8, counsel for Waleed Hamed filed a motion to strike the Government’s unauthorized brief and affidavits that were served after the close of business and on the eve of the hearing. *See Exhibit E*, Dkt. No. 1149. This motion and all of the other documents from the Criminal Case cited in this discussion may also be reviewed on the District Court’s ECF docketing system.

order, which specifically found the Government had provided the Defendants only “limited” access to their documents, thereby rejecting the “unfettered access” assertions in those affidavits. He then granted the extraordinary relief of making the Government copy each and every page of the hundreds of thousands of documents in its possession, at their cost, and then furnish them to the Defendants:⁸

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 involved oversight by government agents involved in investigating this case.**

* * *

Without a complete set of documents for 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 documents 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. (Emphasis supplied in part).

Exhibit F.

On August 14, 2009, the Government filed a Motion to Reconsider Judge Finch’s Order claiming that the Order was clearly erroneous or manifestly unjust and that, among other things, it imposed a burden of production on the Government that would cost “no less than

⁸In relying on the FBI affidavits as dispositive of the discovery rule issues in this case, Hamed neglected to advise this Court not only of the irreconcilably inconsistent position he took in the Criminal Case on document access, but also of Judge Finch’s Order, which found that full access had not been provided. VISCR 211.3.3(a)(2) provides: “A lawyer shall not knowingly: (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”

\$125,000” and require “3 to 4 months” to satisfy.⁹ See Exhibit G, p. 2 Dkt. No. 1177. A month later, on September 14, 2009, Judge Finch entered an Order denying the Government’s Motion to Reconsider. See Exhibit I, Dkt. No. 1212. Shortly thereafter, the Government commenced plea negotiations with the defendants, and in an October 19, 2009 motion, jointly agreed to a stay of Judge Finch’s order during the pendency of the negotiations. See Exhibit J, Dkt. No. 1227, p. 2. Those negotiations resulted in the signing of a plea agreement dated February 26, 2010 (Dkt. No. 1248) under which United pled guilty to one count, which charged it with willfully making and subscribing a 2001 U.S. Corporation Income Tax Return in violation of 33 V.I.C. § 1525(2). Under that plea agreement, all charges against the individual defendants were dismissed with prejudice.¹⁰ The amount of back taxes to be paid by United (and the other defendants), was left open by the plea agreement (to be resolved by the Court if necessary), and as to that issue discovery of documents was still potentially important. On November 30, 2010, some nine months after the plea agreement, Waheed and other defendants advised the Court by motion that the Government had still failed “to produce complete and accurate copies of all of its documents to the defense.” See Exhibit K, p. 5, Dkt. No. 1297. The motion asserted that, to date, “the Government has not complied with [the Judge Finch] Order,” and “steadfastly refuses to return those documents.” Id. at p. 5. Mediation of the back-tax issues took place on December 14, 2010, and on February 7, 2011, the parties filed an addendum to the plea agreement setting forth the agreed-upon restitution amounts. See Exhibit

⁹On August 20, 2009, Defendants filed their Opposition to the Motion to Reconsider. See Exhibit H, Dkt. No. 1180.

¹⁰ The individual defendants were charged, inter alia, with conspiracy to underpay United’s gross receipts taxes for the period 1996 to 2002 and with filing false individual tax returns for (depending on the individual) either the 1996 to 2001 or 1997 to 2000 tax years.

L, Dkt. No. 1304.

From the above history, it is clear that the three requirements for application of judicial estoppel to bar Hamed's reliance on the FBI affidavits are readily met. First a comparison of Hamed's brief in this case and the motions and other filings he joined in the Criminal Case show plainly that the positions Hamed took in the two cases regarding United's access to the documents held by the FBI are irreconcilably inconsistent. Secondly, Hamed's intent to play fast and loose with the Court is evidenced by his failure to tell this Court that the FBI affidavits directly contradict positions taken in a motion filed by him seeking dismissal of the criminal case because of the Government's deprivation of access to documents -- and his equally remarkable failure to advise this Court that Judge Finch entered an order which addressed the document access issue and necessarily rejected the very assertion of "unfettered access" set forth in those affidavits. It is difficult to conclude that the failure to advise the Court of inconsistent positions was anything other than intentional. Lastly, application of judicial estoppel to preclude any reliance by Hamed on those affidavits is exactly tailored to address the harm inflicted on this Court, and no lesser sanction would adequately remedy the damage done by Hamed's misconduct.

And even if the doctrine of judicial estoppel did not apply here, Judge Finch's order in the Criminal Case compels a finding by this Court that Defendants were deprived of full access to their documents, and that the FBI affidavits are false insofar as they assert that United and the other defendants to the Criminal Case had unfettered access to them. Indeed, the motion that Waheed joined in on November 30, 2010 makes it clear that even at that late date, access was still being denied. The Court should accordingly grant reconsideration of the Opinion and vacate the Order dismissing the remaining claims.

B. Before a Claim Can Accrue Under the Discovery Rule, A Plaintiff Must First Have a Reasonable Suspicion of Wrongdoing by Another Which Would Cause Him or Her to Look for and Find Documents Showing the Wrongdoing.

The Court in this case implicitly accepted Hamed's unsupported legal argument that bare access to documents starts the statute of limitations running, even if the plaintiff has no reasonable suspicion that would trigger a duty to look for and examine documents that might show wrongdoing by Hamed, including his tax returns. See Hamed's Brief Support of his Motion for Summary Judgment at 8. The case law provides otherwise. Thus, even if the doctrine of judicial estoppel and Judge Finch's order did not at the very least create genuine issues of material fact regarding United's access to its documents, the Court's ruling would still be erroneous because it presumes on the basis of access to documents that a plaintiff or prospective plaintiff has knowledge of every document in its files.

A Seventh Circuit case, Fujisawa Pharmaceutical Company, Ltd. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997) is very clear on this point. There, a drug company, Fujisawsa, purchased a substantial amount of stock in another drug company, Lyphomed. Fujisawa thereafter brought a securities fraud suit against Lyphomed's principal shareholder an executive, Kapoor, alleging that he had committed fraud by concealing from it material facts regarding Lyphomed's troubles with the FDA that had led to a temporary ban on submitting new drug applications to the Agency. The applicable statute of limitations contained a discovery rule (like that of the Virgin Islands and many other states) under which the claim accrued when the plaintiff should have discovered the existence of a claim. It provided that the limitations period began to run "not when the fraud occurs, and not when the fraud is discovered, but when . . . the plaintiff learns, or should have learned through the exercise of ordinary diligence . . . enough facts to enable him by such further investigation as the facts would induce in a reasonable person to sue

within a year.” Id. at 1334. Kapoor argued that under the discovery rule, “the statute of limitations begins to run as soon as the victim has access to the facts that would show the fraud” Id. at 1335. This meant, Kapoor said, that the claim accrued no later than “1990, when Fujisawa acquired Lyphomed and with it custody of copies of all the questionable applications that the FDA’s investigation later brought to light.” Id. at 1335.

The Seventh Circuit rejected Kapoor’s argument that “ease of access to the necessary information” was enough to start the limitations period to begin running:

Kapoor fastens on ease of access to the necessary information. All of it was in documents that were in the possession of the victim itself, Fujisawa, as the controlling shareholder and later sole owner of Lyphomed. But more than bare access to necessary information is required to start the statute of limitations running. There must also be a suspicious circumstance to trigger the duty to exploit the access; an open door is not by itself a reason to enter a room. We reject the suggestion that the defrauded purchaser of a company is presumed to be on notice of everything in the company’s files, so that the statute of limitation begins to run at the moment of the acquisition.

Id. at 1335.¹¹ See also Pirelli Armstrong Tire Corporation, Retiree Medical Benefits Trust v. Walgreen Co., 2009 U.S. Dist. LEXIS 77648, *19-*20 (N.D. Ill. 2009) (holding that “Pirelli’s mere possession of its [own] payment records [showing the alleged fraudulent prescription-filling practices of Walgreen’s] is not alone sufficient to start the statute of limitations,” and that “[t]here must also be some suspicious circumstance that would alert Pirelli to Walgreens’ potentially fraudulent conduct”); Thompson v. Butler, 2013 Ohio App. LEXIS 957, *22-*23 (Ohio App. 2013) (“evidence of a suspected breach of duty . . . should not usually be deemed

¹¹Of course, the converse is also true. Once a potential plaintiff suspects that he has a claim against another person, he must show his due diligence in discovering the existence of a cause of action, in order to defer the running of the statute of limitations. See Aetna Casualty & Surety Company v. Fernandez, 830 F.2d 952, 956 (8th Cir. 1987) (holding that Aetna’s subrogation claim against an individual allegedly involved in a collusive pricing scheme which caused a loss to the insured was time-barred under the discovery rule because, upon learning that the individual was a suspect in the scheme, Aetna should have undertaken “a review of available documentary evidence in [the insured’s] records” in order to demonstrate its due diligence in determining whether it had a basis

‘discovered’ for starting the running of the statute of limitations” if, inter alia, “it is buried in voluminous documents” or “require[s] a degree in financial economics or accounting to understand”) (concurring opinion).

In his April 7, 2014 declaration attached to United’s opposition to Hamed’s summary judgment motion, Fathi Yusuf asserts that Hamed’s tax returns never came into United’s possession until 2011, when the FBI returned, via hard drive, a small part of the documents it had seized or otherwise obtained in connection with the Criminal Case, and Hamed tax returns were among those documents in that hard drive. Yusuf Declaration, ¶¶ 2, 8. Yusuf did not suspect Waheed of misappropriation before he reviewed his tax returns that happened to be on that hard drive, and he had no reason to ask his criminal attorney to try to obtain those returns beforehand.¹² And without having reasonable ground for suspicion, United and Yusuf cannot be presumed to have knowledge of these documents, even assuming arguendo that United had access to them.

The upshot is that if this Court had any basis for finding that the Government provided full and complete access to documents, it was error to impute to United knowledge of any documents tending to show wrongdoing by Hamed, even before Mr. Yusuf formed any suspicion of Hamed’s conversions and breaches of fiduciary duty and thus had any reason to look for documents to confirm the truth of those suspicions.¹³

for a lawsuit).

¹² A declaration filed by Mr. Yusuf in a case pending before the Honorable Douglas A. Brady, Mohammed Hamed v. United Corporation, et al., (case no. STX-12-CV-370), confirms that he had no suspicion of wrongdoing by any members of the Hamed family until he reviewed those documents. See Exhibit M, ¶ 8. Mohammed Hamed is seeking to use this Court’s September 2, 2014 ruling to foreclose United’s recovery on claims that are part of its counterclaim in the case before Judge Brady.

¹³To resist a motion for summary judgment based on the statute of limitations, a party who relies on equitable tolling need only “alleg[e] acts that, taken as alleged, could persuade a court to activate the doctrine of equitable tolling.” Meyer v. Riegel Products Corporation, 720 F.2d 303, 308 (3d Cir. 1983). As this Court observed in its

III. The June 24, 2013 Opinion and Order Granting Partial Dismissal on the Pleadings Should Also be Reconsidered.

If the Court grants reconsideration of its Opinion and Order, and vacates that final order, United requests that it take a second look at the June 24, 2013 Opinion and Order, which is based, at least in part, on a document access finding that is different from that of the September 2 Order, but in United's view equally untenable. If the September 2 Order is vacated, then the June 24 Order will be restored to the status of an interlocutory order entered before final judgment and it is well-settled that so long as a "court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so." Anthanassious v. Palmer, 2011 U.S. App. LEXIS 5733, *9 (3d Cir. 2011). This inherent power to reconsider an interlocutory order is governed by a more lenient standard than the Rule 59(e) standard quoted above, in Section I of this brief. Thus, when relying on its inherent power to reconsider an interlocutory order, "a trial judge has the discretion to reconsider an issue and should exercise that discretion whenever it appears that a previous ruling, even if unambiguous, might lead to an unjust result." Id. at *9. See also Fye v. Oklahoma Corporation Commission, 516 F.3d 1217, 1224, n.2 (10th Cir. 2008) (court exercising its "general discretionary authority to review and revise interlocutory rulings prior to entry of final judgment" is "not bound by the strict standards for altering or amending a judgment encompassed in Federal Rule of Civil Procedure 59(e)").

Opinion at pages 7-8, the discovery rule and the equitable tolling doctrines both incorporate a "reasonable diligence" element. As such, the rule quoted from the Meyer case would also apply to a party who is relying on the discovery rule to defeat a Rule 56 limitations motion. Here, United has satisfied this burden with respect to both the discovery rule and the doctrine of equitable tolling. Equitable tolling also applies because the Criminal Case and the document access denials qualify as "exceptional circumstances" that delayed discovery and prosecution of the claim. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994).

It is important to recognize that the discovery rule and equitable tolling issues are rarely resolved at the pleadings stage, especially in light of the “exercise reasonable diligence” component of both doctrines, which is almost always a fact-intensive issue. See, e.g., Drennen v. PNC Bank National Association, 622 F.3d 275, 301 (3d Cir. 2010) (“the applicability of equitable tolling depends on matters outside the pleadings, so it is rarely appropriate to grant a . . . motion to dismiss (where review is limited to the complaint) if equitable tolling is at issue”) (citation and internal quotation marks omitted); Permobil, Inc. v. GMRI, Inc., 2010 U.S. Dist. LEXIS 120316, p. *7 (M.D. Tenn. 2010) (“Given Tennessee’s reasonableness standard for its discovery rule, the Court concludes that this issue cannot be resolved on a motion for judgment on the pleadings”); Nichols v. First American Title Insurance Company, 2013 U.S. Dist. LEXIS 30193, p. *6 (D. Az. 2013) (“[t]he discovery rule, like the doctrine of equitable tolling, often depends on matters outside the pleadings and thus cannot usually be resolved on a 12(b)(6) motion to dismiss”) (citation and internal quotation mark omitted); Ballard v. National City Mortgage Co., 2005 U.S. Dist. LEXIS 1834, p. *2 (E.D. Pa. 2005) (“whether the equitable tolling doctrine applies cannot be decided on the pleadings,” and whether the “discovery rule applies” is likewise “a matter for further factual development”); Bearse v. Main Street Investments, 220 F. Supp. 2d 1338, 1345 (M.D. Fl. 2002) (the question of “when the plaintiff, exercising due diligence, reasonably should have learned about the facts giving rise to the fraud claim” is “a question for the jury” that cannot be resolved at the pleading stage); Reed v. Vickery, 2009 U.S. Dist. LEXIS 102151, p. *10 (S.D. Ohio 2009) (“[w]hether the [plaintiffs] should have discovered this failure to disclose at an earlier date is an issue of fact which cannot be resolved on a motion to dismiss or for judgment on the pleadings”).

In its June 24 Opinion dismissing in part United's claims, the Court departed from the strong presumption against deciding discovery rule and equitable tolling issues at the pleadings stage. The Court articulated two grounds for its decision to go against that presumption and dismiss all claims to the extent they rely on a \$70,000 conversion. First, it suggested that United had "access to its own accounting and other record-keeping files, a review of which might have revealed Defendant's alleged conduct." Court's 6/24/13 Opinion at 8, n.31. The Court then went on to say that "[e]ven if the Government had confiscated Plaintiff's business records, an objectively reasonable individual would have retained copies, particularly if an indictment was pending, and have inquired into the wrongdoing suggested by the September 9, 2004 third superseding indictment." *Id.* The Court then concluded, "Thus, Plaintiff's argument that Plaintiff did not have access to the documents to discover Defendants' misconduct is without merit." *Id.*

Next, the Court found that the Third Superseding Indictment alleged that Hamed and others "used cashier's checks and other methods to conceal illegal money transfers abroad . . .," Opinion at 8, and that this "would have at least put a reasonable person in Plaintiff's position. . . on notice that Defendant may have engaged in some wrongful activity regarding the use of cashier's checks" to steal money from United. *Id.* at 8.

With respect to the Court's suggestion that United should, in the exercise of reasonable diligence, have retained copies of all documents that the FBI seized, this was simply not possible. The original documents were seized in a raid, without notice, pursuant to the Government's ex parte search warrants, and no opportunity was given to the targets of those warrants to make copies of originals before the FBI seized and removed them.

As for the allegations of the criminal indictment that Waheed and other members of the

Hamed and Yusuf families were engaged in a conspiracy to underpay gross receipts taxes by, inter alia, causing cashier's checks to be issued from unreported cash income of the grocery store businesses so as to disguise the source of that money, it hardly follows that this tax evasion activity alleged to have been undertaken collectively by the defendants (including United and Waheed) would have put United on notice that Waheed might also be using cashier's checks to conceal separate unauthorized conversions to his own benefit of cash from grocery store safes.¹⁴ The indictment alleges in Count I a conspiracy by United and Waheed, among others, to defraud the Virgin Islands government of gross receipts taxes and alleges, in paragraph 15, that Waheed and three other individual members of the alleged conspiracy purchased cashier's checks made payable to third parties in furtherance of that scheme. Why would an indictment alleging that United, Waheed and others acted in concert to evade United's gross receipts taxes put United on notice that Waheed might be stealing from it? The Court suggests that both the alleged collective acts in furtherance of the underreporting of United's gross receipts taxes and United's allegations in the instant case regarding Waheed's unauthorized taking of cash from it share a common method of concealment of the wrongful act – namely, cashier's checks written to third parties. But it hardly follows from this shared element of the two sets of allegations that once the indictment against United and others was

¹⁴Burton v. First Bank of Puerto Rico, 49 V.I. 16 (2007), which is cited in the Court's June 24 Opinion at page 3, footnote 10, is one of those rare cases in which the plaintiff's complaint contained allegations showing when the plaintiff's claim accrued under the discovery rule, thereby permitting a ruling at the pleadings stage dismissing the suit on limitations grounds. In Burton, the Plaintiff claimed that her bank failed to credit her account for a deposit of an insurance check for \$18,686 that she allegedly endorsed over to the bank in 1996. The plaintiff admitted in her complaint that she received a statement from the defendant Bank that she believed to be "incorrect" because it "did not reflect the large payment that she had made the previous month." Id. at 22. Thus, in her own pleadings, plaintiff admitted to receiving written notice of the very act which eight years later became the subject of her negligence and breach of contract lawsuit. The Superior Court held that plaintiff's receipt of the bank statement put her on notice of a potential claim against the Bank, and her failure to make diligent inquiry thereafter triggered the running of the statute of limitations. Here, of course, United did not allege (and there is no basis for alleging) in its Complaint that Hamed sent United written notice that he had taken \$70,000 in cash from United, and Burton is therefore readily distinguishable on its facts.

brought, United would necessarily be put on notice of its own claims against Waheed for stealing from it. The argument in this form is a non sequitur, and cannot be a proper ground for dismissing a complaint on limitations grounds on a motion for judgment on the pleadings.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, United Corporation respectfully requests this Honorable Court to grant its Motion for Reconsideration and to Alter or Amend Judgment.

DATED: September 29, 2014

Respectfully submitted.

By:



Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
The DeWood Law Firm
2006 Eastern Suburbs, Suite 101
Christiansted, VI 00830
Telephone: (340) 773-3444
Telefax: (888) 398-8428
Email: info@dewood-law.com

Attorneys for United Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2014, I caused the foregoing **United's Brief in Support of Its Rule 59(e) Motion for Reconsideration and to Alter Or Amend Judgment** to be served upon the following via e-mail:

Carl Hartmann, III, Esq.
5000 Estate Coakley Bay, #L-6
Christiansted, VI 00820
Email: carl@carlhartmann.com



Motion To Alter Or Amend Judgment

Index of Exhibits

1. Exhibit A - Motion for Specific Relief Due to the Government's Destruction of the Integrity, Organization and Sources of Material Evidence (Dkt. No. 1038)
2. Exhibit B - Government's Response to Motion for Specific Relief (Dkt. No. 1067)
3. Exhibit C - Defendant's Reply (Dkt. No. 1076)
4. Exhibit D - Government's Response to Defendant's Motion Reply Memorandum in Support of Motion for Specific Relief (Dkt. No. 1148)
5. Exhibit E - Defendant's Motion to Strike Government's Unauthorized Brief and Affidavits filed after close of business on the eve of the hearing. (Dkt. No. 1149)
6. Exhibit F - Order of July 16, 2009 (Dkt. No. 1152)
7. Exhibit G - Government's Motion for Reconsideration (Dkt. No. 1177)
8. Exhibit H - Defendant's Opposition to Motion to Reconsider (Dkt. No. 1180)
9. Exhibit I - Order of September 14, 2009 (Dkt. No. 1212)
10. Exhibit J - October 19, 2009 Motion to Stay Discovery (Dkt. No. 1227)
11. Exhibit K - Defendants' Motion for Specific Relief in Anticipation of the December 14, 2010, Oral Argument (Dkt. No. 1297)
12. Exhibit L - Addendum to Plea Agreement (Dkt. No. 1304)
13. Exhibit M - Fathi Yusuf Affidavit, August 12, 2014.

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. 2005-15F/B

FATHI YUSUF MOHAMAD YUSUF,
aka Fathi Yusuf

WALEED MOHAMMAD HAMED,
aka Wally Hamed

WAHBEED 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 on 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 Cafe*, 940 F. Supp. 102, 104 n13 (D.N.J. 1996); see also *Baliois 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. 415, 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 presuntior contra spoliatorem*.'").

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 (8th Cir. 1983); *United States v. Baca*, 687 F.2d 1356, 1359 (10th Cir. 1982); *United States v. Traylor*, 656 F.2d 1326, 1334 (9th Cir. 1981); *United States v. Picariello*, 568 F.2d 222, 227 (1st 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
Randall P. Andreozzi, Esq.
Attorney for Walced Mohammed Hamed
ANDREOZZI FICKESS, LLP
9145 Main St.
Clarence, NY 14031
(716) 565-1100
(716) 565-1920 (Facsimile)

/s/Gordon C. Rhea
Gordon C. Rhea, Esq.
Attorney for Walced Mohammed Hamed
RICHARDSON, PATRICK WESTBROOK & BRICKMAN, LLC
1037 Chuck Dawley Blvd., Bldg. A
Mt. Pleasant, SC 29464

/s/Derek M. Hodge
Derek M. Hodge, Esq.
Attorney for Nejech Fathi Yusuf
P.O. Box 303678
St. Thomas, USVI 00804

/s/Warren B. Cole

Warren B. Cole, Esq.
Attorney for United Corporation
1138 King St. - Third Floor
Christiansted, St. Croix VI 00820

/s/Thomas Alkon

Thomas Alkon, Esq.
Attorney for United Corporation
2115 Queen St.
Christiansted, St. Croix, USVI 00820

/s/Pamela Colon

Pamela Colon, Esq.
Attorney for Waheed Mohammed Hamed
27 & 28 King Cross Street, 1st Floor
Christiansted, St. Croix, USVI 00820

**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 MOHAMAD YUSUF,
aka Fathi Yusuf,
WALEED MOHAMMAD HAMED,
aka Wally Hamed,
WAHEED MOHAMMED HAMED,
aka Willie Hamed,
MAHER FATHI YUSUF,
aka Mike Yusuf,
ISAM MOHAMAD YOUSUF,
aka Sam Yousuf,
NEJEH FATHI YUSUF, and
UNITED CORPORATION
d/b/a Plaza Extra,

Defendants.

CRIMINAL NO. 2005-015

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR SPECIFIC RELIEF

The United States of America and the Government of the Virgin Islands, by and through undersigned counsel, hereby responds to defendant's Motion for Specific Relief (#1038).

DISCUSSION

Defendant presents numerous spurious, false, and unsupported accusations in his motion. The motion is one in a series filed by the defendant and his co-defendants that are designed not to redress legitimate grievances but to present false allegations to smear the government before the Court. The defendant's failure to identify any harm purportedly suffered or to attach an affidavit or



other evidence to substantiate the claims of misconduct shows that the pleading has been filed merely to grandstand rather than to rectify any error.

I. The Defendant Has Not Suffered Any Harm

The defendant argues that he has been harmed by the alleged reorganization of evidence. That is, he claims that the index of documents created by his defense counsel no longer comports with the evidence as it is maintained by the government. Such an argument is false.

First, it should be noted that the motion does not concern spoliation or destruction of evidence as claimed by the defendant. The defendant cannot identify a single document or even categories of documents that no longer exist or have been destroyed.¹ Ignoring the hyperbole and breathless narration of the motion, and, instead, reviewing the pleading with a clear eye, it is clear that the defendant claims that harm has been suffered because his index does not marry perfectly with the organization of the evidence.² The claim is inherently unreliable because it presumes that

¹ Defense counsel was in government office space reviewing documents during the week of January 26, 2009. The government repeatedly offered to locate any document that the defense purportedly could not find. Defense counsel never provided a description of any records that they allege were missing or could not locate. To this day they still have not done so.

The government repeats its offer to locate specific documents if the defense provides a written request for such assistance. As is customary, the government will provide the seized location and inventory number for any evidence the government seeks to introduce at trial. Lastly, the government is aware of its obligations under Brady v. Maryland and Giglio v. United States and will continue to comply with them.

² The defendant may have been confused by the organization of boxes at the government office space. As the evidence is voluminous and government space is finite, it had been stored throughout the building, not necessarily in ascending or descending numerical order. Recognizing that the organization of the evidence might cause the agents some time to locate an individual box, the government made the reasonable request that defense counsel, prior to their arrival at the government office space, identify boxes that they wished to review so that they could be pulled and readied for inspection. Either the defendants were not organized and had not identified what they wished to review, or they were organized and blithely ignored the government's request. The result was the same: defense counsel arrived at the government office space and asked to review boxes of evidence in numerical order. As the government

the defendant's index was true and accurate at the time it was made.³ Neither the government nor this Court have any reason to believe that the error does not lie with the defendant. To that end, the government has asked the defendant to provide his index so that the government can compare it to the evidence as it is stored. See Exhibit A. The defendant has refused. As such, the government is at a loss to respond to the defendant's allegations.

II. The Lack of Good faith is Evidenced by the Failure to Supply an Affidavit or to Identify an Affiant

The defendant's lack of good faith in bringing the motion is betrayed by the refusal to provide the government with evidence of either the harm purportedly suffered by the defendant or of misconduct allegedly committed by the government. For example, the pleading contains a significant number of allegations regarding acts purportedly taken and statements purportedly made by law enforcement agents. The government, by letter of February 10, 2009, informed the defendant of its difficulty in responding to the motion given the unsourced allegations. The government asked the defendant to provide an affidavit and/or statement, to identify the individual(s) who would testify under oath, or indicate whether no individual would provide an affidavit, statement or testimony. The defendant refused saying that it would only do so at a hearing.

agents had to search the office for each individual box, the requests of defense counsel were not accommodated as quickly as counsel would have preferred. In an attempt to facilitate the defendants' review of evidence, the agents reorganized the boxes to place them in numerical order.

³ There is no evidence or reason to believe that the defendant has reviewed every box of evidence at the government office space. Until such a statement is made and sworn to, they have no good faith basis to argue that documents have been lost or destroyed.

III. The Defendants Have Not Been Denied Access to Material Obtained by the Government

The government has not denied the defendant's requests to review evidence. Indeed, the government has expended great efforts to accommodate the defendants, going so far as to offer to have agents to stay later than their normal working hours in order to permit defense counsel to review documents. As no good deed goes unpunished, defendant now claims, without a scintilla of evidence, that the government has denied "numerous requests" to review certain materials seized in the course of the execution of a search warrant. See Motion, ¶ 13.

In its February 10, 2009 letter, the government informed the defendant that a review of the government's files indicated that no requests had been denied. In turn, the government requested that the defendant provide all correspondence and/or sworn statements that evidenced the government's refusal to accommodate a request to review evidence. See Exhibit B. Given the government's statement that it had no evidence of such conduct, it was reasonable to ask the defendant to support a claim of misconduct made in a public filing.

The defendant refused to provide any such support. See Exhibit C. The government again requested proof that the defendant provide evidentiary support for the claim stated in ¶ 13 of the motion, or – at the very least, to provide dates when requests to review evidence were made by the defendant and refused by the government. Even the most basic information, such as dates, would assist the government in determining whether the defendant's claims have any validity. The defendant failed to respond. Had such misconduct occurred, it is reasonable to believe that the defendant would produce that to the government in order to permit the government to respond.

CONCLUSION

For the reasons stated above, the government is unable to respond to defendant's motion with particularity. The government respectfully requests that the Court dismiss the motion. In so doing, the government respectfully requests that the Court order the defendant to meet and confer with the government before filing any motion similar to the instant one.

Respectfully Submitted,

PAUL A. MURPHY
ACTING UNITED STATES ATTORNEY

/s/ MARK F. DALY
MARK F. DALY
LORI A. HENDRICKSON
Trial Attorneys
U.S. Department of Justice
P.O. Box 972
Washington, D.C. 20044

ALPHONSO ANDREWS
NELSON JONES
Assistant U.S. Attorneys

Dated: February 24, 2009

CERTIFICATE OF SERVICE

I, Mark F. Daly, certify that on this the 24th day of February, 2009 the foregoing pleading, the GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR SPECIFIC RELIEF, was filed and served on the parties through the Court's ECF system.

/s/ Mark F. Daly
Mark F. Daly



U.S. Department of Justice
Tax Division

P.O. Box 972, Ben Franklin Station
Washington, D.C. 20044

(202) 514-2174
Telefax: (202) 616-1786

JAD:BMS:MFDaly
5-90-327

February 11, 2009

By Fax & First Class Mail

Randall P. Andreozzi, Esq.
Andreozzi Fickess LLP
9145 Main Street
Clarence, New York 14031

Re: United States v. Yusuf,
Crim No. 05-15 (D.V.I.)

Dear Mr. Andreozzi,

We write in regard to the pleading styled "Defendant's Motion for Specific Relief Due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence" (#1038 – Feb. 5, 2009). In the pleading it is stated that in 2004 "[d]uring 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." Motion, ¶10. The motion alleges that the evidence as stored does not comport with the index created by the defense team in 2004. *Id.*, ¶14. Although the motion does not identify a single document that was either lost or destroyed, it does claim that the defendants have suffered unspecified albeit "infinite" harm. *Id.*, ¶52.

Given that the motion is based on the purported variance between the state of the evidence and the defendant's index, we request that you provide the government with copies of the original discovery index prepared by the defense team in 2004 and all revisions made to the document since that time. Failure to do so will deprive the government of the ability to either verify the claims set forth in the motion or to quantify any harm purportedly suffered.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark F. Daly".

Mark F. Daly
Trial Attorney



U.S. Department of Justice
Tax Division

P.O. Box 972, Ben Franklin Station
Washington, D.C. 20044

(202) 514-2174
Telefax: (202) 616-1786

JAD:BMS:MFDaly
5-90-327

February 10, 2009

By Fax & First Class Mail

Randall P. Andreozzi, Esq.
Andreozzi Fickess LLP
9145 Main Street
Clarence, New York 14031

Re: United States v. Yusuf,
Crim No. 05-15 (D.V.I.)

Dear Mr. Andreozzi,

We write in regard to the pleading styled "Defendant's Motion for Specific Relief Due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence" (#1038 – Feb. 5, 2009). The pleading contains a significant number of allegations regarding acts purportedly taken and statements purportedly made by law enforcement agents. We note that the motion does not reference an affidavit or other sworn statement to substantiate the allegations. As it is difficult to respond to the motion without knowing their source, we ask that you either provide us with such affidavits and/or statement, identify the individual(s) who will testify under oath, or indicate whether no individual will provide an affidavit, statement or testimony.

We are particularly troubled by the allegation in ¶13 wherein it is stated that from 2006 through November 2008 the defense made numerous requests to review documents in the possession of the government and that the government denied all such requests. We have reviewed our files and can find no outright rejection of any request to review evidence made by the defendants. Given the seriousness of such a charge, we request that you provide us with all correspondence and/or sworn statements that evidence the government's refusal to accommodate a request to review evidence.

Sincerely,

A handwritten signature in black ink that reads "Mark F. Daly". The signature is stylized and written in a cursive-like font.

Mark F. Daly
Trial Attorney

ANDREOZZI FICKESS | LLP

Edward D. Fickess, Partner
Randall P. Andreozzi, Partner

February 16, 2009

VIA FACSIMILE & U.S. MAIL

Mark F. Daly, Esq.
US DOJ/Tax Division/N.Criminal Section
601 D. Street NW, Room 7814
Washington, DC 20004-2904

Re: **United States of America, and Government of the Virgin Islands v.
Fathi Yusuf, Mohamad Yusuf et al.**

Dear Mr. Daly:

We are in receipt of your letters dated February 10, 2009 and February 11, 2009. We agree with you that the government's actions are serious and we appreciate your expressed desire to quantify the harm caused by such actions. Please be advised that the defense will request a hearing on this matter and, to the extent that the government disputes any of the allegations set forth in the motion, the defense intends to present all appropriate testimony, affidavits, and/or documentary evidence.

As you acknowledge in your February 10 correspondence, the harm was caused by the acts of Federal law enforcement agents. In this context and within the scope of this case all agents, past or present, have acted under the authority and direction of your office.

It is noteworthy that neither the FBI agents nor Ms. Hendrickson informed the defense that the subject acts that were committed. Instead, they attempted to limit our access to the evidence, first by requiring the defense to identify *specific documents* we wished to review, and then by limiting our review to *random boxes selected by the Agents*. Despite these constraints, the team quickly discovered that documentary evidence had been removed from boxes. It was only when FBI agent Zieba was confronted with the defense team's findings that she admitted to reorganizing the documents. However, neither agent Zieba or Ms. Hendrickson would provide any explanation of the manner or extent to which the agents altered the evidence. Such conduct has forced the defense to investigate and attempt to discern the precise extent of the harms caused to the defendants' ability to mount an effective defense under the constraints or specific directions imposed by your office.

Now, faced with having to explain this conduct to the Court and to address the allegations set forth in the defendants' motion, you request that the defense provide you with all proof gathered and work product generated in its efforts to determine the extent of the harms federal Agents have caused. You ask that we provide this information *before* you submit your responsive pleading to the Court. Your February 11 correspondence states that the defense's alleged "failure" to provide you with the specific harms it has been able to determine to date will "deprive" the government of the ability to verify the claims or quantify the harm. We view your position as improper, disingenuous, and patently self-serving.

The prosecutor's office and its federal agents are the only persons who possess personal direct knowledge and evidence of the acts committed by federal agents, and the harms caused. Contrary to the assertions in your letter, it appears the only thing your office is "deprived of" is evidence of *the extent to which the defense has ascertained the claims or quantified already identified harms*. If the government intends to deny such conduct and or otherwise quantify the harms caused, then justice requires that your office do so with particularity within its court pleading documents. This entire situation has left the defense with no alternative other than requesting that the Court require your office to completely and truthfully explain the conduct of all government agents to both the defendants and the Court. Once the nature and scope of all government actions or alterations to the evidence have been identified, it may or may not be possible to cooperatively review all evidence of such actions as the government may provide in order to accurately evaluate the extent of the harms caused. It also may result that dismissal with prejudice is the only viable remedy regarding these serious actions and their impact on the evidence in this case.

The same holds true in your reference to Paragraph 13 of the Motion. We agree that your refusal to allow access to the subject records for more than two years is a serious issue. What is more troublesome is your current response implying that the government did *not* deny defendants access to their documents during that time. We note that you qualify your statement by asserting that you can find in your files no "*outright rejection*" of any request to review evidence made by the defendants. Please state whether you will represent to the Court that your office did not affirmatively deny Defendants access to their documents during this period, as your intention to make any such representations to the Court comprises yet another issue in the case that the parties must be prepared to address in a hearing before the Court.

Please contact me to further discuss these important matters.

Very truly yours,

A handwritten signature in black ink that reads "Randall P. Andreozzi/Esq." with a stylized flourish at the end.

Randall P. Andreozzi

cc: Gordon C. Rhea, Esq.
Thomas Alkon, Esq.
Henry Smock, Esq.
Derck M. Hodge, Esq.
Pamela Lynn Colon, Esq.
John K. Dema, Esq.
Bruce Cole, Esq.



U.S. Department of Justice
Tax Division

P.O. Box 972, Ben Franklin Station
Washington, D.C. 20044

(202) 514-5150
Telefax: (202) 616-1786

JAD:BMS:MFDaly
5-90-327

February 20, 2009

By Fax & First Class Mail

Randall P. Andreozzi, Esq.
Andreozzi Fickess LLP
9145 Main Street
Clarence, New York 14031

Re: United States v. Yusuf
Crim No. 05-15 (D.V.I.)

Dear Mr. Andreozzi,

We write in regard to your February 16, 2009 reply to our letter of February 11, 2009. As you know, in our letter we asked you to substantiate the claim in ¶ 13 of "Defendant's Motion for Specific Relief Due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence" (#1038 – Feb. 5, 2009) that from 2006 through November 2008 the defense made numerous requests to review documents in the possession of the government and that the government denied all such requests. Apparently overwhelmed by the task of chronicling the many concessions and admissions in our letter, your reply failed to respond to our request for support for your allegation.

Let me restate it here. We have reviewed our records and can find no evidence that during the time period referenced in your motion the government refused any defense request to review evidence that was obtained during the course of executing the search warrants in 2001. Do you have any evidence that such a request was made and refused? If so, please provide it to us. If you won't produce the evidence, please do us the courtesy of identifying when you made the request and when it was refused. If your intended response is to thank us for admitting something, please spare us. We are not interested in games of semantics and it will benefit everyone, the court included, as it will reduce your next pleading by one exhibit.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark F. Daly", with a stylized flourish at the end.

Mark F. Daly
Trial Attorney

cc: Counsel of Record (by facsimile)

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

UNITED STATES OF AMERICA, and
GOVERNMENT OF THE VIRGIN ISLANDS

Plaintiffs,

vs

Criminal No. 2005-015E/B

FATHI YUSUF MOHAMAD YUSUF
aka Fathi Yusuf,

WALEED MOHAMMAD HAMED,
aka Wally Hamed,

MAHER FATHI YUSUF,
aka Mike Yusuf,

ISAM MOHAMAD YOUSEF,
aka Sam Yousuf,

NEJEH FATHI YUSUF, and

UNITED CORPORATION
d/b/a Plaza Extra

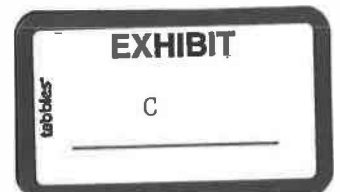
Defendants.

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



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.¹ 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

¹ 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 unourced 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.² Government Counsel must concede these acts

² 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
1037 Chuck Dawley Blvd., Bldg. A
Mt. Pleasant, SC 29464
(843) 727-6656
(843) 216-6509 (Facsimile)

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.

/s/
Henry C. Smock, Esq.
PO Box 1498
St. Thomas, USVI 00804

/s/
Pamela Colon, Esq.
27 & 28 King Cross Street, 1st Floor
Christiansted, St. Croix, USVI 00820

/s/
John K. Dema, Esq.
1236 Strand Street, Suite 103
Christiansted, St. Croix, USVI 00820

/s/
Thomas Alkon, Esq.
2115 Queen St.
Christiansted, St. Croix, USVI 00820

/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 17th 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.

MEMORANDUM
UNITED STATES V. YUSUF, ET AL.

TO: ALL DEFENSE COUNSEL

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

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

DATE: NOVEMBER 10, 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, 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 Maric

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. Androzzoli

Jose Marrero

Ronald Wike

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.

Randall P. Andreozzi



Jose Marrero

Ronald Wise



Theresa Mains

Howard Epstein

Tracy Marien

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 as detailed a 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 foldets 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]

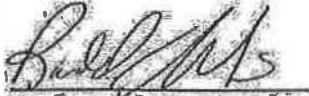
Randy Andreozzi returned to the conference room and the team departed from the FBI office for the rest of the day.

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


Jose Marrero



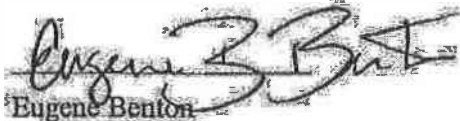
Ronald Wise

Theresa Mains

Howard Epstein



Tracy Marien



Eugene Benton

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

Jose Marrero

Ronald Wise

Theresa Mains



Howard Epstein

Tracy Marien

Eugene Benton

first fifty boxes ready for review the following morning. Mr. Androozzi 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 Androozzi attests to this paragraph]

Randy Androozzi 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. Androozzi



Jose Marrero

Ronald Wise



Theresa Mains

Howard Epstein

Tracy Marien

Eugene Benton

MEMORANDUM
UNITED STATES V. YUSUF, ET AL.

TO: ALL DEFENSE COUNSEL

FROM: RANDAEL ANDREOZZI, RONALD WISE, JOSÉ MARRERO, HOWARD EPSTEIN, THERESA MAINS, TRACY MARIEN

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

DATE: NOVEMBER 13, 2008

CC:

FBI OFFICES DOCUMENT REVIEW NOVEMBER 13, 2008

The following persons travelled to the FBI Offices in St. Thomas to review client documents: Randal Androzzzi, 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 Randal Androzzzi.

In a private discussion, Ms. Hendrickson advised Mr. Androzzzi 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. Androzzzi 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. Androzzzi 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 attests 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

Jose Marrero

Theresa Mains



Howard Epstein



Ronald Wise

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 attests 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


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 stressed 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.

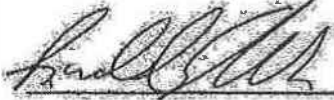
I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



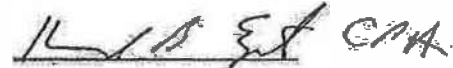
Randy Andreozzi, Attorney



Jose L. Manero, 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 he 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.



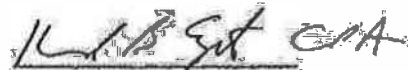
Randall Andreozzi, Attorney



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 Epstain, CPA

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

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

v.

FATHI YUSUF MOHAMAD YUSUF,
aka Fathi Yusuf,
WALEED MOHAMMAD HAMED,
aka Wally Hamed,
WAHEED MOHAMMED HAMED,
aka Willie Hamed,
MAHER FATHI YUSUF,
aka Mike Yusuf,
ISAM MOHAMAD YOUSUF,
aka Sam Yousuf,
NEJEH FATHI YUSUF, and
UNITED CORPORATION
d/b/a Plaza Extra,
Defendants.

CRIMINAL NO. 2005-015

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION REPLY
MEMORANDUM IN SUPPORT OF THE MOTION FOR SPECIFIC RELIEF

The United States of America and the Territory of the Virgin Islands, by and through its undersigned counsel, respectfully submits this response to Defendants' Reply to the Government's Response to Defendants' Motion for Specific Relief (No. 1076 -- Mar. 17, 2009).

DISCUSSION

Defendants present numerous false allegations in their reply memorandum in support of their motion to dismiss. The government submits the attached declarations in support of its opposition to the motion.

The Third Circuit has adapted two Supreme Court cases to adopt a three-part test to



4419718.1

analyze allegations of spoliation of evidence against the Government. See United States v. Jackman, 72 Fed. Appx. 862, 866 (3d Cir. 2003). The three threshold questions are: (1) did the government “act[] in bad faith when it destroyed the evidence,” (2) did the evidence “possess[] an apparent exculpatory value” at the time of loss or destruction, and (3) is the evidence “to some extent irreplaceable.” Id. (internal quotations omitted). The defendant has the burden to demonstrate to the court that all three questions are answered in the affirmative to successfully assert an evidence spoliation claim against the government. See Id. Defendants have not done so in their motion.

The first prong is taken from the Supreme Court’s holding in Arizona v. Youngblood, 488 U.S. 51 (1988). The Court stated that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” Id. at 58. The remaining two prongs were set out prior to Youngblood, in California v. Trombetta, 467 U.S. 479 (1984). The Court, in Trombetta, held that for evidence destruction to rise to the level of a constitutional deficiency, the evidence in question must have “an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Id. at 489. This inquiry turns heavily on the actual knowledge of the law enforcement officials, as to the exculpatory value of the evidence in question, prior to its loss or destruction.

Defendants have not shown that the government acted in bad faith. The government has made every effort to maintain and preserve the evidence. Indeed, any misplaced evidence may be the product of defendants’ review rather than government conduct.

Defendants also cannot show that evidence was destroyed, that it was exculpatory, or that it cannot be replaced. Instead, they claim to be aggrieved by the organization of the evidence. They provide no authority for granting any relief on the grounds that the government altered the manner in which evidence was stored.

CONCLUSION

For the reasons stated above, the government respectfully requests the Court deny defendant's motion in its entirety.

Respectfully Submitted,
PAUL A. MURPHY
ACTING UNITED STATES ATTORNEY

/s/

ALPHONSO ANDREWS
Assistant U.S. Attorney
MARK F. DALY
LORI A. HENDRICKSON
Trial Attorneys
U.S. Department of Justice
601 D Street, N.W. - Room 7814
Washington, D.C. 20004
Tel: (202) 616-2245
Fax: (202) 616-1786

Dated: July 8, 2009

CERTIFICATE OF SERVICE

I, Mark F. Daly, certify that on this the 8th day of July, 2009 the foregoing pleading, the GOVERNMENT'S RESPONSE TO DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF THE MOTION FOR SPECIFIC RELIEF, was served on the counsel of record by filing the same through the ECF system.

/s/
Mark F. Daly

DECLARATION OF SPECIAL AGENT THOMAS L. PETRI

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

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

boxes.

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

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

Executed on July 8, 2009.


Thomas L. Petri

Declaration of Special Agent Christine Zieba

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

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

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

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

Executed on July 8, 2009.


Christine Zieba

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/17/2008

SA Christine Zieba was informed by United States Department of Justice (DOJ) Tax Division Attorneys, Mark Daly and Lori Hendrickson that defense attorney's, representing defendants, in the captioned case needed to review specific items of evidence at some point during the week of November 10, 2008. Attorney Randall Andreozzi was to contact SA Zieba to set up a schedule, describe specifically what items of evidence needed to be reviewed, dates of arrival, length of time needed for review and other travel details.

By November 6, 2008, SA Zieba had not heard from the attorneys and sent an email to Randall P. Andreozzi, [REDACTED]

[REDACTED] which asked Andreozzi to facsimile a letter describing specifically what items of evidence needed to be reviewed, dates of arrival, length of time needed for review and other travel details. On November 7, 2008, Andreozzi responded via email to SA Zieba, "We will be arriving on Monday morning around 9:00 AM. We plan on spending Monday, Wednesday, Thursday and Friday at the office. We plan to go through the exhibit boxes with attorneys and forensic accountants. We anticipate 5-6 people." At this point SA Zieba contacted Hendrickson and SA Thomas Petri (former case agent) to ask for assistance to clarify Andreozzi's request, Hendrickson and Petri left Andreozzi a message for further clarification, neither received a return telephone call. SA Zieba also left Andreozzi a message on his voicemail and provided a cellular telephone number which he could call at anytime. No facsimile, letter or further details were provided by Andreozzi.

On Saturday, November 08, 2008, at approximately 9:30 AM, attorney Andreozzi, called SA Zieba's cellular telephone. Andreozzi explained that he had planned to come to St. Thomas to review all of the evidence in the captioned case. SA Zieba explained that she had expected to hear from him to confirm details and had never received a letter specifying the items that needed to be reviewed or the exact dates requested. SA Zieba told Andreozzi that since the defense had copied all of the evidence in the case that Andreozzi needed to supply a letter specifying the items that needed to be reviewed, in order to facilitate a quick review of the evidence. At this point Andreozzi stated that the defense did not

Investigation on 11/08/2008 at St. Thomas, VI (telephonically)

File # 315S-SJ-38281 Date dictated N/A

by SA Christine Zieba

315S-SJ-38281.

Continuation of FD-302 of Conversation with Randall Andreozzi . On 11/08/2008 , Page 2

have copies of all of the evidence and that during the time that the defense had to copy all of the evidence that they chose not to copy every item. SA Zieba explained that she was not aware that this was the procedure the attorneys chose. SA Zieba had been informed that discovery in the matter was complete and that the defense had copies of all of the evidence. Both parties discussed ways to review the documents and to make sure the defense had everything that they needed. During the conversation Andreozzi stated that some of his experts were new. At this point SA Zieba suggested that Andreozzi postpone his trip until they were able to figure out which items they believed they needed to copy, in order to make the trip more productive, since new experts would not be able to resolve the issue without having already reviewed the voluminous evidence copies that the defense already had. SA Zieba also stated that if Andreozzi could not figure out what he was missing that he may need to recopy all of the evidence but Andreozzi said he did not think that was necessary, since he had copied a majority of the evidence.

SA Zieba further explained that the FBI would not be able to accommodate 5-6 people in the FBI JTTF office space in order to review evidence and that evidence would need to be reviewed item by item. Andreozzi expressed concern for such a procedure and explained that he had been able to review the evidence in a different manner prior to November 08, 2008. SA Zieba explained that based on the circumstances provided that an expert and an attorney would be allowed to review the evidence. Andreozzi again expressed concern for the protocol described and explained that he also needed someone to scan items. SA Zieba agreed that three people could come into the office space to review and copy evidence. Andreozzi explained that he would still bring the group out but he would stagger their visits at the office. SA Zieba asked Andreozzi to call Hendrickson and Petri to further discuss ideas for the most efficient protocol to finish copying the evidence on November 10, 2008. SA Zieba told Andreozzi that the procedure may be able to change on November, 12, 2008, since Petri and Hendrickson would be present. Andreozzi was reminded that, Tuesday, November 11, 2008, was a federal holiday, Andreozzi acknowledged that no review on Tuesday was expected. SA Zieba repeated that although the defense was entitled to all of the evidence if they chose not to copy it then their time reviewing items needed to be limited as FBI space was not the proper place to discuss evidence with his experts. SA Zieba reminded Andreozzi, that if he had all of the evidence copied he could consult with experts openly and in his own space. At this point, Andreozzi

315S-SJ-38281

Continuation of FD-302 of Conversation with Randall Andreozzi , On 11/08/2008 , Page 3

suggested that all of the evidence could be returned to the defendant and SA Zieba explained that would not be possible. Both parties ended the conversation and agreed to meet on Monday, November 10, 2008, at 9:00 AM in the FBI JTF office in St. Thomas, United States Virgin Islands (VI).

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/20/2008

On Monday, November 10, 2008, at approximately 10:15 AM, attorney, Randall P. Andreozzi,

Jose Ismael Marrero,

Tracy L. Marien,

Howard B. Epstein,

Theresa Lillian Robert Mains,

Ronald Eugene Wise,

arrived at the FBI JTTF office in St. Thomas.

SA Christine Zieba allowed Andreozzi into the office and asked the other individuals to remain in the lobby area. SA Zieba reminded Andreozzi that they had agreed that only three people would be reviewing evidence and they could only review one box of evidence at a time. Andreozzi was upset with the reviewing procedure described. SA Zieba asked if Andreozzi had called SA Thomas Petri or DOJ Tax Division attorney Lori Hendrickson to discuss an alternative procedures as SA Zieba had suggested, Andreozzi said he had not. SA Zieba further explained that the schedule would be 9:00 AM until 11:00 AM and 1:00 PM until 5:00 PM. At this point Andreozzi went to the lobby area and decided since it was already 10:45AM that his group would just return after lunch at 1:00PM.

At approximately 12:30 PM, Andreozzi called and stated the he decided that he was not going to return to review evidence, he did not want to "put SA Zieba on the spot" and that he would straighten things out on Wednesday when Hendrickson arrived. SA Zieba explained that there was no problem and he could come to review the evidence as described, however, Andreozzi decided not to return. SA Zieba explained that she would accommodate Andreozzi by staying later on Wednesday, Thursday or Friday, if requested in advance, in order to account for hours missed on Monday. SA Zieba further explained that Andreozzi should contact Hendrickson or Petri to discuss alternative evidence reviewing procedures, so as

Investigation on 11/10/2008 at St. Thomas, VI

315S-SJ-38281

N/A

File #

Date dictated

by SA Christine Zieba

Continuation of FD-302 of Evidence Review, 11/10/2008 , On 11/10/2008 , Page 2

to not delay his review of the evidence on November 12, 2008. SA Zieba also explained that since more people would be present on Monday, more evidence may be accessible and more people may be allowed in the FBI JTTF office to review evidence. Both parties ended the conversation and agreed to meet on Wednesday, November 12, 2008, at 9:00 AM, in the FBI JTTF office in St. Thomas, United States Virgin Islands (VI).

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/20/2008

On Wednesday, November 12, 2008, at approximately 9:00 AM, attorney, Randall P. Andreozzi, Attorney,

Jose Ismael Marrero,

Tracy L. Marien,

Howard B. Epstein,

Eugene Berkeley Benton,

Theresa Lillian Robert Mains,

Ronald Eugene Wise,

arrived at the FBI JTTF office in St. Thomas, VI. Andreozzi spoke with DOJ Tax Division attorney Lori Hendrickson. At approximately 10:20 AM the individuals listed above began to review evidence. Boxes of evidence were pulled in random order since the defense attorneys had never provided a specific list of which items needed to be reviewed. The scanner that Andreozzi brought was damaged on the airplane and could not scan items, Andreozzi asked to put aside certain items to scan later, this request was accommodated and certain items were put aside. At approximately 11:45 AM the individuals took a lunch break, and agreed to return at 1:15 PM.

The individuals returned at approximately 1:30PM, with a new scanner. At one point, Andreozzi specifically asked for five items to review, SA Zieba tried to accommodate but since SA Zieba was the sole person pulling and monitoring evidence. SA Zieba explained to Andreozzi that unless provided with a list ahead of time, as requested, random boxes would be pulled. SA Zieba reminded Andreozzi that he had requested to see all items in evidence and decided not to provide a list ahead of time. Andreozzi also specifically requested that SA Thomas Petri (FBI), SA Javier Bell (IRS) and Hendrickson not assist in evidence review.

Investigation on 11/12/2008 at St. Thomas, VI

File # 315N-SJ-38281

Date dictated _____

by SA Christine Zieba

315N-SJ-38281

Continuation of FD-302 of Evidence Review, On 11/12/2008, Page 2

Several times during the review Andreozzi asked questions on the way evidence was being provided. SA Zieba explained that the items were being randomly pulled based on his request to review all of the evidence and agreements made with Hendrickson. At one point Andreozzi asked if items have been moved by SA Zieba, SA Zieba explained that she had moved boxes around. Andreozzi also asked if SA Zieba could provide him with specific evidence and SA Zieba explained that if he requested evidence ahead of time that it could be reviewed. SA Zieba explained that this was the procedure that was anticipated until SA Zieba was told on November 8, 2008 that the defense planned to review all of the evidence. On another occasion Andreozzi became upset that Petri and Bell were in the evidence room.

Both parties agreed to meet on Thursday, November 13, 2008, at 9:00 AM, in the FBI JTTF office in St. Thomas, United States Virgin Islands (VI).

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/24/2008

On Thursday, November 13, 2008, at approximately 9:25 AM, attorney, Randall P. Andreozzi, Attorney, [REDACTED]

[REDACTED] Jose Ismael Marrero, [REDACTED]

[REDACTED] Howard B. Epstein, [REDACTED]

[REDACTED] Ronald J. Soluri, [REDACTED]

[REDACTED] arrived at the FBI JTTF office in St. Thomas, VI to review evidence. Andreozzi asked to break at 12:30 PM instead of 11:00AM and wanted to come back at 2:00PM, this request was accomodated.

At approximately 2:40 PM, Marrero, Epstein, Theresa Lillian Robert Mains, [REDACTED]

[REDACTED] and Ronald Eugene Wise, [REDACTED]

[REDACTED] returned to the office to continue reviewing evidence. The individuals requested to return at 10:00AM, Friday, November 14, 2008.

Investigation on 11/13/2008 at St Thomas, VI

File # 315S-SJ-38281

Date dictated N/A

by SA Christine Zieba

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/24/2008

On Friday, November 14, 2008, at approximately 10:30 AM,
Jose Ismael Marrero, [REDACTED]

[REDACTED] Howard B.
Epstein, [REDACTED]

(note: Epstein arrived at 10:00 AM and waited for the others to
arrive), Theresa Lillian Robert Mains, [REDACTED]

[REDACTED] Ronald Eugene Wise, [REDACTED] arrived
at the FBI JTTF office in St. Thomas, VI, to review and copy
evidence.

At 11:30 AM the individuals took a lunch break and agreed
to inform what time they were returning since they were not sure
who would be able to come. Randall P. Andreozzi, [REDACTED]

[REDACTED] Marrero, Mains and Wise
returned at 2:30 PM, without calling. An addition person was
present to scan however, the scanner was not utilized.

Investigation on 11/14/2008 at St. Thomas, VI

File # 315S-SJ-38281

Date dictated N/A

by SA Christine Zieba

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/02/2009

On Monday, January 26, 2009, at approximately 9:20 AM, attorney, Randall P. Andreozzi,

Jose Ismael Marrero,

Howard B. Epstein,

and Ronald Eugene Wise,

arrived at the FBI JTTF office in St. Thomas.

FBI SA Christine Zieba, SA Thomas Petri and IRS SA Javier Bell were present at various times during the day.

Andreozzi immediately questioned why Petri and Bell were present. SA Petri responded that both were involved in the investigation and trial preparation of the case. SA Petri further stated that himself and SA Bell will likely be associated with the case through trial.

Andreozzi stated that he was going outside to call the other attorneys. Andreozzi stated that he was unable to get a hold of the other attorneys and eventually began reviewing evidence.

SA Zieba asked the individuals where they wanted to start, SA Zieba was told that they left off at box 254.

Individuals left at approximately 12:00 PM and agreed to return at 1:30 PM. At approximately 1:45 PM, the individuals returned.

SA Petri also explained that they could see any piece of evidence if they asked for it and he also asked if they started reviewing evidence where they had left off the last time.

Andreozzi left at approximately 4:00 PM and the other individuals left at approximately 5:00 PM. The individuals agreed to meet at 9:00 AM on Tuesday, January 27, 2009.

Investigation on 01/26/2009 at St. Thomas, VI

File # 315S-SJ-38281

Date dictated N/A

by SA Christine Zieba:cz

315S-SJ-38281

Continuation of FD-302 of Evidence Review, On 01/26/2009, Page 2

Agent note: The individuals were scheduled to review evidence from January 26th-January 29th. Agents had agreed to stay after normal business hours if requested in advance, the individuals never requested to stay later than 5:30 PM. Individuals did not have a scanner or copier machine.

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/02/2009

On Tuesday, January 27, 2009, at approximately 9:15 AM, attorney, Randall P. Andreozzi,

Jose Ismael Marrero,

Howard B. Epstein,

and Ronald Eugene Wise,

arrived at the FBI JTTF office in St. Thomas.

FBI SA Christine Zieba, SA Thomas Petri and IRS SA Javier Bell were present at various times during the day. The individuals continued reviewing evidence.

At one point during their review of documents, Epstein commented that "this is too much to write down," he then ignored a number of the documents and continued to another box. There were numerous occasions during the review that individuals were observed going through boxes and "red wells" at a rate they were obviously not able to identify the documents being reviewed. At one point, SA Petri commented to the individuals, specifically Epstein regarding the teams ability to actually inventory and review, Epstein simply smiled and continued.

Individuals left at approximately 11:40 PM. At approximately 1:15 PM, the individuals returned.

Individuals continued reviewing evidence. During their review SA Zieba was asked what the last box number was and about how many boxes from the number they were on until the last box number. At this point Andreozzi stated that they wanted to look at additional items after they finished. SA Zieba and Petri explained that they were told Andreozzi was only reviewing boxes of evidence collected from the search warrants. SA Zieba then asked Andreozzi to come up with a list of any additional items that they planned on reviewing.

Investigation on 01/27/2009 at St. Thomas, VI

File # 315S-SJ-38281

Date dictated N/A

by SA Christine Zieba:cz

315S-SJ-38281

Continuation of FD-302 of Evidence Review, On 01/27/2009, Page 2

The individuals list of documents that they wanted to review prior to their departure, included:

1. All documents secured from Jordan entities
2. All documents secured from St. Martin entities.
3. All documents secured from CPA or tax preparer.
4. All other documents secured through Grand Jury or government subpoena.
5. All documents secured from third parties through contacts or communications other than subpoena.
6. CTR and SAR Reports.
7. Report of analysis of seized computers.

SA Petri again asked if the defense was comfortable that they reviewed all of the search warrant evidence and reminded them that he thought they may have missed boxes.

The individuals agreed to meet at 9:00 AM on Wednesday, January 28, 2009. Individuals left at approximately 5:00 PM.

Agent note: The individuals were scheduled to review evidence from January 26th-January 29th. Agents had agreed to stay after normal business hours if requested in advance, the individuals never requested to stay later than 5:30 PM. Individuals did not have a scanner or copier machine.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/02/2009

On Wednesday, January 28, 2009, at approximately 9:15 AM, attorney, Randall P. Andreozzi,

[REDACTED]
[REDACTED] Jose Ismael Marrero,
[REDACTED] Howard B. Epstein,
[REDACTED] Ronald Eugene Wise,
[REDACTED] arrived at the FBI JTTF office in St. Thomas.

FBI SA Christine Zieba and IRS SA Javier Bell were present at various times during the day.

After the individuals arrived they spent approximately 30 minutes reviewing lists and going through their computers before they addressed reviewing evidence and started their review.

In response to their list, CPA/tax preparer evidence was brought for the defense to review.

The individuals also asked to go back and review additional search warrant locations items that they missed, because they had trouble figuring out where they left off from their lists.

Individuals left at approximately 11:30 PM. At approximately 1:30 PM, the individuals returned.

The individuals later began reviewing foreign records, during their review Andreozzi told SA Bell that he needed to copy a document for the defense immediately and that he was not leaving without it. SA Zieba and SA Bell explained that they would not be making any copies for the individuals and reminded them that they were free to bring a scanner/printer along with them but chose not to.

At that point Andreozzi demanded that DOJ Tax Division Attorney Lori Hendrickson be called. Agents assisted Andreozzi in

Investigation on 01/28/2009 at St. Thomas, VI

File # 315S-SJ-38281

Date dictated N/A

by SA Christine Zieba:cZ

315S-SJ-38281

Continuation of FD-302 of Evidence Review, On 01/28/2009, Page 2

contacting Hendrickson to resolve that issue and the other questions asked during the day.

During the review Andreozzi asked if the records had been translated, SA Zieba told Andreozzi that he should speak to DOJ Tax Attorney Lori Hendrickson if he had questions. On another occasion Andreozzi asked if certain markings on the documents were from the bank or the government, again SA Zieba asked Andreozzi to direct all questions to Hendrickson. Andreozzi wanted to get in contact with Hendrickson, who was on leave and SA Zieba asked that he get several question together before disturbing Hendrickson.

Individuals later specifically requested copies of various documents, including:

100 page Banking Commission Report
12 page document dated May 14, 2003
Bank records in the name of Sami Al-Yousef

The individuals agreed to meet at 9:00 AM on Thursday, January 29, 2009. Epstein left at approximately 4:30 PM and the other individuals left at approximately 4:45 PM.

Agent note: The individuals were scheduled to review evidence from January 26th-January 29th. Agents had agreed to stay after normal business hours if requested in advance, the individuals never requested to stay later than 5:30 PM. Individuals did not have a scanner or copier machine.

- 1 -

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/02/2009

On Thursday, January 29, 2009, at approximately 10:40 AM,
attorney, Randall P. Andreozzi,

Jose Ismael Marrero,

Howard B. Epstein,

and Ronald Eugene Wise

At approximately 10:15 AM SA Bell arrived at the JTTF office and stated that he ran into the individuals at the Marriott Hotel around 9:25 AM and that they told him they would see him later at the JTTF office. SA Zieba was about to leave the office after waiting all morning, when the individuals finally arrived at approximately 10:40 AM. Andreozzi had SA Zieba's contact telephone number and cellular telephone number. SA Zieba never received any calls, messages or emails from Andreozzi.

Andreozzi explained that he was to get copies of all of the foreign bank records. SA Zieba explained that Hendrickson had said that they could review the documents but the FBI was not photocopying materials for the individuals. Andreozzi immediately demanded to speak to Lori Hendrickson, and SA Zieba said that she was still on leave and could be contacted later after Andreozzi put all of his questions together. Andreozzi again demanded that Hendrickson be called or an emergency motion needed to be filed, SA Zieba explained that since the individuals wanted to continue reviewing evidence that he could call her later when he had all of his questions together, rather than repeatedly calling Hendrickson while on her leave. At this point Andreozzi explained that someone else (not reviewing evidence) would be drafting an emergency motion, SA Zieba explained that she misunderstood Andreozzi about the urgency of his request since he was staying to review evidence and then got Andreozzi in contact with Hendrickson. Andreozzi insisted that the FBI should copy several documents for Andreozzi and that it would only take a few minutes to copy the documents. After both parties spoke to Hendrickson, SA Zieba reiterated that

Investigation on 01/29/2009 at St. Thomas, VI

File # 315S-SJ-38281

Date dictated N/A

by SA Christine Zieba:cz

315S-SJ-38281

Continuation of FD-302 of Evidence Review , On 01/29/2009 , Page 2

the individuals could review any of the documents but the FBI would not be copying the documents for Andreozzi at that time.

The other individuals then explained that they had given the wrong number that they wanted to start reviewing on Monday and that they now wanted to go back and review additional search warrant location evidence. At this point they asked to start with box 185 and go up to 254, SA Zieba reminded them that they should look at where they left off on November 14, 2008. The individuals went back to their lists and at 11:20 AM they asked to see evidence that was in boxes 136-142, then asked for 145, SA Zieba repeated the suggestion that they start where they left off on November 14, 2008 and go up to 254, they repeated that after 136-142 that they wanted 145-184, SA Zieba asked if they were certain that those were the numbers that they wanted to review and they confirmed that those were the numbers they wanted to review. During the time they were trying to determine a start location the individuals referred to several different lists. The individuals also brought a list which they later took back that had several additional numbers on it.

At 11:50 AM, SA Zieba asked if they wanted to see the foreign documents again and they declined.

The individuals left at approximately 12:00 PM. At approximately 1:30PM, Andreozzi, Marrero, Epstein, Wise and Alice Andreozzi, [REDACTED] arrived at the FBI JTTF office in St. Thomas. The individuals brought a scanner/copier.

SA Zieba pulled some evidence for the individuals, as they requested. The individuals continued reviewing evidence while setting up the printer. At approximately 2:15 PM, Andreozzi asked SA Zieba to get the foreign records out to copy. SA Zieba started to collect the evidence that was being reviewed, Andreozzi then insisted that the different evidence be copied and reviewed at the same time. SA Zieba explained that they could either copy one set or review the other set. Andreozzi chose to copy the foreign records, but demanded to speak to Hendrickson again (who was out of the office on leave). SA Zieba explained that he could call Hendrickson any time he wanted, but SA Zieba was not going to disturb Hendrickson again. Andreozzi also told SA Zieba that she could use SA Bell's assistance so they could pull multiple items. During this time SA Bell was in an office on a conference telephone

315S-SJ-38281

Continuation of FD-302 of Evidence Review, On 01/29/2009, Page 3

call. At 2:25 PM they began photocopying the foreign records. The items that the individuals were copying were the same items that Andreozzi told Hendrickson would take Agents three minutes to copy for him. The individuals copied and scanned the records until they departed.

The individuals scanned/copied the 100 page Banking Commission Report, 12 page document date May 14, 2003 (these documents were requested on January 28, 2009 to be copied) and additional documents. They did not scan/copy the bank records in the name Sami Al-Yousef.

Epstein departed at approximately 3:00 PM. The other individuals departed at approximately 5:40 PM.

Agent note: The individuals were scheduled to review evidence from January 26th-January 29th. Agents had agreed to stay after normal business hours if requested in advance, the individuals never requested in advance to stay later than 5:30 PM.

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal No. 2005-015
)	
FATHI YUSUF MOHAMMED YUSUF,)	
a/k/a Fathi Yusuf,)	
WALEED MOHAMMED HAMED,)	
a/k/a Willie Hamed,)	
WAHEED MOHAMMED HAMED,)	
a/k/a Wally Hamed,)	
MAHER FATHI YUSUF,)	
a/k/a Mike Yusuf,)	
ISAM MOHAMAD YOUSUF,)	
a/k/a Sam Yousuf,)	
NEJEH FATHI YUSUF, and)	
UNITED CORPORATION,)	
dba Plaza Extra Supermarkets,)	
)	
Defendants.)	

DEFENDANTS' MOTION TO STRIKE

COMES NOW the Defendant Waleed Hamed, by and through his attorney, Gordon C. Rhea, Esquire in this criminal matter and requests the Court strike the Government's Response to Defendant's Motion Reply Memorandum in Support of the Motion for Specific Relief (docket #1148).

Defendants filed their Motion for Specific Relief (docket # 1076) on March 17, 2009. The Government did not request any extensions of time or seek any leave from the Court; therefore, its filing is untimely. Further, this filing was presented to the Court and



served upon the Defendants after the close of business on the eve of the hearing on this very matter. This leaves the Defendants no time to adequately prepare for cross examination and/or subpoena witnesses to appear in Court. If the Government's Response is accepted, Defendants' due process rights will be violated. Therefore, it is respectfully requested that the Court strike the Government's Response to Defendant's Motion Reply Memorandum in Support of the Motion for Specific Relief.

Wherefore, Defendant requests the Court strike the Government's Response to Defendant's Motion Reply Memorandum in Support of the Motion for Specific Relief.

Dated: July 8, 2009

Respectfully submitted.

_____/s/_____
Gordon C. Rhea, Esquire
RICHARDSON, PATRICK, WESTBROOK &
BRICKMAN, LLC
1037 Chuck Dawley Blvd., Bldg. A
Mt. Pleasant, SC 29464
(843) 727-6656
(843) 216-6509 (fax)
Attorney for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2009, I electronically filed the foregoing Defendant's Motion to Strike with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

By: /s/ Gordon C. Rhea, Esq.
Gordon C. Rhea, Esq.

**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,)
WALEED MOHAMMED HAMED,)
WAHEED MOHAMMED HAMED,)
MAHER FATHI YUSUF, ISAM)
MOHAMAD YOUSUF, and UNITED)
CORPORATION, dba Plaza Extra)
Supermarkets,)
)
Defendants.)

CRIM NO. 2005-0015

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

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

v.

FATHI YUSUF MOHAMAD YUSUF,
aka Fathi Yusuf,
WALEED MOHAMMAD HAMED,
aka Wally Hamed,
WAHEED MOHAMMED HAMED,
aka Willie Hamed,
MAHER FATHI YUSUF,
aka Mike Yusuf,
ISAM MOHAMAD YOUSUF,
aka Sam Yousuf,
NEJEH FATHI YUSUF, and
UNITED CORPORATION
d/b/a Plaza Extra,
Defendants.

CRIMINAL NO. 2005-015

**GOVERNMENT'S MOTION TO RECONSIDER ORDER GRANTING
DEFENDANT'S MOTION FOR SPECIFIC RELIEF**

The Government respectfully requests that the Court reconsider its order dated July 16, 2009 (docket no. 1152, hereafter, the "July 16 Order") granting Defendant's motion for specific relief. Specifically, the Government asks (i) that Defendants be ordered to provide an index or other substantiation of the documents claimed to be missing and that the Government only be ordered to reproduce those documents; or (ii) in the alternative, that Defendants bear the reproduction costs to be incurred under the July 16 Order. In support of this motion, the Government states the following:

1. The Government has begun the process of complying with this Court's order to provide a duplicate set of all seized documents and all discoverable documents



obtained in the investigation from third parties. After coordinating with the Government's contracting staff, who in turn have consulted outside vendors, the Government estimates that the cost to duplicate, image, and produce the documents will be no less than \$125,000. The Government has been advised that the cost could be substantially higher, depending on the number of documents that are of non-standard size. The timeframe for completion of this effort is expected to be approximately three to four months. The Government believes that the burden imposed by the July 16 Order meets the standard of clear error or manifest injustice under LRCi 7.3(3).

2. The Government respectfully submits that the July 16 Order was premised in part upon certain incorrect findings. First, the Government has not afforded Defendants only limited review of the discovery in this case. [July 16 Order, p. 2, 3rd full ¶] To the contrary, during 2003 and 2004, the Government made full discovery in this case. [*Declaration of Thomas L. Petri*, ¶¶ 7-9 (docket no. 1148-2, hereafter, "Petri Declaration")] Second, the Government has not failed to provide an index to Defendants. [July 16 Order, p. 2, 3rd full ¶] In 2004, the Government provided an index of approximately 26,000 documents, which previously had been produced to Defendants in electronic form and identified by the Government as particularly relevant to the investigation. [Exhibit A, Letter dated April 20, 2004 to Gordon C. Rhea, Esquire]

3. In late 2008 and early 2009, defense counsel requested additional review of the discovery in this case, and the Government complied with the request, as it had on certain other occasions between 2004 and late 2008. Although the Government believed that Defendants had all of the relevant documents in their possession, given that defense counsel had brought reproduction equipment with them to the initial document review

[Petri Declaration, ¶¶ 7-8], the Government made the discovery available, subject to reasonable notice in light of the logistics of providing such voluminous discovery.

During the review in late 2008 and early 2009, FBI agents specifically told defense counsel that they could review any document, as long as they made a request.

[*Declaration of Christine Zieba* (docket no. 1148-3, hereafter, “Zieba Declaration”), Attachments, pp. 9, 12 (memoranda dated November 20, 2008 and February 2, 2009)]

4. During defense counsel’s review in late 2008 and early 2009, counsel claimed to not be able to locate documents described in an index that they previously created. Defendants have not alleged the loss or destruction of any particular document. Nor have defense counsel supplied the Court or the Government with any evidence of bad faith. In fact, defense counsel themselves may be partially responsible for the reorganization of the documents, based on observations of the FBI agents during the initial review in 2003 and 2004. [Petri Declaration, ¶¶ 9-10; Zieba Declaration, ¶ 10]

5. The Government has repeatedly asked Defendants to describe what documents they are unable to locate or to provide a copy of its index (or excerpt thereof) to the Government so that any documents requested by Defendants can be retrieved. Defendants have refused to do so and have declined to cooperate in any effort to identify the documents that they claim are missing. [Government’s Response to Defendant’s Motion for Specific Relief, p. 3 (docket no. 1067)] The Government submits that it should only have to reproduce those documents that Defendants cannot identify.

6. Fed. R. Crim. P. 16 does not require the Government to perform a defendant’s copying or to incur a defendant’s copying costs. Rule 16(a)(1)(E) (Government must “permit the defendant to inspect and to copy or photograph” the

categories of documents subject to the rule). Although the Court has the authority to order copies, such authority is limited by a rule of reasonableness. *United States v Freedman*, 688 F.2d 1364, 1366-67 (11th Cir. 1982) (Rule 16 discovery “should be read and applied with a limitation of reasonableness . . . [w]here the defendant has in no way been prohibited from inspecting the particular documents and cannot demonstrate an undue hardship from this availability, he should not be permitted to transfer the cost of his discovery request to the government especially where, as in the instant case, the defendants are not indigent”; noting Fed. R. Crim. P. 2, which provides that the rules should be interpreted “to eliminate unjustifiable expense and delay”).

7. If the Court does not limit the reproduction of documents to those that Defendants claim to be missing, the Government asks that Defendants bear the reproduction costs to be incurred by the July 16 Order, particularly in light of their refusal to cooperate in identifying the documents claimed to be missing. There is no indication that Defendants are unable to bear such costs.

WHEREFORE, the Government respectfully requests that the Court reconsider the July 16 Order. Specifically, the Government asks (i) that Defendants be ordered to provide an index or other substantiation of the documents claimed to be missing and that the Government only be ordered to reproduce such documents; or (ii) in the alternative, that Defendants bear the reproduction costs to be incurred by the July 16 order.

Respectfully submitted,

PAUL A. MURPHY
UNITED STATES ATTORNEY

/s/Kevin C. Lombardi
ALPHONSO ANDREWS
Assistant U.S. Attorney
MARK F. DALY
LORI A. HENDRICKSON
KEVIN C. LOMBARDI
Trial Attorneys
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20004
Tel: (202) 514-5150
Fax: (202) 616-1786

Dated: August 14, 2009

CERTIFICATE OF SERVICE

I, Kevin C. Lombardi, certify that on August 14, 2009 the foregoing GOVERNMENT'S MOTION TO RECONSIDER ORDER GRANTING DEFENDANT'S MOTION FOR SPECIFIC RELIEF was served upon counsel of record by filing the same through the ECF system.

/s/ Kevin C. Lombardi
Kevin C. Lombardi



U.S. Department of Justice
United States Attorney
District of the Virgin Islands

April 20, 2004

VIA FACSIMILE

Gordon C. Rhea, Esquire
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Check Dawley Blvd., Suite 200
Mount Pleasant, South Carolina 29464

Re: United States v. Fathi Yusuf et al., Cr. No. 2003-147

Dear Counsel:

This letter responds to your request for an index of the materials on the CD-ROMs, labeled Discovery Discs 1-12, made available by the government on October 17, 2003 and March 24, 2004. The discs currently contain an index providing for each document (1) the bates range; (2) the date; and (3) the type of record. You have inquired whether the government has a detailed index providing a description of each document.

In connection with this case, the government prepared a description of each of the documents in the database ("the index"). In order to expedite the disposition of this case, the government will make the index available to your client under the following conditions.¹ First, your client may use neither the index nor any information from the index in any way in any proceeding in which the government is a party, such as at trial and during any pre-trial matter, including but not limited to using the index as evidence or an exhibit, or displaying or describing the index to a witness, the judge, or jury for any purpose. Second, production of the index in no way constitutes a waiver of the work product doctrine with respect to the index or any other materials, and your client may not rely on the production of this index as a basis upon which to claim that a waiver has occurred or to seek additional materials or information from the government. Third, upon request of the government, your client will return all or a portion of the index, including any copies of the index. Fourth, the index may not be shared with any other third party unless the third party agrees in writing to all terms in this letter, which writing is provided to the government before the materials are shared. Fifth, the descriptions on the index do not in any way bind the government with respect to the description of those items in any proceeding in this matter, and the index may not be used in any way to challenge the government's description of an

¹/ As used in this letter, "your client" includes the individuals and entities you represent as well as counsel, investigators and any other agents of your client or counsel.

- 2 -

proceeding in this matter, and the index may not be used in any way to challenge the government's description of an item in any proceeding.

If these conditions are acceptable, please sign below and return a signed copy. Please call me with any questions at 202/353-7517.

Yours sincerely,

DAVID M. NISSMAN
UNITED STATES ATTORNEY

By: Michael Pauze
MICHAEL R. PAUZE
Trial Attorney

AGREED TO:

Gordon C. Rhea
Gordon C. Rhea, Esquire
Counsel for Waleed Hamed and
United Corporation

5/3/04
Date

AGREED TO:

Robert King (with consent)
Robert King, Esquire
Attorney for Fathi Yusuf Mohammad Yusuf

Dated: 5/4/04

Jack Dema (with permission)
John K. Dema, Esquire
Attorney for Maher Fathi Yusuf

Dated: 5/3/04

Derek Hodge (with consent)
Derek M. Hodge, Esquire
Attorney for Neje Fathi Yusuf

Dated: 5/3/04

Leonard Francis (with consent)
Leonard B. Francis, Jr., Esquire
Attorney for Waheed Mohammed Hamed

Dated: 5/3/04

**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 MOHAMAD YUSUF)
aka Fathi Yusuf,)

WALEED MOHAMMAD HAMED,)
aka Wally Hamed,)

MAHER FATHI YUSUF,)
aka Mike Yusuf,)

ISAM MOHAMAD YOUSEF,)
aka Sam Yousuf,)

NEJEH FATHI YUSUF, and)

UNITED CORPORATION)
d/b/a Plaza Extra)

Defendants.)

Criminal No. 2005-015F/B

**DEFENDANTS' OPPOSITION TO THE GOVERNMENT'S MOTION TO
RECONSIDER THE COURT'S JULY 16, 2009 ORDER AND REQUEST FOR
SPECIFIC RELIEF**

COMES NOW, Defendant Waleed Hamed, by and through his counsel, and responds in opposition to the Government's Motion to Reconsider Order Granting Defendant's Motion for Specific Relief.



I. 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 Evidence. (Doc. No. 1038). The Government responded to Defendants' Motion on February 24, 2009. (Doc. No. 1067). The Defendants filed their reply on March 17, 2009. (Doc. No. 1076). The Government filed a reply on July 9, 2009, the evening before the scheduled hearing on the matter. (Doc. No. 1148). On that same date, Defendant filed a Motion to Strike the Government's Response. (Doc. No. 1149).

A hearing on the Motion was held before the Honorable Raymond L. Finch on July 9, 2009. By Order dated July 16, 2009, the Court directed 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 the 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." (Doc. No. 1152).

II. Argument

At the outset, the Government's Motion to Reconsider mischaracterizes the Court's July 16, 2009, Order. The Order does not grant the Defendants' Motion for Specific Relief. Rather, it mandates that the Government serve upon the Defense a duplicate set of the retained documents that corresponds exactly with the then-present document arrangement. It then mandates that the Defense team review the documents within 60 days and supplement the Defendants' Motion by identifying the extent of the

harm that the Government's rearrangement of the documents has caused. In this manner, the Order preserves and memorializes a snapshot of the physical arrangement of the documents for the unlimited use of the Defense, the Government and the Court so as to facilitate the Court's informed consideration of the relief requested in Defendants' Motion.

The Order reasons, and the Government does not dispute, that "[w]ithout 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." The protocol enumerated in the Order facilitates the Court's informed factual determination of the extent of the harm caused to the Defendants. This is especially important in light of Government Counsel's *express denial* at the July 9, 2009, hearing that any documents have been rearranged. The Order is prudent, fair and just, and the Defense team stands ready to comply fully with its responsibilities as prescribed therein.

The Motion to Reconsider is substantially a resubmission of some of the arguments raised in the Government's earlier Oppositions (Doc. Nos. 1067, 1048), interposed with some new arguments. The Defense has addressed the resubmitted arguments in the pleadings and at hearing. The new arguments are addressed below.

A. The Court's Order Is Not Clear Error or a Manifest Injustice.

The Government's first new argument characterizes the Court's Order as so onerous on the Government that the Court or the Defense should back off from such a protocol. It complains – without identifying the number of boxes of documents it possesses and with no substantiating bids, time projections or proposals -- that the copying will take three to four months. It then pinpoints – again with no substantiation --

the cost of copying the documents at no less than \$125,000. The Government describes this cost as a burden so oppressive on the financial resources of the United States of America that it constitutes a manifest injustice under LRCi 7.3(3). Yet in the same breath, it asserts that “[t]here is no indication that Defendants are unable to bear such costs.” (Doc. No. 1177, ¶ 7, p. 4).

The Court’s Order creates no manifest injustice. It prescribes a procedure that the Government should have followed from the inception of this case. More importantly, the Order prescribes a procedure that levels the playing field; it eliminates the inequities and uncertainties caused by the Government’s exclusive dominion and control over the documents as arranged, and gives the Defendants unlimited access to the now-memorialized arrangement of documents. The issue is really one of choice for the Government. If it believes that production of the documents pursuant to the Court’s Order will support the factual representations it made to the Court, then it should be willing to “bear such costs.” If, on the other hand, the Government believes that following the Court’s Order will reveal and memorialize a record that belies its representations, it will balk at the Court’s directive. The Government chooses to balk.

The Defense stands ready to bear its own costs of gathering its team together to review the documents and supplement its motion within the 60-day time frame. If the Government stands behind its express representation to the Court at the July 9, 2009, hearing that its Agents and Attorneys *did not rearrange* the documents, then it should be willing to bear the cost associated with its efforts to prove this charge false. To escape or avoid this prudent, common-sense solution would itself create the manifest injustice.

B. The Government's Representation that it Indexed the Seized Documents is False.

During his rebuttal argument at the July 9, 2009, hearing, Government Counsel represented to the Court that the Government provided an index of *all* documents to the defendants. No such index was ever mentioned in the Government's Opposition papers under this motion or in the accompanying Affidavits. The Government never produced evidence of such an index at the hearing. By letter dated July 10, 2009, Defense Counsel requested that the Government produce the referenced index. (Exhibit A). Government Counsel never responded to the July 10, 2009, letter.

The Court's Order correctly finds that "The Government never provided the Defendants with a detailed inventory of the specific documents seized." The Order goes on to accurately state that "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." The Government Motion challenges these findings as false, but backs away from the representations it made at the hearing. Now the Government contends that "In 2004, the Government provided an index of approximately 26,000 documents, which previously had been produced to Defendants in electronic form *and identified by the Government as particularly relevant to the investigation.*" (Doc. No. 1177, ¶ 2, p. 2, *emphasis added*). These, of course, are the Bates-stamped documents referred to in the Defense Motion and at page 2 of the Court's Order, indexed by the "(1) bates range; (2) the date; and (3) the type of record" for each document. (Doc. No. 1177-2, Ex. A). Thus, contrary to the direct representations of the Government Counsel at the hearing, the Government has *never* produced an index of all of the documents seized, and

certainly did not produce any index that included the non-Bates-stamped documents. Rather, it created and produced an index of *only* the documents it indexed, organized, memorialized and Bates-stamped as relevant to its case in chief. It could have followed precisely the same protocol with *all* of the Defendants' documents and property it held, but it chose not to. The Government's argument, therefore, reaffirms the Order's findings and emphasizes the misrepresentation made by Government Counsel at the hearing.

C. The Government's Proposed Alternative is Improper

The Government's Motion to Reconsider does not request complete rescission of the July 16, 2009, Order. Instead, it offers two alternatives. The first, addressed above, is that the defendants bear the cost of the copying of the documents. The second alternative warrants a direct quote: "The Government submits that it should only have to reproduce those documents that Defendants cannot identify." (Doc. No. 1177, ¶ 5, p. 3). This proposed alternative succinctly and efficiently describes the absurdity of the Government's argument and the arrogance it has exhibited with respect to its dominion over the Defendants' property.

In support of its second alternative, the Government represents that the Defendants have refused to describe documents they are unable to locate or to cooperate in any effort to identify the documents they claim are missing. This representation is false. During its January 2009 visit to the FBI offices, the Defense team did in fact provide Government Counsel Lori A. Hendrickson with specific samples of documents and boxes of documents the team identified as missing. Ms. Hendrickson was unable to produce any of the identified items, which ranged, *inter alia*, from boxes of financial

records, to stock certificates, to a laptop computer, to personal items such as a defendant's marriage certificate. Ms. Hendrickson did not submit an affidavit in support of the Government's Opposition to the Defense Motion, did not sign the Government Pleadings thereon, and did not appear at the hearing. Ms. Hendrickson knows the Government's representations on this point are false. If the Government does not concede this fact, and if the Court deems the fact relevant to its inquiry on this Motion and the overall Motion for Specific Relief, the Defendants will request the opportunity to inquire of Ms. Hendrickson on the issue. To facilitate resolution of this issue, the Defendant requests as relief below that the Court find as follows: That the Government represented to the Court that the Defendants have refused to describe documents they are unable to locate, when Government Counsel knew that such representation was false.

Of course, missing documents is only one consequence of the Government's rearrangement of the non-Bates stamped documents. The other more pervasive consequence, summarily dismissed in the Government's analysis, is the inability to determine the sources of the rearranged documents and the resulting harm to the Defense with respect to those documents at trial. Indeed, while both issues are important, most of the areas of harm enumerated in Defendant's Motion are premised upon the *rearranging* and *sourcing problems* of the non-Bates stamped documents. The Government's proposed alternative completely ignores this issue.

Now, in the context of these misrepresentations, the Government attempts to persuade this Court to decide this crucial matter without memorializing the current state of the documents for either the Court or the Defendants. Given the gravity of this issue, if the Government refuses to retract this representation and admit that it indeed could not

locate certain items identified by the Defense, the Defense will request the Court's permission and assistance in exploring the issue through examination of Ms. Hendrickson at the appropriate time. In the interim, and in the context of these blatant misrepresentations, any reversal or modification of the Court's July 16, 2009 Order would be improper.

D. The Government's Representation that it Indexed the Seized Documents is False

Finally, the Government confuses the Court's Order with Rule 16 discovery. The Court's Order imposes obligations on both parties to this litigation in an effort to effectively and accurately assess the harm caused by the Government's conduct. In this regard, the Order is of direct benefit to the Government as it will memorialize the current state of the documents. Indeed, if the Government truly believes what it states -- that no documents were rearranged and therefore no harm was caused -- it should cooperate with the Court's Order to support that finding. On the other hand, if it does not believe that such is the case, then it will certainly be harmed by production of the incriminating organization.

In any event, the Defense stands ready to fulfill its obligations under the Court's Order. Once the copies are produced, it will immediately begin its work to supplement their Motion.

III. Conclusion

WHEREFORE, in light of the foregoing, Defendant respectfully requests that the government's Motion for Reconsideration be denied.

The Defendant further requests that the Court find as a matter of fact that:

1. The Government represented to the Court that the Defendants have refused to describe documents they are unable to locate, when Government Counsel knew that such representation was false.
2. The Government represented to the Court at the July 9, 2009 hearing that it provided an index of all seized documents to the Defendants when it knew that such representation was false.

DATED: August 20, 2009

Respectfully submitted,

/s/Randall P. Andreozzi
Randall P. Andreozzi, Esq.
ANDREOZZI FICKESS, LLP
9145 Main Street
Clarence, New York 14031
716-565-1100
716-565-1920 (Fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 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/ Randall P. Andreozzi
Randall P. Andreozzi

ANDREOZZI FICKESS | LLP

Edward D. Fickess, Partner
Randall P. Andreozzi, Partner

July 9, 2009

VIA FACSIMILE & U.S. MAIL

Mark Daly, Esq.
US DOJ/Tax Division/N.Criminal Section
601 D. Street NW, Room 7814
Washington, DC 20004-2904

**Re: United States of America, and Government of the Virgin Islands v.
Fathi Yusuf, Mohamad Yusuf et al.**

Dear Mr. Daly:

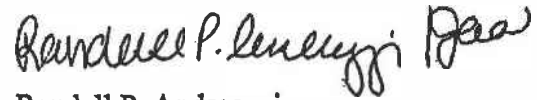
We hereby request production of the following items relating to the referenced matter:

1. Per your correspondence of May 12, 2009, you advised that copies of the hard drives and electronic data we requested have been copied and that you expected to have them ready by the time of our visit to the FBI later in May. We inquired again to the status of these items in our correspondence dated June 22, 2009, and to date, we have still not received these items or a response to our correspondence. Please advise as to when these will be produced;
2. During the hearing of July 9, 2009, you represented to the Court that the FBI and Department of Justice possess a particularized list of all seized documents (bates and non-bates stamped documents) that would enable the FBI to identify all documents (bates stamped and non bates stamped) that may have been moved.

Also, Special Agent Petri's Affidavit dated July 8, 2009, refers to 40 boxes of documents in the FBI possession that are responsive to requests I made in January 2009. Please provide a time for our team to come to the FBI Office in St. Thomas to review these documents.

Thank you for your anticipated cooperation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Randall P. Andreozzi". The signature is written in a cursive style with a large, stylized initial "R".

Randall P. Andreozzi

cc: Thomas Alkon, Esq.
Henry Smock, Esq.
Derek M. Hodge, Esq.
Pamela Lynn Colon, Esq.
John K. Dema, Esq.
Bruce Cole, Esq.

**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,)
WALEED MOHAMMED HAMED,)
WAHEED MOHAMMED HAMED,)
MAHER FATHI YUSUF, ISAM)
MOHAMAD YOUSUF, and UNITED)
CORPORATION, dba Plaza Extra)
Supermarkets,)

Defendants.)

CRIM NO. 2005-0015

ORDER

THIS MATTER comes before the Court on the Government's Motion to Reconsider the Court's Order of July 16, 2009 regarding Defendants' Motion for Specific Relief due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence. Defendant Waleed Hamed filed an opposition to such motion, with which the other Defendants joined.

After consideration of the Government's motion and the opposition thereto, it is hereby **ORDERED** that the Government's Motion to Reconsider is **DENIED**.

ENTER:

DATE: September 14, 2009

_____/s/
RAYMOND L. FINCH
SENIOR DISTRICT JUDGE



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

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

v.

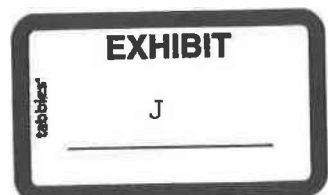
FATHI YUSUF MOHAMAD YUSUF,
aka Fathi Yusuf,
WALEED MOHAMMAD HAMED,
aka Wally Hamed,
WAHEED MOHAMMED HAMED,
aka Willie Hamed,
MAHER FATHI YUSUF,
aka Mike Yusuf,
ISAM MOHAMAD YOUSUF,
aka Sam Yousuf,
NEJEH FATHI YUSUF, and
UNITED CORPORATION
d/b/a Plaza Extra,
Defendants.

CRIMINAL NO. 2005-015

MOTION TO STAY DISCOVERY

The Government respectfully requests that the Court issue a stay of the parties' discovery obligations in this case until December 13, 2009. In support of this motion, the Government states the following:

1. The Government has consulted Defense counsel regarding this motion, and counsel have no objection.
2. Government and Defense counsel recently restarted plea discussions in this matter. Based on a preliminary meeting on October 9, 2009, the parties have a good-faith and reasonable basis to believe that a pretrial resolution of this case is possible.



3. Counsel for both parties expect that discovery will continue for many months. The parties expect further delay after the completion of discovery because, under the terms of the Court's July 16, 2009 discovery order [docket no. 1152], counsel for defendants will have 60 days to file any additional motions based on the discovery provided.

4. In the interest of avoiding unnecessary expense and delay, counsel for all parties agree that the restarted plea negotiations should take priority over discovery obligations. Government and Defense counsel propose a temporary stay of discovery obligations until December 13, 2009 to allow the parties to negotiate the terms of a plea and to determine the likelihood of resolving this case before trial.

5. Government and Defense counsel agree that, if the Court grants this motion, all time from October 9, 2009 until December 13, 2009 should be excludable for Speedy Trial Act purposes because, under 18 U.S.C. § 3161(h)(8)(A), the ends of justice served by the stay outweigh the best interests of the public and defendants in a speedy trial.

WHEREFORE, the Government respectfully requests that the Court enter the proposed order and temporarily the stay the parties' discovery obligations until December 13, 2009.

Respectfully submitted,

RONALD W. SHARPE
UNITED STATES ATTORNEY

/s/Kevin C. Lombardi
ALPHONSO ANDREWS
Assistant U.S. Attorney
MARK F. DALY
LORI A. HENDRICKSON
KEVIN C. LOMBARDI
Trial Attorneys
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20004
Tel: (202) 514-5150
Fax: (202) 616-1786

Dated: October 19, 2009

CERTIFICATE OF SERVICE

I, Kevin C. Lombardi, certify that on October 19, 2009 the foregoing MOTION TO STAY DISCOVERY was served upon counsel of record by filing the same through the ECF system.

/s/ Kevin C. Lombardi
Kevin C. Lombardi

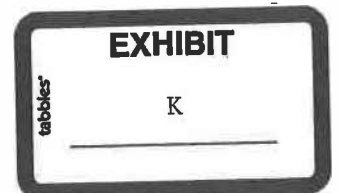
**IN THE DISTRICT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA, and)	
GOVERNMENT OF THE VIRGIN ISLANDS)	
)	
Plaintiffs,)	
)	
vs.)	
)	CRIMINAL NO. 2005-15F/B
)	
UNITED CORPORATION,)	
dba Plaza Extra)	
)	
)	
Defendants.)	

**DEFENDANT'S MOTION FOR SPECIFIC RELIEF IN ANTICIPATION OF
THE DECEMBER 14, 2010, ORAL ARGUMENT**

COMES NOW the Defendant, United Corporation, and submits the following Motion for Specific Relief in Anticipation of the December 14, 2010, Oral Argument. Defendant requests that the Court Order that neither party be permitted to present factual evidence or testimony at the December 14, 2010 Oral Argument.

Alternatively, if the Court determines that such evidence is necessary for a ruling with respect to the statute of limitations in this matter, Defendant respectfully requests that the Court (1) enforce its Order directing the Government to produce all documents in this case; (2) allow each shareholder of United Corporation the opportunity to retain counsel to defend himself or herself against any allegations of civil fraud that the Government might raise with respect to each shareholder's tax returns; (3) adjourn the December 14, 2010, hearing to allow sufficient time for the Government to produce such documents and for the affected parties to review the documents and prepare for such an evidentiary hearing.



IN SUPPORT THEREOF, Defendant submits as follows:

1. On February 26, 2010, the parties executed and filed the Plea Agreement in this case (Document No. 1248). Pursuant to the Plea Agreement, United Corporation pled guilty to one count of the 78-count Third Superseding Indictment. That count (Count 60) charges aiding in the preparation of a single false income tax return in violation of 33 V.I.C. § 1525(2).

2. The parties stipulated to the factual basis for the plea offense as follows:

On or about September 18, 2002, United willfully aided, assisted, procured, counseled, advised, or caused the preparation and presentation of a materially false corporate income tax return on Form 1120S for the year 2001 and filed such return with the Virgin Islands Bureau of Internal Revenue(VIBIR). Specifically, United reported gross receipts or sales on line 1c as \$69,579,412, knowing that the true amount was approximately \$79,305,980.

3. The stipulated plea offense references one year, and one year only. It specifically addresses *gross* sales reported on line 1c of United Corporation's Form 1120, and not taxable income or taxes due from United Corporation or its shareholders. All other counts in the Indictment against United Corporation, and all counts against all other defendants in the matter, were dismissed with prejudice.

4. Restitution pursuant to a conviction (whether by trial or by plea) is limited to the loss caused by the specific conduct underlying the offense of conviction, and does not include related conduct. *Hughey v. United States*, 495 U.S. 411 at 420 (1990). Thus, absent agreement to the contrary, restitution would be limited to the tax loss the Government could prove was attributable to the 2001 offense identified in Count 60.

5. As part of the plea agreement in this case, the Government, the USVI VIBIR, and United Corporation agreed that the restitution amount determined pursuant to the Plea Agreement will include certain periods and amounts in addition to the 2001 tax

year, and that such amounts would also be conclusive for purposes of any civil taxes due and owing to the Virgin Islands. To illustrate, the parties agree that United Corporation will include as restitution amounts determined as gross receipts tax due for the period August 1998 through December 2001, and as income tax due for its 1997 and 1998 taxable years. Likewise, United Corporation agreed to include as restitution an amount equivalent to Fathi Yusuf's allocable share of income tax attributable to United Corporation for the years 1999, 2000 and 2001, even though all counts against Mr. Yusuf were dismissed.

6. The parties disagree with respect to: (1) the periods for which the USVI would be time barred under its examination and deficiency laws and procedures with respect to civil taxes the Government seeks for other periods and individuals, and (2) the correct amount of any non-time-barred civil taxes.

7. The Government seeks taxes for years and individuals outside of the years and individuals charged in the Indictment. United Corporation has consistently disputed the Government's claims in this regard. *See*, Exhibit 1 to Plea Agreement (attached as Exhibit A), wherein the parties provide a Table setting forth each side's statement of the correct restitution numbers for tax loss. The Government's side of the Table purports to extend the "Tax Loss" to years and individuals not charged in the Indictment and for which any civil statute of limitations has long expired. For these years and individuals, the Defendant's side of the Table lists \$0, reflecting its position that these years are time barred. These extra taxes asserted by the Government fall into three categories: (1) Gross Receipts Taxes from January 1996 through July 1998, (2) Corporate Income Tax for 1996, and (3) flow-through of S Corporation income and the resulting personal

income taxes to Mrs. Yusuf and her children, as shareholders of United Corporation from 1999 through 2001.

8. As a preliminary step to a hearing on the restitution amounts due from United Corporation, the parties seek the Court's ruling on the legal issue of the statute of limitations applicable to these disputed periods and individuals. By Order dated September 1 2010, the Court directed the parties to file legal briefs on the issues of (1) the application of the statute of limitations to restitution in the context of sentencing following a guilty plea, and (2) the applicable statute of limitations in this case. The parties briefed the matter with the Court and are scheduled for oral argument on the issue on December 14, 2010.

9. The Government recently advised the defense that it now intends to use the December 14 oral argument as a forum to submit evidence to the Court that United Corporation and its various individual shareholders (including Mrs. Yusuf and her then young children) each filed fraudulent tax returns for the disputed periods with the intent to evade tax, such that the statute of limitations on assessment and collection of tax against them is extended indefinitely for each under 26 U.S.C. § 6501(c)(1) and 33 V.I.C. § 1161 (c)(1). The statute provides, in pertinent part, as follows:

FALSE RETURNS – In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

10. In its Briefs, the Government advances United Corporation's guilty plea to filing a false 2001 income tax return as a pretext to apply Section 6501(c)(1) to all other years, and even to other individuals. As explained in Defendant's Briefs, the Government may not prove its case by simply making an assertion, but must prove civil

fraud under the appropriate standards for each and every year it purports to rely on Section 6501.

11. Recognizing its dilemma, the Government has advised Defendant that it does not intend to stand on its legal argument. Rather, the Government intends to offer evidence on December 14 to establish that United Corporation and its shareholders each committed fraud on all of their respective tax returns. The Government has advised that it intends to submit select business records of United Corporation, summarize testimony of certain of United Corporation's employees, and possibly submit "other evidence of fraud". The Government also intends to present summaries of evidence purportedly prepared by Government Agents.

12. Pending before the Court, and suspended as a result of the Plea Agreement reached in this case, are several defense motions with respect to the Government's conduct and actions, including a motion for relief due to the Government's spoliation of evidence in this case. The Spoliation Motion describes in detail the Government's actions with respect to thousands of documents relevant to precisely the factual issues the Government now seeks to resurrect on December 14. With respect to that Spoliation Motion, the Court issued an Order directing the Government to produce complete and accurate copies of all of its documents to the defense. To date, the Government has not complied with that Order.

13. In recent discussions with the Government, and in the context of assisting in the preparation of out-year tax returns, Defendant has requested the return of the documents subject to the Spoliation Motion. The Government steadfastly refuses to return those documents. Based on its understanding that the proceeding of December 14,

USA v. United Corp., SX-05-CR-15

Defendant's Motion For Specific Relief In Anticipation Of The December 14, 2010, Oral Argument

Page 6 of 7

2010 will involve oral argument and not an evidentiary hearing on deficiencies in tax attributable to fraud, Defendant has not formally pursued the return of the subject documents for the December 14 session. Should the Court grant this Motion and affirm that the session is limited to oral argument on the legal issues, Defendant will not require the documents subject to the Court's Order at this juncture.

14. If, however, the Court is inclined to hear the Government's presentation of factual evidence against these taxpayers, the defense respectfully requests that the Court:

- a. Enforce its Order directing the Government's production all documents in this case.
- b. Allow each shareholder of United Corporation the opportunity to retain counsel to defend himself or herself with respect to such allegations of civil fraud.
- c. Adjourn the December 14, 2010, hearing to allow sufficient time for the Government to produce such documents, and for the affected parties to review the documents and prepare for an evidentiary hearing.

Conclusion

For the reasons set forth above, United Corporation respectfully requests that the Court grant this motion and preclude the United States from introducing any evidence or summary testimony with respect to tax deficiencies attributable to fraud for the periods and individuals in dispute.

USA v. United Corp., SX-05-CR-15

Defendant's Motion For Specific Relief In Anticipation Of The December 14, 2010, Oral Argument

Page 7 of 7

Respectfully submitted,

HUNTER COLE & BENNETT
Counsel for United Corporation

Dated: November 30, 2010

By: /s/Warren B. Cole
Warren B. Cole
VI Bar No. 283
1138 King Street – Third Floor
Christiansted, St. Croix VI 00820
[wbcole@hcbvilaw.com](mailto:wbc@hcbvilaw.com)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 2010, 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/ Warren B. Cole, Esq.

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

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

vs.

**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
ISAM YUSUF, and
UNITED CORPORATION,
dba Plaza Extra,
Defendants.**

CRIMINAL NO. 2005-15F/B

PLEA AGREEMENT-ADDENDUM

The parties agree to the following:

- 1) United will pay a \$5,000 fine, as set forth in Paragraphs III.A.1 and VIII.A;
- 2) United will pay \$10 million to the VIBIR for restitution, as set forth in Paragraphs III.A.3 and VIII.D;
- 3) United will pay \$1 million as a substantial monetary penalty, as set forth in Paragraphs III.A.2, III.B, VIII.B, and VIII.C.

In consideration of the settlement herein, United, the Individual defendants, and United's shareholders, and their heirs, executors, administrators, or assigns do hereby stipulate and agree to pay the agreed upon



sums, and to waive and release any and all claims, demands, rights, and causes of action of whatsoever kind and nature, whether sounding in tort, contract, or any other theory of legal liability, including any claims for fees, interest, costs, and expenses, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, death, or damage to property, and the consequences thereof, which United, the individual defendants, and United's shareholders, or their heirs, executors, administrators, or assigns may have or hereafter acquire against the United States, its agents, servants, and employees on account of the same subject matter that gave rise to the above-captioned action. United, the individual defendants, and United's shareholders, and their heirs, executors, administrators, and assigns do hereby further agree to reimburse, indemnify, and hold harmless the United States and its agents, servants, and employees from and against any and all such claims, causes of action, liens, rights, or subrogated or contribution interests incident to, or resulting or arising from, the acts or omissions that gave rise to the above-captioned action. Provided, however, that the duties to reimburse, indemnify and hold harmless the United States and its agents as set forth in the preceding sentence shall be strictly limited to claims made by United, the individual defendants, United's shareholders, or their executors, administrators, assigns, or their family members.

**UNITED AND COUNSEL FULLY UNDERSTAND PLEA AGREEMENT-
ADDENDUM**

By signing this Plea Agreement-Addendum, United's representative certifies that he has been given lawful authority to enter into this Plea Agreement-


Addendum. United further certifies that its counsel has discussed the terms of this Plea Agreement- Addendum with appropriate officers, directors, and shareholders of United and that United fully understands its meanings and effect.

The Government agrees to the terms set forth in this Plea Agreement- Addendum.

RONALD SHARPE
UNITED STATES ATTORNEY


JOHN A. DICICCO
ACTING ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF JUSTICE, TAX DIVISION

Dated: 2/2/2011

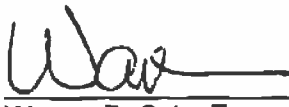

Mark F. Daly
Lori A. Hendrickson
Kevin C. Lombardi
Trial Attorneys

The defendant United Corporation agrees to the terms set forth in this Plea Agreement-Addendum.

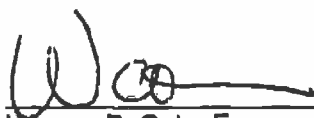
Dated: 1/20/11



Thomas Alkon, Esq.
Attorney for Defendant United Corporation

Dated: 1/20/11


Warren B. Cole, Esq.
Attorney for Defendant United Corporation

Dated: 1/20/11


Warren B. Cole, Esq.
Attorney for Defendant's unindicted shareholders

Dated: _____ 
Maher Fathi Yusuf
President, Defendant United Corporation

Dated: _____
Gordon C. Rhea, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: _____
Randall P. Andreozzi, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: _____
Derek M. Hodge, Esq.
Attorney for Defendant Nejeih Fathi Yusuf

Dated: _____
Pamela Colon, Esq.
Attorney for Defendant Waheed Mohammed Hamed

Dated: _____
Henry C. Smock, Esq.
Attorney for Defendant Fathi Yusuf Mohamad Yusuf

Dated: _____
John K. Dema, Esq.
Attorney for Defendant Maher Fathi Yusuf

Dated: _____

Maher Fathi Yusuf
President, Defendant United Corporation

Dated: 1/20/2011

Gordon C. Rhea
Gordon C. Rhea, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: _____

Randall P. Andreozzi, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: 2/2/11

Derek M. Hodge
by WABA with authorization
Derek M. Hodge, Esq.
Attorney for Defendant Nejeih Fathi Yusuf

Dated: _____

Pamela Colon, Esq.
Attorney for Defendant Waheed Mohammed Hamed

Dated: _____


Henry C. Smock, Esq.
Attorney for Defendant Fathi Yusuf Mohamad Yusuf

Dated: _____

John K. Dema
John K. Dema, Esq.
Attorney for Defendant Maher Fathi Yusuf

Dated: _____
Maher Fathi Yusuf
President, Defendant United Corporation

Dated: _____
Gordon C. Rhea, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: 1/24/11

Randall P. Andreozzi, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: _____
Derek M. Hodge, Esq.
Attorney for Defendant Nejeih Fathi Yusuf

Dated: _____
Pamela Colon, Esq.
Attorney for Defendant Waheed Mohammed Hamed

Dated: _____
Henry C. Smock, Esq.
Attorney for Defendant Fathi Yusuf Mohamad Yusuf

Dated: _____
John K. Dema, Esq.
Attorney for Defendant Maher Fathi Yusuf

Dated: _____

Maheer Fathi Yusuf
President, Defendant United Corporation

Dated: _____

Gordon C. Rhea, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: _____

Randall P. Andreozzi, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: _____

Derek M. Hodge, Esq.
Attorney for Defendant Nejeer Fathi Yusuf

Dated: 2/1/11



Pamela Colon, Esq.
Attorney for Defendant Waheed Mohammed Hamed

Dated: _____

Henry C. Smock, Esq.
Attorney for Defendant Fathi Yusuf Mohamad Yusuf

Dated: _____

John K. Dema, Esq.
Attorney for Defendant Maheer Fathi Yusuf

Dated: _____

Maheer Fathi Yusuf
President, Defendant United Corporation

Dated: _____

Gordon C. Rhea, Esq.
Attorney for Defendant Waleed Mohammed Hamed

Dated: _____

Randall P. Androozzi, Esq.
Attorney for Defendant Waleed Mohammed Hamed


Dated: _____

Derek M. Hodge, Esq.
Attorney for Defendant Nejeer Fathi Yusuf

Dated: _____

Pamela Colon, Esq.
Attorney for Defendant Waheed Mohammed Hamed

Dated: 1-25-11


Henry C. Smock, Esq.
Attorney for Defendant Fathi Yusuf Mohamad Yusuf

Dated: _____

John K. Dema, Esq.
Attorney for Defendant Maheer Fathi Yusuf

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

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

Plaintiff/Counterclaim Defendant,

vs.

FATHI YUSUF and UNITED CORPORATION,

Defendants/Counterclaimants,

vs.

**WALEED HAMED, WAHEED HAMED,
MUFEED HAMED, HISHAM HAMED, and
PLESSEN ENTERPRISES,**

Additional Counterclaim Defendants.

CIVIL NO. SX-12-CV-370

**ACTION FOR DAMAGES,
INJUNCTIVE RELIEF
AND DECLARATORY RELIEF**

JURY TRIAL DEMANDED

DECLARATION OF FATHI YUSUF

I, Fathi Yusuf, pursuant to 28 USC §1746 and Super. Ct. R. 18, declare under the penalties of perjury, that:

1. Since the partnership that operates the Plaza Extra Stores was formed in 1986, it has obligated itself to make rent payments to United Corporation ("United") for the Plaza Extra-East store. I was the partner responsible for making all decisions regarding the timing, amount and payment of rent. As of December 31, 1993, all rent due from the partnership to United had been paid.

2. The Plaza Extra-East store was reopened in May 1994 after it had been destroyed by fire in 1992. The Plaza Extra-Tutu Park store had just opened in October 1993. Around the time that the Plaza Extra-East store reopened, I was arranging a Scotiabank loan to United



Corporation for approximately \$5,000,000 for the benefit of the partnership. The loan was guaranteed by my wife and I and it was secured by our home on St. Croix and by United's shopping center in St. Croix. In light of these circumstances, I determined that because United did not need the rent revenue, the rent would accrue and the monies that otherwise would be used to pay rent could serve as working capital for the partnership.

3. Some time in 2002 or 2003, I began discussions with Waleed Hamed regarding the rent that would be due for Plaza Extra-East after the expiration of the prior ten-year term in 2004. During those discussions, we recognized that the prior rent was far below fair market value, and the decision was made to base the rent on the same formula utilized at the Tutu Park store in St. Thomas. There is no dispute concerning the formula for calculating the rent for Plaza Extra-East from May 2004 forward, since rent based upon that agreed formula was paid on February 7, 2012 in the amount of \$5,408,806.74.

4. At the time we made the agreement regarding Plaza Extra-East rent for 2004 going forward, we were embroiled in the criminal case and all of the Plaza Extra accounts were frozen by an injunction. As a result, I made a decision and Waleed Hamed, on behalf of Mohammed Hamed, agreed, that there was no prospect for the payment of the rents owed for the 1994-2004 period. However, even if the ability to collect the rent was not blocked by the injunction, I was unable to calculate the rent for 1994-2004, as I did not have the "black book," a black ledger book containing accounting information concerning the Hamed and Yusuf families, as well as other information relating to the Plaza Extra Stores, including the payment of rent to United. The FBI had seized that book when it conducted its raid in October 2001. Among other

things, the "black book" reflected the date of the last rent payment in 1994, information I needed to accurately determine the rent for Plaza Extra-East from 1994–2004.

5. In the latter part of 2011 and early 2012, United was in a position to request – and the partnership was in a position to pay – rent for the 1994–2004 period, as the criminal matter had progressed to a point where there was a relaxing of the injunction. However, the original problem regarding the absence of the records to accurately calculate the rent for the 1994-2004 period remained unresolved because of the absence of the "black book." I did not want to either understate or overstate the rent amount, but wanted the dollar amount of rent to be exactly correct.

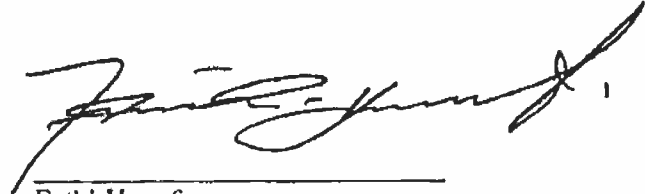
6. In early 2012, I discussed the 1994-2004 rent with Waleed Hamed when the payment of \$5,408,806.74 in rent for the period from May 5, 2004 to December 31, 2011 was coordinated. I again explained to Waleed Hamed that I could not request the 1994–2004 rent, as we still had not received the "black book" to determine the exact starting point for that period. During that conversation in 2012, Waleed Hamed agreed that rent was owed for the 1994–2004 period, and agreed that it would be paid once the "black book" was recovered and a proper calculation could be made.

7. My son found the "black book" in early 2013, among a large number of documents that were returned to us by the FBI. After receipt of the "black book," we asked Waleed Hamed for the rent for 1994–2004, as we then were able to properly calculate the dollar amount. On May 22, 2013, counsel for Mohammed Hamed wrote a letter to my counsel in which he advised that his client disputed there was any obligation to pay the 1994–2004 rent.

Until the litigation in this matter, nobody had ever disputed United's entitlement to rent for the 1994-2004 period.

8. I received a partial copy of the FBI file, records, and documents electronically produced and stored on a hard drive in approximately mid-2011. When these documents were initially returned, I had no reason to suspect any wrongdoing by Plaintiff, Waleed Hamed or any other members of the Hamed family. In 2011, as I reviewed these documents, I discovered certain documents which led me to believe that Plaintiff and Waleed Hamed may have taken monies without my knowledge. In 2012, I discovered the tax returns for Waleed Hamed for various years which reflected more than \$7,500,000 in stocks and securities owned by Waleed Hamed. I knew what Waleed's salary as a Plaza Extra store manager was, and knew that he had no other employment or source of income. My belief was that there was no way he could have legitimately accumulated that much wealth.

Dated: June 6, 2014



Fathi Yusuf