IN THE SUPREME COURT OF THE VIRGIN ISLANDS

UNITED CORPORATION,	)	
	)	**S. Ct. Civ. No. 2015-0021**
Appellant/Plaintiff,	)	Re: Super. Ct. Civ. No. ST-13-CV-101
	)	
v.	)	
	)	
WAHEED HAMED	)	
	)	
Appellee/Defendant.	)	
	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS
Division of S. Thomas & St. John
Superior Court No. ST-13-CV-101
HON. MICHAEL C. DUNSTON, PRESIDING

APPELLANT UNITED CORPORATION'S BRIEF ON APPEAL

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JURISDICTIONAL STATEMENT

The Supreme Court has appellate jurisdiction over all final orders and judgments of the Superior Court pursuant to V.I. Code Ann. tit. 4, §33(b)(1). Here, the Superior Court entered a final order and judgment on September 2, 2014 granting Appellee's Motion for Summary Judgment (JA 4-13). On September 29, 2014, Appellant filed a Motion to Reconsider the Superior Court' grant of Defendant's Summary Judgment (JA 134). By the 120th day after the September 2, 2014 Order (January 27, 2015), the Superior Court had failed to dispose of Appellant's Motion to Reconsider, resulting in an effective denial of that Motion pursuant to VISCR Rule 5(4)(a). As such, the Superior Court is deemed to have denied Appellant's Motion for Reconsideration on January 27, 2015. Appellant United Corporation ("United" or "Appellant") timely perfected this appeal by filing a Notice of Appeal with this honorable Court on February 24, 2015. (JA 1).

STATEMENT OF THE ISSUES

I. Whether the Superior Court Erred in Granting Appellee's Motion for Judgment on the Pleadings On Statute of Limitations Grounds?

II. Whether The Court Erred in Granting Appellee's Summary Judgment Motion On Statute of Limitations Grounds As To All Claims Regarding Appellee's Competing Business?

   a. Whether The Doctrine of Judicial Estoppel Precludes Any Reliance by Appellee on the FBI Affidavits and their Assertions that Defendants were Given "Unfettered Access" to Documents?

   b. Whether 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?

These issues were presented and preserved (JA 1, 46, 97).

STANDARD OF REVIEW

The standard of review for the Superior Court's grant of Appellee's Summary Judgment Motion is "whether the trial court abused its discretion, committed an obvious error in applying the law, or made a clear mistake in considering the proof." *See In re Najawicz,* 52 VI 311 (V.I. 2009). The Virgin Islands Supreme Court exercises plenary review over a Superior Court's decision granting or denying summary judgment. See *Pollara v. Chateau St. Croix, LLC,* 58 V.I. 455, 468 (V.I. 2013); *United Corp. v. Tutu Park Ltd.,* 55 V.I. 702, 707 (V.I. 2011); *Williams v. United Corp.,* 50 V.I. 191, 194 (V.I. 2008).

STATEMENT OF RELATED CASES PER RULE 22(a)(3)(i)

The following is a list of the cases that are or may be related to this case: 1) *United Corporation v. Waleed Hamed*, SX-13-CV-3 (suit for accounting, conversion and breach of fiduciary duties); 2) *United Corporation v. Charriez*, SX-13-CV-152 (suit for accounting, conversion and breach of fiduciary duties); 3) *Yusuf, derivatively on behalf of Plessen Enterprises, Inc. v. Hamed*, SX-13-CV-120 (shareholder derivative suit); 5) *Mohammed Hamed v. Fathi Yusuf*, et al. (*SX-12-cv-370*) (declaratory action). Each of these cases include allegations that one or more members of the Hamed family misappropriated money belong to United or Fathi Yusuf, or a corporation in which the Yusuf and Hameds are shareholders.

STATEMENT OF THE CASE

On March 5, 2013, Appellant filed complaint against Appellee Hamed for conversion, breach of fiduciary duty, and for an accounting after United discovered unauthorized financial

transactions by Appellee using United's funds and inventory he had converted for his personal use (JA 31). On April 15, 2013, Appellee filed a Motion for Judgment on the Pleadings, arguing that Appellant's claims were barred by the statute of limitations (JA 41). The Superior Court granted Appellee's Motion in part. The Superior Court dismissed the first cause of action of the Complaint alleging conversion, but denied dismissal with respect to the second cause of action alleging that Appellee conducted unauthorized competing business (JA 4). In the same Order, the Superior Court directed Appellant to amend its complaint to reflect only the second cause of action. On July 15, 2013, Appellant filed its Amended Complaint (JA 63).

On January 31, 2014, Appellee filed a Motion for Summary Judgment to dismiss the final count of the Amended Complaint on the same statute of limitations grounds (JA 81). On September 2, 2014, the Superior Court, again relying on the discovery rule, granted Appellee's summary judgment motion and dismissed the case (JA 5). On September 29, 2014, Appellant filed a Motion for Reconsideration and to Alter Judgment (JA 140). As of January 27, 2015 (120 days after the filing of United's Motion for Reconsideration), the Superior Court had still not disposed of Appellant's Motion for Reconsideration. As a result, the Motion is treated as having been denied under VISCR 5(a)(4). This appeal follows.

STATEMENT OF FACTS

As this Court knows from another Superior Court case that has been appealed to this Court,[1] Fathi Yusuf and Mohammed Hamed owned and operated three Plaza Extra Supermarkets in the Virgin Islands – one in St. Thomas, and two in St. Croix. All of the operations of the supermarket businesses were conducted through a Virgin Islands corporation, United Corporation ("United" or "Appellant") that was partially owned but managed completely by Fathi Yusuf. United maintained bank accounts for the business, and also kept a great deal of cash in safes located in each store. Certain sons of Fathi Yusuf as well as the sons of Mohammed Hamed were employed at each store.[2]

In 1986, Appellant United employed Appellee Waheed Hamed in its Plaza Extra Store in Sion Farm, St. Croix, Virgin Islands (known as Plaza Extra – East). In 1993, another Plaza Extra store was opened in Tutu Park, St. Thomas, Virgin Islands, and Appellee was re-assigned to work there as an employee manager (JA 31). As manager, Appellee was entrusted with significant managerial duties and responsibilities, including daily cash collections, deposits, and inventory acquisition (JA 33, ¶9).

A. The U.S. Government Raid

On September 30th, 2001, the U.S. Government launched multiple coordinated raids on the three Plaza Extra stores and on the homes of six of the individual defendants, and seized substantially all of Appellant United's business and financial records (JA 164). The raids also seized numerous personal and financial records of the individual Defendants. (JA 164)[3].

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[1] *Yusuf v. Hamed*, 2013 WL 5429498 *1 (V.I. 2013).
[2] These facts regarding the Plaza Extra supermarket are set forth in numerous briefs and motions filed by the parties on remand from the case heard and decided by this court.
[3] The raid occurred almost one month after the tragic events of 9/11, and was based on allegedly reliable affidavits from anonymous tipsters and there was speculation that the intensity and scope of the raid was based on the U.S. Government's zealous anti-terror policy at the time, thereby destroying their ability to defend the case.

In addition to the raid, the U.S. Government obtained Defendants' documents from "a variety of other third-party sources, including financial institutions, outside accounting firms, and family members. . . ." (JA 164, ¶ 3). All told, the Government obtained more than "five hundred banker boxes of the Defendants' documents from these and other sources" (JA 164 at ¶ 3). 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. [4]

B. The Indictments & Criminal Proceedings (2003 – 2014)

The raids unearthed no evidence to support any terrorist charges. But some two years later, in September of 2003, the U.S. Government indicted Appellee Waheed Hamed, his brother Waleed Hamed, Appellant, Fathi Yusuf, Maher Yusuf, and Nejeh Yusuf for various tax violations of the U.S. and Virgin Islands tax code (JA 325). The primary thrust of the Third Superseding Indictment was that the Hamed and Yusuf family members named in the indictment had acted collectively to underpay United's gross receipt taxes (JA 338, 350).

C. The U.S. Government's Failure to Produce Discovery

On Feb. 5, 2009, after six years of criminal proceedings, including Defendants' vigorous and joint defense against the Government's allegations, the matter culminated in the Defendants filing a Motion to dismiss the criminal indictment because of what Appellee Hamed and Appellant United argued was the U.S. Government's failure to provide Appellee and the other co-defendants with access to their documents that had been seized (JA 183). Appellee joined in the Motion along with other co-defendants, and represented to the District Court that the U.S. Government failed to provide Defendants with access to their seized documents (JA 163).

[4] A banker's box will accommodate 4,000 pages of neatly organized material. (JA 142, fn.1).

The U.S. Attorney's Office filed an Opposition, and attached the Declarations of two FBI Agents in an effort to rebut Defendants' detailed and comprehensive allegations that the Government failed to provide Defendants with access to their seized documents (JA 238-241). After a hearing on Defendants' Motion, the Hon. Raymond L. Finch, who was presiding over the criminal case, granted the Motion in part, and ordered the Government to copy each and every record in its possession, some 1 million documents in total, at its expense. (JA 263). The government objected on grounds that it would be burdensome and costly to comply with the Court's order. (JA 266). The District Court dismissed the Government's concerns, and ordered the discovery to be produced forthwith.

The Plea Resolves the Criminal Case

Shortly after Judge Finch's July 9, 2009 order, the parties put discovery issues aside, and entered plea negotiations. In October of 2010, the parties resolved the criminal proceeding in a deal in which Appellant pled guilty to one count of "willfully making and subscribing a Corporation Tax Return." The plea resulted in the dismissal with prejudice of the Third Superseding Indictment as to all of the individual defendants (JA 289).

In 2011, Appellant received from the U.S. Attorney's Office numerous boxes of documents previously seized by the U.S. Government in the raid on Oct. 2001 (JA 107). Shortly afterwards, Appellant United's Treasurer, Fathi Yusuf, began making an inventory and review of the returned documents (JA 310). In late November of 2011, while reviewing documents, Mr. Yusuf noticed two specific transactions organized by the Government in Appellee's electronic folder (JA 35). The first transaction was a $70,000 check made payable to a school attended by Appellee in Orlando, Florida (JA 58). The second, which was reflected in the 1992 Tax Returns of Appellee, showed him to have operated a wholesale food business (Five Corners Wholesale) back in 1992

without United's knowledge (JA 107). Appellant had never before been aware of either the $70,000 dollar check or Appellee's 1992 U.S. Tax Returns (JA 93, 107-108).[5]

i. **The $70,000 Cashier's Check**

United noticed that in March of 1997, a check in the amount of $70,000 payable to the Universal Academy of Florida was purchased by an unidentified individual using United's cash. The cashier's check was drawn on Scotiabank in St. Thomas (JA 57). Upon inquiry, it was discovered that the school was attended by none other than Appellee (JA 34). United never authorized the purchase of that check (JA 34). Because the $70,000 was taken by Appellee without authorization, Appellant's complaint asserted a cause of action for conversion, accounting, and breach of fiduciary duty (JA 35-37).

ii. **Appellee's Wholesale Food Business (5 Corners)**

In addition to the $70,000 check that Appellee failed to explain, United discovered Appellee's 1992 tax returns showing Appellee to have operated a business in 1992, in competition with the Plaza Extra Store – East in Sion Farm, St. Croix (JA 35). Appellee never obtained United's authorization to conduct such business, and never provided United with a full accounting of that wholesale business, especially the source of the food inventory Appellee used to sell to the various retail grocery stores. Accordingly, Appellant included in its complaint a cause of action for breach of fiduciary duties and a full accounting against Appellee (JA 35-37).

D. Appellee Hamed's Rule 12(c) Motion for Judgment on the Pleadings.

On April 15, 2013, Appellee filed a Rule 12(c) Motion for Judgment on the Pleadings arguing that the statute of limitations barred Appellant's claims. Appellee maintained that since the complaint was filed on March 5, 2013, and the longest statute of limitations for any of United's

[5] Neither of these documents were the kind of documents that would be kept in United's files.

causes of action is (6) years, Appellant's claims would be time barred (JA 44). However, the Superior Court went beyond the arguments raised in Hamed's Motion, by taking judicial notice of the Third Superseding Indictment in *U.S. v. United Corp.* 03-cr-15. The Superior Court concluded that the language in one of the criminal counts against Appellee "would have a least put a reasonable person in Plaintiff's position, as Defendant's employer, on notice that Defendant may have engaged in some wrongful activity regarding the use of cashier's checks to transfer money to unknown third parties, as alleged in Plaintiff's Complaint at Paragraph 15." (JA 22). Based only on the general language of the Third Superseding Indictment (JA 326), the Superior Court imputed knowledge of the $70,000 check to United well before the last date the claims could accrue without being time barred. (JA 22). On that basis alone, the Superior Court then granted Appellee's Rule 12(c) Motion in part with respect to the complaint's first cause of action relating to the $70,000 check, but denied the Rule 12(c) Motion with respect to the second cause of action concerning the Five Corner wholesale business (JA 14, 23-24). Accordingly, the trial court ordered United to amend its original complaint to reflect only the second cause of action with respect to Appellee's unauthorized competing business (JA 14). On July 15, 2013, United filed its Amended Complaint (JA 63).

C. Appellee's Motion for Summary Judgment

On February 5, 2014, Appellee filed a Motion for Summary Judgment arguing again that the claims regarding the competing business were time-barred under the discovery rule, because United had notice of Appellee's tax returns in 2003. (JA 85). This time, in support of his Motion for Summary Judgment, Appellee attached the affidavits of two FBI Agents filed in the criminal case which asserted that all the parties to the indictment had full and "unfettered access" to all documents seized or obtained by the Government. (JA 92-95). However, the conclusory and self-

serving Affidavits did not specify which documents were allegedly provided to United. (JA 92-95). Worse yet, Appellee's counsel failed to advise the Superior Court that the FBI agents' declarations were submitted in opposition to the aforementioned motion to dismiss, and that the unfettered access assertions were thoroughly rejected by Judge Finch's Order (JA 162, 263).

The Superior Court's September 2, 2014 Opinion and Order granting Appellee's summary judgment in this case found the two declarations submitted by FBI agents in the criminal case - and attached to Appellee's Motion for Summary Judgment - brought against Appellant to be "dispositive" on the statute of limitations issue. (JA 10).

Specifically, the Superior Court accepted the truthfulness of the representations in those declarations that "Plaintiff's defense team was granted 'unfettered' access to discovery" and made a finding to that effect. (JA 10) . On the basis of that finding, and the Superior Court's inference that Appellee's 1992 tax return was among the documents in the FBI's possession, the Superior 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." (JA 10-11).

What the Superior 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 Appellee'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 (JA 162). As discussed previously, the Superior Court also did not know about Judge Finch's July 16, 2009 Order which necessarily rejected the truthfulness of the unfettered allegations in the FBI affidavits.

Appellant and his counsel were likewise unaware of of these significant reasons why the

"unfettered access" allegations were entitled to no weight. After the Superior Court summary judgment ruling, Appellant began investigating the contacts in which those affidavits had been presented. Appellant, having found these affidavits on the ECF system as part of a Government's opposition to Appellee's Motion to dismiss in the criminal matter, timely filed its Motion for Reconsideration showing why the affidavits could not be a proper basis for grant of summary judgment to Appellee.[6]

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING APPELLEE'S MOTION FOR JUDGMENT ON THE PLEADINGS ON STATUTE OF LIMITATIONS GROUNDS.

It is well-settled 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, *6 (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, *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"); Ballard v. National City

[6] Appellant's counsel knew vaguely that the FBI Affidavits had been offered as part of motion practice in the criminal case, but did not investigate that motion practice until after grant of summary judgment. The undersigned counsel not doing so but never believed that the Superior Court would attach dispositive weight to affidavits submitted by one side in a bitterly contested adversarial proceedings (JA 146, n.4)

Mortgage Co., 2005 U.S. Dist. LEXIS 1834, *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, *9 (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, 2013 Opinion dismissing in part United's claims, the Superior Court disregarded this general rule against deciding discovery rule and equitable tolling issues at the pleadings stage. The Superior Court articulated two grounds for its decision to dismiss all claims to the extent they rely on a $70,000 converted check. 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." (JA 22 at n.31).

The Superior 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" (JA 330). The Superior Court then concludes, "Thus, Plaintiff's argument that Plaintiff did not have access to the documents to discover Defendants' misconduct is without merit." (JA 22). Next, the Superior 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 . . .," 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. (JA 22). With respect to the Superior 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 target of those warrants to make copies of originals before the FBI seized and removed them. Indeed it is difficult to imagine any scenario in which a law enforcement agency would give an owner the privilege to copy them as they were being confiscated.

As for the allegations of the criminal indictment that Appellee 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 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 store safes.[7] The indictment alleges in Count I a conspiracy by United and Waheed,

[7]While Burton v. First Bank of Puerto Rico, 49 V.I. 16 (V.I. Superior 2007), a case cited in the Superior Court's June 24 Opinion (JA 16, footnote 10), decided a discovery rule issue at the pleadings stage, that case was unusual because the defendant actually gave the plaintiff written notice of the very act which eight years later became the subject of her negligence and breach of contract lawsuit. 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. The Superior Court held that plaintiff's receipt of a statement that she regarded as "incorrect" put her on notice of a potential claim against the Bank, and triggered a duty to make "diligent inquiry" to determine whether she had a claim. Id. at 22. The Court ruled that she could not avail herself of the discovery rule because, after getting notice of the statement showing that the check had not been credited, she did not make any such diligent inquiry before

among others, to defraud the Virgin Islands government of gross receipt taxes and alleges, in paragraph 15, that four individual members of that conspiracy purchased cashier's checks made payable to third parties in furtherance of that scheme (JA 21).

How can an indictment against Appellant United, Appellee Waheed and others collectively for tax evasion possibly put United on notice that Waheed might be stealing from it? That the collective underreporting of income alleged in the criminal case, and the unauthorized taking of cash from United alleged in this case share a common method of concealment (cashier's checks written to third parties) plainly does not make notice of the former equivalent to notice of the latter.

Finally, and most important, all of the charges alleged in the Indictment were eventually dismissed against each of the individual Defendants in the criminal proceedings, which in turn begs the question, how is it reasonable to ask United to look into Appellee when all of the Defendants denied the very wrong doing in the Third Superseding Indictment. Further, United paid the lion's share of legal fees for defendants in the criminal case. Under these circumstances, it is impossible to say that an unproven allegation that Appellee committed a tax offense put United on notice that Appellee might be stealing from it.

This Court should therefore reverse the June 24, 2013 Superior Court Order granting in part Appellee's Motion for Judgment on the Pleadings.

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the limitations period ran. 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.

II. The Court Erred in Granting Summary Judgment On Statute of Limitations Grounds As To All Claims Regarding Appellee's Competing Business.

A. The Doctrine of Judicial Estoppel Precludes Any Reliance by Appellee 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.

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.

Krystal Cadillac Oldsmobile GMC Truck, Inc. v. General Motors Corp, 337 F.3d 314, 319-320 (3d Cir. 2003).

In the instant case, Appellee 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 Superior Court regarding United's access to the documents that had been seized by the FBI from the homes of Yusuf and Hamed family members 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 . . . (JA 90, 92).
>
> 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. (JA 87).
>
> ...[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.** . .. (JA 114) (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. (JA 90).

Appellee 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 . . ." (JA 85).

What Hamed **failed** to tell the Superior Court was that these affidavits were submitted by the Government in response to a motion filed by him (Hamed) and the other defendants in the Criminal Case on February 5, 2009 (JA 162). 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," Appellee 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 (JA 165-166). "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." (JA 166-168).

The Motion described in detail the various other ways in which Defendants had been denied access to their own documents. For example, when the defense team's 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." (JA 168). Among these restrictions were that "the Government agents – not defense counsel – would decide which boxes the team would be permitted to review." (JA 167).

The motion to dismiss the criminal case 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." (JA 168). This severely compromised Defendants' access to their documents because the defense team "relied on the box numbers" to identify what was contained in them. (JA 169). 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. (JA 170-171, ¶¶ 31, 37, 43).

At various points during their review of documents, FBI agent Petri, who submitted one of the affidavits relied upon by Appellee 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." (JA 173, ¶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." (JA 174, ¶ 48).[8] The denial of access

[8]The Motion also asserted that rather than copying what it needed and returning original documents to the rightful owners, as it should have done so under its own internal protocols, "the Government deliberately held [Defendants'] property for more than seven years." (JA 180, ¶ 70). Moreover, the Motion said, the Government "never compiled an inventory of the specific items and documents seized in the October 2001 raid." (JA 180, ¶ 69).

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 to dismiss on February 24, 2009, and Defendants filed their reply to the Government's response on March 17, 2009. (JA 187 and 198, respectively). 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" (JA 234), which attached as exhibits the FBI affidavits relied upon by Appellee and by the Superior Court as "dispositive" of the discovery rule, and claim accrual issues in this case.[9] (JA 238-241). .

On July 9, 2009, a hearing on the motion was held before the Hon. Raymond L. Finch, and on July 16, Judge Finch entered an 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 (JA 265). 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:[10]

> 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.**

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[9]On that same day, July 8, counsel for Appellee 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. (JA 263). 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.

[10]In relying on the FBI affidavits as dispositive of the discovery rule issues in this case, Appellee neglected to advise this Court not only of the irreconcilably inconsistent position he in took 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."

* * *

> 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). (JA 265)

On Aug. 14, 2009, the Government filed a Motion to Reconsider Judge Finch's Order (JA 266), 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 $125,000" and require 3 to 4 months to satisfy (JA 267). A month later, on September 14, 2009, Judge Finch entered an Order denying the Government's Motion to Reconsider. Not long thereafter, the Government entered plea negotiations with the defendants, which resulted in a plea agreement on February 26, 2010 that effectively mooted the order requiring immediate production of copies of all documents. Under that plea agreement, United pled guilty to one count, which charges willfully making and subscribing a 2001 U.S. Corporation Income Tax Return in violation of 33 V.I.C. § 1525 (2), and charges against all individual defendants were dismissed with prejudice.

All of the elements for the application of judicial estoppel to bar Appellee Hamed's reliance on the FBI affidavits are readily established. First a comparison of Hamed's brief in this case and the motion he joined in the criminal case shows 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 Superior Court is evidenced by his failure to tell this Court that the FBI affidavits directly contradict positions taken in a motion filed by him (Appellee) seeking dismissal of the criminal case because of the Government's deprivation of access to documents -- and his equally remarkable failure to advise the Superior 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 Appellee on those affidavits is exactly tailored to address the harm inflicted on the Superior Court, and no lesser sanction would adequately remedy the damage done by Appellee's misconduct.

And even if the doctrine of judicial estoppel did not apply here, Judge Finch's order in the criminal case compelled a finding by the Superior 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. At an absolute minimum, the inconsistent positions taken by Appellee and Judge Finch's Order demonstrate that there are genuine issues of material facts precluding summary judgment. This Court should accordingly reverse the Sep. 2, 2014 Order of the Superior Court granting summary judgment to Appellee.

Appellee's response to the motion for reconsideration in the lower court proceedings only proves why the doctrine of judicial estoppel should apply here. Appellee disparaged the defense motion seeking to strike the FBI affidavits as "a rambling statement by counsel" and speculated that Judge Finch allowed the filing only "out of an abundance of caution because it was a criminal proceeding." (JA 319). Even more remarkable, Appellee went so far in the proceedings below as

to claim that the detailed and comprehensive motion to dismiss in the criminal case that he joined was plagued by a "lack of factual accuracy and support." (JA 319). Id. at 10.[11] Appellee's arguments in response to United's reconsideration motion only intensified the irreconcilability of positions taken by him in his summary judgment brief in the instant case and in the criminal case.[12]

Hamed then argues that Judge Finch's Order is irrelevant because it was stayed (JA 319). This is false. Judge Finch's Order was never stayed by any court, and was the immediate cause for the conclusion of the criminal proceedings as evidenced by the U.S. Government's Motion to Stay discovery for purposes of plea negotiations, filed in the aftermath of Judge Finch's July 2009 Order (JA 263).

Appellee's final argument below was that the Defendants in the criminal case had "extensive pre-2006 access" to the documents. This assertion is unfounded and certainly contradicts Appellee's Motion to dismiss. The motion to dismiss made clear to the District Court that the entire defense team was denied the right to access the Government's seized documents, period. There was no distinction as to time periods. Nothing in Judge Finch's order mentions anything about "extensive pre-2006 access."

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[11] Appellee also tried to undercut Judge Finch's order by suggesting that he never conducted a hearing on the motion. (JA 319-320). In fact, a hearing was held on July 9, 2009, as is reflected by Dkt. No. 1163 in the federal criminal case.

[12] As described in the case law cited above, 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 Appellee and the other defendants that the Government had unlawfully limited their access to documents.

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 Superior Court in this case implicitly accepted Appellee'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 (JA 90). 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 Superior 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.

See also *Pirelli Armstrong Tire Corporation, Retiree Medical Benefits Trust v. Walgreen Co.*, 209 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 '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 Appellee'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. (JA 107-108, ¶¶ 2, 8). Yusuf did not suspect Appellee of any wrongdoing before he stumbled onto the 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. And without having reasonable ground for suspicion, United and its treasurer Yusuf cannot be presumed to have knowledge of these documents, even assuming arguendo that United had access to them.

If the Superior Court had any basis for finding that the Government provided full and complete access to documents, it was error to impute to Appellant 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]

C. The Superior Court's Directive That Appellant Obtain An Affidavit From The U.S. Attorney's Office Contradicting the FBI Affidavits Was An Impossibility.

The Superior Court imperssibly engaged in the role of fact finder in adjudicating Appellee's Motion for Summary Judgment. This is evidenced by the Superior Court's Order of

[13]To 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). Since as the Superior Court observed in its Opinion (JA 11-12), the discovery rule and the equitable tolling doctrines both incorporate a "reasonable diligence" element, the rule quoted from the Meyer case would also apply to a party who is relying on the discovery rule to defeat a limitations defense. Here, Yusuf has satisfied this burden with respect to both the discovery rule and the doctrine of equitable tolling.

April 25, 2014, ordering Appellant United to obtain an Affidavit from the U.S. Attorney's Office (USAO) to rebut the two Declarations of the FBI agents that were attached to Appellee's Motion for Summary Judgment (JA 116). That Superior Court ordered Appellant to:

> "**supplement** by May 12, 2014 its Response in Opposition with proof of Affidavit **from** the United States Attorney's Office that it no longer has access to review documents held by the federal government, as opposed to the facts set forth in Special Agent Thomas L. Petri's July 08, 2009 Declaration."
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> (JA 116) (Emphasis Supplied).

The problem with the above Order are as follows:

1. No Superior Court can compel the U.S. Attorney's Office ("USAO") to issue Affidavits of this nature, let alone a private litigant. Certainly no USAO will issue Affidavits contradicting the two July 08, 2009 Declarations of its own FBI agents in an ongoing criminal proceeding. This would amount to the USAO conceding that its FBI agents provided false affidavits in open court.

2. Appellant's counsel did telephonically contact Assistant U.S. Attorney Ishamel Meyers, who advised the undersigned that he has never heard of such request, and that any such request must be first sent to the U.S. Attorney General's office in Washington, D.C. who will 1) first undertake a review of the request, and 2) then decide whether these agents should be ordered to make such inconsistent affidavits. Assitant U.S. Attorney Meyers stressed that he has never seen, heard of, nor handled such requests before.

3. Appellant's counsel did not respond to the Superior Court's Order to advise the Superior Court that it was impossible to comply with, and concedes that a written Notice of Inability to Comply should have been filed to advise the Court of this problem. However, Appellant's counsel did attach the Affidavit of Fathi Yusuf[14] to its Opposition to rebut the Declarations of the two FBI agents (JA 107).

[14] Fathi Yusuf is the secretary/treasurer of United

4. The clash between the Affidavits of the FBI agents and United's Treasurer's affidavit was clearly an issue for a fact finder to weigh as to credibility and relevance. At that point, the Superior Court faced a serious and genuine factual dispute, mainly whether United has access to to the Government's discovery. The Superior Court should have simply reserved this genuine issue of material fact for a jury to decide, and equally should have denied Appellee's Motion for Summary Judgment on statue of limitations grounds.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Appellant United respectfully requests that this Honorable Court reverse the Superior Court's Sep. 2, 2014 Order granting Appellee's Summary Judgment Motion and vacate the Jun 24, 2013 Order granting in part Appellee's Motion for Judgment on the Pleadings. In the alternative, this Honorable Court may remand this matter to the Superior Court to consider the facts and arguments raised in Appellant's Sep. 29, 2014 Motion for Reconsideration, and to issue a written opinion deciding that Motion.

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DATED: April 20, 2015

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CERTIFICATE OF BAR MEMBERSHIP

I HEREBY CERTIFY that I am a member in good standing of the Virgin Islands Bar.

DATED: April 20, 2015

/s/ Nizar A. DeWood
Nizar A. DeWood, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, I caused the foregoing **APPELLANT'S BRIEF ON APPEAL and the Joint Appendix** to be electronically filed with the Clerk of the Court using the V.I. Supreme Court e-filing system and that the attorneys listed below, who are Filing Users, will be e-served by the Notice of Electronic Filing:

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