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

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

DEFENDANT WAHEED ("WILLIE") HAMED'S
OPPOSITION TO PLAINTIFF UNITED'S MOTION FOR RECONSIDERATION

Four points are relevant: (1) United was given two separate opportunities[1] to provide timely counter-arguments in this case and affirmatively states that it knew of the order it seeks to raise, considered raising it, but *consciously elected* not to do so *for a strategic reason*.[2] Thus, after judgment has been granted, United seeks to reargue the case *as to facts known to it and not submitted for strategic reasons* under the rubric of Rule 59(e) "reconsideration"; (2) when it was issued, the newly submitted 2009 Finch Order was immediately appealed via a timely motion for reconsideration for lack of factual support, then permanently *stayed* and **is NOT now (and never again was) in**

[1] These opportunities were *Opposition to the Motion for Summary Judgment* and in response to the Court's subsequent order to submit a responsive affidavit on this exact issue.

[2] Stating at page 5, footnote 4 of the *Memorandum in Support of Motion For Reconsideration*:

> The 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….(Emphasis added.)

effect;[3] (3) as United knows well (as an hour of document research on this order reveals), Judge Finch's order had NOTHING to do with the documents at issue here, as the referenced Finch Order dealt only with boxes of *non-Bates stamped* documents—the Bates stamped Hamed tax returns and other documents extensively reviewed in 2003 and 2004 were (according to *both* Atty. Andreozzi and Judge Finch) provided and properly indexed/sourced[4]; and (4) the Finch Order addresses an alleged *interruption* of that access well after 2004—during the 2006-2008 period—after which access was restored.

Thus, this is nothing more than a last ditch effort to run up fees and time with a *new argument* regarding an inapplicable order that United Corporation admits it knew about, and clearly knows does not apply to the Bates stamped documents at issue here.

While Hamed briefs all four points, this Court can summarily deny this motion based on the first issue, as United should have raised the Finch Order in response to the summary judgment motion and in response to the direct order of this Court that it supplement the record on the issue of access to the records in question.

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[3] As Hamed has determined with recent research and United admits in its Memorandum at 2:

> 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.... (Emphasis added.)

[4] Counsel for Hamed was unaware of the 2009 Finch Order. He is not counsel in that criminal case as is United's counsel -- and became involved with the Hamed and Yusuf civil dispute years after the events related to that Order. The two affidavits were discovered by a paralegal doing a database word search, by themselves, on a disk with approximately 48,000 random criminal documents supplied in a 'bulk drop' of documents in the St. Croix *Hamed v. Yusuf* civil action.

I. Fed. R. Civ. P 59(e) Cannot be Invoked Where United was Given Two Separate Opportunities to Provide Timely Counter-Arguments In this Case and Affirmatively States that it Considered Doing So, but *Consciously Elected* Not to do so *for a Strategic Reason*

United concedes that the issues of collateral estoppel and the effect of Judge Finch's Order are not newly discovered and were intentionally not previously raised. Thus, the parties agree on the applicable legal standard, and that points (1) and (2) of that standard do not apply here.

> 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.

Plaintiff's Memorandum at 4. Both parties also agree that the Court has discretion to consider whether reconsideration should be allowed under the third, "manifest injustice point of that standard. However, United then veers off into a misinterpretation of what courts uniformly refer to as a "rare" exception regarding the extent to which a court *should* "consider arguments and evidence that *could* have been presented earlier, if doing so will. . .avoid manifest injustice." *Id.* at 4 (emphasis added).[5]

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[5] United cites the following decisions in support, each of which will be addressed. *Gutierrez v. Gonzales*, 2005 U.S. App. LEXIS 4502 (3d Cir. 2005), *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995), *Ortiz v. City of Chicago*, 2011 U.S. Dist. LEXIS 53206 (N.D. Ill. 2011), *Ford Motor Credit Company v. Bright*, 34 F.3d 322 (5th Cir. 1994, *U.S. Home Corporation v. Settlers Crossing, LLC*, 2012 U.S. Dist. LEXIS 101778 (D. Md. 2012), *Church & Dwight Co., Inc. v. Abbott Laboratories*, 545 F. Supp. 2d 447 (D.N.J. 2008) and *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152 (C.D. Cal. 2008). Note: *Ortiz v. City of Chicago*

"[M]otions for reconsideration under Rule 59(e) are disfavored and should be granted only under extraordinary circumstances" * * * [M]anifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead *elected* not to act until after a final order had been entered." *Agrocomplect, AD v. Republic of Iraq*, 262 F.R.D. 18, 21 (D.D.C., 2009) (emphasis added.) Even a cursory reading of the cases cited by United—particularly the Third Circuit's *Guttierrez* decision—demonstrate there is no such manifest injustice here.

Guttierez is a decision the Third Circuit marked "Non-Precedential." It does *not* deal with a situation where a conscious decision was made for tactical reasons such as Plaintiff admits here—but rather involved an error of what appeared to be malpractice in a *habeas corpus* proceeding. Even then, the Court merely recites the basic rule. In fact, none of the cases cited by United relieved a party from a conscious, strategic decision not to argue a position. To the contrary, in *Ford Motor Company v. Bright,* the problem was that, as was the case in Guttierez, the trial Court initially identified "professional carelessness" as the cause of the problem. *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir.1994). But the Circuit Court *did then consider whether Rule 59(e) was*

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was a criminal case (despite the apparent civil caption.) It did not involve evidence known to a party, but strategically withheld. Similarly, *U.S. Home Corporation v. Settlers Crossing, LLC*, 2012 U.S. Dist. LEXIS 101778, p. *15 (D. Md. July 23, 2012) is a decision under Rule 54(b) not 59, where the Court noted the "rare" applicability of the exception.

> [W]hile *rare*, some courts have considered previously available evidence when resolving a motion under Rule 54(b).

met—and decided no relief should be given under the Rule as a specific strategic decision not to plead a particular defense led to the non-submission of the position. *Id.* at 324-325:

> Bright's answer to Ford Credit's complaint did not plead a defense under TEX.BUS. & COM.CODE § 9.504(c). However, in response to Ford Credit's summary judgment motion, Bright argued that he was not liable on the guaranties because he did not receive a notice of the sale of the collateral, and because Ford Credit did not dispose of the collateral in a commercially reasonable manner. The district court granted summary judgment, finding that because Bright failed to specifically deny notification or commercially reasonable disposition in his answer, there existed no triable issue of fact as to Bright's liability on the guaranties.
>
> In its order denying Bright's Rule 59(e) motion and Rule 15(a) motion, **the district court stated that the "alleged 'professional carelessness' of Bright's previous counsel** does not merit reinstatement of his case." Our review of the record reveals no abuse of discretion. **Bright failed to plead a defense pursuant to § 9.504(c) in his answer to Ford Credit's complaint.** He also failed to seek leave to amend his answer to include the defense before the district court entered summary judgment against him. ***A court considering a Rule 59(e) motion requesting reconsideration may take into consideration an attorney's conduct in determining whether to reopen a case.*** See *Lavespere,* 910 F.2d at 175. Therefore, the court's decision regarding whether to reopen a case must be reviewed in light of all the relevant circumstances*325 on a case-by-case basis. *Id.* **In this case, we find that the district court did not abuse its discretion in denying Bright's Rule 59(e) motion.** Further, we find that the district court did not abuse its discretion in denying Bright's Rule 15(a) motion as moot. (Emphasis added.)

Put another way, the *Ford Motor* decision completely supports Hamed here—and completely undercuts Plaintiff's own argument. When a conscious DECISION is made by counsel NOT TO SUBMIT materials for a strategic reason, right or wrong, it is not the sort of situation for which reconsideration should be allowed.

Similarly, in *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F.Supp.2d 1152, 1162 -1163 (C.D.Cal., 2008) the Court stated:

> [Party against which summary judgment was granted] represent[ed] however, that they did not receive it [the new information] until the Greene/Kelley motions for summary judgment were fully briefed, [footnote omitted] and that they were ***unable to discover and present it*** **to the court previously because it was "buried in the more than 58,000 documents [that plaintiffs] produced"** ***after*** **briefing was complete**. (Emphasis added.)

United was not unable to discover and present the information. Nothing was supplied to United after summary judgment briefing. The same was true in *Church & Dwight Co., Inc. v. Abbott Laboratories*, 545 F. Supp. 2d 447, 450 (D.N.J. 2008) where the Court noted:

> **The standard for reconsideration is high and reconsideration is to be granted only sparingly**. *United States v. Jones,* 158 F.R.D. 309, 314 (D.N.J.1994). In this district, motions for reconsideration are governed by Local Civil Rule 7.1(I). These motions can succeed only upon a showing that either: "(1) an intervening change in controlling law has occurred; (2) evidence not previously available has become available; or (3) [reconsideration] is necessary to correct a clear error of law or *450 prevent manifest injustice." *Carmichael v. Everson,* No. 03–4787(DMC), 2004 WL 1587894, at *1 (D.N.J. May 21, 2004) (citations omitted). The Court will grant a motion for reconsideration only where its prior decision has **overlooked** a factual or legal issue that may alter the disposition of the matter. *United States v. Compaction Sys. Corp.,* 88 F.Supp.2d 339, 345 (D.N.J.1999); *see also* L. Civ. R. 7.1(I). **"The word 'overlooked' is the operative term in the Rule."** *Bowers v. NCAA,* 130 F.Supp.2d 610, 612 (D.N.J.2001) (citation omitted). . . .

Id. at 449-450. The Finch Order was not *overlooked.*

In sum, this is not a matter of "professional carelessness," nor is it information that was overlooked in a late-arriving mass of documents. Counsel here, who is also counsel in the still pending criminal case where the Finch Order was entered, has stated to the Court that he knew of and considered this evidence both when filing United's opposition to the motion for summary judgment and when not responding to the Court's order on this specific issue—but *chose* not to submit it for the reason stated. Hamed will take him at his word that this was not done to SANDBAG the Hameds in the main case in St. Croix despite the fact that the Order was submitted there at just the right time to undercut them.

II. The Finch Order Does Not Involve Bates Stamped Documents at Issue Here and States that only 2006-2008 Access Was Involved

Both Attorney Andreozzi and Judge Finch expressly noted that the Bates stamped documents were not involved in the Order and contained all source/indexing information that was at issue. *None* of the 2006-2008 confusion about access or indexing (resulting from moving *only* UNSTAMPED documents among boxes) set forth in Andreozzi's Motion for Reconsideration pertains to the documents that *were* Bates stamped—*which includes the tax returns at issue here*. This obvious fact is explicitly stated in both Andreozzi's motion and in the Court's Order. Andreozzi summarizes what allegedly went wrong *after* United's extensive pre-2006 access, at page 14 of his motion:

> 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. (Emphasis added.)

Judge Finch also specifically noted the availability and indexing of the Bates stamped documents (such as the documents here) in his Order, at 1:

> 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 numbers. However, ***all*** **of the documents the Government intends to use at trial do have bates numbers.** (Emphasis added.)

Thus, the Bates stamped documents were all specifically coded as to source and box location, identified as trial documents and were properly indexed—and *nothing* in the Andreozzi motion or the Court's Order applies to them. To the contrary, both Andreozzi's brief and Judge Finch's order expressly relate that the Bates numbered documents were the ones the Government had identified for use at trial[6]—*something that*

[6] Nor is there any estoppel issue. Andreozzi's joint defense brief, even if ascribed to Hamed here, is not contrary to his arguments or this Court's decision. The agents' statements stand uncontradicted as to the extensive access prior to 2006 to the Bates numbered documents. The

United denied here which would have been revealed had United provided the Finch Order to this Court.

Moreover, United Corporation concedes that access was available prior to 2006 and that Judge Finch's order involves only a two year period from 2006-2008, in its *Memorandum*, at 7:

> **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 if 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. (Emphasis added.)

Thus, the documents relied upon by this Court were not part of the documents that were the subject of the 2009 Finch Order.

Defense motion to Judge Finch apparently did not contain any counter-affidavit (at least that Hamed can locate) and is a rambling statement by counsel which Judge Finch apparently allowed out of an abundance of caution because it was a criminal proceeding.

III. Judge Finch's Order Was Preemptory and Decided Under a Different, Criminal Standard, and was Appealed and Stayed

Judge Finch issued his order in a criminal case—with significantly different standards of proof and concern for Sixth Amendment rights. This was a motion to assure access, hardly a difficult choice for the Court in a criminal matter and *there was apparently no supporting affidavit* or hearing. It was stayed following a motion for reconsideration filed by the Government based on that lack of factual accuracy and support—and has never been in effect since. *See Plaintiff's Memorandum* at 2.

IV. Judge Finch's Order Addresses an Alleged *Interruption* of Full Access During Just 2006-2008, After Which Access Was Restored

It is also important to note that United's statements now about how a settlement made it "unnecessary" to go on to obtain a complete set is irrelevant. United's own motion admits United had access up to the time of the interference and then again after that 2009 Order—and could have reviewed them. United admits in it Memorandum, at footnote 4 on page 5, that it sought an affidavit to support its present position as it was directed to by this Court—from the U.S. Attorney. No such affidavit was obtained (for what seem to be obvious reasons) and thus, there is no counter-affidavit to the agents' statements regarding the access in 2004-2006 or as to Bates stamped documents.

RESPECTFULLY SUBMITTED,

Dated: October 5, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2014, I served a copy of the foregoing Opposition by email, as agreed by the parties, on :

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