

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

UNITED CORPORATION,)	
)	Case No.: ST-13-CV-101
Plaintiff,)	
)	ACTION FOR DAMAGES
v.)	
)	
WAHEED HAMED,)	<u>JURY TRIAL DEMANDED</u>
(a/k/a Willy or Willie Hamed),)	
)	
Defendant.)	
_____)	

**REPLY BRIEF IN SUPPORT OF UNITED CORPORATION’S MOTION FOR
RECONSIDERATION**

In a tortured attempt to sidetrack the Court from the serious judicial estoppel issues raised in United Corporation’s Motion for Reconsideration, Defendant Waheed Hamed (“Hamed”) makes the incorrect and unsupported assertion that United knew that the positions Hamed took in his summary judgment motion were irreconcilably opposed to positions he took in the criminal case, and knew of Judge Finch’s order adopting most of those positions, but “consciously elected” not to raise the judicial estoppel argument for a “strategic reason.” Hamed’s Opposition at 1. Hamed never suggests what possible strategic benefit United might have obtained by failing to raise arguments that it knew about, and United can imagine none. But insofar as it is relevant to the Court’s ability to address the judicial estoppel arguments in a motion for reconsideration, the facts are that the undersigned counsel did not learn about the extensive “denial of access” assertions by Hamed and the other defendants in the criminal case until after this Court’s September 2, 2014 Order granting Hamed’s motion for summary judgment in this case. He knew vaguely that the FBI affidavits asserting “unfettered access” to documents had been submitted in response to a motion filed by one or more defendants in the criminal case, but had not read the

motion or any of the briefs on Pacer or elsewhere. And like Hamed's counsel, he did not learn about the existence of the Judge Finch Order, let alone its contents, until after entry of this Court's September 2, 2014 Order. See Hamed's Opposition at 2, note 2 ("Counsel was unaware of the 2009 Finch Order"¹).²

As argued by United in its initial brief in support of the motion for reconsideration, Hamed's briefs and Judge Finch's 2009 order were available at the time of the summary judgment briefing. While United therefore cannot argue that these materials constitute "new evidence" that would justify reconsideration, the case law cited by United makes it abundantly clear that the Court may grant a motion for reconsideration on the basis of these materials to avoid clear error or prevent manifest injustice. Hamed suggests that what this case law really holds is that "[w]hen a conscious decision is made by counsel not to submit materials for a strategic reason, right or wrong,

¹ Hamed's counsel does not say whether he knew about the positions taken in the motion and briefs signed by Hamed's counsel in the criminal case that are quoted extensively in United's initial brief in support of its motion for reconsideration filed on September 29, 2014 (the "Brief").

² Contrary to Hamed's insinuation, nothing in footnote 4 to the Brief states otherwise. As stated in the footnote, United's counsel does regret not bringing these matters to the Court's attention in his briefing on Hamed's motion for summary judgment. It would have clearly been preferable had he gone onto Pacer, found the relevant motions and briefs, along with the Judge Finch order, and then studied them and relied on them in his brief opposing Hamed's motion for summary judgment. (Presumably Hamed's counsel would say the same thing about the Judge Finch order that he, too, failed to look for and examine, before making an argument based on the FBI affidavits.) United's counsel knew that the Government affidavits cited by Hamed were issued in a hotly-contested criminal proceeding brought against both parties to this litigation. Because these affidavits were presented by the Government in a criminal proceeding commenced against both United and Hamed, and thus were inherently adversarial in nature, United's counsel "did not believe that the Court would attach dispositive significance to [them] . . ." See Brief at p. 5, note 4. Had United's counsel known otherwise, he would have undertaken to go into Pacer to locate the motion against which those affidavits were presented, and also sought any order disposing of that motion. It is also important to note that while United's undersigned counsel did enter his appearance in the criminal case, he did not do so until February 7, 2013 (Dkt. No. 1326), long after Judge Finch entered his July 2009 order.

it is not the sort of situation for which reconsideration should be allowed.” Hamed’s Opposition at 5. None of the cases cited by United in its Brief (and discussed by Hamed in his Opposition) even mention that consideration, let alone make it decisive. And even if Hamed had cited a single case that actually adopted this rule, as the discussion above makes clear, counsel for Hamed made no deliberate decision to not make the judicial estoppel argument in the summary judgment briefing.

In the criminal case, Hamed joined briefs identifying a multitude of ways in which the Government denied access to documents, including a complete denial of access from 2006 through 2008, and the placement of numerous restrictions on access after defense team visits to the FBI to review documents resumed in November 2008.³ See United’s Brief at 7. In a wholesale reversal of positions taken in that case, Hamed now argues the complete denial of access in 2006-2008 was merely “confusion about access of indexing” of documents. Hamed’s Opposition at 7. He now asserts that the defendants in the criminal case had “extensive pre-2006 access,” and tries to defend the “unfettered access” allegations in the FBI affidavits. Hamed’s Opposition at 7 and 8, note 6. In the same vein, he argues that the motion and briefs he joined in the criminal case only raised access issues for the period 2006-2008, when in fact they were not confined to that time period. Hamed now disparages the defense motion seeking to strike the FBI affidavits as “a rambling statement by counsel” and speculates that Judge Finch allowed the filing only “out of an abundance

³There is no suggestion in the motions or briefs in the criminal case that the restrictions on access that Hamed and the other defendants said had continued after 2008 were limited to non-Bates stamped documents. Among these restrictions were that “the Government agents – not defense counsel – would decide which boxes the team would be permitted to review.” See Exhibit A to United’s Brief at ¶ 18.

of caution because it was a criminal proceeding.” Hamed’s Opposition at 9, note 6. Hamed even goes so far as to now claim that the detailed and comprehensive February 5, 2009 motion in the criminal case that he joined (the motion describing the various ways in which access to documents had been denied) was plagued by a “lack of factual accuracy and support.” *Id.* at 10.⁴ The arguments Hamed is making now in defense of the FBI assertions of unfettered access are poles apart in tone and substance from his sweeping and multi-faceted claims of deprivation of access in the criminal case.⁵ Hamed’s Opposition itself proves the applicability of judicial estoppel.

Hamed also suggests that Judge Finch’s order makes it clear that all criminal defendants had unfettered access to Bates-stamped documents prior to 2006. See Hamed’s Opposition at 8, note 6. First, Judge Finch’s order nowhere states that the “unfettered access” allegations in the FBI agent’s affidavit were true for the limited period September 2003 through 2006, even if untrue for periods thereafter. Indeed, Judge Finch specifically found that “[t]he Government never provided the Defendants with a detailed inventory of the specific documents seized,” and that failure itself amounts to a deprivation of access.⁶ Exhibit F to the Brief. Moreover, the nature of

⁴Hamed incorrectly asserts that Judge Finch never conducted a hearing on the motion. *Id.* at 10. In fact, a hearing was held on July 9, 2009 (Dkt. No. 1163).

⁵ As described in the case law cited in United’s Brief, judicial estoppel would apply here even if Judge Finch had ruled against Hamed and United in their motion contending that access to documents had been denied. In the Third Circuit there is no requirement that the party asserting the irreconcilably inconsistent position in the first proceeding persuaded a court to adopt those arguments. At any rate, Judge Finch did accept the arguments made by Hamed and the other defendants that the Government had unlawfully limited their access to documents.

⁶Without that inventory, how would United even know that the FBI had obtained a copy of Hamed’s 1992 tax return? As United noted in the Brief (p. 10, n.10), the indictment did not even cover Hamed’s 1992 tax return. Rather, it covered later tax years beginning in 1996 or 1997. It also goes without saying that Hamed’s tax returns were not kept in United’s files, and therefore

the relief ordered by Judge Finch belies any suggestion that his finding that access had been limited was confined only to non-Bates stamped documents. Judge Finch ordered a copy of all documents in the Government's possession to be produced to the defendants, at the Government's expense, including those that were Bates stamped. The deprivation of access was so severe that the only way to make up for it was to direct the Government to provide copies of every single page of the hundreds of thousands of documents in its possession, including Bates-stamped copies. In addition, even assuming arguendo that United had complete access to documents, including the 1992 tax return of Waheed, from September 2003 through part of 2006, the fact that access was denied for a significant period thereafter would still amount to a substantial deprivation of access.

Hamed next asserts that the Judge Finch order was "permanently stayed" following the Government's motion for reconsideration, "and is not now (and never again was) in effect." Hamed's Opposition at 1-2. This is false. Hamed does not and cannot point to any order in the criminal case staying Judge Finch's order. Although the parties filed a joint motion for a temporary stay to allow plea discussions to proceed, that motion was never acted upon by Judge Finch. See Exhibit J to the Brief. As discussed in United's Brief, on November 30, 2010, some nine months after the plea agreement, Hamed 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 to the Brief. The motion asserted that, to date, "the Government has not complied with [the Judge Finch] Order," and "steadfastly refuses to return those documents."

would not have been part of the United records seized by the FBI in October 2001 (the FBI obtained them from another source).

Id. at p. 5. Plainly, Judge Finch's July 2009 order was never stayed and it is disingenuous for Hamed to claim otherwise.


Hamed fails to address at all United's alternative argument that 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 that preclude the grant of summary judgment for Hamed, this 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. Hamed does not even attempt to distinguish the cases cited by United on this point, including Fujisawa Pharmaceutical Company, Ltd. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997). Likewise, Hamed does not address any of United's arguments in support of reconsideration of the Court's June 24, 2013 order granting, in part, Hamed's motion to dismiss.

For all of the foregoing reasons, United respectfully requests that this Honorable Court grant its motion for reconsideration of the September 2, 2014 and June 24, 2013 orders.

Respectfully submitted,

DATED: November 7, 2014

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 7th day of November, 2014, I caused the foregoing **Reply Brief In Support Of United Corporation's Motion For Reconsideration** 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

A handwritten signature in black ink, appearing to read 'Carl Hartmann, III', is written over a horizontal line.