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IN THE SUPREME COURT OF THE VIRGIN ISLANDS

UNITED CORPORATION,

Appellant,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Appellee.

S. CT. CIV. NO. 2015-

Re: Super. Ct. Civ. ST-2013-CV-101

ACTION FOR DAMAGES

NOTICE OF APPEAL

NOTICE OF APPEAL

Notice is hereby given that United Corporation ("United"), plaintiff in the above-referenced Superior Court action, pursuant to V.I. Code Ann. Tit. 4, §33(a), appeals the Superior Court's September 2, 2014 Order¹ (the "Order") granting defendant Waheed Hamed's Motion for Summary Judgment on all remaining claims in this case. On September 29, 2014, United filed a timely Rule 59(e) Motion for Reconsideration and to Alter or Amend Judgment of the Order (the "Motion"). The Superior Court did not rule on the Motion within 120 days of the September 29, 2014 motion – i.e., by January 27, 2015. Under Supreme Court Rule 5(a)(4), the 30-day time for appealing the order began running on January 27, 2015, which means that this is a timely appeal of the September 2, 2014 Order and all interlocutory orders of this Court, including a June 24, 2013 Order granting in part Defendant Hamed's Motion to Dismiss.

The issues to be presented on appeal include 1) whether the Superior Court erred in applying the law and/or evaluating the evidence when it granted summary judgment on statute of limitations grounds on the basis of statements in FBI affidavits regarding "unfettered access" to documents

¹The September 2, 2014 Order was entered on September 4, 2014.

that were filed in a criminal proceeding involving these same parties, but which were challenged by Defendant Waheed Hamed as false in that proceeding, and which were necessarily treated as false by a ruling of a federal judge in that proceeding; 2) whether the Superior Court erred in its September 2 Order by ruling as a matter of law that a party who has access to hundreds of thousands of documents is presumed for statute of limitations discovery rule purposes to have knowledge of any document in that group of documents that provides notice of a claim; and 3) whether the Superior Court erred in its June 24, 2013 Order granting in part Defendant Waheed Hamed's Motion to Dismiss on statute of limitations grounds by ruling because a criminal indictment accused both United and Waheed Hamed of collectively engaging in a conspiracy to underpay United's gross receipts taxes, that indictment necessarily put United on notice that Waheed Hamed might be misappropriating money from United; and 4) whether the Superior Court erred in its June 24, 2013 Order granting in part Defendant Waheed Hamed's Motion to Dismiss on statute of limitations grounds by ruling that United should in the exercise of reasonable care have "retained copies" of documents that were seized by the FBI, and that may have given it notice of claims it had against Waheed Hamed, even though the seizure of documents was pursuant to *ex parte* search warrants and United had no opportunity during the execution of those search warrants to retain copies of any documents being seized.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 24th, 2015, I caused the foregoing Notice of Appeal to be electronically filed with the Clerk of the Court using the V.I. Supreme Court e filing system, and I caused a copy of same to be mailed to the following attorney for the Appellee via first class mail and email at the physical and email addresses below.

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/s/ Nizar DeWood
Nizar A. DeWood

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

UNITED CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	
	)	CASE NO. ST-13-CV-101
WAHEED HAMED, a/k/a WILLY OR WILLIE)	
HAMED)	
)	
Defendant.)	
<hr style="width:60%; margin-left:0"/>)	

MEMORANDUM OPINION

Pending before the Court is Defendant's February 5, 2014, Motion for Summary Judgment¹ and Defendant's April 28, 2014, Motion to Dismiss for Lack of Standing.² For the following reasons, Defendant's Motion for Summary Judgment will be granted and Defendant's Motion to Dismiss for Lack of Standing will be denied as moot.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Corporation filed a Complaint on March 5, 2013, amended on July 14, 2013, alleging that during Defendant Waheed Hamed's employment with Plaintiff as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant secretly converted and misappropriated substantial assets by secretly operating a separate wholesale grocery business called "5 Corner's Mini Mart" from at least some time in 1992.

¹ Plaintiff responded on April 7, 2014. Defendant replied on April 23, 2014.
² Despite an Order directing Plaintiff to respond by May 23, 2014, Plaintiff has failed to respond to date.

STANDARD

Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, provides that summary judgment is appropriate only

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.³

In considering a motion for summary judgment, a court must “draw ... all reasonable inferences from the underlying facts in the light most favorable to the non-moving party.”⁴

Once the movant demonstrates that no genuine issue of material fact exists, the burden shifts to the non-moving party to demonstrate that a genuine issue of material fact exists.⁵

Nevertheless, in some instances where a nonmoving party has not had adequate time for discovery, a Court may find the motion premature and defer ruling on the motion until further discovery may be conducted.⁶

ANALYSIS

Defendant submits that Plaintiff’s Amended Complaint should be dismissed in its entirety because the statutory periods for Plaintiff’s claims have expired. Specifically, Defendant argues that Plaintiff had notice of Defendant’s alleged conduct by at least 2003

³ FED. R. CIV. P. 56. See *V.I. Housing Auth. v. Santiago*, 57 V.I. 256, 264 (V.I. 2012).

⁴ *Battaglia v. McKendry*, 233 F.3d 720, 722 (3d Cir. 2000); see *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 127 (V.I. 2009).

⁵ See, e.g., *Galloway v. Islands Mechanical Contractor, Inc.*, 2012 WL 3984891 (D.V.I. Sept. 11, 2012); *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (noting an issue is “genuine” if a reasonable jury could possibly hold in the nonmovant’s favor with regard to that issue).

⁶ See FED. R. CIV. P. 56(c)(d); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”).

when Defendant had access to discoverable documents - including Defendant's 1992 tax returns - in a federal criminal investigation in *U.S. v. United Corporation, et al.*, Crim. No. 2003-147.⁷ Plaintiff claims that the statute of limitations was tolled until October 2011 when some of the documents seized by the Federal Bureau of Investigation related to *U.S. v. United Corporation, et al.* - including Defendant's 1992 tax returns - were turned over to Plaintiff. While Plaintiff does not dispute that it had access to documents related to its prosecution in *U.S. v. United Corporation, et al.* in 2003, Plaintiff argues that at this stage of litigation Plaintiff does not have sufficient information to demonstrate whether Defendant's 1992 tax returns were included in those discoverable documents. As a result, Plaintiff requests the Court to either deny Defendant's Motion or defer judgment on the Motion pursuant to Fed. R. Civ. P. 56(d).

I. Plaintiff fails to satisfy its burden to demonstrate the Court should defer judgment on Defendant's Motion for Summary Judgment.

The Court finds that Plaintiff has failed to show that the Court should further delay its decision in this matter pending additional discovery. Pursuant to Fed. R. Civ. P. 56(d), the Court may "defer considering the motion or deny" the motion if the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to

⁷ Defendant failed to provide this Court with a separate statement of undisputed material facts in accordance with Loc. R. Civ. P. 56.1(a)(1), which is sanctionable conduct pursuant to Loc. R. Civ. P. 11.2. The Court strongly cautions counsel in this regard. Despite the parties' failure to abide by the rules of procedure that govern practice before this Court, the Court finds the briefs sufficiently clear - particularly regarding which facts are in dispute - in order to make a determination on the merits of the summary judgment motion. See FED. R. CIV. P. 56(f)(3).

justify its opposition.”⁸ To satisfy Fed. R. Civ. P. 56(d), the Plaintiff must make a showing of the following three elements by affidavit or declaration:

- (1) what particular information is sought;
- (2) how, if uncovered, it would preclude summary judgment; and
- (3) why it has not previously been obtained.⁹

If these elements are met, it is commonly accepted that, if the information needed to defend against the summary judgment motion is solely in the possession of the movant, a continuance should be granted as a matter of course. However, that is not necessarily the case where a party seeking discovery can obtain the information from a source other than the movant.¹⁰

Here, the Court finds that Plaintiff did not demonstrate compliance with the third element. The Affidavit of Fathi Yusuf, the treasurer and secretary of United Corporation, simply establishes that Plaintiff had no *actual* knowledge of Defendant’s 1992 tax returns until 2011. The Affidavit does not establish that Defendant’s 1992 tax returns were not among the discoverable documents to which Plaintiff’s defense team had access in 2003 in *U.S. v. United Corporation, et al.* On April 25, 2014, without deciding the Motion, the Court ordered Plaintiff to supplement its Response “with proof by 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 8, 2009, Declaration.” While the deadline for this supplement was May 12, 2014, the

⁸ FED. R. CIV. P. 56(d).

⁹ *Pennsylvania, Dep’t of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir. 2012) (citing *Dowling v. City of Philadelphia*, 855 F.2d 136, 139 (3d Cir. 1988)).

¹⁰ See, e.g., *Contractors Ass’n of E. Pennsylvania, Inc. v. City of Philadelphia*, 945 F.2d 1260, 1263 (3d Cir. 1991).

Court received no response from Plaintiff. Considering it has been over six months since Defendant's Motion for Summary Judgment was filed and the Court has received no indication that Plaintiff may not obtain the necessary information from the U.S. Attorney's Office in order to respond to Defendant's Motion for Summary Judgment on the merits, the Court finds that Plaintiff has failed to demonstrate why the information was not previously obtained. As a result, the Court shall make a determination on the merits of Defendant's Motion for Summary Judgment.

II. The Court finds it undisputed for the purposes of Defendant's Motion for Summary Judgment that Defendant's 1992 tax returns were included in the documents to which Plaintiff had access during discovery in 2003 in *U.S. v. United Corporation, et al.*

Pursuant to Fed. R. Civ. P. 56(e), the Court gave Plaintiff "an opportunity to properly support or address the fact" of whether Plaintiff has access to the necessary information to determine whether Defendant's 1992 tax returns were among the documents available for review in 2003 in *U.S. v. United Corporation, et al.* by Plaintiff's defense team. Plaintiff failed to respond. While Plaintiff's failure to respond is insufficient for the Court to conclude that the 1992 tax returns were among the documents available for review in 2003,¹¹ the Court finds the Declarations of Special Agent Thomas L. Petri and Special Agent Christine Zieba, both filed July, 8, 2009 in *U.S. v. United Corporation, et al.*,

¹¹ See FED. R. CIV. P. 56, 2010 Advisory Committee Notes ("Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials--including the facts considered undisputed under subdivision (e)(2)--show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts--both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply--it must determine the legal consequences of these facts and permissible inferences from them.")

dispositive. Neither Declaration specifically states that Defendant's 1992 tax returns were among the documents. However, both Declarations demonstrate that Plaintiff's defense team was granted "unfettered" access to discovery, although the access and the nature of the access was closely regulated and monitored by the FBI for security reasons.¹² Considering the indictment in *U.S. v. United Corporation, et al.* charged both Plaintiff and Defendant with conspiring to defraud the Virgin Islands by filing false personal income tax returns, territorial gross receipts taxes, and corporate income taxes for a period from approximately 1996 to 2001 and thereby Defendant's tax returns would be essential in the prosecution of that matter,¹³ the Court may logically conclude that Defendant's 1992 tax return, only four (4) years prior to 1996, was among the discoverable documents available in 2003. In fact, while Plaintiff argues the sequential *Bates* numbers of the collected documents is not evidence that the 1992 tax returns were in the government's possession in 2003 and available for Plaintiff's defense team's review, the Court finds that this stamp is relevant and provides corroborating support that the 1992 tax returns were in the government's possession in 2003 and available for Plaintiff's defense team's review. Furthermore, Plaintiff concedes that it obtained Defendant's tax return in 2011 from the FBI as a *part* of the records collected for the purposes of the United States' prosecution of Plaintiff and Defendant in *U.S. v. United Corporation, et al.*, also suggesting the 1992 tax

¹² See Defendant's Motion for Summary Judgment, Feb. 5, 2014, at Exhibits 1-9, 2-9. Plaintiff argues that these "Declarations are not evidence, and *could* be false, inaccurate, and/or erroneous." However, Plaintiff has not provided the Court with any evidence that these Declarations are inaccurate representations of the Declarations filed in *U.S. v. United Corporation, et al.*, and thus, the Court accepts them as true representations of the FBI's original Declarations filed on July 8, 2009.

¹³ *U.S. v. Yusuf, et al.*, 2003-147, Third Superseding Indictment, Sept. 9, 2004.

returns were part of the documents available for review in 2003. Considering all the above evidence, the Court finds no genuine issue of material fact exists because, even construing the facts in a light most favorable to Plaintiff, no reasonable jury could find that Defendant's 1992 tax returns were not among the documents available for review in 2003 in *U.S. v. United Corporation, et al.*, as asserted by Defendant in his Motion for Summary Judgment.¹⁴ It appears that no other material fact necessary to the Court's determination on the merits here is in dispute.

As the Court previously stated in its June 24, 2013, Opinion, ordinarily "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.¹⁵ Here, Plaintiff argues that both the discovery rule and the doctrine of equitable tolling apply. Specifically,

Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by *exercising reasonable diligence*, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.¹⁶ (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.¹⁷ However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate

¹⁴ See FED. R. CIV. P. 56(e)(2)(3).

¹⁵ *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 81 (Terr. V.I. Apr. 21, 1997).

¹⁶ *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (Bankr. D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I. 2002)) (internal citations and quotations omitted).

¹⁷ *Id.* at *6.

“that he or she could not, by the *exercise of reasonable diligence*, have discovered essential information bearing on his or her claim.”¹⁸ (emphasis added) To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an “objective reasonable person standard.”¹⁹

Here, the Court finds that under both the discovery rule and doctrine of equitable tolling, Plaintiff should have discovered Defendant’s alleged conduct by at least 2003 by exercising reasonable diligence, when all documents – including Defendant’s tax returns from 1992 and later – related to the United States’ prosecution in *U.S. v. United Corporation, et al.* were made available to Plaintiff for review.

III. The statutes of limitations on all Counts alleged in Plaintiff’s Amended Complaint have expired.

Considering the Court finds that Plaintiff knew or should have discovered Defendant’s alleged conduct around 2003, the statute of limitations for breach of fiduciary duty (Count I), constructive trust or recoupment (Count II), conversion (Count III), breach of contract (Count IV), and accounting (Count V) alleged in Plaintiff’s Amended Complaint have long expired. Pursuant to 5 V.I.C. § 31(3) and (5), a breach of fiduciary duty claim carries a two (2) year statute of limitations if it is “based on a breach of a legal duty imposed by law that arises out of the performance of the contract” or otherwise carries a six (6) year statute of limitations if it is “based upon a breach of specific provisions in the

¹⁸ *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

¹⁹ *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) (“[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.”) (internal citations and quotations omitted).


contract.”²⁰ Under 5 V.I.C. § 31(3)(D), conversion carries a six (6) year statute of limitations,²¹ and a breach of contract claim carries a six (6) year statute of limitations pursuant to 5 V.I.C. § 31(3)(A).²² While Plaintiff lists “accounting”²³ and “constructive trust or recoupment” as separate counts, those are equitable remedies and therefore not separate causes of action. Thus, they do not carry a statute of limitations apart from the independent causes of action upon which they rely.²⁴ As a result, considering over ten (10) years has passed between the time Plaintiff knew or should have known of Defendant’s alleged conduct and the date Plaintiff filed the Complaint in 2013, Plaintiff’s Amended Complaint shall be dismissed in its entirety.

For the foregoing reasons, the Court will grant Defendant’s Motion for Summary Judgment and will deny Defendant’s Motion to Dismiss for Lack of Standing as moot. An Order consistent with this Opinion shall follow.

Dated: September 2, 2014

ATTEST: Estrella H. George
Acting Clerk of Court / /

by: Paula Clayton
Lori Boynes-Tyson 9/4/2014
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY
Date 9/4/14
Estrella H. George
Acting Clerk of the Court
BY Lori Boynes-Tyson
Deputy

²⁰ *Whitaker*, 36 V.I. at 79.
²¹ *Id.* at 84 (“[A]n action for conversion of property is considered complete when the property is first tortiously taken or retained by the defendant.”)
²² *See, e.g., Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).
²³ *Gov’t Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 466 (D.V.I. 1997).
²⁴ *See generally* 1A C.J.S. Accounting § 6.

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

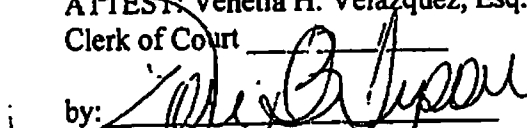
UNITED CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	
)	CASE NO. ST-13-CV-101
WAHEED HAMED, a/k/a WILLY OR WILLIE)	
HAMED)	
)	
Defendant.)	
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ORDER

The Court having issued a Memorandum Opinion on this date, it is
ORDERED that Defendant's April 15, 2013, Motion for Judgment on the
Pleadings is GRANTED in part and DENIED in part without prejudice; and it is
ORDERED that the portion of Plaintiff's Complaint related to an alleged certified
check for seventy-thousand dollars (\$70,000.00) is DISMISSED with prejudice; and it is
ORDERED that Plaintiff submit an amended complaint by July 15, 2013,
consistent with holding of the Memorandum Opinion; and it is
ORDERED that copies of this Order shall be directed to counsel of record.

Dated: June 24, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor 6/25/2013


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

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

UNITED CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	
	)	CASE NO. ST-13-CV-101
WAHEED HAMED, a/k/a WILLY OR WILLIE)	
HAMED)	
)	
Defendant.)	
<hr style="width:50%; margin-left:0;"/>)	

MEMORANDUM OPINION

Pending before the Court is Defendant Waheed Hamed’s April 15, 2013, Motion for Judgment on the Pleadings.¹ For the following reasons, Defendant’s Motion will be granted in part and denied in part without prejudice.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Corporation filed a Complaint on March 5, 2013, alleging that during Defendant Waheed Hamed’s employment with Plaintiff as a manager at Plaza Extra located in Tutu Park, St Thomas, Defendant secretly converted and misappropriated substantial assets of Plaintiff in two separate instances. Specifically, Plaintiff alleges (1) that on October 7, 1995, Defendant converted Seventy thousand dollars (\$70,000.00) by conveying it to a third party through a certified check without Plaintiff’s approval; and (2) that in at least 1992 and for a following unknown period of time, Defendant operated a wholesale grocery business called “5 Corner’s Mini Mart,” converting Plaintiff’s inventory and personal property without Plaintiff’s knowledge.

¹ Plaintiff responded on May 1, 2013. Defendant replied on June 4, 2013.

STANDARD

Pursuant to Fed. R. Civ. P. 12(c), made applicable to the Virgin Islands Superior Court through Superior Court Rule 7, a party may move for judgment on the pleadings, “[a]fter the pleadings are closed – but early enough not to delay trial.”² The standard applied under Fed. R. Civ. P. 12(c) mirrors that of Fed. R. Civ. P. 12(b)(6),³ under which a defendant may test the sufficiency of the pleadings by seeking dismissal for the plaintiff’s “failure to state a claim upon which relief can be granted.”⁴ In considering the motion, the Court must first liberally construe the pleadings,⁵ and “accept as true all well-pleaded allegations in the complaint” in favor of the plaintiff.⁶ While “the Court must take all of the factual allegations in the [c]omplaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation.”⁷ Second, once the legal and factual allegations have been distinguished, the Court must decide whether “the plaintiff

² Fed. R. Civ. P. 12(c).

³ See, e.g., *Sanders v. Gov’t of the V.I.*, 2009 WL 649888, at *2 (D.V.I. Mar. 9, 2009); *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1285-86 (10th Cir. 2011). An essential difference between a motion under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(c) is that a motion under Fed. R. Civ. P. 12(b)(6) must be made before a responsive pleading is allowed, while Fed. R. Civ. P. 12(c) applies after a responsive pleading has been filed.

⁴ Fed. R. Civ. P. 12(b)(6).

⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation”) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

⁶ *Gov’t Guarantee Fund v. Hyatt Corp.*, 166 F.R.D. 321, 325-26 (D.V.I. 1996) *aff’d sub nom. Gov’t Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 95 F.3d 291 (3d Cir. 1996) (“[I]n considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true the well-pleaded allegations in the complaint. . . . [T]he plaintiff is required to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. . . . Finally, when evaluating a 12(b)(6) motion the court must be mindful of the liberal pleading practice permitted by Rule 8(a)”) (internal citations omitted).

⁷ *Webster v. CBI Acquisitions, LLC*, 2012 WL 832044, at *1 (V.I. Super. 2012) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

pleads factual content that allows the court to draw the reasonable inference”⁸ that the claim is plausible on its face.

Considering that a motion to for judgment on the pleadings challenges the sufficiency of the pleadings rather than disputed factual allegations, a Court will not generally grant a motion to dismiss based on either Fed. R. Civ. Pro. 12(c) or Fed. R. Civ. P. 12(b)(6) that solely asserts an affirmative defense.⁹ However, a Court may consider such a motion to dismiss where “the relevant facts are . . . readily apparent on the face of the complaint.”¹⁰ For instance, while “the expiration of the [s]tatute of [l]imitations often presents a question of fact [for the jury], where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law.”¹¹ When conducting such an analysis the Court primarily relies on the factual allegations plead in the Complaint, but may also consider “matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint”¹² For instance, in *Burton v. First Bank of Puerto Rico*, the court considered the plaintiff’s

⁸ *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 446).

⁹ See, e.g., *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008) (“Where a court grants a Rule 12(b)(6) or Rule 12(c) motion based on an affirmative defense, the facts establishing that defense must: (1) be definitively ascertainable from the complaint and other allowable sources of information, and (2) suffice to establish the affirmative defense with certitude.”)(internal quotations omitted)(citing *Nisselson v. Lernout*, 469 F.3d 143, 150 (1st Cir.2006)).

¹⁰ *Burton v. First Bank of Puerto Rico*, 49 V.I. 16, 20 (V.I. Super. 2007)(applying the pre-*Twombly* standard to a Fed. R. Civ. P. 12(b)(6) motion); see *Charleswell v. Chase Manhattan Bank*, 45 V.I., 495, 506 (D.V.I, 2004).

¹¹ *Burton*, 49 V.I. at 20 (internal citations and quotations omitted) (citing *Vitalo v. Cabot Corp.*, 399 F.3d 536, 543 (3d Cir. 2005)).

¹² *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008) (citing *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir.2001)); see generally *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994). If other extrinsic evidence is considered, a court may convert the motion into Fed. R. Civ. P. 56 motion at its discretion. See generally STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK, at 470 (2012).

billing statements because they were “indisputably authentic documents” that were explicitly referred to in the complaint.¹³

ANALYSIS

Defendant argues that Plaintiff’s Complaint should be dismissed because the statute of limitations period for Plaintiff’s claims for breach of fiduciary duty (Count I), constructive trust or recoupment (Count II), conversion (Count III), breach of contract (Count IV), and accounting (Count V) have expired. Pursuant to 5 V.I.C. § 31(3) and (5), a breach of fiduciary duty claim carries a two (2) year statute of limitations if it is “based on a breach of a legal duty imposed by law that arises out of the performance of the contract” or otherwise carries a six (6) year statute of limitations if it is “based upon a breach of specific provisions in the contract.”¹⁴ Pursuant to 5 V.I.C. § 31(3)(D), conversion carries a six (6) year statute of limitations.¹⁵ Pursuant to 5 V.I.C. § 31(3)(A), a breach of contract claim carries a six (6) year statute of limitations.¹⁶ While Plaintiff lists “accounting”¹⁷ and “constructive trust or recoupment” as separate counts, they are equitable remedies, and therefore not separate causes of action. Thus, they do not carry a statute of limitations apart from the independent causes of action upon which they rely.¹⁸

¹³ 49 V.I. at 20.

¹⁴ *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 79 (Terr. V.I. Apr. 21, 1997)

¹⁵ *Id.* at 84 (“[A]n action for conversion of property is considered complete when the property is first tortiously taken or retained by the defendant.”)

¹⁶ *See, e.g., Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 134 (V.I. 2009).

¹⁷ *Gov’t Guarantee Fund of Republic of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 466 (D.V.I.

1997)(“ equitable accounting is a remedy of restitution where a fiduciary defendant is forced to disgorge gains received from the improper use of the plaintiff’s property or entitlements. The plaintiff makes a prima facie case by showing a breach of fiduciary duty plus gross receipts resulting to the fiduciary, and the defendant must prove what deductions are appropriate to figure the net profit.”)(internal quotations and citations omitted)(quoting 1 Dan B. Dobbs, *Law Of Remedies* § 4.3(5), at 610 (2d ed.1993)).

¹⁸ *See generally* 1A C.J.S. *Accounting* § 6 (“An accounting is essentially an equitable remedy, which arises from an obligation to account for the plaintiff’s money or property.”); 90 C.J.S. *Trusts* § 176

Plaintiff argues that, while the alleged acts of misconduct occurred as early as 1992 and in 1995, the statutory period was tolled because Plaintiff had no way of knowing of the misconduct until Plaintiff received certain documents in October 2011 that had been gathered pursuant to a 2003 federal criminal investigation in *U.S. v. United Corporation, et al.*

Ordinarily, “a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action” unless the statute of limitations has been tolled.¹⁹ While Plaintiff’s reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant argues that Plaintiff’s argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

Under the law of the Virgin Islands, application of the equitable ‘discovery rule’ tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by *exercising reasonable diligence*, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party’s conduct. The discovery rule is to be applied using an objective reasonable person standard.²⁰ (emphasis added)

On the other hand, equitable tolling may apply “where the defendant has actively misled the plaintiff,” as Plaintiff here alleges in the Complaint.²¹ However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate

(“[Constructive trusts] are remedial in character and are classified as belonging to remedial rather than substantive law, and it is not itself a substantive right.”)(internal citations omitted).

¹⁹ *Whitaker*, 36 V.I. at 81.

²⁰ *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (Bankr. D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I 2002)) (internal citations and quotations omitted).

²¹ *Id.* at *6.

“that he or she could not, by the *exercise of reasonable diligence*, have discovered essential information bearing on his or her claim.”²² (emphasis added) To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an “objective reasonable person standard.”²³

Applying the “reasonable diligence” standard of the discovery rule and doctrine of equitable tolling, the Court will discuss in turn the 1992 and 1995 allegations of wrongful conduct to determine whether recovery on the Complaint on its face, construed liberally in a light most favorable to Plaintiff, is barred on statute of limitations grounds.

I. Claims relying on facts alleging Defendant converted Seventy thousand dollars (\$70,000.00) via a certified check to a third party on October 7, 1995.

Plaintiff’s Complaint alleges that

In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United’s knowledge or consent, Defendant Waheed Hamed converted \$70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7th, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff’s business operations.²⁴

Further, in his response to Defendant’s Motion, Plaintiff argues that the “statute of limitations could not accrue and was tolled because Plaintiff could not have possibly known of Defendant’s misconduct until a federal investigation revealed this

²² *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

²³ *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) (“[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.”)(internal citations and quotations omitted).

²⁴ Complaint, ¶ 14.

misconduct.”²⁵ Defendant argues that the statute of limitations period was not tolled because under either the discovery rule or doctrine of equitable tolling Plaintiff failed to exercise “reasonable diligence” in reviewing the basic accounting records of the company before the records were seized by the government in *U.S. v. United Corporation, et al.*

The Court agrees with Defendant, albeit on different grounds. Specifically, the Complaint states that in 2003 Plaintiff United, along with Defendant and others, were indicted in “*U.S. v. United Corp., ST-15-CR-2005.*”²⁶ Upon a review of public records, it appears that Plaintiff is referring to *U.S. v. United Corporation, et al.,* Crim. No. 2003-147 in the District Court. The original indictment, issued and unsealed on September 18, 2003, in *U.S. v. United Corporation, et al.,* Crim. No. 2003-147, and any subsequent superseding indictments may be considered by the Court in its analysis to determine whether Plaintiff exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling because Plaintiff explicitly refers to that case on the face of the Complaint, and further, these indictments are indisputable public records.²⁷ The third superseding indictment, issued on September 9, 2004, charged Defendant Waheed Hamed, among others, with

purchas[ing] and direct[ing] and caus[ing] Plaza Extra employees and others to purchase cashier’s checks, traveler’s checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than the defendants, in order to disguise the case as legitimate-appearing financial instruments.²⁸

²⁵ Plaintiff’s Response in Opposition to Defendant’s Motion for Judgment on the Pleadings, May 1, 2013, at ¶ 7.

²⁶ Complaint, ¶ 14.

²⁷ *Barary-Snyder*, 539 F.3d at 332; See Fed. R. Evid 902.

²⁸ *U.S. v. Yusuf, et al.*, 2003-147, Third Superseding Indictment, Sept. 9, 2004, at ¶ 15.

While the third superseding indictment largely alleges that Defendant Waheed Hamed, among others, used cashier's checks and other methods to conceal illegal money transfers abroad, the third superseding indictment, although only containing allegations, would have *at least* put a reasonable person in Plaintiff's position,²⁹ as Defendant's employer, on notice³⁰ 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. Plaintiff does not contend any efforts were made after this point to review United's business and accounting records to investigate the government's allegations against Defendant.³¹ Instead, the Complaint clearly states on its face that the discovery was only made in October 2011 upon a review of the government's records and documents. Thus, here, "the facts are so clear that reasonable minds cannot differ," on the face of the Complaint that the commencement period for the statute of limitations began *at least* by September 9, 2004.³² As such, all claims relying on facts alleging

²⁹ *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *6 (noting that while reasonable diligence is an objective test based on a reasonable person standard, the test is flexible to take into account certain situations and circumstances).

³⁰ See *Whitaker*, 36 V.I. at 81 ("the . . . crucial question in determining the accrual date for statute of limitations purposes is whether the injured party had sufficient notice of the invasion of his legal rights to require that he investigate and make a timely claim or risk its loss. Once the injured party is put on notice, the burden is upon him to determine within the limitations period whether any party may be liable to him.") (quoting *Zelesnik v. U.S.*, 770 F.2d 20, 23 (3d Cir. 1985)).

³¹ See, e.g. *Zafarana v. Pfizer, Inc.*, 724 F. Supp. 2d 545, 553 (E.D. Pa. 2010) ("Once a plaintiff becomes aware of an injury and who caused it, he is under a duty to investigate and promptly file his suit.") Plaintiff primary argument is that Plaintiff did not have access until October 2011 to many of the records, particularly Defendant's 1992 tax return, which lead to the discovery of Defendant's alleged misconduct. Here, Plaintiff, a corporation, has access to its own accounting and other record-keeping files, a review of which may have revealed Defendant's alleged misconduct. Even 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. Thus, Plaintiff's argument that Plaintiff did not have access to the documents to discover Defendant's misconduct is without merit.

³² As the Court relied on the third superseding indictment, the Court does not hold or address whether the original indictment may have also placed Plaintiff on notice of Defendant's alleged misconduct.

Defendant converted Seventy thousand dollars (\$70,000.00) via a certified check to a third party on October 7, 1995, are barred on statute of limitations grounds. All of Plaintiff's claims carry a six (6) year statute of limitation or less, meaning the statutory period expired by *at least* September 9, 2010.

II. Claims relying on facts alleging Defendant operated a wholesale grocery business called "5 Corner's Mini Mart" and converted Plaintiff's inventory and personal property without Plaintiff's knowledge in 1992 for an unknown period of time.

Plaintiff's Complaint alleges that a review of Defendant Waheed Hamed's 1992 tax return revealed that "Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart," and further that "Defendant Hamed's tax returns demonstrate substantial inventory . . . belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business."³³ Again, Plaintiff argues that until October 2011, when the documents collected by the U.S. government in *U.S. v. United Corporation, et al.*, were given to Plaintiff, Plaintiff had no way of knowing of Defendant's alleged misconduct.³⁴

³³ Complaint, ¶¶ 16-20.

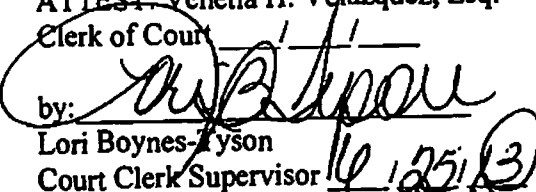
³⁴ Plaintiff's Response in Opposition to Defendant's Motion for Judgment on the Pleadings, May 1, 2013, at ¶¶ 4, 7. Defendant argues that because Plaintiff fails to specifically reference the alleged 1992 misconduct in their response to Defendant's Motion that "[P]laintiff concedes the limitation issue as to the 1992 act." Defendant Hamed's Reply to Plaintiff's Opposition to the Motion for Judgment on the Pleadings, June 4, 2013, at 3. The Court agrees that Plaintiff's counsel failed to cite to any relevant authority in violation of Local Rule of Civil Procedure 11.1 which provides that, "[b]y signing a motion or supporting memorandum or brief, an attorney certifies to the Court that: (a) the applicable law in this jurisdiction has been cited, including authority for and against the position being advocated by counsel" The Court strongly cautions Plaintiff's counsel to cite to relevant authority and applicable legal standards in any future representations before this Court. However, the Court in its discretion, and in viewing the Complaint in a light most favorable to Plaintiff, has considered Plaintiff's general argument that Plaintiff had no way of discovering Defendant's alleged misconduct until October 2011 to both the alleged misconduct that occurred in 1992 and 1995.


Here, the Court finds that a review of the Complaint on its face reveals that the commencement period may not be determine as a matter of law and is rather a question of material fact.³⁵ Specifically, unlike Plaintiff's allegations regarding the October 7, 1995, certified check, the indictment in *U.S. v. United*, Crim. No. 2003-147, does not put Plaintiff on notice of this alleged wrongdoing because the indictment does not suggest that Defendant may have engaged in a secretive wholesale business. Instead, here, Plaintiff contends their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, a document to which Plaintiff previously did not have access. As such, Defendant's motion is premature with regard to Defendant's alleged misconduct in 1992, and Plaintiff's claims for breach of fiduciary duty, conversion, and breach of contract survive on these limited facts. However, despite this holding, moving forward Plaintiff still bears the burden of showing that Plaintiff exercised "reasonable diligence" under the discovery rule or doctrine of equitable tolling such that the statute of limitations was tolled until October 2011.

For the foregoing reasons, the Court will grant in part and deny in part Defendant's Motion for Judgment on the Pleadings. An Order consistent with this Opinion shall follow.

Dated: June 24, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor 6/25/13


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

³⁵ See, e.g. *In re Mushroom*, 383 F.3d at 338.

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

UNITED CORPORATION	Plaintiff)	
	) )	CASE NO: ST-2013-CV-0000101 FILING DATE: March 05, 2013 JUDGE: Hon. Michael C. Dunston CASE TYPE: DAMAGES - CIVIL SECONDARY null PETITION
Vs.))	
WAHEED HAMED (A/K/A WILLY, WILLY HAMED)	Defendant)	

<u>PARTY NAME</u>	<u>LITIGANT</u>	<u>PARTY TYPE</u>
UNITED CORPORATION ,	P001	PLAINTIFF
DEWOOD , NIZAR A.	P001	ATTORNEY FOR PLAINTIFF OR PETITIONER
WAHEED HAMED (A/K/A WILLY, WILLY HAMED) ,	D001	DEFENDANT

DOCKETS ENTERED ON THIS CASE:

<u>DOCKET DATE</u>	<u>DESCRIPTION</u>	<u>AMOUNT</u>
04/13/2015	FEE RECEIVED RECEIPT # - 00144858	6.00
03/20/2015	PURSUANT TO SUPREME COURT'S SCHEDULING ORDER ENTERED MARCH 10, 2015 IN THE ABOVE NOTED CASE, WHICH REQUIRES THIS OFFICE TO FILE THE E-RECORD ON OR BEFORE MARCH 20, 2015	
03/20/2015	UPDATED CERTIFIED DOCKET FORWARDED TO SUPREME COURT	
03/10/2015	SUPREME COURT'S SCHEDULING ORDER ENTERED RE: ORDERED THAT PURSUANT TO SUPREME COURT RULES 11(b) AND 40.3(j) THE CLERK OF THE SUPERIOR COURT SHALL FILE THE E-RECORD ON OR BEFORE MARCH 20, 2015.	
02/26/2015	PURSUANT TO SUPREME COURT'S DOCKETING ORDER ENTERED FEBRUARY 24, 2015, PLEASE FIND INDEX WITH REQUIRED DOCUMENTS	
02/26/2015	CERTIFIED DOCKET FORWARDED TO SUPREME COURT	
02/25/2015	NOTICE OF FILING DOCUMENTS IN THE OTHER DIVISION, NOTICE OF FILING APPEAL SUBMITTED BY CARL HATMANN, III, ESQ.	
02/24/2015	NOTICE OF APPEAL FILED IN THE SUPREME COURT.	
02/24/2015	DOCKETING ORDER ENTERED RE: ORDERED THAT APPELLANT'S NOTICE OF APPEAL BE DOCKETED AS S . CT. CIV. NO. 2015-0021	
11/07/2014	REPLY TO BRIEF IN SUPPORT OF UNITED CORPORATIONS'S MOTION FOR RECONSIDERATION FILED BY NIZAR A. DEWOOD, ESQ	
10/16/2014	DEFENDANT WAHEED ("WILLIE") HAMED'S OPPOSITION TO PLAINTIFF UNITED'S MOTION FOR RECONSDIERATION FILED BY CARL J. HARTMANN, III, ESQUIRE LETTER ATTACHED	
10/10/2014	PLAINTIFF UNITED'S MOTION TO STAY FILING OF RESPONSES TO DEFENDANT'S BILL OF COSTS FILED BY NIZAR A. DEWOOD, ESQ PROPOSED ORDER ATTACH	
10/06/2014	NOTICE OF ENTRY OF ORDER 10/05/2014 CARL J. HARTMANN, ESQUIRE (STX) NIZAR A. DEWOOD, ESQUIRE (STX)	
10/06/2014	AMENDED CERTIFICATE OF SERVICE RECEIVED SUBMITTED BY NIZAR DEWOOD, ESQ.	
10/05/2014	ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON, THAT DEFENDANT SHALL RESOND TO THE MOTION BY OCTOBER 27, 2014, AND PLAINTIFF MAY REPLY BY NOVEMBER 7, 2014.	
09/29/2014	PLAINTIFF'S RULE 59(E) MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGEMENT FILED BY NIZAR A. DEWOOD, ESQ UNITED'S BRIEF IN SUPPORT OF ITS RULE 59(E) MOTION ATTACH	
09/24/2014	MOTION AND MEMORANDUM AS TO BILL OF COST AND ATTORNEYS FEES FILED BY CARL J. HARMANN III, ESQ PROPOSED ORDER ATTACH	
09/18/2014	MOTION & MEMORANDUM AS TO BILL OF COST AND ATTORNEYS FEES FILED BY CARL HARTMAN, ESQ.	

09/04/2014 NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER
09/02/2014
CARL J. HARTMANN III, ESQUIRE (STX)
NIZAR A. DEWOOD, ESQUIRE (STX)

09/02/2014 MEMORANDUM OPINION SIGNED BY JUDGE MICHAEL C. DUNSTON.

09/02/2014 ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON, THAT PLAINTIFF'S AMENDED COMPLAINT IS DISMISSED WITH PREJUDICE IN ITS ENTIRETY. ORDERED THAT DEFENDANT'S APRIL 28, 2014, MOTION TO DISMISS FOR LACK OF STANDING IS DENIED AS MOOT.

05/13/2014 NOTICE OF ENTRY OF ORDER
05/12/2014
CARL J. HARTMANN, III, ESQ.
NIZAR DEWOOD, ESQ.

05/12/2014 ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON

04/29/2014 NOTICE OF ENTRY OF ORDER
04/25/2014
NIZAR DEWOOD, ESQ.
CARL J. HARTMANN, III, ESQ.

04/28/2014 DEFENDANT WAHEED HAMED'S RULE 12(c) MOTION TO DISMISS FOR LACK OF STANDING FILED BY CARL J. HARTMANN, III, ESQ.

04/25/2014 ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON

04/23/2014 DEFENDANT WAHEED HAMED'S REPLY WITH REGARD TO HIS MOTION FOR SUMMARY JUDGMENT FILED BY CARL J. HARTMANN III, ESQ.

04/07/2014 MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED BY NIZAR A. DEWOOD, ESQ.

03/12/2014 NOTICE OF ENTRY OF ORDER
03/07/2014
NIZAR DEWOOD, ESQ.
CARL J. HARTMANN, III, ESQ.

03/12/2014 NOTICE OF SERVICE OF DEFENDANT HAMED'S INTERROGATORY RESPONSES, RESPONSES TO REQUEST FOR PRODUCTION AND REQUESTS TO ADMIT FILED BY CARL J. HARTMANN III, ESQ.

03/07/2014 ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON

03/06/2014 PLAINTIFF UNITED'S MOTION TO EXTEND TIME TO FILE HIS RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED BY NIZAR A. DEWOOD, ESQ.

02/12/2014 NOTICE OF ENTRY OF ORDER
02/11/2014
NIZAR A. DEWOOD, ESQ.
CARL J. HARTMANN, II, ESQ.

02/11/2014 ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON

02/05/2014 DEFENDANT HAMED'S MOTION FOR SUMMARY JUDGMENT FILED BY CARL J. HARTMANN, III, ESQ.
DEFENDANT HAMED'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO THE SOLE REMAINING CLAIM FILED BY CARL J. HARTMANN, III, ESQ.

12/16/2013 JOINT STIPULATION FOR ENLARGEMENT OF TIME AS TO DISCOVERY FILED BY NIZAR A. DEWOOD, ESQ.

10/10/2013 NOTICE OF SERVICE OF PLAINTIFF UNITED CORPORATION'S ANSWER TO DEFENDANT'S (CORRECTED) FIRST SET OF INTERROGATORIES SUBMITTED BY NIZAR DEWOOD, ESQ.

10/10/2013 NOTICE OF SERVICE OF PLAINTIFF UNITED CORPORATION'S RESPONSES TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS SUBMITTED BY NIZAR DEWOOD, ESQ.

10/08/2013 NOTICE OF SERVICE OF PLAINTIFF UNITED CORPORATION'S RESPONSES TO DEFENDANT'S (CORRECTED) FIRST REQUEST FOR ADMISSIONS SUBMITTED BY NIZAR DEWOOD, ESQ.

09/12/2013 DEFENDANT WAHEED HAMED'S {CORRECTED} FIRST INTERROGATORIES TO PLAINTIFF UNITED FILED BY CARL J. HARTMANN, III, ESQUIRE...

09/12/2013 DEFENDANT WAHEED HAMED'S {CORRECTED} FIRST REQUESTS FOR ADMISSIONS TO PLAINTIFF UNITED FILED BY CARL HARTMANN, III, ESQUIRE...

09/09/2013 DEFENDANT WAHEED HAMED'S FIRST INTERROGATORIES TO PLAINTIFF UNITED FILED BY CARL J. HARTMANN III, ESQUIRE.

09/09/2013 DEFENDANT WAHEED HAMED'S FIRST REQUESTS FOR ADMISSIONS TO PLAINTIFF UNITED FILED BY CARL HARTMANN III, ESQUIRE.

09/09/2013 DEFENDANT WAHEED HAMED'S FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS TO PLAINTIFF UNITED FILED BY CARL HARTMANN III, ESQUIRE.

08/23/2013 LETTER ADDRESSED TO OFFICE OF THE CLERK FILED BY CARL J. HARTMANN SELF-DISCLOSURES PURSUANT TO RULE 26 ATTACHED

08/23/2013 SELF-DISCLOSURES PURSUANT TO RULE 26 FILED BY ATTY. CARL HARTMANN

07/30/2013 ANSWER TO FIRST AMENDED COMPLAINT FILED BY CARL J. HARTMANN III, ESQUIRE.

07/30/2013 ANSWER TO FIRST AMENDED COMPLAINT AND LETTER FILED BY CARL J. HARTMANN III, ESQUIRE.

07/18/2013 SCHEDULING AND MEDIATION ORDER SIGNED AND ENTERED BY JUDGE DDUNSTON

07/18/2013 NOTICE OF ENTRY OF ORDER DATED
7/18/2013
NIZAR DEWOOD, ESQUIRE
CARL HARTMANN, III, ESQUIRE

07/17/2013 FILE FORWARDED TO JUDGE'S CHAMBER

07/16/2013 PROPOSED STIPULATED SCHEDULING ORDER RECEIVED, FILED BY CARL HARTMANN, ESQ.

07/15/2013 AMENDED COMPLAINT FILED BY NIZAR A. DEWOOD, ESQUIRE

06/25/2013 NOTICE OF ENTRY OF MEMORANDUM AND ORDER
06/24/2013
NIZAR DEWOOD, ESQ.
CARL HARTMANN, III, ESQ.

06/25/2013 NOTICE OF ENTRY OF ORDER
06/24/2013
NIZAR DEWOOD, ESQ.
CARL HARTMANN, III, ESQ.

06/24/2013 MEMORANDUM OPINION AND ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON; IT IS ORDERED THAT DEFENDANT'S APRIL 15, 2013 MOTION FOR JUDGMENT ON THE PLEADINGS IS GRANTED IN PART AND DENIED IN PART WITHOUT PREJUDICE; AND IT IS ORDERED THAT THE PORTION OF PLAINTIFF'S COMPLAINT RELATED TO AN ALLEGED CERTIFIED CHECK FOR SEVENTY THOUSAND DOLLARS IS DISMISSED WITH PREJUDICE; ETC.

06/24/2013 ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON; IT IS ORDERED THAT BY JULY 12, 2013, THE PARTIES SHALL CONDUCT A SCHEDULING CONFERENCE PURSUANT TO RULE 26(f) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND SHALL SUBMIT TO THE COURT BY JUNE 19, 2013 A WRITTEN REPORT SETTING FORTH A PROPOSED DISCOVERY PLAN AND PROPOSED SCHEDULING ORDER APPROVING THE SAME AND ADOPTING IT AS THE SCHEDULING ORDER IN THIS CASE;

06/12/2013 FILE FORWARDED TO JUDGE'S CHAMBER

06/04/2013 DEFENDANT HAMED'S REPLY TO PLAINTIFF'S OPPOSITION TO THE MOTION FOR JUDGMENT ON THE PLEADINGS RECEIVED, FILED BY CARL J. HARTMANN, III, ESQ.

05/22/2013 AMENDED CERTIFICATE OF SERVICE RECEIVED SUBMITTED BY NIZAR DEWOOD, ESQ.

05/13/2013 FILE RETURNED TO THE CLERK'S OFFICE

05/09/2013 FILE FORWARDED TO JUDGE'S CHAMBERS

05/01/2013 PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS FILED BY NIZAR DEWOOD, ESQUIRE.

04/30/2013 FILE RETURNED TO THE CLERKS OFFICE

04/30/2013 NOTICE OF ENTRY OF ORDER DATED:
04/29/2013
CARL HARTMANN, ESQUIRE via EMAIL: carl@carlhartman.com
NIZAR A. DEWOOD, ESQUIRE 888-398-84289(FAX)

04/29/2013 ORDER SIGNED BY JUDGE MICHAEL C. DUNSTON--ORDERED THAT PLAINTIFF SHALL RESPOND TO THE MOTION BY MAY 13, 2013, AND DEFENDANT MAY REPLY BY MAY 24, 2013.

04/24/2013 FILE FORWARDED TO JUDGE'S CHAMBER

04/23/2013 NOTICE OF APPEARANCE RECEIVED FROM JOSEPH DIRUZZO, ESQUIRE.

04/15/2013 MOTION FOR JUDGMENT ON THE PLEADINGS, MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND ORDER SUBMITTED BY CARL HARTMANN, ESQ.

03/20/2013 ANSWER FILED BY CARL HARTMANN, ESQUIRE

03/07/2013 CASE SENT FROM NON-JURY TO JURY

03/06/2013 FEE RECEIVED 75.00
RECEIPT # - 00128993

03/06/2013 RETURN OF SERVICE FOR 20 DAY SUMMONS FOR WAHEED HAMED RETURNED SERVED ON 3/5/13.

03/05/2013 DIRECT JUDGE ASSIGNMENT Hon. Michael C. Dunston MCD

03/05/2013 COMPLAINT AND SUMMONS FILED BY NIZAR A. DEWOOD, ESQ.

03/05/2013 FILING FEE ASSESSED
03/05/2013 CIVIL LITIGANT PERSONAL DATA FORMS FILED BY NIZAR A. DEWOOD, ESQ.
03/05/2013 20 DAY SUMMONS ISSUED
03/05/2013 DOCKETING LETTER AND NOTICE OF JUDGE ASSIGNMENT PROCESSED BY CLERK

TOTAL NUMBER OF ENTRIES: 79

PREPARED BY:

*****END OF REPORT*****

CERTIFIED A TRUE COPY

Date: 4/18/15
Estrella A. George
Rehne Clerk of the Court

By: [Signature]
Court Clerk

II. JURISDICTION, VENUE, & DEMAND FOR JURY TRIAL

2. This Court has personal jurisdiction, subject matter jurisdiction, and the amount in controversy is satisfied, pursuant to 4 VIC §76.
3. Venue is proper in the District of St. Thomas because the defendant is a resident of St. Thomas, Virgin Islands, and the facts underlying the causes of action arose in said District, pursuant to 4 VIC § 78.
4. A trial by jury is demanded pursuant to 4 VIC § 80.

III. THE PARTIES

5. Plaintiff United Corporation is a duly organized Virgin Islands Corporation since January of 1979, and is authorized to conduct business in the Virgin Islands. Plaintiff is *sui juris*.
6. Plaintiff is owned completely in various shares by Fathi Yusuf, Fawzia Yusuf, Maher Yusuf, NejeH Yusuf, Zayed Yusuf, and Yusuf Yusuf, hereinafter collectively referred to as the "Yusuf Family".
7. Defendant Waheed Hamed is a natural person and is a resident of St. Thomas, U.S. Virgin Islands. At all times relevant to this action, Defendant Hamed has been an employee of Plaintiff United.
8. Defendants John Doe 1 to 10, upon information, are employees, family, friends, and agents of Defendant Hamed who have participated and/or assisted defendant Waheed Hamed with the defalcation, conversion, and concealment of substantial assets that are the sole property of Plaintiff United. John Doe 1 to 10 may be both natural persons and/or incorporated or unincorporated associations/entities. Each is *sui juris*.

IV. FACTS

9. In 1992, Plaintiff United hired Waheed Hamed as an employee, and assigned him managerial duties at the Plaza Extra supermarket located in Tutu Park, St. Thomas, U.S. Virgin Islands. Defendant Hamed managed and collected significant cash and other assets on behalf of Plaintiff United during the course of his employment.

10. In 2003, Plaintiff United, Fathi Yusuf, Maher Yusuf, and Defendant Waheed Hamed, and the Defendant's brother Waleed Hamed, among others, were indicted in the case of *U.S. v United Corporation*, case no. 15-cr-2005 (D.V.I.).

11. During nine years of criminal proceedings, the U.S. Department of Justice and federal law enforcement (collectively the "U.S. Government"), gathered *significant financial documents*, including but not limited to tax returns, financial ledgers, accounting records, and various other documents concerning the parties herein. Prior to the release of the documents in October of 2011 to Plaintiff United, none of the officers of Plaintiff United had any actual or constructive knowledge of Defendant Hamed's conduct, financial affairs, or tax returns.

12. During a review and inventory of the documents and files delivered and returned by the U.S. Government to Plaintiff United, Plaintiff United reviewed documents comprising tax returns for Waheed Hamed, including but not limited to Defendant's tax returns for the years

13. With the exception of his salaried position with United Corporation, Defendant Waheed Hamed never had any other significant source of income from business operations, investments, etc., prior to or during his employment tenure with Plaintiff United.



14. In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United's knowledge or consent, Defendant Waheed Hamed converted \$70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7th, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff's business operations.

15. Defendant Waheed Hamed owed absolute duty of loyalty and care to United Corporation to act in its best interest and not to usurp any of Plaintiff's assets and business opportunity that would otherwise inure to Plaintiff's benefit. ←

16. A further review of Defendant Waheed Hamed's tax returns, including Defendant's 1992 Tax Return, obtained from the United States Government also revealed that Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart. ←

17. Defendant Waheed Hamed was never permitted to acquire, engage, or manage any business that may compete with the operations of the Plaza Extra Stores. Defendant Hamed never disclosed to his employer that he was operating a separate wholesale grocery business called "5 Corner's Mini Mart." ←

18. Defendant Hamed's sole income in 1992 did not exceed \$35,000, and Defendant Hamed never had any other businesses or employment to produce additional revenue to purchase and sell grocery inventory to other retailers. ←

19. The scale and scope of the wholesale business as indicated in Defendant Hamed's tax returns demonstrates substantial inventory, upon information, belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business. ←

20. To date, Defendant Waheed Hamed refuses to explain and account to Plaintiff United for any of the aforementioned funds, inventory, and the business opportunities Defendant Hamed diverted to his personal benefit.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION BREACH OF FIDUCIARY DUTIES

21. Plaintiff incorporates paragraphs 1 through 20 inclusive as if fully set forth verbatim herein.

22. As an agent and employee of Plaintiff United, a corporate entity, Defendant Waheed Hamed owes fiduciary duties to the entity. Included in the fiduciary duty is the duty of loyalty. Not only is it Defendant Waheed Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, he is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

23. Defendant Waheed Hamed has breached the following duties (the list of duties violated by Defendant Hamed, below is not intended to be an exhaustive or exclusive list):

- a. Duty of Loyalty
- b. Duty of good faith and candor;
- c. Duty to manage the day-to-day operations of Plaintiff United's Plaza Extra supermarket for the benefit of United;
- d. Duty of full disclosure of all matters affecting his employer Plaintiff United;
- e. Duty to refrain from self-dealing, and/or general prohibition against the fiduciary using his relationship to benefit his personal interest; and
- f. Duty to manage any funds, assets, and/or property belonging to Plaintiff United by virtue

of its operation of the Plaza Extra Supermarket stores in accordance with applicable laws.

**SECOND CAUSE OF ACTION
CONSTRUCTIVE TRUST/RECOUPMENT**

24. Plaintiff incorporates paragraphs 1 through 23 as if fully set forth verbatim herein.

25. As an agent and employee of Plaintiff United, Defendant Hamed owes numerous fiduciary duties to Plaintiff United and its shareholders. Not only is it Defendant Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, but Defendant Hamed also is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

26. Defendant Hamed has engaged in misappropriation of substantial and valuable assets of Plaintiff United causing substantial injury to Plaintiff United. As a result, Plaintiff United has sustained significant financial injury.

27. As such, a constructive trust should be imposed to gather and account for all assets misappropriated by Defendant Hamed that belongs to Plaintiff United.

**THIRD CAUSE OF ACTION
CONVERSION**

28. Plaintiff re-incorporates paragraphs 1 through inclusive as if fully set forth verbatim herein.

29. Defendant Waheed Hamed has knowingly converted substantial funds and assets belonging to Plaintiff United. Plaintiff never consented or agreed to Defendant Hamed's unauthorized use of its funds and assets. As such, Defendant Hamed is liable for conversion.

**FOURTH CAUSE OF ACTION
BREACH OF CONTRACT**

30. Plaintiff incorporates paragraphs 1 through 37 inclusive as if fully set forth verbatim herein.

31. Defendant was an at-will employee of Plaintiff United.

32. As an at-will employee of Plaintiff United, Defendant Hamed had a contractual duty to act in good faith, and to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United.

33. Defendant Hamed has breached his contractual duties to Plaintiff United, causing Plaintiff substantial economic and financial harm. As a result, Defendant Hamed is liable to Plaintiff for breach of contract.

**SIXTH CAUSE OF ACTION
ACCOUNTING**

34. Plaintiff incorporates paragraphs 1 through 33 inclusive as if fully set forth verbatim herein.

35. As agent and employee of Plaintiff United, Defendant Hamed was under full contractual obligation and other fiduciary duties to perform his functions as a manager with competence, integrity, and honesty to Plaintiff United Corporation and its shareholders. Defendant Hamed was not permitted to place himself in a position where it would be for his own benefit to violate the duty.

36. Defendant Hamed has breached his employment contractual agreement with Plaintiff United by mismanaging, misappropriating, and converting funds, monies, and other valuables to his personal use. As a result, Plaintiff United has sustained substantial financial damages.

37. As such, Plaintiff United is entitled a full accounting of all monies, funds, and assets unlawfully appropriated by Defendant Hamed.

VI. RELIEF REQUESTED

Wherefore, Plaintiff United Corporation, and its shareholders, respectfully pray for the following relief:

- a. Actual and compensatory damages to be determined at trial.
- b. Punitive damages for the intentional defalcation of funds and damages caused to Plaintiff United Corporation.
- c. A complete accounting and constructive trust of all funds, assets, opportunities, and other valuables converted and or misappropriated by Defendant Hamed.
- d. Costs of all professional fees that may be required for the audit and investigation of this matter.
- e. A return of all documents, including but not limited to electronically stored information, belonging to Plaintiff United in the possession (both actual and constructive) of Defendant Hamed.
- f. A Restraining Order precluding Defendant Hamed from:
 - i. Physically returning, or attempting to return, to any of the Plaza Extra supermarket stores;
 - ii. Accessing, or attempting to access, any bank accounts belonging to United Corporation for any purpose;
 - iii. Contacting, or attempting to contact, any employee of Plaintiff United concerning the operations and management of the Plaza Extra Supermarkets;

- iv. Preclude Defendant Waheed Hamed from contacting any business associates of Plaintiff United;
- v. Preclude Defendant Waheed Hamed from representing to third-parties that he is an employee of Plaza Extra;
- vi. Accessing, or attempting to access, any of Plaintiff United's, including but not limited to the Plaza Extra Supermarkets, books, records, and information regarding as to location or manner of storage;
- vii. Attorney's fees, court costs, and any other relief the court deems equitable.

Date: March 5, 2013

Respectfully Submitted,

DeWood Law Firm
Counsel for Plaintiff United

By: 

Nizar A. DeWood, Esq. (1177)
200 Eastern Suburb, Suite 102
Christiansted, V.I. 00820
t. (340) 773-3444
f. (888) 398-8428

SUMMONS

(CIVIL ACTION - ORIGINAL)

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

UNITED CORPORATION,

Plaintiff,

vs.

WAHEED HAMED,

(a/k/a Willy, Willy Hamed)

Defendant.

CIVIL NO. ST-13-CV- 101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

2013 MAR -5 P.M. 4.16

TO: WAHEED HAMED
ADDRESS: C/O PLAZA EXTRA - TUTU PARK
St. Thomas, VI 00802


YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon:

Plaintiff's Attorney:
NIZAR A. DEWOOD, ESQ.
2006 Eastern Suburb, Ste. 101
Christiansted, VI 00820
T: (340) 773-3444
F: (888) 398-8428

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Witness my hand and the seal of this Court this 5th day of March, 2013.

VENETIA H. VELASQUEZ, ESQ.
Clerk of the Court


Nizar A. DeWood, Esquire
Attorney for Plaintiff


BY DEPUTY CLERK

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

UNITED CORPORATON,

Plaintiff,

v.

WAHEED HAMED,

(a/k/a Willy, Willy Hamed)

Defendant.

Case No.:2013-CV-101

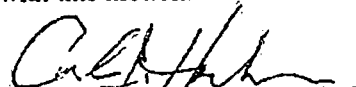
ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MOTION FOR JUDGMENT ON THE PLEADINGS

COMES NOW the Defendant, Waheed Hamed, and hereby moves pursuant to Rule 12(c) for judgment on the pleadings. The basis of this motion is more fully set forth in the attached memorandum, which is incorporated herein by reference. For the reasons set forth therein, it is respectfully submitted that the relief sought should be granted and this case should be dismissed with prejudice. A proposed order is also being submitted with this motion.

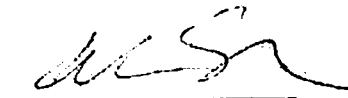
Dated: April 15, 2013


Carl J. Hurlmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2013, I served a copy of the foregoing Motion by hand on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820



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

UNITED CORPORATON,

Plaintiff,

v_s

WAHEED HAMED,

(a/k/a Willy, Willy Hamed)

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

ORDER

This matter is before the Court on the Plaintiff's Motion for Judgment on the Pleadings. Upon consideration of the matters before the Court, the motion is granted and this Complaint is dismissed with prejudice.

Dated:

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT

A T T E S T: VENETIA VELAZQUEZ
Clerk of the Court

BY: _____
Deputy Clerk

Dist.: Nizar DeWood
Carl Hartmann

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

The Defendant, Waheed Hamed, hereby moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), which provides in relevant part::

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

The pleadings are closed, so this matter is ripe for a Rule 12(c) motion.

While there are many defenses to plaintiff's complaint, the most obvious one is statute of limitations, which is properly raised by a Rule 12(c) motion. *See, 5C Wright and Miller, Federal Practice and Procedure (2004), §1367 at p. 211 (with cases cited in n.9).*

In this regard, the allegations in the complaint allege two separate transactions to support the five counts.¹ The first act of alleged wrongdoing is set forth in Paragraph 14, alleging conversion of \$70,000 in cash in 1997. In paragraphs 15 to 19, it is further alleged that in 1992, defendant was involved in a competing grocery business. There are no other factual averments of any wrongdoing other than these two acts -- in 1992 and 1997.

¹ The complaint avers six counts, but Count V was omitted

Plaintiff seeks relief for breach of fiduciary duty, constructive trust/recoupment, conversion, breach of contract, conversion and accounting. The statute of limitations has expired on all five of these counts. Chapter 3 of Title 5 of the Virgin Islands Code provides that the longest statute of limitations period is 20 years, but that this provision it applies only to disputes related to real property. See 5 V.I.C. §31(1). The statutes of limitations for all other causes of action expire after 10 years or less pursuant to 5 V.I.C. §31, so this Court need not reach the issue of which specific limitations period applies to each cause of action (e.g., 6 years for contract, 2 years for conversion, etc.) as clearly more than 10 years have passed since the dates of the alleged wrongdoings in 1992 and 1997.

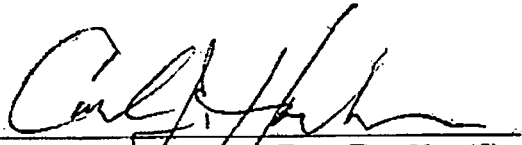
Likewise, regarding the equitable claims such as constructive trust/recoupment and accounting, 5 V.I.C. § 32(a) provides:

- (a) An action of an equitable nature shall only be commenced within the time limited to commence an action as provided in this chapter.

Thus, since none of the counts involve claims related to real property, the equitable claims are also time barred since they are over 10 years old without the need to decide whether a more specific statute of limitations applies.

In summary, the factual basis for the five counts alleged in the complaint were in 1992 and 1997, so they are all time barred by the statute of limitations defense. As such, this matter should be dismissed with prejudice.


Dated: April 15, 2013


Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
(340) 719-8941
carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2013, I served a copy of the foregoing Motion by hand on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820



3. In support of his Motion, Defendant simply recites the various statute of limitations for the various causes of action in the Virgin Islands, and proceeds to conclude that because any cause of action alleged against the Defendant would fall outside the Statute of Limitations, Plaintiff's complaint should be dismissed.
4. Conveniently, Defendant does not argue that the statute of limitations for the causes of action in the complaint could be tolled because Plaintiff never, and could not have known of Defendant's defalcation until Plaintiff obtained the information from the U.S. Attorney's Office during an unrelated criminal investigation.
5. As fully averred in Plaintiff's Complaint, the funds in question were discovered in late 2011. Plaintiff's Complaint states the following facts:

"In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United's knowledge or consent, Defendant Waheed Hamed converted \$70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7th, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff's business operations."

Complaint, ¶14.

6. Again, Defendant's Motion fails to state a single fact showing that Plaintiff had any reason to know of Defendant Hamed's misconduct. There is no doubt that Plaintiff could not have known of Defendant's misconduct because the check in question for \$70,000 was a Certified Check without the name of Defendant Waheed Hamed, and was obtained from the U.S. Attorney's Office during an unrelated criminal investigation only in October of 2011.
7. As such, the statute of limitations could not accrue and was tolled because Plaintiff could not have possibly known of Defendant's misconduct until a federal investigation revealed this misconduct.

8. This matter requires detailed discovery to determine the origins of the cash used to purchase the money order in question as well as third party subpoenas in the state of Florida to the institution that has received these funds without Plaintiff United's authorization.
9. As such, at best Defendant's Motion is premature, at worst it is without merit since it fails to detail any facts showing Plaintiff's reasonable knowledge of the facts underlying Defendant's conversion of funds.


For the reasons stated above it is respectfully requested that Defendant's Motion for Judgment on the Pleadings.

Date: May 1, 2013

Respectfully Submitted,

DeWood Law Firm, LLC
Counsel for Plaintiff

By:


Nizar A. DeWood, Esq. (1177)
2006 Eastern Suburb, Suite 102
Christiansted, V.I. 00820
t. 340.773.3444
f. 888.398.8428

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff Response in Opposition to Defendant's Motion for Judgment on the Pleadings was served on the Defendant via his counsel at the below address and date via first class mail.

Date: May 1, 2013

Carl J. Hartmann, III
5000 Estate Coakley Bay, L-6
Christiansted, V.I. 00820



Nizar A. DeWood, Esq.

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

UNITED CORPORATION	)	CIV. NO. SX-13-CV-101
)	
Plaintiff)	
)	
VS.	)	ACTION FOR DAMAGES
	)	CIVIL ACTION
)	
	)	AMENDED CERTIFICATE OF SERVICE
)	
WAHEED HAMED)	
(a/k/a Willy, Willy Hamed))	
)	
Defendant)	
_____)	

AMENDED CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff Response in Opposition to Defendant's Motion for Judgment on the Pleadings was served on the Defendant via his counsel at the below address and date via EMAIL AND REGULAR CLASS MAIL.

Date: May 21st, 2013

Carl J. Hartmann, III
5000 Estate Coakley Bay, L-6
Christiansted, V.I. 00820



Nizar A. DeWood, Esq.

13 MAY 22 P 1:56

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

UNITED CORPORATION,

Plaintiff,

v.

**WAHEED HAMED,
(a/k/a Willy or Willie Hamed),**

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**DEFENDANT HAMED'S REPLY TO PLAINTIFF'S OPPOSITION TO THE
MOTION FOR JUDGMENT ON THE PLEADINGS**

The complaint in this case was filed in 2013, but seeks relief for two acts in the 1990's. The first act allegedly occurred wholly in 1992 (involving a competing grocery business) and the second occurred and was completed in 1995 (involving a dispute over \$70,000). By any calculation of time under 5 V.I.C. §31, the statute of limitations expired years ago as to both.¹ Because the complaint is barred by the statute of limitations on its face, defendant Hamed moved for judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)*.²

Without citation to authority, plaintiff filed an opposition asserting that the statute of limitations was tolled until 2013 as to the 1995 act. It asserts that plaintiff did not

¹ There are five counts in the complaint seeking relief for breach of fiduciary duty, constructive trust/recoupment, breach of contract, conversion and accounting. Pursuant to 5 V.I.C. §31, the statute of limitations for the torts claims is two years and six years for contract claims.

² Plaintiff's original certificate of service stated the opposition was served some time ago. However, a corrected certificate of service was filed. It states that the opposition was served on May 21, 2013. Thus, this reply is timely.

realize the meaning of its own accounting documents in its possession beginning in 1995. Without affidavits or other evidence, plaintiff's counsel argues plaintiff's 'discovery' of the meaning of records it had was somehow delayed because the federal government seized its accounting records between 2002 and 2011. In the opposition, plaintiff states:

5. As fully averred in Plaintiff's Complaint, the funds in question were discovered in late 2011. Plaintiff's Complaint states the following facts:

In October of 2011, upon information, a review of the U.S. Government records and files by the treasurer of Plaintiff United further revealed that without Plaintiff United's knowledge or consent, Defendant Waheed Hamed converted \$70,000 in cash belonging to Plaintiff United by purchasing a Certified Check, dated October 7th, 1995, made payable to a third party unrelated to Plaintiff United, or any of Plaintiff's business operations.

Complaint, ¶14.

This response is significant for two reasons.

First, the plaintiff concedes (and defendant agrees) this issue can be resolved solely by reference to the facts set forth on the face of the complaint—as the basis for its assertion that it just discovered the facts giving rise to this claim is set forth in paragraph 14. Courts in this jurisdiction have repeatedly held that a motion to dismiss based on the statute of limitations defense can be addressed on the face of the complaint if the essential facts are clearly stated. *Burton v. First Bank of Puerto Rico*, Civ. No. 554/2005, 2007 WL 2332084 at *3 (V.I. Super, July 19, 2007), *citing Vitalo v. Cabot Corp.*, 399 F.3d 536, 543 (3d Cir. 2005) ("where the facts are so clear that

reasonable minds cannot differ, the commencement period may be determined as a matter of law").

Second, while the plaintiff asserts that it just realized it has a claim against the defendant for \$70,000 based on funds accounted for in its 1995 records, it makes no similar claim as to the alleged 1992 act. Therefore, plaintiff concedes the limitation issue as to the 1992 act. The 1992 should be summarily dismissed.

Thus, the only question actually before this Court is whether the 1995 claim is time barred. While plaintiff does not direct this Court to any law to support its argument that the 1995 claim should be tolled, application of the 'discovery' issue in the Virgin Islands was discussed in detail in *In re Equivest St. Thomas, Inc.*, 53 Bankr. Ct. Dec. 260, 2010 WL 4343616, at *5-6 (Bankr. D.V.I. Nov. 1, 2010).

Generally, "a statute of limitations begins to run upon the occurrence of the essential facts which constitute the cause of action." *Simmons v. Ocean*, 544 F. Supp. 841, 843 (D.Vi.1982) (quoting *Wilcox v. Plummer's Executors*, (1830)). Under the law of the Virgin Islands, "application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim." *Joseph v. Hess Oil*, 867 F.2d179, 182 (3d Cir.1989). Thus, the discovery rule provides that the statute of limitations period begins to run when the "plaintiff has discovered, or by exercising reasonable diligence, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct." *Boehm v. Chase Manhattan Bank*, 2002 U.S. Dist. LEXIS 25238, *9, 2002 WL 31986128 (citing *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1124 (3d Cir.1997)).

The Court went on to explain that this is an "objective test":

The discovery rule is to be applied using an objective reasonable person standard. *Charleswell v. Chase Manhattan Bank, N.A.*, 2009 U.S. Dist. LEXIS 54519, *35, 2009 WL 1850650 (D.V.I.2009) (citing *In re Tutu Wells Contamination Litigation*, 909 F.Supp. 980, 984 (D.Vi.1995)). The Court of

Appeals for the Third Circuit explained the requisite "reasonable diligence" in *D.D. v. Idant Laboratories*, 2010 U.S.App. LEXIS 6815, *8–9, 2010 WL 1257705 (3d Cir.2010):

Reasonable diligence is an objective test, but it is also "sufficiently flexible ... to take into account the difference[s] between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question." *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850, 858 (Pa.2005) (citations omitted). Demonstrating reasonable diligence requires a plaintiff to establish that she displayed "those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others." *Wilson [v. El-Daief]*, 600 Pa. 161, 964 A.2d [354], 363 n. 6 [(Pa.2009)] (citation omitted).

This is well-established, black letter law. See, e.g. *Vitalo*, 399 F.3d at 543 (discovery rule requires qualities of attention, knowledge, intelligence and judgment which society requires of its members--subject knowledge is not sufficient to invoke the rule); *Burton*, 2007 WL 2332084 (applying an objective, rather than a subjective, standard when determining whether an individual demonstrated reasonable diligence in ascertaining the source of his injury).³

³ *Equivest* also addressed the doctrine of "equitable tolling" but the plaintiff has not argued that doctrine is applicable here, as it only argued that it did not 'discover' the facts giving rise to this claim until 2011. Equitable tolling involves factors not alleged by the plaintiff to have occurred here (which are applied pursuant to the same standards as tolling under the "discovery rule"), described in *Equivest, supra* at *6:

Equitable tolling may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.

Plaintiff clearly did not apply reasonable diligence, under the "objective standard," regarding a 2013 discovery of the 1995 claim for \$70,000 based on records in its possession beginning in 1995. The 2013 'discovery' involved the basic accounting records of a company from 1995. *Plaintiff offered no explanation as to why it "objectively" could not have discovered the loss of \$70,000 from its business in 1995 through 2001—during the six years when it had access to the basic accounting records before they were seized by the government.* (The complaint alleges this seizure occurred 9 years before 2011.) The statute of limitations had run before the seizure. (Moreover, the complaint makes it clear that even more time—easily exceeding a total of 7 years—passed if one adds the time *after* the documents were returned, to the initial period before the seizure!)

Burton v. First Bank of Puerto Rico is directly on point here. Plaintiff claimed she did not *realize* her bank had not cashed a check she had deposited to pay off her mortgage, but the Court held that where all of the information was in her possession, the failure to consider or understand the implications of the documents did not warrant the application of the discovery rule to toll the statute of limitations on her breach of contract and negligence claims against the bank. In reaching this conclusion, the court held that the plaintiff had not exercised reasonable diligence in recognizing that funds were still in the account, using an "objective' standard" in making this determination. The identical reasoning applies here, as *plaintiff certainly had its records available to it for over 6 years to ascertain this alleged loss of \$70,000 before the government seized*

the records. That time extends to over seven years if the time after return of the documents prior to 2013 is added.

In short, the plaintiff has failed to satisfy the burden on a party seeking such tolling. Clearly a plaintiff has to: (1) act within a total of 7+ years, and (2) present more facts to justify suspending the statute of limitations under the "objective test". Simply asserting it subjectively 'just learned' about an alleged claim is not enough. Otherwise any plaintiff could force any case to trial by just claiming ignorance, which is what the statute of limitations is intended to guard against.⁴

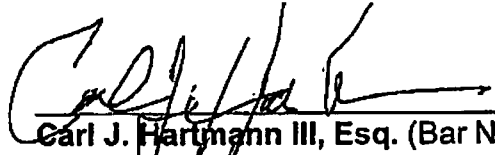
As there is no "objective basis" for concluding that the plaintiff acted diligently in determining the loss of this \$70,000 from its business, it is not entitled to the benefit of the "discovery rule" in pursuing these alleged claims (that occurred in 1992 and 1995) for the first time in 2013. The same analysis would apply under the "equitable tolling" rule as well, had the plaintiff raised it.

This 2013 complaint seeking relief for acts in 1992 and 1995 is time barred under the statute of limitations defense on its face. It should be dismissed.

⁴ For example, while completely irrelevant to the issues raised in this motion, the \$70,000 check in dispute was actually given as a donation to a private school in the Florida See Exhibit 1. As noted by the email from the lawyer who tracked this down, the school believes it was given by one of the shareholders of the plaintiff, Yusef Yusef. The point is that this information is now quite stale, which is one of the primary reasons for having a limitations period—to protect defendants from stale claims that are difficult to defend.

Reply with Regard to Defendant's Rule 12(c) Motion
Page 7

Dated: June 4, 2013



Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
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(340) 719-8941
carl@carlhartmann.com

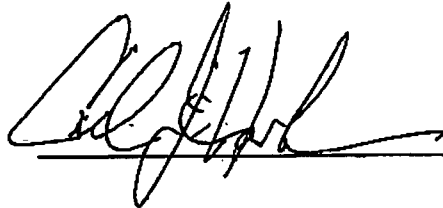
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2013, I served a copy of the foregoing Motion by hand on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820

and by Email on:

Joseph A. DiRuzzo, III
Fuerst Ittleman David & Joseph, PL
1001 Brickell Bay Drive, 32nd. Fl.
Miami, FL 33131
305-350-5690



Scotiabank 
THE BANK OF NOVA SCOTIA
TUTU PARK SHOPPING CENTRE
ST. THOMAS, U.S. VIRGIN ISLANDS

No 1629041546

80 142
457

October 3 2004
DATE

PAY TO ORDER OF ****Universal Academy of Florida****

\$70,000.00
U.S. DOLLARS

SUM OF US \$ **70,000.00**

SUM OF

TO:

PNC BANK, NATIONAL ASSOCIATION
JEANETTE, PA.

AUTH NO. THE BANK OF NOVA SCOTIA
AUTH NO. AUTHORIZED OFFICER
B. W. Hamer
AUTHORIZED OFFICER

⑈ 16 2904 1546 ⑈ ⑈ 043301627 ⑈ 0009596509 ⑈

EXHIBIT
A

054-0133

Willie Hamed

From: Randy Andreozzi <rpa@abfmwb.com>
Sent: Monday, July 02, 2012 12:26 PM
To: NejeH Yusuf (nejeh27@earthlink.net) (nejeh27@earthlink.net); Mike Yusuf (mikefyusuf@yahoo.com); Joel Holt (Holtvi@aol.com); joel@holtvi.com; dewoodlaw@gmail.com; Gordon Rhea; Pamela Colon (pamelalcolon@msn.com); smock@islands.vi; Wally Hamed (wallyhstx@yahoo.com); Wally (wally@plazaextra.com); willie@plazaextra.com; howard.epstein@freedmaxick.com; ron.soluri@freedmaxick.com; Randy Andreozzi
Cc: Tracy Marien
Subject: FW: Donation inquiry

Hello Everyone;

I am forwarding an email we received today from the Universal Academy of Florida regarding the inquiry on the \$70,000 payment to that institution. Mike or NejeH, would you please forward to Mr. Yusuf? Please call if you have any questions. You may also contact Ms. Paula Nawawi, the bookkeeper for the institution who was our contact. Her contact information is below.

Thanks and best regards,

Randy

*Randall P. Andreozzi
Partner
Andreozzi, Bluestein, Fickess, Muhlbauer Weber, Brown LLP
9145 Main Street
Clarence, New York 14031
Phone: (716) 565-1100
Fax: (716) 565-1920*

In accordance with IRS requirements, we inform you that any Federal tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

Notice of Privacy and Confidentiality: The information contained within this electronic mail is being sent by an attorney and is intended to be received and read only by certain individuals and is attorney-client privileged, confidential information and work product. It may

contain information that is privileged and/or protected from disclosure by law. No addressee should forward, print, copy, or otherwise reproduce this message in any manner that would allow it to be viewed by any individual not originally listed as a recipient without the consent of the author. If you have received this message in error, please notify me by replying and then delete both my message and your reply and destroy any paper copies. Thank you.

From: Tracy Marien
Sent: Monday, July 02, 2012 12:15 PM
To: Randy Andreozzi
Subject: FW: Donation inquiry

From: Paula Nawawi [<mailto:paulan@uaftampa.org>]
Sent: Monday, July 02, 2012 11:12 AM
To: Tracy Marien
Subject: Donation inquiry

Hey Tracy,

Regarding that donation, our former Principal says that she believes the donation was made by Yusuf Yusuf. We were asking for donations for trailers for the school, the cost of the project was \$270,000. and this man donated \$70,000.

Take care,

Paula Nawawi
Bookkeeper
Universal Academy of Florida
Ph: [813\)664-0695](tel:(813)664-0695) x1511
Fax: [813\)664-4506](tel:(813)664-4506)
Email: paulan@uaftampa.org

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

UNITED CORPORATON,

Plaintiff,

v.

**WAHEED HAMED,
(a/k/a Willy, Willy Hamed)**

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

PROPOSED STIPULATED SCHEDULING ORDER

COME NOW, the Parties by and through their counsel, and hereby stipulate and agree to the following Scheduling Order:

1. RULE 26 DISCLOSURES

The parties shall serve disclosures, pursuant to Fed. R. Civ. P 26(a)(i), by September 1, 2013.

2. FACTUAL DISCOVERY

All factual discovery, including written discovery and fact witness depositions, shall be completed by April 1, 2014.

2. PLAINTIFF'S EXPERT REPORTS

Plaintiff's expert disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2), if any, shall be submitted by May 1, 2014.

3. DEFENDANT'S EXPERT REPORTS

Defendant's expert disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2), if any, shall be submitted by June 30, 2014.

Stipulated Scheduling Order
Page 2

4. EXPERT DEPOSITIONS

Depositions of experts and other health care providers shall be completed by **July 30, 2014.**

5. MEDIATION

Mediation shall be completed not later than **September 1, 2014.**

6. MOTIONS

All dispositive motions shall be filed by **November 1, 2014.**

7. STATUS CONFERENCE.


A status conference will be held as scheduled by the Court

8. TRIAL DATE

A trial date will be scheduled by the Court.

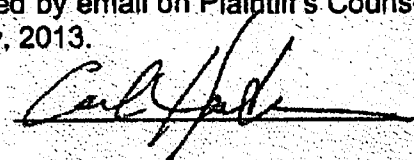
Counsel for the parties have conferred. Counsel for the Plaintiff, Nizar A. DeWood, Esq., 2006 Eastern Suburb, Suite 101, Christiansted, VI 00820, has agreed to undersigned counsel's the filing of this document for both -- by email dated Mon 7/1/2013

Dated: July 10, 2013


Carl Hartmann, Esq. (#48)
Counsel for the Defendant
5000 Estate Coakley Bay, # L-6
Christiansted, VI 00820
Telephone: (340) 719-8941
Email: carl@carlhartmann.com

CERTIFICATE OF SERVICE

A true and accurate copy of this document was served by email on Plaintiff's Counsel as per the agreement of the parties, this 10th day of July, 2013.



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

UNITED CORPORATION	)	CIV. NO. SX-13-CV-
)	
Plaintiff	)	ACTION FOR DAMAGES
	)	CIVIL ACTION
VS.)	
	)	AMENDED COMPLAINT
)	
WAHEED HAMED)	
<i>(a/k/a Willy, Willy Hamed)</i>	)	JURY TRIAL DEMANDED
)	
Defendant)	
<hr style="width: 40%; margin-left: 0;"/>)	

AMENDED COMPLAINT

Plaintiff United Corporation, hereinafter (“United”), and by and through its undersigned counsel complains of Defendant Waheed Hamed, hereinafter (“Hamed”) as follows:

I. BACKGROUND

1. This is a civil action for damages (both compensatory and punitive) recoupment, conversion, accounting, constructive trust, breach of contract, and breach of various fiduciary duties against Defendant Waheed Hamed, an employee of Plaintiff United. This complaint includes causes of action against Defendant Waheed Hamed for defalcating, and misappropriating significant funds belonging to Plaintiff United, arising out of Defendant Hamed’s tenure as manager of the operations of the Plaza Extra Supermarket store in St. Thomas, V.I. as well as other locations. Further, this civil action names John Doe 1-10 as persons who have worked knowingly, and jointly with Waheed Hamed in the commission of each of the causes of action alleged herein.

II. JURISDICTION, VENUE, & DEMAND FOR JURY TRIAL

2. This Court has personal jurisdiction, subject matter jurisdiction, and the amount in controversy is satisfied, pursuant to 4 VIC §76.
3. Venue is proper in the District of St. Thomas because the defendant is a resident of St. Thomas, Virgin Islands, and the facts underlying the causes of action arose in said District, pursuant to 4 VIC § 78.
4. A trial by jury is demanded pursuant to 4 VIC § 80.

III. THE PARTIES

5. Plaintiff United Corporation is a duly organized Virgin Islands Corporation since January of 1979, and is authorized to conduct business in the Virgin Islands. Plaintiff is *sui juris*.
6. Plaintiff is owned completely in various shares by Fathi Yusuf, Fawzia Yusuf, Maher Yusuf, NejeH Yusuf, Zayed Yusuf, and Yusuf, hereinafter collectively referred to as the “Yusuf Family”.
7. Defendant Waheed Hamed is a natural person and is a resident of St. Thomas, U.S. Virgin Islands. At all times relevant to this action, Defendant Hamed has been an employee of Plaintiff United.
8. Defendants John Doe 1 to 10, upon information, are employees, family, friends, and agents of Defendant Hamed who have participated and/or assisted defendant Waheed Hamed with the defalcation, conversion, and concealment of substantial assets that are the sole property of Plaintiff United. John Doe 1 to 10 may be both natural persons and/or incorporated or unincorporated associations/entities. Each is *sui juris*.

IV. FACTS

9. In 1992, Plaintiff United hired Waheed Hamed as an employee, and assigned him managerial duties at the Plaza Extra supermarket located in Tutu Park, St. Thomas, U.S. Virgin Islands. Defendant Hamed managed and collected significant cash and other assets on behalf of Plaintiff United during the course of his employment.

10. In 2003, Plaintiff United, Fathi Yusuf, Maher Yusuf, and Defendant Waheed Hamed, and the Defendant's brother Waleed Hamed, among others, were indicted in the case of *U.S. v United Corporation*, case no. 15-cr-2005 (D.V.I.).

11. During nine years of criminal proceedings, the U.S. Department of Justice and federal law enforcement (collectively the "U.S. Government"), gathered significant financial documents, including but not limited to tax returns, financial ledgers, accounting records, and various other documents concerning the parties herein. Prior to the release of the documents in October of 2010 to Plaintiff United, none of the officers of Plaintiff United had any actual or constructive knowledge of Defendant Hamed's conduct, financial affairs, or tax returns.

12. During a review and inventory of the documents and files delivered and returned by the U.S. Government to Plaintiff United, Plaintiff United reviewed documents comprising tax returns for Waheed Hamed, including but not limited to Defendant's tax returns for the years

13. With the exception of his salaried position with United Corporation, Defendant Waheed Hamed never had any other significant source of income from business operations, investments, etc., prior to or during his employment tenure with Plaintiff United.

14. Defendant Waheed Hamed owed an absolute duty of loyalty and care to United Corporation to act in its best interest and not to usurp any of Plaintiff's assets and business opportunity that would otherwise inure to Plaintiff's benefit.
15. A further review of Defendant Waheed Hamed's tax returns, including Defendant's 1992 Tax Return, obtained from the United States Government also revealed that Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart.
16. Defendant Waheed Hamed was never permitted to acquire, engage, or manage any business that may compete with the operations of the Plaza Extra Stores. Defendant Hamed never disclosed to his employer that he was operating a separate wholesale grocery business called "5 Corner's Mini Mart."
17. Defendant Hamed's sole income in 1992 did not exceed \$35,000, and Defendant Hamed never had any other businesses or employment to produce additional revenue to purchase and sell grocery inventory to other retailers.
18. The scale and scope of the wholesale business as indicated in Defendant Hamed's tax returns demonstrates substantial inventory, upon information, belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business.
19. To date, Defendant Waheed Hamed refuses to explain and account to Plaintiff United for any of the aforementioned funds, inventory, and the business opportunities Defendant Hamed diverted to his personal benefit.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION BREACH OF FIDUCIARY DUTIES

20. Plaintiff incorporates paragraphs 1 through 20 inclusive as if fully set forth verbatim herein.

21. As an agent and employee of Plaintiff United, a corporate entity, Defendant Waheed Hamed owes fiduciary duties to the entity. Included in the fiduciary duty is the duty of loyalty. Not only is it Defendant Waheed Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, he is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

22. Defendant Waheed Hamed has breached the following duties (the list of duties violated by Defendant Hamed, below is not intended to be an exhaustive or exclusive list):

- a. Duty of Loyalty
- b. Duty of good faith and candor;
- c. Duty to manage the day-to-day operations of Plaintiff United's Plaza Extra supermarket for the benefit of United;
- d. Duty of full disclosure of all matters affecting his employer Plaintiff United;
- e. Duty to refrain from self-dealing, and/or general prohibition against the fiduciary using his relationship to benefit his personal interest; and
- f. Duty to manage any funds, assets, and/or property belonging to Plaintiff United by virtue of its operation of the Plaza Extra Supermarket stores in accordance with applicable laws.

SECOND CAUSE OF ACTION

CONSTRUCTIVE TRUST/RECOUPMENT

23. Plaintiff incorporates paragraphs 1 through 23 as if fully set forth verbatim herein.

24. As an agent and employee of Plaintiff United, Defendant Hamed owes numerous fiduciary duties to Plaintiff United and its shareholders. Not only is it Defendant Hamed's duty to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United, but Defendant Hamed also is not permitted to place himself in a position where it would be for his own benefit to violate the duty.

25. Defendant Hamed has engaged in misappropriation of substantial and valuable assets of Plaintiff United causing substantial injury to Plaintiff United. As a result, Plaintiff United has sustained significant financial injury.

26. As such, a constructive trust should be imposed to gather and account for all assets misappropriated by Defendant Hamed that belongs to Plaintiff United.

THIRD CAUSE OF ACTION CONVERSION

27. Plaintiff re-incorporates paragraphs 1 through inclusive as if fully set forth verbatim herein.

28. Defendant Waheed Hamed has knowingly converted substantial funds and assets belonging to Plaintiff United. Plaintiff never consented or agreed to Defendant Hamed's unauthorized use of its funds and assets. As such, Defendant Hamed is liable for conversion.

FOURTH CAUSE OF ACTION BREACH OF CONTRACT

29. Plaintiff incorporates paragraphs 1 through 37 inclusive as if fully set forth verbatim herein.

30. Defendant was an at-will employee of Plaintiff United.

31. As an at-will employee of Plaintiff United, Defendant Hamed had a contractual duty to act in good faith, and to properly manage the business affairs of the Plaza Extra Supermarket stores for the benefit of Plaintiff United.

32. Defendant Hamed has breached his contractual duties to Plaintiff United, causing Plaintiff substantial economic and financial harm. As a result, Defendant Hamed is liable to Plaintiff for breach of contract.

SIXTH CAUSE OF ACTION ACCOUNTING

33. Plaintiff incorporates paragraphs 1 through 33 inclusive as if fully set forth verbatim herein.

34. As agent and employee of Plaintiff United, Defendant Hamed was under full contractual obligation and other fiduciary duties to perform his functions as a manager with competence, integrity, and honesty to Plaintiff United Corporation and its shareholders. Defendant Hamed was not permitted to place himself in a position where it would be for his own benefit to violate the duty.

35. Defendant Hamed has breached his employment contractual agreement with Plaintiff United by mismanaging, misappropriating, and converting funds, monies, and other valuables to his personal use. As a result, Plaintiff United has sustained substantial financial damages.

36. As such, Plaintiff United is entitled a full accounting of all monies, funds, and assets unlawfully appropriated by Defendant Hamed.

VI. RELIEF REQUESTED

Wherefore, Plaintiff United Corporation, and its shareholders, respectfully pray for the following relief:

- a. Actual and compensatory damages to be determined at trial.
- b. Punitive damages for the intentional defalcation of funds and damages caused to Plaintiff United Corporation.
- c. A complete accounting and constructive trust of all funds, assets, opportunities, and other valuables converted and or misappropriated by Defendant Hamed.
- d. Costs of all professional fees that may be required for the audit and investigation of this matter.
- e. A return of all documents, including but not limited to electronically stored information, belonging to Plaintiff United in the possession (both actual and constructive) of Defendant Hamed.
- f. A Restraining Order precluding Defendant Hamed from:
 - i. Physically returning, or attempting to return, to any of the Plaza Extra supermarket stores;
 - ii. Accessing, or attempting to access, any bank accounts belonging to United Corporation for any purpose;
 - iii. Contacting, or attempting to contact, any employee of Plaintiff United concerning the operations and management of the Plaza Extra Supermarkets;
 - iv. Preclude Defendant Waheed Hamed from contacting any business associates of Plaintiff United;
 - v. Preclude Defendant Waheed Hamed from representing to third-parties that he is an employee of Plaza Extra;

- vi. Accessing, or attempting to access, any of Plaintiff United's, including but not limited to the Plaza Extra Supermarkets, books, records, and information regarding as to location or manner of storage;
- vii. Attorney's fees, court costs, and any other relief the court deems equitable.

Date: July 15, 2013

Respectfully Submitted,

DeWood Law Firm
Counsel for Plaintiff United

By: /s/ Nizar DeWood
Nizar A. DeWood, Esq. (1177)
2006 Eastern Suburb, Suite 102
Christiansted, V.I. 00820
t. (340) 773-3444
f. (888) 398-8428

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's Amended Complaint was served on the Defendant via his counsel at the below address and date via EMAIL AND REGULAR CLASS MAIL.

Date: July 15, 2013

Carl J. Hartmann, III
5000 Estate Coakley Bay, L-6
Christiansted, V.I. 00820

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

of the total charges of the mediator as may be agreed upon, unless the mediator and/or the court determines that one party has not mediated in good faith.

6. Discovery may continue throughout mediation.

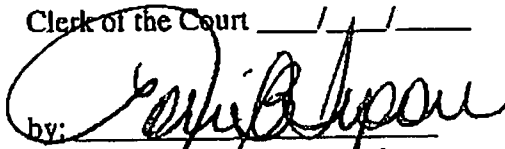
7. The parties shall mediate in good faith.


8. The parties shall cause the mediator to file a **Mediation Report** with the Court by **September 5, 2014**, failing which the parties shall notify the Court in writing of the outcome of the mediation by that date; and it is

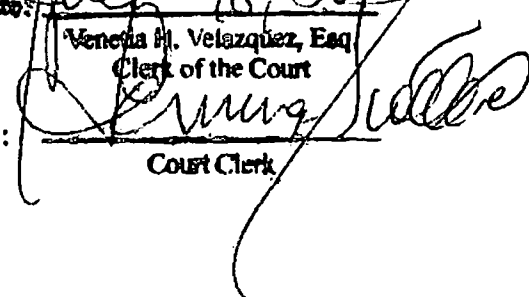
ORDERED that copies of this Order shall be directed to counsel of record.

Dated: July 18, 2013.

ATTEST: Venetia H. Velazquez, Esq.
Clerk of the Court

by: 
Lori Boyner-Tyson
Court Clerk Supervisor 7/18/13


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

CERTIFIED A TRUE COPY
Date: July 18, 2013
Venetia H. Velazquez, Esq.
Clerk of the Court
By: 
Court Clerk

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**ANSWER
TO FIRST AMENDED COMPLAINT**

COMES NOW defendant, Waheed Hamed, and states the following for his answer to the First Amended Complaint dated July 15, 2013.

1. With regard to the introductory statements of paragraph 1, they are not proper averments and are therefore denied.
2. Plaintiff states no factual basis for jurisdiction in paragraph 2. Therefore, Plaintiff is unable to respond and thus denies.
3. Defendant concedes that if there is a proper basis for jurisdiction, this is the proper district.
4. Defendant also demands a trial by jury.
5. Defendant does not have sufficient information to be able to answer the averments of paragraph 5, and therefore denies the same.

6. Defendant does not have sufficient information to be able to answer the averments of paragraph 6, and therefore denies the same.

7. Defendant admits that he is a natural person and resident of the USVI, but states that he is and has been at all times relevant to the amended complaint an employee of a partnership that operates three grocery stores under the name of "Plaza Extra" and therefore denies the balance of the averments.

8. Defendant denies the averments of paragraph 8.

9. Paragraph 9 restates averments of paragraphs 5 and 6. Defendant re-states his responses thereto.

10. Defendant admits the averments of paragraph 10.

11. Defendant does not have sufficient information to be able to answer the averments of paragraph 11, and therefore denies the same.

12. Defendant does not have sufficient information to be able to answer the averments of paragraph 12, and therefore denies the same.

13. Defendant admits that he is and was an employee of a partnership that operates three grocery stores under the name of "Plaza Extra" and therefore denies the balance of the averments in paragraph 13.

14. Defendant admits that he is an employee of a partnership that operates three grocery stores under the name of "Plaza Extra" and therefore denies the balance of the averments in paragraph 14.

15. Defendant knows of no review of his tax returns and therefore is unable to state what such a review did or did not reveal and therefore denies the averments of paragraph 15.

16. Defendant admits that he is an employee of a partnership that operates three grocery stores under the name of "Plaza Extra" and therefore denies the balance of the averments in paragraph 16.

17. Paragraph 17 is compound, and first assumes as a fact that it would have been necessary to have income in 1992 to "purchase and sell" anything. That is a false assumption and thus Defendant denies paragraph 17.

18. Paragraph 18 is compound, and first assumes facts that are untrue. Moreover the only Plaza Extra Supermarkets store in existence during the period asserted (1992) was the "East" store located at Sion Farm on St. Croix, which went out of business due to a devastating fire on January 4, 1992, and did not re-open until May of 1994, (the St. Thomas store did not open until October of 1993 and the "West" store well after that.) As a result there was no Plaza Extra Supermarkets Store to "misappropriate" from during the time of the alleged operation of the competing entity -- and the allegation asserts an impossibility.) Thus Defendant denies paragraph 18.

19. Defendant has no duty to either or explain nor account to United. Thus he has never been required to do so nor refused to do so. Thus Defendant denies paragraph 19.

20. Paragraph 20 restates prior paragraphs. Defendant incorporates his prior responses here.

21. Defendant admits that he is an employee of a partnership that operates three grocery stores under the name of "Plaza Extra" and therefore denies the balance of the averments in paragraph 21.

22. Defendant admits that he is an employee of a partnership that operates three grocery stores under the name of "Plaza Extra" and therefore denies the balance of the averments in paragraph 22.

23. Paragraph 23 restates prior paragraphs. Defendant incorporates his prior responses here.

24. Defendant admits that he is an employee of a partnership that operates three grocery stores under the name of "Plaza Extra" and therefore denies the balance of the averments in paragraph 24.

25. Defendant denies paragraph 25.

26. Defendant denies paragraph 26.

27. Paragraph 27 restates prior paragraphs. Defendant incorporates his prior responses here.

28. Defendant denies paragraph 28.

29. Paragraph 29 restates prior paragraphs. Defendant incorporates his prior responses here.

30. Defendant denies paragraph 30.

31. Defendant denies paragraph 31.

32. Defendant denies paragraph 32.

33. Paragraph 33 restates prior paragraphs. Defendant incorporates his prior responses here.

34. Defendant denies paragraph 34.

35. Defendant denies paragraph 35.

WHEREFORE, Defendant asks that Plaintiff take nothing by its Amended Complaint.

AFFIRMATIVE DEFENSES

1. The statutory limitation period with regard to the alleged bases of relief have passed.

2. Plaintiff has failed to state a claim upon which relief can be granted.

3. Plaintiff has failed to join a party under Rule 19.

4. Plaintiff has unclean hands and is therefore not entitled to recover.

5. Plaintiff is not a real party in interest.

6. Defendant asserts the affirmative defense of accord and satisfaction.

7. Defendant asserts the affirmative defense of arbitration and award.

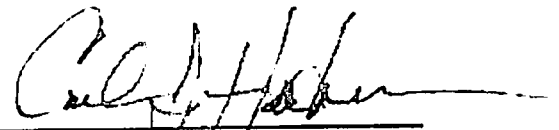
8. Defendant asserts the affirmative defense of estoppel.

9. Defendant asserts the affirmative defense of fraud
(as an equitable defense.)

10. Defendant asserts the affirmative defense of laches.

11. Defendant asserts the affirmative defense of license.
12. Defendant asserts the affirmative defense of release.
13. Defendant asserts the affirmative defense of failure to mitigate damages, or, alternatively mitigation of damages.
14. Defendant asserts the affirmative defense of offset.
15. Defendant asserts the affirmative defense of indemnity.
16. Defendant asserts the affirmative defense of unconscionability.
17. Defendant asserts the affirmative defense of ratification.
18. Defendant asserts the affirmative defense of lack of privity.
19. Defendant asserts the affirmative defense of acquiescence.
20. Defendant asserts the affirmative defense of agency.
21. Defendant asserts the affirmative defense of claim of right.

Dated: July 25, 2013



Carl J. Hartmann III, Esq.
Counsel for Defendant
5000 Est. Coakley Bay, L6
Christiansted, VI 00820
Email: carl@carlhartmann.com
Telephone: (340) 642-4422

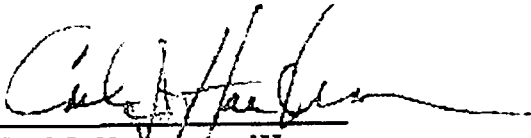
CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2013, I served a copy of the foregoing document by USPS and email on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820

And a courtesy copy by email (jdiruzzo@fuerstlaw.com) to:

Joseph A. DiRuzzo, III
Fuerst Ittleman David & Joseph, PL
1001 Brickell Bay Drive, 32nd. Fl.
Miami, FL 33131


Carl J. Hartmann III

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

DEFENDANT HAMED'S
MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant, Waheed Hamed, and moves this Court for summary judgment as to the sole remaining factual allegation contained in Plaintiff's *First Amended Complaint* of July 15, 2015, for the reasons set forth in the accompanying Memorandum of Law, to wit:


1. the time period for the bringing of an action based on an act in 1992 has long passed, and
2. there is no dispute as to the *sole operative fact* that, contrary to what Plaintiff previously represented to this 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 in 2011.

A Proposed Order is attached.

Motion
Page 2

RESPECTFULLY SUBMITTED,

Dated: January 31, 2014

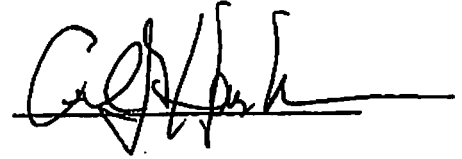


Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
(340) 719-8941
carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January April, 2014, I served a copy of the foregoing Motion by email, as agreed by the parties, on :

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820



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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

DEFENDANT HAMED'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT AS TO THE SOLE REMAINING CLAIM

I. Introduction

Defendant, Waheed Hamed, hereby moves for summary judgment as to the sole remaining factual allegation contained in Plaintiff's *First Amended Complaint* of July 15, 2015.

II. Procedural Posture

The original *Complaint* (filed March 5, 2013) alleged claims arising out of two acts:

- (1) Defendant's issuance of a \$70,000 payment (dismissed), and
- (2) that Defendant covertly participated in a competing grocery store in 1992.

On June 24, 2013, the Court dismissed the first claim and ordered the *First Amended Complaint* to be filed, limited to the remaining wrongful act -- Defendant's alleged 1992 involvement in the 5-Corners Mini-Mart.

With regard to this remaining factual allegation, in its June 24, 2013 *Memorandum Order*, at 9-10, the Court found Defendant's motion to be "premature" and provisionally allowed this remaining claim as follows:

Plaintiff's Complaint alleges that a review of Defendant Waheed Hamed's 1992 tax return revealed that "Defendant Hamed had engaged in a separate and secretive wholesale grocery business called 5 Corner's Mini Mart," and further that "Defendant Hamed's tax returns demonstrate substantial inventory ... belonging to Plaintiff United were misappropriated by Defendant Hamed to operate his wholesale business."³³ Again, Plaintiff argues that until October 2011, when the documents collected by the U.S. government in *U.S. v. United Corporation, et al.*, were given to Plaintiff, Plaintiff had no way of knowing of Defendant's alleged misconduct.³⁴

* * * *

Here, the Court finds that a review of the Complaint on its face reveals that the commencement period may not be determined as a matter of law and is rather a question of material fact.³⁵ Specifically, unlike Plaintiff's allegations regarding the October 7, 1995, certified check, the indictment in *U.S. v. United, Crim. No. 2003-147*, does not put Plaintiff on notice of this alleged wrongdoing because the indictment does not suggest that Defendant may have engaged in a secretive wholesale business. Instead, here, Plaintiff contends their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, a document to which Plaintiff previously did not have access. As such, *Defendant's motion is premature* with regard to Defendant's alleged misconduct in 1992, and Plaintiff's claims for breach of fiduciary duty, conversion, and breach of contract survive on these limited facts. However, despite this holding, moving forward Plaintiff still bears the burden of showing that Plaintiff exercised "reasonable diligence" under the discovery rule or doctrine of equitable tolling such that the statute of limitations was tolled until October 2011. While there are many defenses to plaintiff's complaint, the most obvious one is statute of limitations, which is properly raised by a Rule 12(c) motion. See, *5C Wright and Miller, Federal Practice and Procedure (2004)*, §1367 at p. 211 (with cases cited in n.9). (Emphasis added, text of footnotes omitted)

III. Facts Relevant to this Motion

As discussed below, the time period for the bringing of an action based on an act in 1992 has long passed. Summary judgment based on the statute of limitations is appropriate here because there is no dispute as to the *sole operative fact* that, contrary to what Plaintiff previously represented to this 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 in 2011. Moreover, there is no question that the document at issue (Defendant's 1992 tax return) was in that collection or that plaintiff took advantage of this access in that it repeatedly viewed the documents without restriction -- and repeatedly scanned and copied any documents it wished.

Defendant's tax document at issue here was seized by the FBI in its 2001-2003 collection of documents in the criminal case. (Plaintiff's tax returns, like all of the rest of the documents returned in 2011, bears the *sequential* Bates numbers of those collected documents. Because of this, there is no dispute that they were all in that collection in the government's possession.) 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.*, Crim. No. 2005-015 (DE 1148-1):

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.

and

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.

See Exhibit 1 (Emphasis added.) This unfettered access for United continued over many years, as noted by FBI Special Agent Christine Zieba. She personally watched Plaintiff's counsel access and review these documents over many weeks on subsequent occasions, as set forth in her *Declaration* in the same case. *See Exhibit 2.*

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

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.

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. There is no requirement that Defendant somehow prove Plaintiff looked at all of the documents to which it has such access. To the contrary, as discussed below, any exception is Plaintiff's burden.

IV. Law

a. Summary Judgment

As this Court is well-versed in the standard for summary judgment, defendant will not belabor the point. *See e.g. Machado v. Yacht Haven USVI, LLC*, 2012 WL 5894805, *1 (V.I.Super. 2102) ("Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Rule 7 of the Rules of the Superior Court, provides that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, a court must "draw ... all reasonable inferences from the underlying facts in the light most favorable to the non-moving party." An issue is

"genuine" if a reasonable jury could possibly hold in the non-movant's favor with regard to that issue.")

b. Statutes of Limitations

Plaintiff seeks relief for breach of fiduciary duty, constructive trust/recoupment, conversion, breach of contract, conversion and accounting. The statute of limitations has expired on all five of these counts. Chapter 3 of Title 5 of the Virgin Islands Code provides the statutes of limitations for all of these causes of action expire after 6 years or less pursuant to 5 V.I.C. §31 (e.g., 6 years for contract, 2 years for conversion, etc.) Clearly more than 6 years have passed since the dates of both the alleged wrongdoings in 1992 and the beginning of unfettered access to all relevant documents in 2003. The date of physical return in 2011 is irrelevant.

Likewise, regarding the equitable claims such as constructive trust/recoupment and accounting, 5 V.I.C. § 32(a) provides:

- (a) An action of an equitable nature shall only be commenced within the time limited to commence an action as provided in this chapter.

Thus, since none of the counts involve claims related to real property, the equitable claims are also time barred since they are over 6 years old without the need to decide whether a more specific statute of limitations applies.

c. Exceptions to Statutes of Limitations

The applicable law has been clearly set forth by this Court. At 5-6 of this Court's *Memorandum Opinion*, it observed the following regarding Plaintiff's burden here::

Ordinarily, "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.¹⁹ While Plaintiff's reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant

argues that Plaintiff's argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by exercising reasonable diligence, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.²⁰⁽¹⁾ (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.²¹⁽²⁾ However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, the Plaintiff must demonstrate "that he or she could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim."²²⁽³⁾ (emphasis added). To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an "objective reasonable person standard."²³⁽⁴⁾ (Emphasis added.)

¹ 20 [Footnote in original] *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir.1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I 2002)) (internal citations and quotations omitted).

² 21 [Footnote in original] *Id.* at *6.

³ 22 [Footnote in original] *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir.2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir.1994))).

⁴ 23 [Footnote in original] *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) ("[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. Rather, it is whether a diligent investigation would have revealed it.")(internal citations and quotations omitted).

V. Argument

There is no dispute that the factual basis for the five counts alleged in the *Amended Complaint* all occurred in 1992. Thus, they fall within and are time-barred by the applicable statutes of limitations. Plaintiff has the burden to show an exception to the statutes of limitations. To do so, United raised the lack of access to the documents. The Court allowed this sole factual issue to remain pending an examination of that access.


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. Thus, there is no set of facts under which Plaintiff can carry the burden of showing that lacked such access -- that it "could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim." All Plaintiff or its counsel had to do was copy and/or read the documents. The fact that they were located outside of Plaintiff's physical premises or that Plaintiff (or its counsel) did not focus on the issues here at that time is irrelevant.

VI. Conclusion

As such, summary judgment should be granted.

RESPECTFULLY SUBMITTED,

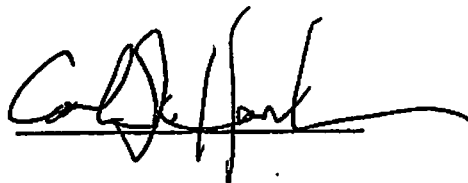
Dated: January 31, 2014


Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
(340) 719-8941
carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2014, I served a copy of the foregoing Motion by email, as agreed by the parties, on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820

A handwritten signature in black ink, appearing to read "Nizar A. DeWood", written over a horizontal line.

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, Nejeah 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

4420752.1

HAMD247566

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

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HAMD247567

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 building 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.

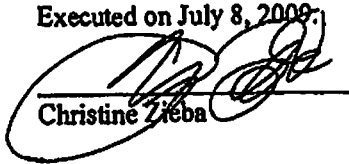
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Subsequent to the shelving of the original of the first box, it was discovered that the defense team had left a document on the scanner and had not returned it to the original box. The document was taken from one of the defense team and returned to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

4420755.1

HAMD247569

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

JUDGMENT

THIS MATTER having come on before the Court on the motion for summary judgment of Defendant, Waheed Hamed, and the Court being fully apprised of the premises, it is hereby:

ORDERED and ADJUDGED:

1. The Counts applicable to the sole remaining factual averment with regard to the 5-Corners Mini-Mart are dismissed with prejudice.

Dated:

HON. MICHAEL C. DUNSTON
Judge of the Superior Court
of the U.S. Virgin Islands

ATTEST:
Clerk of Court
Deputy Clerk

By: _____
Deputy Clerk

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.: ST-13-CV-101

MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF'S
RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ORAL ARGUMENTS REQUESTED

14 APR -7 P5:00

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

COMES NOW Plaintiff United Corporation ("United") and respectfully opposes Defendant Waheed Hamed's Summary Judgment Motion. Defendant's summary judgment motion repeats the same rejected argument as to Plaintiff's second cause of action previously raised in his Rule 12(c) Motion. Just as that argument was rejected then, it should be rejected now. The court should also deny Defendant Hamed's Summary Judgment Motion on the following additional grounds:

- 1) Pursuant to Fed. R. Civ. 56(d), this honorable court should 1) defer considering the [summary judgment] motion or deny it, or 2) allow time to obtain affidavits or declarations or to take additional discovery. In opposition to Defendant's summary judgment Motion, Plaintiff United attaches a Rule 56(d) Declaration from Fathi Yusuf, treasurer and secretary of United Corporation.
- 2) Contrary to Defendant's assertion, a genuine issue of material fact exists as to whether Plaintiff had possession, access, or even reason to know of Defendant Hamed's tax returns.

- 3) Plaintiff has received absolutely no responsive discovery to Plaintiff's Interrogatories, Request for Production of Documents, and Request for Admissions. A Rule 37 conference was held on March 28th, 2014, and a Rule 37 Letter will follow shortly. Therefore, discovery is nowhere near complete. As such, Defendant's summary judgment motion is both premature and should be denied at this stage.

- 4) Plaintiff is awaiting the release of substantial document from the United States Attorney's Office in the case of *United States v. United Corporation (1:05-CR-15)*. See *Affidavit of Fathi Yusuf*, **EXHIBIT A**; Those documents are critical to rebut Defendant's grounds for summary judgment. As such, the court should deny at this point Defendant's Motion for Summary Judgment.

For the reasons outlined above and fully addressed below, it is respectfully requested that Defendant's Motion for Summary Judgment be denied.

II. FACTS RELEVANT TO THIS MOTION

On March 5th, 2013, Plaintiff United sued Defendant Waheed Hamed for breach of contract, conversion, and breach of various fiduciary duties. The original complaint sought recoupment and accounting regarding two known financial improprieties: the first, an unauthorized money order in the amount of \$70,000 discovered in Waheed Hamed's FBI folder, the second, a full accounting of all funds used by Defendant Waheed Hamed to operate a retail grocery business called 5 Corners Mini Market using Plaintiff United's funds. The Court dismissed the first cause of action concerning the \$70,000 check United alleged was purchased by Defendant from Plaintiff United's funds. The court memorandum opinion cited Defendant's acquisition of

checks and other negotiable instruments for cash in the various criminal counts of the indictment against Defendant Waheed Hamed as reasonable notice to Plaintiff United. As to the second cause of action, the court rejected Defendant's argument as premature that Plaintiff had reason to know of Waheed Hamed's tax returns.

On November 15th, 2013, Plaintiff served upon Defendant Waheed Hamed its interrogatories, request for production of documents, and request of admissions. On February 12th, 2014, Defendant Waheed Hamed responded to Plaintiff's discovery requests. Unfortunately, no responsive discovery was received. Defendant Hamed discovery responses can be summarized as follows: "I cannot recall" and "Objection due to relevance."

On March 28th, 2014, counsel for the parties conducted a Rule 37 conference. Due to the complete non-responsiveness of Defendant to Plaintiff's discovery request, Plaintiff is in the process of serving a voluminous Rule 37 demand letter upon Defendant. **As such, discovery here is simply not complete.** Additionally, during the course of this matter, Plaintiff has been awaiting the release of tens of thousands of financial documents seized by the U.S. Government in the case of *United States v. United Corporation (05-cr-15)*. Waheed Hamed who is a co-indictee is fully aware of the existence, location, and custody of these documents; however, in a race against time, Defendant Hamed seeks to dismiss this matter on statute of limitations grounds notwithstanding that discovery is not complete and that the documents in the possession of the U.S. Attorney's Office were never received by the Plaintiff. Thus, a separate Motion to Extend Scheduling Order to address the serious discovery issues in this matter will be filed shortly.

In his Summary Judgment Motion, Defendant Hamed repackages the same rejected arguments raised in his previous Rule 12(c) Motion to Dismiss - mainly that 1) the time period for

the bringing of an action based on an act in 1992 has long passed, and 2) that Plaintiff 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 in 2011. Defendant's assertions are sadly misleading and based on speculation. Based on the grounds below Defendant's Motion for Summary Judgment should be denied.

III. ISSUES BEFORE THE COURT

1. **Whether Defendant's Summary Judgment Motion should be denied because of the existence of a genuine issue of material facts as to Plaintiff's lack of knowledge, access, or reason to know about Defendant Waheed Hamed's tax returns?**
2. **Whether the doctrine of equitable tolling applies such that the statute of limitations for the various causes of action in Plaintiff United's complaint are tolled?**

IV. ARGUMENTS

- I. **THE COURT SHOULD DENY DEFENDANT'S SUMMARY JUDGMENT MOTION BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTS AS TO PLAINTIFF'S LACK OF ACCESS, KNOWLEDGE AND/OR REASON TO KNOW OF DEFENDANT'S TAX RETURNS.**

Background: Summary Judgment

Summary judgment is appropriate when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment will not be denied based on mere allegations or denials in the pleadings; instead, some evidence must be produced to support a material fact. *U.S. v. Premises Known as 717 S. Woodward Street*,

Allentown, Pa., 2 F.3d 529, 533 (3d Cir.1993). However, the Court will view the evidence and draw any reasonable inferences in the light most favorable to the nonmoving party. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). In response to a motion for summary judgment, the nonmoving party can file a Rule 56(d) declaration. Fed. R. Civ. P. 56(d) provides: If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

In the declaration, a party must specify: (1) what particular information is sought; (2) how, if uncovered, it would preclude summary judgment; and (3) why it has not previously been obtained. *Pa., Dept. of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir.2012)(citing *Dowling v. City of Phila.*, 855 F.2d 136, 139–40 (3d Cir.1988)). If a party opposing summary judgment files an affidavit that specifically addresses these requirements, the Third Circuit has held that “a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course,” especially when particular information is in the sole possession of the moving party. *Malouf v. Turner*, 814 F.Supp.2d 454, 459–60 (D.N.J.2011) (quoting *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir.1984)).

Here, the facts as outlined in Plaintiff's Declaration meet the requirements of a Rule 56(d); as such, this court should continue or deny the motion for summary judgment, at this point, as a matter of course.

1. The Particular Information Sought

As stated previously, Plaintiff is seeking all documents seized by the United States Attorneys' office in the case of United States v. United Corporation (05-cr-15). These documents may reveal when, where, and how Defendant Waheed Hamed's tax returns were made available to Plaintiff or its counsels. Despite repeated efforts by United to bring this matter to conclude this matter and to release the tens of thousands of documents currently held by the U.S. Attorney's Office, the court should continue the Summary Judgment motion. Thus, because Plaintiff has no control over these documents, and is at the mercy of the District Court's calendar, this honorable court should defer adjudication or deny Defendant's Motion for Summary Judgment.

The information being sought, if uncovered, would preclude summary judgment;

Defendant Hamed's Summary Judgment motion reasserts the previously rejected argument that Plaintiff United had reason to know of Defendant Waheed Hamed's tax returns. However, the only thing that Defendant can only point to are general Affidavits of FBI agents that do not specify which documents were made available to Plaintiff United. Also these Declarations do not identify which attorney copied what, and whether Waheed Hamed's tax returns were in any of the boxes that were inspected by the defense attorneys. None of the Affidavits of the FBI agents specifically mention Waheed Hamed's tax returns or any other information regarding his operations of the grocery retail business called "5 Corner Mini Mart." To address Defendant's speculations and insinuation that Plaintiff had reasonable access to Defendant Waheed Hamed's tax returns, Plaintiff will need to review all the records seized as they pertain to Defendant Waheed Hamed. Finally, it is worth repeating that because Plaintiff has received virtually no responsive discovery, and Rule 37 discussions are ongoing, the Court should deny the Summary Judgment at this point.

Reason Why Information Was Not Previously Available.

As to the third requirement of a Rule 56(d) declaration, the reason why the required information to rebut Plaintiff's Motion was not previously available and remains unavailable is because these documents are in the possession of the United States Attorney's Office. See Affidavit of Fathi Yusuf, as EXHIBIT B.

II. THE DOCTRINE OF EQUITABLE TOLLING, AND THE DISCOVERY RULE APPLIES AS TO TOLL THE STATUTE OF LIMITATIONS FOR PLAINTIFF'S CAUSE OF ACTION.

The Equitable Tolling of the Statute of Limitations of Plaintiff's Claims.

Defendant argues that the statute of limitations applies in this case since the action is based on an act in 1992, and that "Plaintiff had complete access to all of the documents in possession of the U.S. Government." Def. SJM, p 3. Despite this sweeping and unsupported allegation, Defendant fails to cite any proof of how, when, and where the Plaintiff, through its counsel, had access specifically to Waheed Hamed's 1992 tax returns. Defendant attaches the Declaration of FBI Agents Thomas L. Petri and Christine Zieba. These Declarations make general claims of access to evidence or documents by defense attorneys. However, these allegations are vague and general in nature, and do not specifically address Waheed Hamed's tax returns. Also, these FBI agents are unavailable witnesses at this point. Plaintiff cannot properly depose them, or obtain an information by way of subpoenas. Those Declarations are not evidence, and could be false,

inaccurate, and/or erroneous. Thus, Plaintiff cannot be constrained by Declarations made five (5) years ago that do not address Waheed Hamed's tax returns.

Moreover, both Declarations refer to attorney Randall Andreozzi's request to review documents, and his failure to "pursue the matter." In his arguments, Defendant conveniently omits ¶11, which states the following:

"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.**"

See Declaration of FBI Agent Thomas L Petri, ¶11, Exhibit D (relevant portion highlighted)
See Declaration of FBI Agent Christine Zieba, ¶11, Exhibit E (relevant portion highlighted).

The Declarations show that Attorney Andreozzi needed a "subpoena" in 2009 to request documents. This begs the question of why would Andreozzi need a subpoena if as Defendant contends the documents were always available to Plaintiff through its attorneys. Clearly, these documents were not available for inspection without a subpoena. Defendant's cherry picking and selective presentation of evidence is calculated to present a misleading view of the real facts. Both Declarations demonstrate that in fact no review and/or identification of documents was done by Attorney Andriozzi. If anything both of these Declarations clearly state that Attorney Andriozzi did not "pursue the matter" i.e., the documents that he was seeking. This directly contradicts Defendant Waheed Hamed's assertion that Plaintiff knew or had to reason to know of Waheed Hamed's tax returns. *Affidavit of Fathi Yusuf*, ¶¶ 3, 5, 6. It was only when the FBI returned on a hard drive a small portion of the documents they seized that Plaintiff United became aware in October of 2011 of the existence of Waheed Hamed's financial improprieties. *Affidavit of Fathi*

Yusuf, ¶2. Indeed when afforded the chance to review documents, Plaintiff took immediate action to review the documents that were provided by the FBI. *Affidavit of Fathi Yusuf*, ¶2. However, prior to the release of the documents in October 2011, Plaintiff simply had no way of knowing or reason to know that such documents ever existed. Defendant of course would have the court believe that these documents were ready for inspection and review because they were "bate stamped." Defendant engages in pure speculation, and declines to include paragraph 11 of both FBI Agent's Declarations in his Motion.

Additionally, nothing in the attached Declarations provide an inventory of what documents were available at the time for inspection. In other words, we don't know if Waheed Hamed's tax returns would have been available for inspection on January 2009, or whether another agent placed those documents on a hard drive from another source in 2010 or 2011. No one even knows which attorneys were present at the evidence review meetings with the FBI, and what documents in fact were available for inspection. Defendant Waheed Hamed of course assumes that his tax returns existed somewhere in these 40 boxes of documents and were available for inspection by attorney Andriozzi since the indictment in 2003. Not only is this pure speculation, but is inconsistent with ¶11 of the Declarations.

V. CONCLUSION

For the reasons stated above, the Court should either continue the Summary Judgment Motion or deny it at this point pending additional discovery.

Dated: April 7, 2014

Respectfully Submitted,
THE DEWOOD LAW FIRM
Counsel for Plaintiff

By: _____


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Email: dewoodlaw@gmail.com

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT a true and exact copy of the foregoing was served
via electronic mail on this 7th day of April 2014:

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


Nizar A. DeWood, Esq.

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

UNITED CORPORATION	)	CIV. NO. SX-13-CV-101
)	
Plaintiff)	
)	
VS.	)	ACTION FOR DAMAGES
	)	CIVIL ACTION
)	
	)	JURY TRIAL DEMANDED
)	
WAHEED HAMED)	
(a/k/a Willy, Willy Hamed))	
)	
Defendant)	

AFFIDAVIT OF FATHI YUSUF

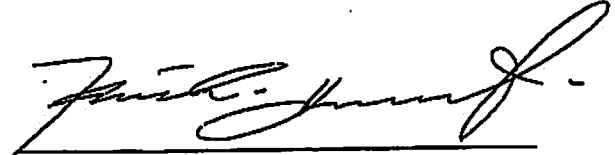
I, Fathi Yusuf, duly sworn and under oath pursuant to 28 USC ¶1746, and Super. Ct. R. 18, under the penalties of perjury, hereby attest that following is true and correct:

1. I am the treasurer and secretary of United Corporation. I am the person in charge of the overall operations of Plaza Extra. I supervise the various managers at the Plaza Extra stores.

2. I received a hard drive sometime in October of 2011 from the FBI with thousands of scanned documents. That was only a small part of the file the FBI had in this case. As the treasurer, I reviewed the documents on the hard drive shortly after I received it. During my review, I found scanned copies of Waheed Hamed's tax returns. The returns showed a business called 5 Corner Mini Mart. United never knew of this business, and where Defendant got the money to operate it, and buy the necessary inventory.

3. Since the indictments in 2003, I have never had access to any of the documents that the Office of the U.S. Attorney and FBI had. Waheed Hamed was represented by Attorney Pamela Colon. Attorney Colon never shared with me any documents regarding Waheed Hamed.
4. None of my attorneys or any other attorney that was part of the joint defense team ever produced Waheed Hamed's tax returns to United Corporation.
5. The allegation that Waheed Hamed's tax returns were available for inspection by my attorney or by the attorneys of United Corporation, is not true. At no time did any corporate officer of United received or had any knowledge of Waheed Hamed's tax returns.
6. Even the Declarations of both FBI agents that Waheed Hamed used to support his summary judgment motion shows that the documents were required to be subpoenaed as late as January 2009. Both agents said that attorney Randall Andriozzi never followed up, and that no documents were identified.
7. I do not know whether the agent's version of the story is true, or not. However, until I received the hard drive from the FBI, I along with the officers of United Corporation never knew or had any reason to know of the existence of Waheed Hamed's tax returns.
8. To date, United Corporation is waiting for its sentencing so that it can receive back the tens of thousands of seized documents from the U.S. Attorney's office. The sentencing has been delayed due to the tax obligations of Waleed and Waheed Hamed. The United States Attorneys' Office agreed to release all of the documents seized during the criminal case beginning in 2001 once sentencing is completed.
9. The documents seized by the FBI were never returned to United Corporation since 2001. Because of that United Corporation still does not have all the financial documents regarding Waheed Hamed, including additional information regarding the 5 Corner Mini Mart grocery retail business Defendant Waheed was operating.
10. I attest the information here is correct.

Date: April 7, 2014

A handwritten signature in black ink, appearing to read 'Fathi Yusuf', written over a horizontal line.

Fathi Yusuf,
United Corporation
Treasurer and Secretary

100-1-10-11

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.:2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

DEFENDANT WAHEED HAMED'S REPLY WITH REGARD TO
HIS MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff brought suit based two sets of alleged acts -- the first occurred in 1992 and the second in 1995. This Court previously dismissed the 1995 acts based on the obvious statute of limitations defense. At the time of that dismissal, the Court declined to similarly dismiss as to the 1992 claim; but only because plaintiff alleged that it did not have access to documents in the U.S. Government's control, holding:

Plaintiff contends their suspicions arose only when they obtained Defendant's 1992 tax return in October 2011, a document to which *Plaintiff [contends it] previously did not have access.* (Emphasis added.)

Summary judgment is, therefore, sought regarding the 1992 claim. Two contemporaneous FBI affidavits have been submitted stating that plenary access was fully available to Plaintiff's counsel. Plaintiff responds with a Fathi Yusuf affidavit (Opposition

Exhibit A) stating that he did not see the document. He avers no actual personal knowledge as to what documents his attorney did or did not see or have access to.

But mainly, to try to avoid summary judgment, Plaintiff asks that discovery be reopened pursuant to Rule 56(d) for three (incorrect) reasons:

1) "a genuine issue of material fact exists as to whether Plaintiff had possession, access, or even reason to know of Defendant Hamed's tax returns."

because

2) "Plaintiff has received absolutely no responsive discovery to Plaintiffs Interrogatories, Request for Production of Documents, and Request for Admissions. (Emphasis added.)

and

Plaintiff is awaiting the release of substantial document [sic.] from the United States Attorney's Office in the case of *United States v. United Corporation*. See *Affidavit of Fathi Yusuf*,

I. Facts

The parties submitted a joint proposed Scheduling Order *with dates and times altered to accommodate plaintiff*. There Court thereafter entered the stipulated Scheduling Order which provided:

FACTUAL DISCOVERY. All factual discovery, including written discovery and fact witness depositions, shall be completed by April 1, 2014.

Both parties promulgated a full spread of discovery -- interrogatories, requests for documents and requests for admissions. Both parties then answered the full spread of

discovery.¹ (MANY of the discovery questions promulgated by Plaintiff dealt with questions about, or requests for documents in or about 1992. Thus, many of the responses were "I did not keep records from 22 years ago" or "I cannot recall.") Thereafter, both parties requested Rule 37 conferences. Rule 37 conferences were held separately on both parties' sets of Rule 37 notifications.²

Moreover, *the instant motion was filed in January of this year.* Instead of replying within the time allowed, Plaintiff asked for and received extensions during which it could have filed any discovery, taken additional depositions³ or filed discovery motions. The stated purpose for the needing more than **two months** to reply was to allow plaintiff to complete whatever it felt necessary to fully reply.

The final such extension was to April 7, 2014 -- at which time the reply was filed, essentially asking for more extensions. No motions to enlarge discovery were requested as plaintiff already had the extra time allotted under its other time requests.

Only after the time allowed for discovery lapsed, did plaintiff file its reply.

¹ Plaintiff had defendant's responses for more than a month before the Opposition was filed.

² The parties discussed and agreed to have the issues set forth in a letter that plaintiff was to write prior to the end of the discovery date (as had been done with regard to the other Rule 37 conference) -- but did not do so.

³ Plaintiff cleverly words its reply, but tacitly admits that it did not seek discovery, serve subpoenae or otherwise attempt in any manner to take depositions of the FBI agents whose contemporaneous sworn affidavits in another proceeding are before the Court. Having the burden with regard to the non-access/statute of limitations it is Plaintiff's burden to prove *reasonable* lack of access, not Defendants to prove the contrary.

III. Argument

This Court has stated the applicable law -- which is patently clear:

Ordinarily, "a statute of limitation begins to run upon the occurrence of the essential facts which constitute the cause of action" unless the statute of limitations has been tolled.¹⁹ While Plaintiff's reply fails to address under which legal standard they contend the statute of limitations period was tolled, Defendant argues that Plaintiff's argument fails under both the discovery rule and the doctrine of equitable tolling. Specifically,

Under the law of the Virgin Islands, application of the equitable 'discovery rule' tolls the statute of limitation[s] when the injury or its cause is not immediately evident to the victim. Thus, the discovery rule provides that the statute of limitations period begins to run when the plaintiff has discovered, or by exercising reasonable diligence, should have discovered (1) that she has been injured, and (2) that this injury has been caused by another party's conduct. The discovery rule is to be applied using an objective reasonable person standard.^{20[4]} (emphasis added)

On the other hand, equitable tolling may apply "where the defendant has actively misled the plaintiff," as Plaintiff here alleges in the Complaint.^{21[5]} However, similarly to the discovery rule, for a Plaintiff to invoke equitable tolling, **the Plaintiff must demonstrate "that he or she could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim."**^{22[6]} (emphasis added). To determine whether a person has exercised reasonable diligence under either the discovery rule or doctrine of equitable tolling, courts employ an "objective reasonable person standard."^{23[7]} (Emphasis added.)

⁴ 20 [Footnote in original] *In re Equivest St. Thomas, Inc.*, 2010 WL 4343616, at *5 (D.V.I. Nov. 1, 2010) (quoting *Joseph v. Hess Oil*, 867 F.2d 179, 182 (3d Cir. 1989) and *Boehm v. Chase Manhattan Bank*, 2002 WL 31986128, at *3 (D.V.I. 2002)) (internal citations and quotations omitted).

⁵ 21 [Footnote in original] *Id.* at *6.

⁶ 22 [Footnote in original] *Id.* (citing *In re Mushroom Transp. Co., Inc.*, 382 F.3d 325, 339 (3d Cir. 2004) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir. 1994)).

The Court's footnote 23 makes this even clearer:

23 [*Footnote in original*] *Id.*; see also *Riley v. Medtronic, Inc.*, 2011 WL 3444190 (W.D. Pa. Aug. 8, 2011) ("[T]he applicable standard is not whether the Plaintiff subjectively knew of the cause of the injury. **Rather, it is whether a diligent investigation would have revealed it.**")(internal citations and quotations omitted). (Emphasis added.)

Thus it is plaintiff's burden to "demonstrate" some factual basis for believing that "[it] could not, by the exercise of reasonable diligence, have discovered essential information bearing on his or her claim."

This is a 1992 event, it is based on 22 year-old memories and plaintiff is seeking to try to prove its case solely by fishing for plaintiff's own 22 year old, non-existent documents. These are documents that nobody would keep -- documents from before Marilyn, Georges, Lenny and Omar. There simply are no more responsive documents.

Moreover it is uncontested that the sole Plaza Extra Store (East) burned down on in January, 1992, and did not even re-open until more than a year later. This means that not only all applicable business records burned, but that *Plaza Extra was not even open during 1992 or most of 1993 when this was supposed to have happened.* No more discovery is warranted because there is not even the faintest indication that defendant has any such documents -- he does not.

Finally, in the face of two sworn FBI affidavits which state that plaintiff and their counsel **absolutely and positively had access to ALL of the documents in the government's possession**, and the admission that plaintiff got the 1992 tax returns from the government -- more discovery should be allowed because . . . because why? Having

the burden, plaintiff should have done some fact discovery or Rule 45 depositions. Plaintiff states:

Defendant fails to cite any proof of how, when, and where the Plaintiff, through its counsel, had access specifically to Waheed Hamed's 1992 tax returns. Defendant attaches the Declaration of FBI Agents Thomas L. Petri and Christine Zieba. These Declarations make general claims of access to evidence or documents by defense attorneys. (Emphasis added.)

Defendant fails? Leaving aside the fact that this is plaintiff's burden and that plaintiff has supplied no affidavits of anyone with personal knowledge supporting such a lack of ACCESS, the Yusuf affidavit contests actual possession of the specific document rather than access, and is just legally irrelevant. The document was clearly in the government's collection -- *plaintiff admits that is where it came from*. And two FBI agents recite not only the fact that ALL collected documents were made available -- but that Plaintiff's counsel went through, copied and scanned *many times*. Did he see this exact document? Again, not the question.

a. Plaintiff's statements in Reply are completely unsupported of record.

Below are Plaintiff's verbatim statements (italicized text) made in opposition -- with Defendant's reply to each:

On November 15th, 2013, Plaintiff served upon Defendant Waheed Hamed its interrogatories, request for production of documents, and request of admissions. On February 12th, 2014, Defendant Waheed Hamed responded to Plaintiff's discovery requests. Unfortunately, no responsive discovery was received.

Defendant's Response: (1) Responsive discovery was most certainly received, and (2) no motion for enlargement of time for discovery was filed on a timely basis.

Additionally, during the course of this matter, Plaintiff has been awaiting the release of tens of thousands of financial documents seized by the U.S. Government in the case of United States v. United Corporation (05-cr-1 5). Waheed Hamed who is a co-indictee is fully aware of the existence, location, and custody of these documents. (Emphasis added.)

Defendant's Response: (1) Plaintiff's lawyers have had access to these documents and the opportunity to review them for more than a decade -- something plaintiff does not dispute by any method or submission of record, (2) there is no showing what the relevance is here and (3) plaintiff has not sought to depose the FBI agents or dispute the access by its attorneys.

however, in a race against time, Defendant Hamed seeks to dismiss this matter on statute of limitations grounds

Defendant's Response: What race against time ? Plaintiff stipulated to a scheduling order, (2) Plaintiff has been given all extensions requested, (3) plaintiff has had over two months since this motion was filed but sought neither Rule 45 inquiry nor an extension of discovery.

Defendant's assertions are sadly misleading and based on speculation.

Defendant's Response: The FBI affidavits are neither misleading nor speculative. And it is plaintiff's burden here that is important -- so defendant's assertions are not the issue.

In response to a motion for summary judgment, the nonmoving party can file a Rule 56(d) declaration. Fed. R. Civ. P. 56(d) provides: If a non-movant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to

justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery;

or

(3) issue any other appropriate order.

In the declaration, a party must specify: (1) what particular information is

sought; (2) how, if uncovered, it would preclude summary judgment; and (3) why it has not previously been obtained. Pa., Dept. of Pub. Welfare v. Sebelius, 674 F.3d 139, 157 (3d Cir.2012)(citing Dowling v. City of Phila., 855 F.2d 136, 139--40 (3d Cir.1988)). If a party opposing summary judgment files an affidavit that specifically addresses these requirements, the Third Circuit has held that "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course," especially when particular information is in the sole possession of the moving party. Malouf v. Turner, 814 F.Supp.2d 454, 459--60 (D.N.J.2011) (quoting Sames v. Gable, 732 F.2d 49, 51 (3d Cir.1984)).

Defendant's Response: This is a patently absurd argument. All of the cases cited and the applicable rule involve the right to Rule 56(d) discovery *BEFORE* discovery as ordered by the court and stipulated to by the parties has been completed. Even the most cursory reading of *Sebelius* and *Sames* reveals that additional discovery may be necessary when an opportunity for adequate discovery has not yet already been given. The cases cited directly contradict plaintiff's argument. The whole reason that defendant gave plaintiff many extra weeks to reply was to allow any such discovery or make an appropriate motion.

Moreover, both Declarations refer to attorney Randall Andreozzi's request to review documents, and his failure to "pursue the matter." In his arguments, Defendant conveniently omits ~11, which states the following:

"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." See Declaration of FBI Agent Thomas L Petri, ~11, Exhibit D (relevant portion highlighted) See Declaration of FBI Agent Christine Zieba, ~11, Exhibit E (relevant portion highlighted).

The Declarations show that Attorney Andreozzi needed a "subpoena" in 2009 to request documents. This begs the question of why would Andreozzi need a subpoena if as Defendant contends the documents were always

available to Plaintiff through its attorneys. Clearly, these documents were not available for inspection without a subpoena. Defendant's cherry picking and selective presentation of evidence is calculated to present a misleading view of the real facts.

Here, plaintiff simply misreads the document. Attorney Andriozzi was not exercising a subpoena to see the documents -- he was requesting all documents the government had obtained *by subpoena*. And the Government was not able to supply them all *in toto* at that moment -- but the affidavits reflect that *all* of those documents were reviewed many times. And aside from that -- who is testifying to what went on there? It is plaintiff's counsel in his argument -- with no deposition or affidavit. Again, nothing of record. Counsel argues:

Declarations demonstrate that in fact no review and/or identification of documents was done by Attorney Andriozzi. If anything both of these Declarations clearly state that Attorney Andriozzi did not "pursue the matter" i.e., the documents that he was seeking.

No affidavit or deposition of Attorney Andriozzi is presented. There is no basis for this.

No one even knows which attorneys were present at the evidence review meetings with the FBI, and what documents in fact were available for inspection.

This is not plaintiff's burden. The documents were available. United clearly could have accessed them. Defendant needs not prove that United took the opportunity or ever saw the specific document.

Conclusion

Plaintiff has failed to shoulder its burden by placing any facts before the Court that give rise to any issue as to its defense to its "lack of access" defense to the statute of limitations.

Dated: April 16, 2014



Carl J. Hartmann III, Esq.
Counsel for Defendant
5000 Est. Coakley Bay, L6
Christiansted, VI 00820
Email: carl@carlhartmann.com
Telephone: (340) 642-4422

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2014, I served a copy of the foregoing document by email, as per the agreement of the parties, on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820



Carl J. Hartmann III

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

UNITED CORPORATION

Case Number ST-2013-CV-0000101

VS.

Action For DAMAGES

WILLIE HAMED

NOTICE
OF
ENTRY OF ORDER

NIZAR A. DeWOOD, ESQ

CARL J. HARTMANN III, ESQ

Please take notice that on 29th day of April, 2014 a(n) ORDER dated April 25, 2014 was entered by this Court in the above-titled matter.

Dated: 29th day of April, 2014

ESTRELLA H. GEORGE

Acting Clerk of the Court

By: *Shelby Duran*

TITLE: Court Clerk Interpreter

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

UNITED CORPORATION,

Plaintiff,

vs.

**WAHEED HAMED, a/k/a WILLY OR WILLIE
HAMED**

Defendant.

)
)
)
)
) **Case. No. ST-13-CV-101**
)
)
)
)
)
)

ORDER

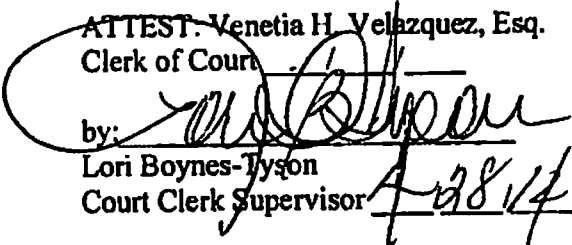
The Plaintiff having responded on April 07, 2014, to Defendant's Motion for Summary Judgment, it is


ORDERED that Plaintiff SUPPLEMENT, by May 12, 2014, its Response in Opposition with proof by 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; and it is

ORDERED that copies of this Order shall be directed to counsel of record.

Dated: April 25, 2014

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor 4/28/14


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No. 2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

**DEFENDANT WAHEED HAMED'S
RULE 12(c) MOTION TO DISMISS FOR LACK OF STANDING**

Comes now defendant Hamed, pursuant to *Rule 12(c)* and asks the Court to dismiss the claims¹ being asserted against her pursuant to Rule 12(c), which states:

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

In this regard, on April 7, 2014, the plaintiff herein, United Corporation, filed a pleading in a related case on St. Croix finally admitting that the Plaza Extra store where the defendant is employed is owned by a partnership, not United Corporation. See ¶ 7 on page 3-4 of Exhibit 1 attached.² Additionally, United's counsel, in that case, has confirmed this fact in an email sent shortly after this

¹ This motion, if granted, renders the summary judgment briefed before this Court moot.

² Indeed, in that filing United not only makes this concession, but one of the partners in the partnership (Fathi Yusuf) that employs the Defendant seeks to dissolve the partnership and lay off all of the employees, including the Defendant in this case.

pleading was filed, stating it has always been the Hamed/Yusuf partnership operating this store. See **Exhibit 2** attached.

In short, those alleged claims belong to her employer, the partnership, not United, who is nothing more than the Landlord at the shopping center where Plaza Extra Supermarkets East is located..

RESPECTFULLY SUBMITTED,

Dated: April 22, 2014



Carl J. Hartmann III, Esq. (Bar No. 48)
Counsel for the Defendant
5000 Estate Coakley Bay, L-6
Christiansted, VI 00820
(340) 719-8941
carl@carlhartmann.com

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, I served a copy of the foregoing Memorandum by email, as agreed by the parties, on:

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820



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

UNITED CORPORATION,

Plaintiff,

v.

**WAHEED HAMED,
(a/k/a Willy or Willie Hamed),**

Defendant.

Case No. 2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

ORDER

THIS MATTER having come on before the Court on the motion of Defendant Hamed, pursuant to *Rule 12(c)* and the Court being advised in the premises and matters of record, it is hereby:

ORDERED:

1. This action is **DISMISSED** with prejudice.

Dated:

HON. MICHAEL C. DUNSTON
Judge of the Superior Court
of the U.S. Virgin Islands

ATTEST:

Clerk of Court
Deputy Clerk

By: _____
Deputy Clerk

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

MOHAMMAD HAMED, by his authorized agent WALEED HAMED,	)	CIVIL NO. SX-12-CV-370
)	
Plaintiff/Counterclaim Defendant,	)	ACTION FOR DAMAGES, INJUNCTIVE RELIEF AND DECLARATORY RELIEF
)	
vs.)	
	)	JURY TRIAL DEMANDED
FATHI YUSUF and UNITED CORPORATION,)	
)	
Defendants/Counterclaimants,)	
)	
vs.)	
)	
WALEED HAMED, WAHEED HAMED, MUFEED HAMED, HISHAM HAMED, and PLESSEN ENTERPRISES, INC.,)	
)	
Additional Counterclaim Defendants)	
<hr style="border: 0.5px solid black;"/>		

**MEMORANDUM IN SUPPORT OF
MOTION TO APPOINT MASTER FOR JUDICIAL SUPERVISION
OF PARTNERSHIP WINDING UP OR,
IN THE ALTERNATIVE, TO APPOINT RECEIVER TO WIND UP PARTNERSHIP**

Defendants/counterclaimants Fathi Yusuf ("Yusuf") and United Corporation ("United") (collectively, the "Defendants"), respectfully submit this Memorandum in Support of their Motion To Appoint Master For Judicial Supervision Of Partnership Winding Up Or, In the Alternative, To Appoint Receiver To Wind Up Partnership (the "Motion").

FACTUAL AND PROCEDURAL BACKGROUND

1. On September 17, 2012, plaintiff/counterclaim defendant Mohammed Hamed ("Hamed" or "Plaintiff") filed his complaint in this matter. Hamed filed his first amended complaint ("FAC") on October 19, 2012. The FAC alleges, among other things, that Hamed and Yusuf formed a partnership to own and operate a supermarket business comprised of three supermarket stores located in Sion Farm, St. Croix, Estate Plessen, St. Croix, and Tutu Park, St.

Thomas (collectively, the "Plaza Extra Stores"). See FAC at ¶¶ 9 and 12. The Plaza Extra Stores also maintained various operating and brokerage banking accounts. See FAC at ¶¶ 16 and 18.

2. On April 25, 2013, this Court issued its Memorandum Opinion and Order granting Plaintiff's Motion for a Preliminary Injunction. See Hamed v. Yusuf, 58 V.I. 117 (Super. Ct. 2013). The Virgin Islands Supreme Court affirmed the portion of this Court's Order granting Hamed's Motion for a Preliminary Injunction but vacated the portion of the Order allowing the use of funds held by the District Court to serve as security for an injunction bond and remanded the matter for reconsideration of the injunction bond. See Yusuf v. Hamed, 2013 V.I. Supreme LEXIS 67, * 43 (V.I. Sept. 30, 2013).

3. This Court has preliminarily found, among other things, that "[a]lthough Plaintiff retired from the day-to-day operation of the supermarket business in about 1996, Waleed Hamed has acted on his behalf pursuant to two powers of attorney from Plaintiff." See Hamed v. Yusuf, 58 V.I. at 126; see also Yusuf v. Hamed, 2013 V.I. Supreme LEXIS 67, * 2-3 ("In 1996, Hamed retired from his role in the operations from the business due to illness, giving a power of attorney and delegating his management responsibilities to one of his sons, Waleed Hamed."). However, this Court also found there to be questions of fact as to whether Waleed Hamed's authority was as a result of his acting as an agent for Hamed or simply as a result of his managerial position as an employee of United (e.g. whether Waleed's ability to sign checks "originate[d] from [Hamed's] 50% interest in the Partnership business or is...simply a feature of the managerial positions of [Hamed's] sons" and "did [Hamed's] sons become Plaza Extra Store managers, as agents of their father, pursuant to his assertion of his partnership rights of joint control, or were

they hired as managerial employees because they were nephews of ...Yusuf's wife") See December 5, 2013 Order Denying Motion for Partial Summary Judgment, p. 6.

4. This Court also preliminarily found that "[o]n March 13, 2012, through counsel, Yusuf sent a Proposed Partnership Dissolution Agreement to Hamed, which described the history and context of the parties' relationship, including the formation of an oral partnership agreement to operate the supermarkets, by which they shared profits and losses." Hamed v. Yusuf, 58 V.I. at 126; see also Yusuf v. Hamed, 2013 V.I. Supreme LEXIS 67, * 4 ("A few months later, Yusuf informed Mohammad Hamed of his intention to end their business relationship, sending a proposed "Dissolution of Partnership" agreement to Hamed on March 12, 2012.").

5. In its April 25, 2013 Memorandum Opinion, this Court noted the following:

Neither party has sought and the Court has not considered the prospect of appointing a receiver or bringing in any other outsider to insure that the joint management and control of the partnership is maintained. Rather, notwithstanding the animosity that exists between the parties, they are left to work out issues of equal management and control themselves as they have done successfully over the years.

Hamed v. Yusuf, 58 V.I. at 136-137.

6. On December 23, 2013, Defendants filed their Answer and Counterclaim, which, among other things, denied the existence of the partnership as alleged in the FAC. Defendants filed a First Amended Counterclaim on January 13, 2014. Although Defendants denied the existence of any partnership as alleged in the FAC, they pled in the alternative in the event a partnership is nevertheless found to exist. See, e.g., First Amended Counterclaim at ¶ 12.

7. Given the animosity between the parties noted by this Court, Yusuf's complete lack of trust in Hamed, and Yusuf's unwillingness to continue to carry on any business

relationship whatsoever with Hamed, Yusuf now concedes for the purposes of this case that he and Hamed entered into a partnership to carry on the business of the Plaza Extra Stores and to share equally the net profits from the operation of the Plaza Extra Stores.

ARGUMENT

I. THE PARTNERSHIP HAS BEEN DISSOLVED AND ITS BUSINESS MUST BE WOUND UP.

As provided in the Uniform Partnership Act, V.I. Code Ann. tit. 26, §§ 1-274

("UPA"):

A partnership is dissolved, and its business must be wound up, only upon the occurrence of the following events:

- (1) in a partnership at will, the partnership's having notice from a partner other than a partner who is dissociated under Section 121, subsections (2) through (10) of this chapter, of that partner's express will to withdraw as a partner, or on a later date specified by the partner[.]

UPA § 171(1).

Here, the partnership has either already been dissolved or is dissolved by virtue of this filing. Therefore, assuming *arguendo* that Hamed's retirement from the partnership in 1996 or counsel for Yusuf's March 12, 2012 notice of intent to end the partnership did not dissolve the partnership by operation of law, then clearly paragraph 7, above, sets forth Yusuf's "express will to withdraw as a partner," thus dissolving the partnership, if it had not already been dissolved.

Pursuant to UPA § 172(a):

Subject to subsection (b) of this section, a partnership continues after dissolution *only* for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed.

(Emphasis added). Section 173 of the UPA provides, in pertinent part:

(a) After dissolution, a partner who has not wrongfully¹ dissociated may participate in winding up the partnership's business, but *on application of any partner*, the partner's legal representative, or transferee, the Superior Court, for good cause shown, *may order judicial supervision of the winding up.*

* * *

(c) A person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to section 177 of this chapter, settle disputes by mediation or arbitration, and perform other necessary acts.

(Emphasis added).

A. Hamed Dissociated in 1996 and Could Not Transfer Management Rights.

Yusuf submits that Hamed effectively dissociated from and dissolved the partnership when he "retired from the day-to-day operations of the supermarket business in . . . 1996" and returned to his homeland of Jordan. While this Court and the Supreme Court have referenced the powers of attorney from Hamed to his son, Waleed Hamed, neither Hamed, this Court nor the Supreme Court have cited a single authority that allows a "retiring" partner to effectively assign or delegate his role as partner to his son or any other person.²

Section 2(9) of the UPA provides: "partner's interest in the partnership" means all of a partner's interests in the partnership, including the partner's transferable interest and all

¹ A partner's dissociation is wrongful only if one of the conditions set forth in UPA § 122(b) applies. Defendants submit that these provisions are inapplicable to the circumstances of this case.

² This Court has noted previously that Waleed Hamed has taken a contradictory position in the Plea Agreement in the pending criminal action claiming to be merely an employee of United as opposed to one able to exercise concurrent control. See December 5, 2013 Order Denying Motion for Partial Summary Judgment, p. 6.

management and other rights.” Section 92 of the UPA makes it clear that a partner’s management rights are not transferable: “The only transferable interest of a partner in a partnership is the partner’s share of the profits and losses of the partnership and the partner’s right to receive distributions. The interest is personal property.”³

If Hamed’s retirement in 1996 or Yusuf’s notice of his intention to end their business relationship in March of 2012 did not effect a dissolution, clearly, Yusuf’s position set forth in paragraph 7, above, qualifies as notice of his “express will to withdraw as a partner.” See UPA § 121(1).

B. Partnerships Require At Least Two Partners.

Hamed appears to be laboring under the mistaken belief that “Yusuf’s partnership interest should be disassociated [sic] from the business, allowing Hamed to continue the Partnership’s business without him pursuant to the provisions of 26 V.I.C. including §§ 122-123, 130 and what is now Subchapter VII of Title 26.” See FAC at ¶ 42. Under the UPA, the term “partnership” means an association of *two or more* persons to carry on as co-owners a business for profit formed under section 22 of this chapter, predecessor law, or comparable law of another jurisdiction.” UPA, § 2(6)(emphasis supplied). See also UPA § 22(a). As this Court has noted, “[i]n the mid-1980s when the Hamad-Yusuf business relationship began, a Virgin Islands partnership was defined as ‘an association of two or more persons to carry on as co-owners a business for profit.’ V.I. Code Ann. tit. 26, § 21(a) (predecessor statute). Hamed v. Yusuf, 58 V.I. at 130.

³ Section 92 of the UPA is identical to § 502 of the Uniform Partnership Act (1997). One of the comments to § 502 states: “A partner has other interests in the partnership that may not be transferred, such as the right to participate in the management of the business. Those rights are included in the broader concept of a ‘partner’s interest in the partnership.’”

Hamed, like the parties in Corrales v. Corrales, 198 Cal. App. 4th 221, 129 Cal. Rptr. 3d 428, 2011 Cal. App. LEXIS 1043 (August 10, 2011), incorrectly assumes the business of a two person partnership can be continued by one partner. As the Court in Corrales cogently concluded after considering California's partnership statutes, which are analogous to the Virgin Islands' UPA, when it comes to a one-partner partnership:

[N]o such animal exists. If a partnership consists of only two persons, the partnership dissolves by operation of law when one of them departs.

Id at 224.

The Corrales court went on to explain that:

When Richard withdrew from RCE, the partnership dissolved by operation of law; by definition, a partnership must consist of at least two persons. A person cannot dissociate from a dissolved partnership, and the buyout rule of section 16701 does not apply to a two-person partnership when one partner leaves. When that happens, the dissolution procedures take over. The partnership is wound up, its business is completed, and the partners make whatever adjustments are necessary to their own accounts after paying the creditors.

Id. at 227 (citations and footnotes omitted).

Finally, the Corrales court pointed out that "[t]he purpose of dissociation is to allow the partnership to continue with the remaining partners. When a partner withdraws from a two-person partnership, however, the business cannot continue as before. One person cannot carry on a business as a partnership." Id.

Accordingly, the partnership that once existed between Hamed and Yusuf has clearly been dissolved (whether in 1996, 2012 or now) and the only thing that remains to be done is to wind up the partnership business.

II. A MASTER SHOULD BE APPOINTED TO SUPERVISE THE WINDING UP.

Yusuf requests the appointment of a Master in this case to provide judicial supervision to the wind up efforts. Pursuant to Fed. R. Civ. Pro. 53(a), made applicable to proceedings in this Court by Super. Ct. R. 7, a court may appoint a Master⁴ to assist with certain matters including situations where there is a “need to perform an accounting or resolve a difficult computation of damages” or to “address pretrial...matters that cannot be effectively and timely addressed by an available...judge.” As set forth above, §173 of the UPA provides, that a partner “may participate in winding up the partnership’s business” and “on application...for good cause shown” seek “judicial supervision of the winding up.”

By admission of Hamed, Yusuf has made all of the business decisions relating to the Plaza Extra Stores from their inception. Hamed testified at the preliminary injunction hearing that “Mr. Yusuf be in charge of everybody...[in] all the three stores.” See Jan. 25, 2013 Hrg. Tr. 201:4; 210:22-23. Hamed confirmed that Yusuf was the partner who possessed the ultimate decision making authority with respect to the Plaza Extra Stores at his deposition on April 1, 2014. Further, Hamed has not been in the Plaza Extra Stores in his capacity as a partner since his retirement in 1996 and has not been involved in the daily operations in over eighteen (18) years. Although Hamed may be incapable of meaningful participation in the winding up due to, among other things, his lack of working knowledge of the operations of the Plaza Extra Stores and perhaps his poor health, Yusuf has no objection to Hamed’s personal participation in the winding up. Yusuf does, however, object to Hamed’s delegation of his rights and obligations as a partner in the winding up of the partnership to his son or any other person. Given the

⁴ Hamed should not be heard to complain about the appointment of a Master since he requested this relief in the first sentence of his prayer for relief. See FAC at p. 15 (“Wherefore, the Plaintiff seeks the following relief from this Court as follows: 1) A full and complete accounting to be conducted by a court-appointed Master . . .”).

animosity between the parties and the concern that any proposals or decisions made by Yusuf in winding up the partnership will be constantly challenged, Yusuf seeks judicial supervision by a Court appointed master of the winding up to insure an orderly process.

To that end, Yusuf submits a proposed plan for winding up of the partnership (the "Plan"). See Exhibit A. Consistent with the powers set forth in §173(c) of the UPA for "a person winding up a partnership's business," the Plan seeks to:

preserve the partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the partnership's business, dispose of and transfer the partnership's property, discharge the partnership's liabilities, distribute the assets of the partnership pursuant to section 177 of this chapter, settle disputes by mediation or arbitration, and perform other necessary acts.

The Plan sets forth the partnership assets and liabilities, how the assets will be disposed and the liabilities satisfied, and the anticipated time-frame for winding up the partnership. Further, the Plan provides that all monies recovered shall be placed in an escrow account to be utilized for the payment of any partnership debts and, thereafter, for distribution following presentation to the Master of an accounting and proposed distribution by the partners.

If the Court concurs that a Master should be appointed and the parties are unable to agree on the person(s) to be appointed Master, Defendants request an opportunity to submit proposed candidates for the Court's consideration, along with a brief addressing the Master's proposed duties and compensation.

III. AS AN ALTERNATIVE TO JUDICIAL SUPERVISION OF WINDING UP, YUSUF REQUESTS THE COURT TO APPOINT A DISINTERESTED, THIRD-PARTY AS RECEIVER TO WIND UP THE PARTNERSHIP'S BUSINESS.

In the event that this Court is not inclined to appoint a Master to supervise the winding up of the partnership pursuant to the Plan, then Yusuf respectfully requests the Court to appoint a disinterested, third-party receiver to undertake the winding up. Although the UPA does not specifically provide for the appointment of a receiver, §173(a) clearly contemplates that the “Superior Court, for good cause shown, may order judicial supervision of the winding up.” While Yusuf is prepared to participate in the winding up as contemplated under UPA §173, given the animosity between the parties and the constant conflicts arising from that animosity, Yusuf submits that a disinterested, third-party receiver serving as an officer of this Court should be appointed to effectuate the winding up.

Pursuant to Fed. R. Civ. P. 66 and local case law, receivership is generally considered to be a drastic remedy resorted to only in extreme circumstances. See, e.g., Busenburg v. Dowd, 1980 U.S. Dist. LEXIS 15244, * 2-3 (D.V.I. Dec. 9, 1980). In this case, however, UPA § 173(a) only requires “good cause” to be shown for judicial supervision of the winding up. Yusuf respectfully submits that he has established good cause for the appointment of a receiver and that a receiver, rather than the Court itself, can more practically provide the judicial supervision contemplated by §173(a). If the Court is inclined to appoint a third-party receiver, Yusuf respectfully submits that the Plan provides an appropriate “road map” for the receiver to wind up the partnership as contemplated by §173(c). If the Court is so inclined to appoint a third-party receiver, Defendants request the opportunity to submit proposed candidates for the Court’s consideration along with a brief addressing the receiver’s proposed powers and compensation.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request this Court to enter an order granting Defendants’ Motion by either appointing a Master to supervise the winding up of

Hamed v. Yusuf, et al.
Civil No. STX-12-cv-370
Page 11 of 12

the partnership pursuant to the Plan or appointing a Receiver to effect the wind up and requiring the parties to promptly submit proposed Receiver candidates for the Court to consider along with a brief addressing the Receiver's proposed powers and compensation, and providing such further relief as is just and proper under the circumstances.

DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: April 7, 2014

By: 

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Attorneys for Fathi Yusuf and United Corporation

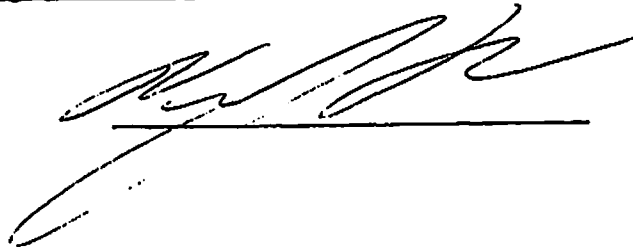
CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2014, I caused the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO APPOINT MASTER FOR JUDICIAL SUPERVISION OF PARTNERSHIP WINDING UP OR, IN THE ALTERNATIVE, TO APPOINT RECEIVER TO WIND UP PARTNERSHIP** to be served upon the following via e-mail:

Joel H. Holt, Esq.
LAW OFFICES OF JOEL H. HOLT
2132 Company Street
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Mark W. Eckard, Esq.
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Christiansted, VI 00824
Email: mark@markeckard.com

A handwritten signature in black ink, appearing to be 'Mark W. Eckard', is written over a solid horizontal line. The signature is fluid and cursive.

-----Original Message-----

From: George H.T. Dudley <gdudley@dtflaw.com>

To: 'Joseph DiRuzzo' <JDiRuzzo@fuerstlaw.com>; 'Joel Holt' <holtvi@aol.com>

Cc: Christopher David <cdavid@fuerstlaw.com>; Gregory H. Hodges <ghodges@dtflaw.com>;
dewoodlaw <dewoodlaw@gmail.com>; Charlotte Perrell <cperrell@dtflaw.com>; carl

<carl@carlhartmann.com>; rpa <rpa@abfmwb.com>; grhea <grhea@rpwb.com>; pamelalcolon

<pamelalcolon@msn.com>; Deborah Muller <DMuller@fuerstlaw.com>; 'K. Glenda Cameron'

<kglenda@cameronlawvi.com>

Sent: Tue, Apr 8, 2014 6:51 pm

Subject: RE: Plaza

Gentlemen,

Since United is not and has never been a partner in the Plaza Extra "partnership" between Fathi Yusuf and Mohammad Hamed, this discussion is misplaced. United's tax returns for 2013 and thereafter will not reflect anything having to do with the business of the "partnership" (except the rent owed to United as landlord of Plaza - East) and the two partners have to select an accountant to prepare the partnership income tax return and the related K-1s to be issued to each partner.

There also is the matter of applicable filings for the Department of Labor and other agencies for the employees and business of the Yusuf/Hamed "partnership" d/b/a Plaza Extra Supermarkets.

Joel, if you will confer with your client on suggested accountants, I will confer with my client on the same matter and perhaps we can agree on an accounting firm to prepare all relevant tax and other filings on behalf of the "partnership."

Regards,

George H.T. Dudley

Dudley, Topper and Feuerzeig, LLP

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St. Thomas, VI 00804

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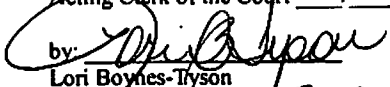
IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN


UNITED CORPORATION,)
)
 Plaintiff,)
) CASE NO. ST-13-CV-101
 vs.)
)
 WAHEED HAMED (a/k/a WILLY, WILLY HAMED),)
)
 Defendant.)
_____)

ORDER

Defendant having filed a Motion to Dismiss for Lack of Standing on April 28, 2014; it is
ORDERED that Plaintiff shall respond to Defendant's Motion by May 23, 2014, and
Defendant may reply by June 2, 2014; and it is
ORDERED that copies of this Order shall be directed to counsel of record.

Dated: May 12, 2014.

ATTEST: Estrella H. George
Acting Clerk of the Court
by: 
Lori Boynes-Tyson
Court Clerk Supervisor 5/13/14


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

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

UNITED CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 WAHEED HAMED,)
 (a/k/a Willy or Willie Hamed),)
)
 Defendant.)
 _____)

Case No.: 2013-CV-101

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

2014 SEP 29 PM 4:37
OFFICE OF CLERK
OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

**PLAINTIFF'S RULE 59(e) MOTION FOR RECONSIDERATION AND
TO ALTER OR AMEND JUDGMENT**

Plaintiff United Corporation ("United"), through their undersigned attorney, respectfully move this Court, pursuant Fed.R.Civ.P. 59(e) (as applied to this Court by Superior Court Rule 7), and the Court's inherent authority, to reconsider the Court's September 2, 2014 Opinion and Order granting summary judgment on all remaining claims to Defendant and the Court's June 24, 2013 Opinion and Order, and to vacate both Orders. In support of this motion, United respectfully refers this Court to the accompanying Brief.

Respectfully submitted,



DATED: September 29, 2014

By:

Nizar A. DeWood, Esq. (V.I. Bar No. 1177)
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Attorneys for Fathi Yusuf and 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 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



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 Walced 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.

¹⁰The 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 Wahced 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

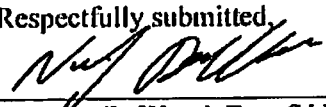
¹⁴Burton v. First Bank of Puerto Rico, 49 V.I. 16 (2007), which is cited in the Court's June 24 Opinion at page 3, footnote 10, is one of those rare cases in which the plaintiff's complaint contained allegations showing when the plaintiff's claim accrued under the discovery rule, thereby permitting a 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: _____
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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.
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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

WALBED MOHAMMAD HAMED,
aka Wally Hamed

WAHRED MOHOMMAD HAMED,
aka Willie Hamed

MAHER FATHI YUSUF,
aka Mike Yusuf

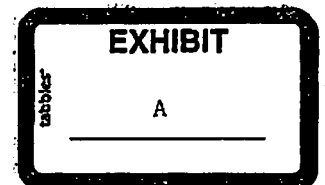
NEJBH FATHI YUSUF and

UNITED CORPORATION,
dba Plaza Extra

Defendants.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

II. Defense Team's Discovery of Spoliation

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

15. Defense counsel Randall Andreozzi asked Ms. Zieba to explain why the defense team was suddenly being denied the access and ability to review and examine the Defendants' own documents in a manner that was inconsistent with the prior discovery visits.
16. Without explanation, Ms. Zieba advised that prior protocol would no longer be possible. She directed the defense team to leave and return on Wednesday, November 12, 2008, to discuss the matter with Department of Justice attorney Lori Hendrickson.
17. On November 12, 2008, the defense team returned to the FBI offices and was greeted by several Government representatives, including FBI case Agent Thomas Petri, IRS case Agent Javier Bell, and newly-assigned case Agent Christine Zieba. Department of Justice Counsel Lori Hendrickson was also in attendance. As the Court is aware, Agents Bell and Petri were involved in this case at the search warrant stage. They advised that they will also be working on the trial of the case.
18. Ms. Hendrickson explained that Agents Petri and Bell were detailed from their United States Places of Duty so that they could monitor the defense team's document review. She outlined new procedures that she would enforce for the Defendants' review of their own documents. As part of that procedure, the defense team would only be permitted to review one box at a time; only one person would be allowed to touch the documents; and the Government agents -- not defense counsel -- would decide which boxes the team would be permitted to review.
19. When the defense team demanded an explanation, Ms. Hendrickson stated that she implemented these new procedures to ensure the integrity of the documents as the Government maintained them.

20. With little alternative, the defense team agreed to proceed under this protocol so long as it proved feasible to an effective and efficient review of the documents. Defense counsel Randall Andreozzi stated, however, that the defense could not agree to allow Agents Petri and Bell, and Attorney Hendrickson, to monitor the team's review of the defendants' documents. As a compromise, the team agreed to limit the number of individuals who would review the documents at any one time. Ms. Hendrickson agreed to this stipulation.
21. The first box the Government provided for the defense team's review was FBI box number 131. Upon review of the contents of Box 131, the defense team immediately recognized that the current contents of the box did not match the general summary inventory the defense had prepared during its previous document reviews. Box 131 now contained groups of documents that were not identified in the defense's inventory of Box 131, including, *inter alia*, documents with the bates prefix 295. By reference to its summary index, the defense team confirmed that these documents were originally stored in Box 295.
22. Defense counsel Andreozzi asked Ms. Zieba why documents with bates prefixes 295 were contained in box 131.
23. It was then that Ms. Zieba informed the defense team that she had reorganized and rearranged the Defendants' documents by removing some documents from their original boxes and placing them in different boxes because the revised organization better suited her needs. She refused to explain the revised organizational method.
24. Mr. Andreozzi explained to Ms. Zieba that the FBI represented to the defense team during the initial document review sessions that the box numbers corresponded to the various sources from which the documents were seized or otherwise procured. Because

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

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

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

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

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

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

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

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

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

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

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

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

34. Ms. Zieba refused to produce three of the boxes requested. She stated that, pursuant to Attorney Hendrickson's instructions, "For today I will just keep pulling boxes randomly because I don't have them organized the way you have them organized."
35. The team requested access to the storage room to view the current manner in which the boxes were being maintained. Ms. Zieba refused access and directed all questions to Ms. Hendrickson.
36. Upon Ms. Hendrickson's return to the office, Mr. Andreozzi explained the afternoon's events and the defense team's concerns regarding the integrity of the documents. Ms. Hendrickson responded by stating, "What's done is done."
37. Mr. Andreozzi insisted that, in light of the circumstances, the team be allowed to review all of the boxes in numerical order to determine the extent of the harm. Ms. Hendrickson agreed, but asked that the defense team leave for the day to allow her to "prepare" the boxes for viewing. She stated that, if the team allowed the prosecution team to start working now, they could have the first fifty or so boxes "ready" for review by the next morning.
38. Mr. Andreozzi again expressed concern, and asked what Ms. Hendrickson meant by "prepare" the documents for review. Ms. Hendrickson refused to answer the question and asked again that the team leave for the day.
39. The next morning, November 13, 2008, Ms. Hendrickson advised Mr. Andreozzi that she had occasion to work with and review the documents until 8 p.m. the prior evening. She confirmed that the FBI Agents did in fact reorganize and remove documents from the

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

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

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

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

42. The defense team continued to review the boxes in numerical order during the time remaining on November 13, and 14, 2008, to determine the extent of the damage caused by the Government's actions. Of the boxes the team was able to review during that time, the team continued to discover misplaced and missing documents.
43. The defense team returned to the FBI offices on January 26, 2009 and continued its document review through January 29, 2009. Agents Petri and Bell returned to St. Thomas from their United States Places of Duty to monitor the review with Agent Zieba.
44. Attorney Hendrickson was not present. In a telephone conversation with Randall Andreozzi, Mr. Andreozzi advised Ms. Hendrickson that the defense planned to continue to review the boxes in numerical order from where it left off in November. He asked Ms. Hendrickson whether the Government Agents had reorganized the documents since the defense team's last review. Ms. Hendrickson informed Mr. Andreozzi that the Government had not reorganized the documents since the defense team last reviewed them in November 2008. She refused to comment on whether the Agents did anything to affect the integrity of the boxes of documents the defense team had yet to review.
45. At various points during the course of the document review, Mr. Petri informed the defense team that they were misinformed if they believed the documents seized and maintained by the government belonged to the defendants. Mr. Petri stated that the documents belonged to the Government, and that he would do with them as he pleased. He informed the team that he and other Agents rearranged and removed documents from the boxes and that the Agents were within their rights to do so.

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

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

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

III. Consequences of the Government's Actions

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

50. With respect to the remaining documents, instead of returning them to the Defendants, the Government kept them and willfully proceeded to reorganize and shuffle them. Because most of these documents are not bates stamped, they cannot be returned to their original boxes.
51. The Government could have returned these documents to the Defendants. In fact, the Government has returned some boxes of documents to the Defendants, presumably on the presumption that such documents were not pertinent to the case. Yet, the Government has affirmatively elected to retain the remaining documents and then to shuffle and reorganize them.
52. The Defendants and the Court may never know all of the documents that may have been lost or destroyed by the Government's conduct. However, some aspects of the harm caused can be articulated and evaluated with some specificity:
- a. The defense can no longer establish or contest the authenticity of the non-bates stamped documents.
 - b. The defense can no longer establish or contest the source of the non-bates stamped documents.
 - c. The Defendants have been completely deprived of their ability to cross-examine the government's witnesses at trial with respect to any of the non-bates stamped documents, thus seriously impairing their Sixth Amendment rights.
 - d. Defendants can no longer establish or contest whether any particular individual had access to a particular non-bates stamped document, challenge a witnesses' knowledge of the contents of or existence of a particular document, or question their reliance on a particular documents. The resulting harm is infinite.

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

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

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

IV. Argument and Grounds for Relief

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

55. These actions are simply a continuation of the consistent and methodical bad faith exhibited by the Government throughout this case as illustrated to the Court in the various pending and resolved motions, all of which the Defendants incorporate herein by reference.
56. Government counsel and Agents acknowledge what has occurred, and respond only with the statement, "What's done is done."
57. As enumerated herein, the Government's actions severely impair the Defendants' ability to defend against the Indictment, thereby depriving the Defendants of their Constitutional right to due process of law.
58. In *United Medical Supply Company, Inc. v. United States*, 77 Fed. Cl. 257 (1997), the Court of Claims stressed the importance of preserving the integrity of documentary evidence:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Following the execution of the search warrant, the special agent, pursuant to Fed. R. Crim. P. R-41, will return the search warrant, with an inventory of the items seized, to the issuing magistrate. This return must be done within 10-days of executing the search warrant.
2. The special agent (team leader) will also prepare the Post Enforcement Operation Summary Form, (Exhibit 9.4.9-3), for each search warrant

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

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

I.R.M. 9.4.9.3.6.1 Preserving the Chain of Custody

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

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

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

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

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

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

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

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

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

74. FBI Agents Zieba and Petri concede that they deliberately destroyed the organization of the seized documents because they were not ordered in a way that suited *their* needs. Regardless of the Agents' purported motivation, sanctions are appropriate since the actions prejudiced the Defendants.
75. The source and authenticity of the particular documents are critical to defense of the case. Consequently, the Defendants are prejudiced by the Agents' deliberate actions. Accordingly, sanctions are warranted. *Accord Kronish v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999) ("It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by that favorite maxim of the law, *omnia presumuntur 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,

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

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

Plaintiffs,

v.

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.

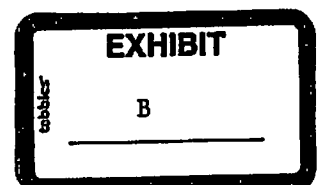
CRIMINAL NO. 2005-015

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 that reads "Mark F. Daly". The signature is stylized and cursive.

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 includes a large loop at the end.

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,


Randall P. Andreozzi

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



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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 that reads "Mark F. Daly".

Mark F. Daly
Trial Attorney

cc: Counsel of Record (by facsimile)

JA -197-

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

UNITED STATES OF AMERICA, and
GOVERNMENT OF THE VIRGIN ISLANDS

Plaintiffs,

v.

Criminal No. 2005-015R/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,

NEJBH FATHI YUSUF, and

UNITED CORPORATION
d/b/a Plaza Extra

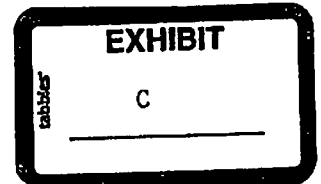
Defendants.

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 *routing* 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

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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-Bates 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 unsource'd 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. 1057 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 its 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)

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require the Defendants to identify each document that the defense deems pertinent to this case before gaining access to it. Thus, the "rule" is not only impossible but violates the Defendants' due process rights.

/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:

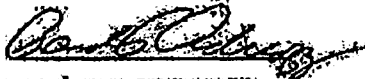
The following persons travelled to the FBI Offices in St. Thomas to review client documents: Randall Andreozzi, Ronald Wise, José Marrero, Howard Epstein, Theresa Mains, and Tracy Marien.

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.

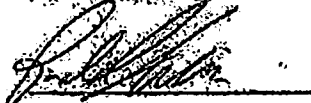
In a private conversation, Special Agent Zeiba advised Mr. Andreozzi that she was under the impression that a group of only two or three people would be at the office, and that the group would identify specific documents they wished to see and that she would bring the documents to them. She advised that 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 R. Androzz

Jose Marrero


Ronald Wise

Theresa Mains

Howard Epstein


Tracy Marion

SUPERIOR COURT
OF THE VIRGIN ISLANDS
2014 SCF 2014-11-14-08

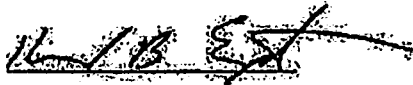
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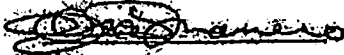


Howard Epstein

Tracy Marien

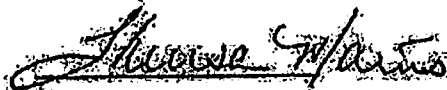
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Randall P. Andreozzi



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 to 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 take the documents in. Zeiba got up from the table and went into the storage room with Petri and Bell. Zeiba stated to them, "I just finished telling them you were not looking at documents." It was clear to the team that Petri and Bell were taking further unknown actions with respect to the clients' documents.

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

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

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

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

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

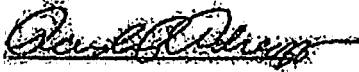
Laurie Hendrickson then arrived and asked Randy Andreozzi to meet with her in the waiting area. The two went outside to discuss the matter privately.

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

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

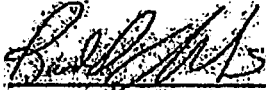
Randy Andreozzi returned to the conference room and the team departed from the FBI office for the rest of the day.

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



Randall P. Andreozzi

Jose Marrero



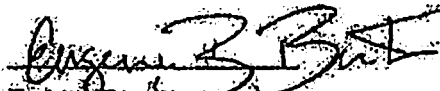
Ronald Wise

Theresa Mains

Howard Epstein



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Eugene Benton

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Howard Epstein

Tracy Marden

Eugene Benton

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 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: Randall Andreozzi, José Marrero, Howard Epstein, and Theresa Mains. Ron Wise joined the group during the afternoon session.

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

MORNING

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

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

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

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

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

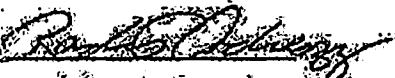
AFTERNOON

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.

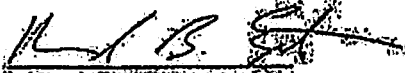
At one point, Ronald Wise handed a document to Theresa Mains and asked her to scan it for our files. An unidentified FBI Special Agent who had been monitoring our activities from one end of the table immediately stood, feigned as if stretching, and casually walked to the side of the table where Ms. Mains 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.

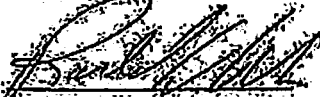

Randall P. Andreozzi

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Howard Epstein



Ronald Wise

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Randall P. Andreozzi


Jose Marrero



Theresa Mann

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 L. Marrero, Consultant
Ronald E. Wise, Consultant
Howard Epstein, CPA
Thomas Petri, Special Agent, FBI
Christine Zelba, 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 Zelba (FBI).

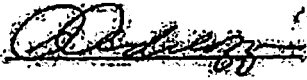
The session began at approximately 9:15 a.m. with the defense team continuing its review of the boxes of client documents to determine the extent of the harm caused by the Agents' reorganization of documents. Specifically, the team began its review with Box 255 and continued in numerical progression.

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.

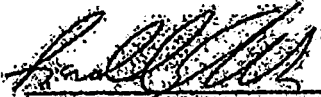
Agent Petri further stressed that all of the documents obtained by the U. S. Government during the raid and subsequent investigation were "his" and not the defendants'. According to Agent Petri, he could and did organize them as he deemed appropriate. In response to questions from Randy Andreozzi, SA 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.

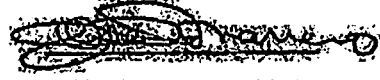
I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



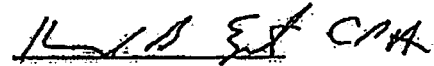
Randall Andreozzi, Attorney



Ronald B. Wise, Consultant



Jose I. Marrero, Consultant



Howard Epstein, CPA

2014 SEP 23 11:4:36
SUPERIOR COURT
OF THE VIRGIN ISLANDS

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 this 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

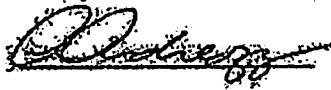
documents, as the defense team may not be allowed to return again. Mr. Andreozzi repeated that the purpose of the defense team's presence was to both review documents and to assess any potential harm resulting from the rearrangement of documents by the Government. SA Petri said that the only movement 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 were specifically requested. 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.

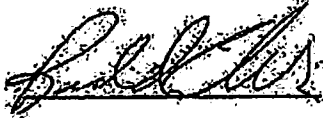
The defense team left the premises around 11:45 AM and returned around 1:15 PM to continue its review. During the afternoon session, SA Petri and Mr. Andreozzi continued to discuss documents needed for review by the defense team. Mr. Andreozzi explained to SA Petri that the FBI's identification of specific 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.]

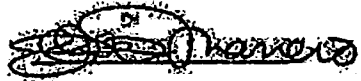
I have reviewed the foregoing narrative and confirm to the best of my recollection that it is a true and accurate summary of the events described.



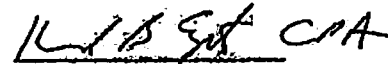
Randall Andreozzi, Attorney



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
Jose L. 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, Jose 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.

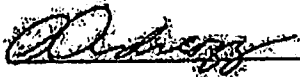
The defense team reminded Special Agent Zeiba that the Government did not produce copies of Suspicious Activity Reports (SAR's) and Currency Transaction Reports (CTR's). She advised that the defense team would not be provided with any of these documents. No explanation was given. Special Agent Bell was 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.



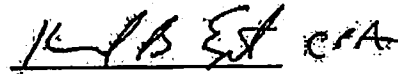
Randall Andreozzi, Attorney



Ronald E. Wise, Consultant



José L. Marrero, Consultant



Howard E. Bost, 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

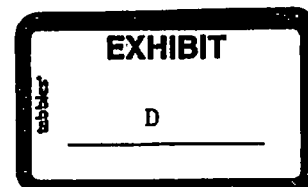
The United States of America and the Territory of the Virgin Islands, by and through its undersigned counsel, respectfully submits this response to Defendants' Reply to the Government's Response to Defendants' Motion for Specific Relief (No. 1076 – Mar. 17, 2009).

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

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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.

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, Nejeih 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

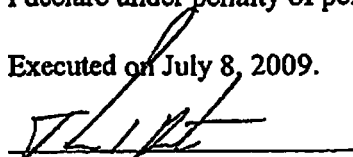
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boxes.

- 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

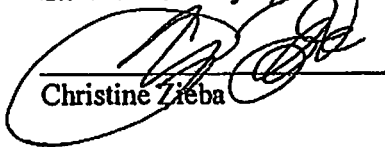
I, Christine Zieba, make this Declaration in support of the Government's Response to Defendants' Reply Memorandum in Support of the Motion for Specific Relief.

- 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 building 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 JTTF 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

3158-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] Jose Ismael Marrero,

[REDACTED] Howard B. Epstein,

[REDACTED] Ronald J. Soluri,

[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] and Ronald Eugene Wise,

[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]
Epstein, [REDACTED]

[REDACTED] Howard B.

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

[REDACTED] Ronald Eugene Wise, [REDACTED]

[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 JTF 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 JTF 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.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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]

[REDACTED] Howard B. Epstein, [REDACTED]

[REDACTED] Ronald Eugene Wise, [REDACTED]

[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

3158-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.

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 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

**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 Pauzé
MICHAEL R. PAUZÉ
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

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

Dated: 5/3/04

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

Dated: 5/3/04

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

Dated: 5/3/04

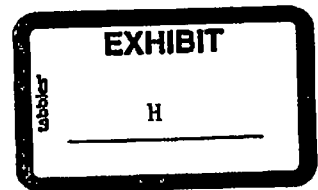
IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

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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,)
)
NEJBH FATHI YUSUF, and)
)
UNITED CORPORATION)
d/b/a Plaza Extra)
)
Defendants.)
<hr/>	

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,


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

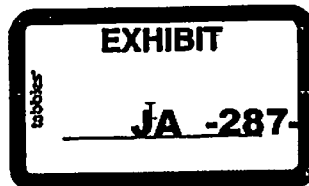
THIS MATTER comes before the Court on the Government's Motion to Reconsider the Court's Order of July 16, 2009 regarding Defendants' Motion for Specific Relief due to the Government's Destruction of the Integrity, Organization and Sourcing of Material Evidence. Defendant Waleed Hamed filed an opposition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

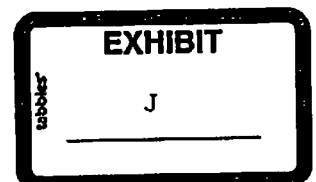
FATHI YUSUF MOHAMAD YUSUF,
aka Fathi Yusuf,
WALEED MOHAMMAD HAMED,
aka Wally Hamed,
WAHEED MOHAMMED HAMED,
aka Willie Hamed,
MAHER FATHI YUSUF,
aka Mike Yusuf,
ISAM MOHAMAD YOUSUF,
aka Sam Yousuf,
NEJEH FATHI YUSUF, and
UNITED CORPORATION
d/b/a Plaza Extra,
Defendants.

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

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Defendant's Motion For Specific Relief In Anticipation Of The December 14, 2010, Oral Argument
Page 4 of 7

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,

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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
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:

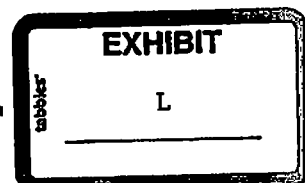
- 1) United will pay a \$5,000 fine, as set forth in Paragraphs III.A.1 and VIII.A;**
- 2) United will pay \$10 million to the VIBIR for restitution, as set forth in Paragraphs III.A.3 and VIII.D;**
- 3) United will pay \$1 million as a substantial monetary penalty, as set forth in Paragraphs III.A.2,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

I

JA -299-

5228046.1



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-

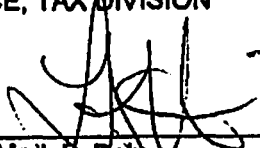
Addendum. United further certifies that its counsel has discussed the terms of this Plea Agreement- Addendum with appropriate officers, directors, and shareholders of United and that United fully understands its meanings and effect.

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 B. Daly
Lori A. Hendrickson
Kevin C. Lombardi
Trial Attorneys

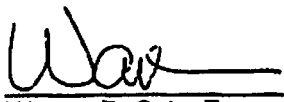
The defendant United Corporation agrees to the terms set forth in this Plea Agreement-Addendum.

Dated: 1/20/11



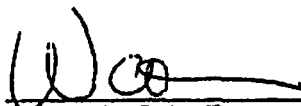
Thomas Atkon, Esq.
Attorney for Defendant United Corporation

Dated: 1/20/11

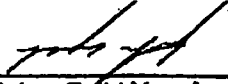


Warren B. Cole, Esq.
Attorney for Defendant United Corporation

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

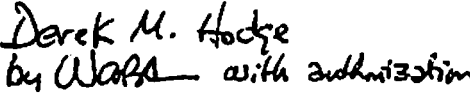
Dated: _____

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, Esq.
Attorney for Defendant Waleed Mohammed Hamed

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

Dated: 2/2/11 
by WASS with authorization
Derek M. Hodge, Esq.
Attorney for Defendant Neje 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: _____
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

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Henry C. Smock, Esq.
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John K. Dema, Esq.
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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

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.

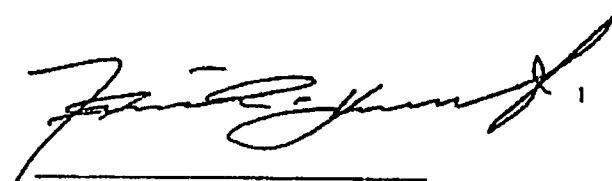
6. In early 2012, I discussed the 1994–2004 rent with Waleed Hamed when the payment of \$5,408,806.74 in rent for the period from May 5, 2004 to December 31, 2011 was coordinated. I again explained to Waleed Hamed that I could not request the 1994–2004 rent, as we still had not received the "black book" 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

**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 style="width: 50%; margin-left: 0;"/>		

**ORDER GRANTING
PLAINTIFF'S MOTION FOR RECONSIDERATION AND
TO ALTER OR AMEND JUDGMENT**

THIS MATTER is before the Court on the Plaintiff's Rule 59(e) Motion for Reconsideration and to Alter or Amend Judgment (the "Motion"). The Court having read the briefs of the parties and being otherwise fully advised in the premises, it is hereby

ORDERED that the Motion is GRANTED, and the Court's September 2, 2014 Order granting Defendant Summary Judgment is VACATED; and

IT IS FURTHER ORDERED that the Court's June 24, 2013 Order Granting in Part Defendant's Motion for Judgment on the pleading is VACATED.

Dated: September __, 2014

Hon. Michael C. Dunston
Judge of the Superior Court
Of the Virgin Islands

ATTEST: Estrella H. George
Acting Clerk of the Court

By: _____
Lori Boynes-Tyson
Court Clerk Supervisor __/__/__

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

UNITED CORPORATION,

Plaintiff,

v.

WAHEED HAMED,
(a/k/a Willy or Willie Hamed),

Defendant.

Case No.: 2013-CV-101

ACTION FOR DAMAGES

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 opportunities¹ 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/sourced⁴; 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.

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

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 *Gutierrez* decision—demonstrate there is no such manifest injustice here.

Gutierrez 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 *Gutierrez*, 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

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 trial⁶—*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 ¶ 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 its 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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Christiansted, VI 00820
Telephone: (340) 719-8941
Email: carl@carlhartmann.com

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 :

Nizar A. DeWood
The DeWood Law Firm
2006 Eastern Suburb, Suite 101
Christiansted, VI 00820
Email: dewoodlaw@gmail.com



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

2014 NOV -7 AM 9:53
SUPERIOR COURT
OF THE VIRGIN ISLANDS

UNITED CORPORATION,)
)
 Plaintiff,) Case No.: ST-13-CV-101
)
 v.) ACTION FOR DAMAGES
)
 WAHEED HAMED,) JURY TRIAL DEMANDED
 (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:

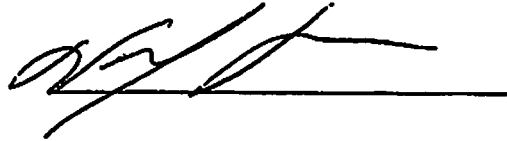

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CERTIFICATE OF SERVICE

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', is written over a solid horizontal line.

9/18/04

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

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,
dba Plaza Extra,

Defendants.

THIRD SUPERSEDING INDICTMENT

CRIMINAL NO. 2003-147

18 U.S.C. § 371
CONSPIRACY TO COMMIT MAIL FRAUD
STRUCTURE FINANCIAL TRANSACTIONS

18 U.S.C. § 1956(b)
CONSPIRACY TO LAUNDER MONEY

18 U.S.C. § 1341
MAIL FRAUD

18 U.S.C. § 1956(a)(2)(B)(i)
MONEY LAUNDERING

26 U.S.C. § 7206(2)
CAUSING FALSE TAX RETURNS

31 U.S.C. § 5324(a)(3)
STRUCTURING FINANCIAL TRANSACTIONS

33 V.I.C. § 1522
CONSPIRACY TO EVADE TAXES

33 V.I.C. § 1525(2)
CAUSING FALSE TAX RETURNS

14 V.I.C. § 605(a)
ENGAGING IN A CRIMINAL ENTERPRISE

14 V.I.C. § 605(d)
CONSPIRACY TO ENGAGE IN A CRIMINAL
ENTERPRISE

18 U.S.C. § 1503
OBSTRUCTION OF JUSTICE

18 U.S.C. § 982
21 U.S.C. § 853
ASSET FORFEITURE

14 V.I.C. § 606
ASSET FORFEITURE

SENTENCING ALLEGATIONS

THE GRAND JURY CHARGES:

GENERAL ALLEGATIONS

At all times relevant to this Indictment:

A. Defendants

1. Defendant UNITED CORPORATION (hereinafter UNITED) was a corporation organized and existing under the laws of the United States Virgin Islands (hereinafter "Virgin Islands") that did business as Plaza Extra (hereinafter "Plaza Extra"). In the mid-1980s, Plaza Extra opened its first store, which was located in St. Croix. In 1993, Plaza Extra opened a second store, which was located in St. Thomas. In 2000, Plaza Extra opened a third store, which also was located in St. Croix. Plaza Extra sold groceries and other merchandise, which was purchased from wholesalers and other suppliers located in states, territories and countries outside of the Virgin Islands. From 1996 through 2001, Plaza Extra's sales totaled over \$300 million.

2. Defendant FATHI YUSUF MOHAMAD YUSUF (hereinafter FATHI YUSUF) is a citizen of the United States and a resident of the Virgin Islands. FATHI YUSUF was an owner, director and officer of defendant UNITED and participated in the operation of Plaza Extra. FATHI YUSUF's duties and responsibilities included management of the business and conduct of the affairs of the corporation. FATHI YUSUF acted with the intent to benefit both himself and UNITED in executing his duties and responsibilities.

3. Defendant WALEED MOHAMMAD HAMED (hereinafter WALEED HAMED) is a citizen of the United States and a resident of the Virgin Islands. WALEED HAMED was employed by UNITED as the manager of a Plaza Extra supermarket in St. Croix. WALEED HAMED's duties and responsibilities included the overall operation and financial management

of the store. WALEED HAMED acted with the intent to benefit both himself and UNITED in executing his duties and responsibilities.

4. Defendant WAHEED MOHAMMED HAMED (hereinafter WAHEED HAMED) is a citizen of the United States, a resident of the Virgin Islands, and the brother of WALEED HAMED. WAHEED HAMED was employed by UNITED as the manager of the Plaza Extra supermarket in St. Thomas. WAHEED HAMED's duties and responsibilities included the overall operation and financial management of the store. WAHEED HAMED acted with the intent to benefit both himself and UNITED in executing his duties and responsibilities.

5. Defendant MAHER FATHI YUSUF (hereinafter MAHER YUSUF) is a citizen of the United States, a resident of the Virgin Islands, and the son of defendant FATHI YUSUF. MAHER YUSUF was an owner, director and officer of UNITED and participated in the operation of Plaza Extra. MAHER YUSUF's duties and responsibilities included management of the business and conduct of the affairs of the corporation. MAHER YUSUF acted with the intent to benefit both himself and UNITED in executing his duties and responsibilities.

6. Defendant ISAM MOHAMAD YOUSUF (hereinafter ISAM YOUSUF) is a citizen of the United States, a resident of St. Maarten, Netherlands Antilles, and the nephew of defendant FATHI YUSUF. ISAM YOUSUF owns and operates Island Appliances, a company located in St. Maarten that sells appliances and furniture.

7. Defendant NEJEH FATHI YUSUF (hereinafter NEJEH YUSUF) is a citizen of the United States, a resident of the Virgin Islands, and the son of defendant FATHI YUSUF. NEJEH YUSUF was an owner and employee of UNITED and participated in the operation of Plaza Extra. NEJEH YUSUF's duties and responsibilities included management of the business

and conduct of the affairs of the corporation. NEJEH YUSUF acted with the intent to benefit both himself and UNITED in executing his duties and responsibilities.

B. Virgin Islands Tax Revenue Collection

8. The Virgin Islands Code requires Virgin Islands corporations to report their gross receipts to the territorial government and pay a tax of four percent (4%) on such gross receipts. Gross receipts tax returns must be completed under oath subject to penalties for perjury and filed monthly with the Virgin Islands Bureau of Internal Revenue. Gross receipts tax revenue collected from corporations in this manner is deposited into the general fund of the treasury for use by the territory. Defendant UNITED was required to file monthly gross receipts tax returns and to pay taxes on its monthly gross sales receipts.

9. United States law provides that the income-tax laws in force in the United States apply to the Virgin Islands, and that the proceeds of such taxes must be paid to the Virgin Islands.

C. Scheme to Defraud

10. Beginning at least as early as in or about January 1996 and continuing through at least in or about September, 2002, defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED and UNITED defrauded the Virgin Islands of money in the form of tax revenue, specifically territorial gross receipts taxes as well as corporate income taxes, by failing to report at least \$60 million in Plaza Extra sales on gross receipts tax returns and corporate income tax returns.

11. Plaza Extra customers paid for their purchases with cash, checks, credit cards, food stamps, and other forms of payment. After Plaza Extra's sales receipts were collected each day, the funds typically were transferred to a room in the store often referred to as the "cash room," to which only certain individuals, including the defendants, were permitted access. In the cash room, Plaza Extra employees counted the sales receipts and prepared bank deposit slips for the sales receipts.

12. Defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED, NEJEH YUSUF, and UNITED directed and caused Plaza Extra employees to withhold from deposit substantial amounts of cash received from sales, typically bills in denominations of \$100, \$50 and \$20. Instead of being deposited into the bank accounts with other sales receipts, this cash was delivered to one of the defendants or placed in a designated safe in the cash room. From 1996 through 2001, tens of millions of dollars in cash was withheld from deposit in this manner and as such, was not reported as gross receipts on tax returns filed by UNITED.

13. In this way, defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED and UNITED caused the filing of dozens of false monthly gross receipts tax returns, which failed to report the cash withheld from deposit as gross receipts, thereby depriving the Virgin Islands of substantial tax revenue. Defendant UNITED's controller prepared and signed Plaza Extra's monthly gross receipts tax returns, declaring under oath that the returns were true and complete, knowing full well that the returns were false in that they failed to report substantial sales receipts.

14. Defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED and UNITED also caused the filing of false annual corporate income tax returns of UNITED that failed to report the cash withheld from deposit as sales, thereby depriving the Virgin Islands of substantial tax revenue. Defendant FATHI YUSUF signed UNITED's returns, declaring under oath that the returns were true and complete, knowing full well that the returns were false in that they failed to report substantial sales receipts.

D. Concealment of the Fraud Proceeds

15. The defendants engaged in various efforts to disguise and conceal the illegal scheme and its proceeds. For example, defendants FATHI YUSUF, WAHEED HAMED, MAHER YUSUF, and NEJEH YUSUF purchased and directed and caused Plaza Extra employees and others to purchase cashier's checks, traveler's checks, and money orders with unreported cash, typically from different bank branches and made payable to individuals and entities other than the defendants, in order to disguise the cash as legitimate-appearing financial instruments.

16. Defendants FATHI YUSUF, WAHEED HAMED, MAHER YUSUF, and NEJEH YUSUF also purchased and caused others to purchase checks and money orders, and engaged in and caused others to engage in various cash transactions with banks, in amounts designed to evade the legal requirements that banks keep records and file reports regarding cash transactions with the U.S. Treasury Department.

17. Defendants WALEED HAMED and MAHER YUSUF caused unreported currency to be used to cash the checks of Plaza Extra customers and others in order to disguise the cash as legitimate-appearing financial instruments.

18. Defendants FATHI YUSUF and WALEED HAMED caused the checks and money orders described above to be deposited into foreign bank accounts they controlled. For example, defendants FATHI YUSUF and WALEED HAMED compiled the various checks and money orders obtained with unreported cash and caused them to be transported from the Virgin Islands to the Kingdom of Jordan ("Jordan"), where the funds were deposited into accounts they controlled at Cairo Amman Bank, in Amman, Jordan.

19. Defendants WALEED HAMED and WAHEED HAMED used and caused to be used UNITED corporate checks to purchase cashiers' checks made payable to Plaza Extra suppliers and other entities to create the false appearance that the checks were payments to Plaza Extra suppliers. In fact, these cashier's checks were transported to Amman, Jordan and deposited into accounts at Cairo Amman Bank controlled by defendants FATHI YUSUF and WALEED HAMED.

20. Defendants FATHI YUSUF and WALEED HAMED smuggled and caused to be smuggled millions of dollars of unreported cash from the Virgin Islands to the island of St. Martin, in the French West Indies, where it was deposited into accounts at Banque Francaise Commerciale that they and defendant ISAM YOUSUF controlled.

21. To conceal the transfer of unreported cash to foreign bank accounts, defendants FATHI YUSUF and WALEED HAMED failed to file financial reports with the United States, as required by law. Specifically, FATHI YUSUF and WALEED HAMED failed to file required reports with the U.S. Treasury Department that would have revealed: (a) their transfer of monetary instruments and cash in amounts greater than \$10,000 from the Virgin Islands to foreign countries, including Jordan and St. Martin; and (b) their control over bank accounts in

foreign countries, including Jordan and St. Martin.

E. Filing False Personal Income Tax Returns

22. Defendants FATHI YUSUF, WALEED HAMED and WAHEED HAMED also filed and caused to be filed false personal income tax returns that failed to report and pay tax on the cash and other funds that they diverted from Plaza Extra and transferred to bank accounts they controlled and used for their own personal benefit, including for the construction of lavish and expensive personal residences in the Virgin Islands. FATHI YUSUF, WALEED HAMED and WAHEED HAMED signed their personal returns, declaring under oath that the returns were true and complete, knowing full well that the returns were false in that they failed to report substantial income from funds diverted from Plaza Extra.

COUNT 1
(Conspiracy)

23. The allegations in paragraphs 1 through 21 above are realleged as if set forth in full here.

24. Beginning at least as early as in or about January 1996 and continuing through at least in or about September 2002, in the District of the Virgin Islands and elsewhere, defendants

**FATHI YUSUF
WALEED HAMED
WAHEED HAMED
MAHER YUSUF
NEJEH YUSUF
and UNITED**

knowingly conspired and agreed with each other and with others known and unknown to the grand jury to:

a. Knowingly and willfully devise and intend to devise a scheme and artifice to defraud and to obtain money and property, specifically money belonging to the Virgin Islands in the form of territorial gross receipts tax revenue, by means of material false and fraudulent pretenses, representations and promises, knowing that the pretenses, representations and promises were false when made, and for the purpose of executing and attempting to execute and in furtherance of the scheme and artifice to defraud and for obtaining money and property by means of material false and fraudulent pretenses, representations and promises, did knowingly cause to be sent and moved by the United States Postal Service, Gross Receipts Monthly Tax Returns, Forms 720 V.L., addressed to the Virgin Islands Bureau of Internal Revenue; in violation of Title 18, United States Code, Section 1341; and

b. Knowingly and for the purpose of evading the reporting and record-keeping requirements of Title 31, United States Code, Section 5313(a) and 5325, and the regulations promulgated thereunder, structure, cause to be structured, assist in the structuring, and attempt to structure and assist in the attempted structuring of financial transactions with one or more domestic financial institutions involving: (i) the issuance and sale of bank checks, bank drafts, cashier's checks, and money orders for \$3,000 or more in currency; and (ii) transactions with financial institutions involving more than \$10,000 of currency; in violation of Title 31, United States Code, Section 5324(a)(3) and (d)(2).

A. Purpose and Object of the Conspiracy

25. It was the purpose and object of the conspiracy for the defendants to unlawfully enrich themselves and the corporations they controlled by engaging in a fraudulent scheme to obtain and conceal money belonging to the Virgin Islands in the form of gross receipts tax revenue.

B. Overt Acts

26. In furtherance of the conspiracy and to effect the objects thereof, in the District of the Virgin Islands and elsewhere, the defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED, MAHER YUSUF, NEJEH YUSUF, UNITED, and others known and unknown to the grand jury committed and caused to be committed the following overt acts, among others:

a. Beginning in or about January 1996 and continuing through in or about September 2002, defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED, and NEJEH YUSUF directed and caused Plaza Extra employees to withhold from deposit substantial

amounts of cash received from sales, typically bills in denominations of \$100, \$50 and \$20;

b. Beginning in or about January 1996 and continuing through in or about September 2002, defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED and UNITED's controller caused the mailing and filing of false monthly gross receipts tax returns for defendant UNITED;

c. Beginning at least as early as in or about July 1996 and continuing at least through in or about January 2000, defendants FATHI YUSUF and WALEED HAMED on numerous occasions transported and caused to be transported tens of thousands of dollars in unreported cash, typically bills in denominations of \$100, \$50 and \$20, from the Virgin Islands to St. Martin;

d. Beginning at least as early as in or about July 1996 and continuing at least through in or about January 2000, defendants FATHI YUSUF, WALEED HAMED and ISAM YOUSUF on numerous occasions deposited unreported cash into accounts they controlled at banks in St. Martin;

e. Beginning on or about July 7, 1998 and continuing through on or about October 15, 1998, on numerous occasions defendant WAHEED HAMED purchased and caused others to purchase cashier's checks and traveler's checks with unreported cash;

f. On or about July 22, 1998, defendant WALEED HAMED transported and caused to be transported approximately 23 checks totaling \$79,205.83 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled;

g. On or about August 4, 1998, defendant WALEED HAMED transported and caused to be transported approximately 60 checks totaling \$237,526.64 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled;

h. Beginning on or about August 7, 1998 and continuing through on or about October 8, 1998, on numerous occasions, defendant MAHER YUSUF purchased and caused others to purchase cashier's checks and bank checks with unreported cash;

i. On or about August 21, 1998, defendants WALEED HAMED and MAHER YUSUF transported and caused to be transported approximately 54 checks totaling \$105,225.97 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account controlled by defendant WALEED HAMED;

j. On or about September 1, 1998, defendant FATHI YUSUF transported and caused to be transported approximately 265 checks totaling \$135,880.42 from the U.S. Virgin Islands to Cairo Amman Bank in Amman, Jordan, where the proceeds were deposited into an account he controlled;

k. On or about September 11, 1998, defendant WALEED HAMED transported and caused to be transported approximately 138 checks totaling \$171,042.53 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled;

l. On or about September 25, 1998, defendant FATHI YUSUF transported and caused to be transported approximately 3 checks totaling \$179,468.50, including two bank checks totaling \$150,000 payable to a third party whose endorsement was forged, from the U.S.

Virgin Islands to Cairo Amman Bank in Amman, Jordan, where the proceeds were deposited into an account he controlled;

m. On or about October 23, 1998, defendant FATHI YUSUF transported and caused to be transported approximately 42 checks totaling \$106,092.74 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled;

n. On or about October 23, 1998, defendant WALEED HAMED transported and caused to be transported checks totaling \$100,901.44 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled;

o. On or about December 5, 1998, defendant WALEED HAMED transported and caused to be transported approximately 85 checks totaling \$161,846.15 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled;

p. On or about December 22 and 23, 1998, defendant NEJEH YUSUF purchased checks with unreported cash;

q. On or about January 6, 1999, defendant WALEED HAMED transported and caused to be transported approximately 57 checks totaling \$232,788.69 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled;

r. On or about February 18, 1999, defendant WALEED HAMED transported and caused to be transported approximately 80 checks totaling \$152,425.89 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an

account he controlled;

s. On or about April 15, 1999, defendant FATHI YUSUF transported and caused to be transported approximately 6 checks totaling \$66,660.39 from the U.S. Virgin Islands to Cairo Amman Bank in Amman, Jordan, where the proceeds were deposited into an account he controlled;

t. On or about May 25, 1999, defendant FATHI YUSUF transported and caused to be transported approximately 8 checks totaling \$439,502.62, including a bank check in the amount of \$179,273.64 payable to and endorsed by a third party who had been deceased for over two years, from the U.S. Virgin Islands to Cairo Amman Bank in Amman, Jordan, where the proceeds were deposited into an account controlled by defendant FATHI YUSUF;

u. On or about August 5, 1999, defendant WALEED HAMED transported and caused to be transported approximately 98 checks totaling \$384,145.40 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled; and

v. On or about April 10, 2000, defendant WALEED HAMED transported and caused to be transported approximately 7 checks totaling \$164,576.54 from the U.S. Virgin Islands to Cairo Amman Bank, in Amman, Jordan, where the funds were deposited into an account he controlled.

All in violation of Title 18, Sections 371 and 3551 *et seq.*

COUNT 2
(Money Laundering Conspiracy)

27. The allegations in paragraphs 1 through 13 and 15 through 21 above are realleged as if set forth in full here.

28. Beginning at least as early as in or about January 1996 and continuing through at least in or about October 2001, in the District of the Virgin Islands and elsewhere, defendants

**FATHI YUSUF
WALEED HAMED
WAHEED HAMED
MAHER YUSUF
ISAM YOUSUF
NEJEH YUSUF
and UNITED**

knowingly conspired and agreed with each other and with others known and unknown to the grand jury to:

a. Conduct and attempt to conduct financial transactions, affecting interstate and foreign commerce, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, which in fact involved the proceeds of specified unlawful activity, that is, mail fraud in violation of Title 18, United States Code, Section 1341, knowing that the financial transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity; in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i); and

b. Transport and transfer, and attempt to transport and transfer, monetary instruments and funds from a place in the United States, to and through a place outside the United States, knowing that the monetary instruments and funds involved in the transportation

and transfers represented the proceeds of some form of unlawful activity, and knowing that such transportation and transfers were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341; in violation of Title 18, United States Code, Section 1956(a)(2)(B)(i).

All in violation of Title 18, Section 1956(h) and 3551 *et seq.*

COUNTS 3 - 43
(Mail Fraud)

29. The allegations of paragraphs 1 through 13 and 15 through 21 are realleged as if fully set forth here.

30. Beginning at least as early as in or about January 1996 and continuing through at least in or about September 2002, in the District of the Virgin Islands and elsewhere, defendants

**FATHI YUSUF
WAHEED HAMED
WALEED HAMED
and UNITED**

and others known and unknown to the grand jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property, specifically money belonging to the Virgin Islands in the form of territorial gross receipts tax revenue, by means of material false and fraudulent pretenses, representations and promises, knowing that the pretenses, representations and promises were false when made, as more particularly described in paragraphs 9 through 12 and 14 through 20 of this Indictment.

31. On or about the dates specified in each count below, the defendants, for the purpose of executing and attempting to execute and in furtherance of the aforesaid scheme and artifice to defraud and for obtaining money and property by means of material false and fraudulent pretenses, representations and promises, did knowingly cause to be sent and moved by the United States Postal Service, at the East End United States Post Office in St. Thomas, Gross Receipts Monthly Tax Returns, Forms 720 V.I., addressed to the Virgin Islands Bureau of Internal Revenue, St. Thomas, Virgin Islands, 00802.

Count	Approximate Date of Mailing	Sales Month
3	09/29/1998	August 1998
4	10/30/1998	September 1998
5	11/27/1998	October 1998
6	12/30/1998	November 1998
7	01/29/1999	December 1998
8	03/01/1999	January 1999
9	03/30/1999	February 1999
10	04/30/1999	March 1999
11	06/01/1999	April 1999
12	06/30/1999	May 1999
13	07/30/1999	June 1999
14	08/30/1999	July 1999
15	09/30/1999	August 1999
16	10/29/1999	September 1999
17	11/30/1999	October 1999
18	12/29/1999	November 1999
19	01/29/2000	December 1999
20	02/29/2000	January 2000
21	03/30/2000	February 2000
22	05/01/2000	March 2000
23	05/31/2000	April 2000
24	06/30/2000	May 2000
25	07/31/2000	June 2000
26	08/30/2000	July 2000
27	10/02/2000	August 2000

Count	Approximate Date of Mailing	Sales Month
28	10/30/2000	September 2000
29	11/30/2000	October 2000
30	01/02/2001	November 2000
31	01/30/2001	December 2000
32	02/28/2001	January 2001
33	03/28/2001	February 2001
34	04/30/2001	March 2001
35	05/30/2001	April 2001
36	07/02/2001	May 2001
37	07/30/2001	June 2001
38	08/28/2001	July 2001
39	10/01/2001	August 2001
40	11/02/2001	September 2001
41	11/30/2001	October 2001
42	01/02/2002	November 2001
43	01/30/2002	December 2001

All in violation of Title 18, United States Code, Sections 1341, 2, and 3551 *et seq.*

COUNTS 44 - 52
(Money Laundering)

32. The allegations in paragraphs 1 through 13 and 15 through 21 are realleged as if fully set forth here.

33. On or about the dates listed in each count below, in the District of the Virgin Islands and elsewhere, the defendants listed below, transported and transferred, and attempted to transport and transfer, monetary instruments and funds in amounts described below from a place in the United States, specifically the United States Virgin Islands, to and through a place outside the United States, specifically Amman, Jordan, knowing that the monetary instruments and funds involved in the transportation and transfer represented the proceeds of some form of unlawful activity and knowing that such transportation and transfer was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of a specified unlawful activity, that is, mail fraud, in violation of Title 18, United States Code, Section 1341:

Count	Date	Amount	Defendant
44	09/25/98	\$179,468.50	FATHI YUSUF
45	10/23/98	\$106,092.74	FATHI YUSUF
46	12/05/98	\$161,846.15	WALEED HAMED
47	01/06/99	\$232,788.69	WALEED HAMED
48	02/18/99	\$152,425.89	WALEED HAMED
49	04/15/99	\$66,660.39	FATHI YUSUF
50	05/25/99	\$439,502.62	FATHI YUSUF
51	08/05/99	\$384,145.40	WALEED HAMED
52	04/10/00	\$164,576.54	WALEED HAMED

All in violation of Title 18, United States Code, Sections 1956(a)(2)(B)(i), 2, 3551 *et seq.*

COUNT 53
(Structuring Financial Transactions)

34. The allegations of paragraphs 1 through 21 are realleged as if fully set forth here.

35. Beginning on or about July 7, 1998 and continuing through on or about October 15, 1998, in the District of the Virgin Islands, defendant

WAHEED HAMED

knowingly structured and assisted in structuring, and attempted to structure and assist in structuring, the following transaction with the domestic financial institutions listed below for the purpose of evading the record-keeping and reporting requirements of Title 31, United States Code, Section 5325, and the regulations promulgated thereunder, for transactions involving the issuance and sale of a bank check, bank draft, and cashier's check for \$3,000 or more in currency, by purchasing the following cashier's checks and bank checks with currency; and did so as part of a pattern of illegal activity involving more than \$100,000 in a 12-month period, and while violating another law of the United States, to wit: Title 18, United States Code, Sections 1341 and 1956(h), and Title 26, United States Code, Section 7206(2):

Date	Amount	Financial Institution
07/07/98	\$2,975.00	Scotiabank
07/23/98	\$2,943.00	Scotiabank
07/23/98	\$2,900.00	Scotiabank
07/24/98	\$2,750.00	Scotiabank
07/24/98	\$2,900.00	Scotiabank
07/27/98	\$2,501.56	Scotiabank
07/27/98	\$2,891.61	Scotiabank
07/27/98	\$2,598.98	Scotiabank
07/28/98	\$2,541.01	Banco Popular

Date	Amount	Financial Institution
07/28/98	\$2,781.81	Banco Popular
07/29/98	\$2,768.68	Scotiabank
07/29/98	\$2,898.15	Scotiabank
07/29/98	\$2,819.92	Scotiabank
07/29/98	\$2,967.75	Scotiabank
07/29/98	\$2,644.38	Scotiabank
07/29/98	\$2,777.50	Scotiabank
07/29/98	\$2,998.98	Scotiabank
07/29/98	\$2,981.11	Scotiabank
08/10/98	\$2,801.98	Scotiabank
08/10/98	\$2,784.40	Scotiabank
08/10/98	\$2,998.48	Scotiabank
08/10/98	\$2,862.48	Scotiabank
08/11/98	\$2,862.48	Scotiabank
08/12/98	\$2,784.40	Scotiabank
08/20/98	\$2,950.00	Scotiabank
08/20/98	\$2,777.41	Scotiabank
08/20/98	\$2,991.70	Scotiabank
08/20/98	\$2,698.90	Scotiabank
09/11/98	\$2,858.50	First Bank
09/11/98	\$2,879.98	Scotiabank
09/11/98	\$2,990.05	Scotiabank
09/11/98	\$2,995.48	Scotiabank
10/15/98	\$2,805.00	Scotiabank

Date	Amount	Financial Institution
10/15/98	\$2,999.10	Scotiabank
10/15/98	\$2,899.60	Scotiaban

All in violation of Title 31, United States Code, Sections 5324(a)(3) and (d)(2), and Title 18, United States Code, Sections 2 and 3551 *et seq.*

COUNT 54
(Structuring Financial Transactions)

36. The allegations of paragraphs 1 through 21 are realleged as if fully set forth here.

37. From on or about August 6, 1998 through on or about October 8, 1998, in the District of the Virgin Islands, defendant

MAHER YUSUF

knowingly structured and assisted in structuring, and attempted to structure and assist in structuring, the following transaction with the domestic financial institutions listed below for the purpose of evading the record-keeping and reporting requirements of Title 31, United States Code, Section 5325, and the regulations promulgated thereunder, for transactions involving the issuance and sale of a bank check, bank draft, and cashier's check for \$3,000 or more in currency, by purchasing the following cashier's checks and bank checks with currency; and did so as part of a pattern of illegal activity involving more than \$100,000 in a 12-month period, and while violating another law of the United States, to wit: Title 18, United States Code, Section 1956(h):

Date	Amount	Financial Institution
08/06/98	\$2,400.00	Bank of St. Croix
08/06/98	\$2,500.00	Scotiabank
08/10/98	\$2,990.00	Bank of St. Croix
08/10/98	\$2,891.00	Scotiabank
08/10/98	\$2,794.00	Banco Popular
08/10/98	\$2,661.00	Banco Popular
08/10/98	\$2,665.00	Scotiabank
08/11/98	\$2,480.00	Scotiabank
08/12/98	\$2,123.00	Scotiabank

Date	Amount	Financial Institution
08/19/98	\$2,700.00	Scotiabank
08/27/98	\$2,500.00	Banco Popular
08/27/98	\$2,500.00	Scotiabank
09/04/98	\$2,500.00	Scotiabank
09/04/98	\$2,500.00	Banco Popular
10/05/98	\$2,847.00	Banco Popular
10/05/98	\$2,900.00	Scotiabank
10/07/98	\$2,800.00	Bank of St. Croix
10/07/98	\$2,800.00	Scotiabank
10/08/98	\$2,920.00	Scotiabank

All in violation of Title 31, United States Code, Sections 5324(a)(3) and (d)(2), and Title 18, United States Code, Sections 2 and 3551 *et seq.*

COUNT 55
(Conspiracy to Evade Taxes)

38. The allegations in paragraphs 1 through 22 above are realleged as if set forth in full here.

39. Beginning at least as early as in or about January 1996 and continuing through at least in or about September 2002, in the District of the Virgin Islands and elsewhere, defendants

**FATHI YUSUF
WALEED HAMED
WAHEED HAMED
and UNITED**

knowingly and intentionally combined, conspired, confederated and agreed with each other and with others known and unknown to the grand jury to willfully evade and defeat taxes imposed by the Virgin Islands, to wit gross receipts taxes and corporate and individual income taxes.

A. Purpose and Object of the Conspiracy

40. It was the purpose and object of the conspiracy for the defendants to unlawfully enrich themselves and the corporations they controlled by depriving the Virgin Islands of gross receipts tax revenue and corporate and individual income tax revenue.

B. Overt Acts

41. In furtherance of the conspiracy and to effect the objects thereof, in the District of the Virgin Islands and elsewhere, the defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED, UNITED, and others known and unknown to the grand jury committed and caused to be committed the overt acts described in paragraphs 26(a) through (v); which are realleged as if set forth in full here, in addition to the following overt acts, among others:

a. Between on or about March 4, 1997 and September 11, 2002, defendant WALEED HAMED caused the filing of false annual individual income tax returns, Forms 1040, in his name for the tax years 1996 through 2001;

b. Between on or about April 11, 1997 and September 30, 2002, defendant FATHI YUSUF caused the filing of false annual individual income tax returns, Forms 1040, in his name for the tax years 1996 through 2001;

c. Between on or about August 14, 1997 and September 18, 2002, defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED and UNITED caused the filing of false annual corporate income tax returns, Forms 1120 and 1120S, on behalf of defendant UNITED, for the tax years 1996 through 2001; and

d. Between on or about April 17, 1998 and April 17, 2001, defendant WAHEED HAMED caused the filing of false annual individual income tax returns, Forms 1040, in his name for the tax years 1997 through 2000.

All in violation of Title 33, Virgin Islands Code, Section 1522.

COUNTS 56 - 60
(Causing False Tax Returns)

42. On or about the dates listed below, in the District of the Virgin Islands, defendants

**FATHI YUSUF
WALEED HAMED
WAHEED HAMED
and UNITED**

the individuals all being residents of the United States Virgin Islands and the corporation, being organized under the laws of the United States Virgin Islands, did willfully cause and aid and assist in, and procure, counsel, and advise, the preparation and presentation to the Virgin Islands Bureau of Internal Revenue, of defendant UNITED's Corporate Income Tax Returns, Forms 1120 and 1120S, for the calendar years listed below, which were false and fraudulent as to a material matter, in that the returns reported sales in the amount listed below, whereas defendants then and there knew and believed that UNITED made substantial sales in addition to the amount reported.

Count	Date	Tax Year	Form	Reported Sales
56	07/11/98	1997	1120	\$36,823,771
57	04/07/99	1998	1120	\$40,706,669
58	07/05/00	1999	1120S	\$47,004,399
59	08/30/01	2000	1120S	\$51,746,933
60	09/18/02	2001	1120S	\$69,579,412

All in violation of Title 33, Virgin Islands Code, Section 1525(2).

COUNTS 61 - 65
(Causing False Tax Returns)

43. On or about the dates listed below, in the District of the Virgin Islands, defendant

FATHI YUSUF

a resident of the Virgin Islands, did willfully cause and aid and assist in, and procure, counsel, and advise, the preparation and presentation to the Virgin Islands Bureau of Internal Revenue, of Individual Income Tax Returns, Forms 1040, for the calendar years listed below, which were filed with the Virgin Islands pursuant to the Internal Revenue Code, Title 26 of the United States Code, section 932(c)(4), and were false and fraudulent as to a material matter, in that the returns reported total income in the amount listed below, whereas he then and there knew and believed that his true total income was substantially more than the amount reported.

Count	Date	Tax Year	Reported Total Income
61	04/15/98	1997	\$58,360
62	04/09/99	1998	\$33,341
63	10/16/00	1999	\$1,936,460
64	09/28/01	2000	\$1,607,800
65	09/30/02	2001	\$3,402,579

All in violation of Title 26, United States Code, Section 7206(2).

COUNTS 66 - 70
(Causing False Tax Returns)

44. On or about the dates listed below, in the District of the Virgin Islands, defendant

WALEED HAMED

a resident of the Virgin Islands, did willfully cause and aid and assist in, and procure, counsel, and advise, the preparation and presentation to the Virgin Islands Bureau of Internal Revenue, of Individual Income Tax Returns, Forms 1040, for the calendar years listed below, which were filed with the Virgin Islands pursuant to the Internal Revenue Code, Title 26 of the United States Code, section 932(c)(4), and were false and fraudulent as to a material matter, in that the returns reported total income in the amount listed below, whereas he then and there knew and believed that he received substantial income in addition to the amount reported.

Count	Date	Tax Year	Reported Total Income
66	03/31/98	1997	\$23,825
67	07/29/99	1998	\$25,598
68	08/10/00	1999	\$23,017
69	08/24/01	2000	\$28,259
70	09/11/02	2001	\$39,052

All in violation of Title 26, United States Code, Section 7206(2).

COUNTS 71 - 74
(Causing False Tax Returns)

45. On or about the date listed below, in the District of the Virgin Islands, defendant

WAHEED HAMED

a resident of the Virgin Islands, did willfully cause and aid and assist in, and procure, counsel, and advise, the preparation and presentation to the Virgin Islands Bureau of Internal Revenue, of Individual Income Tax Returns, Forms 1040, for the calendar years listed below, which were filed with the Virgin Islands pursuant to the Internal Revenue Code, Title 26 of the United States Code, section 932(c)(4), and were false and fraudulent as to a material matter, in that the returns reported total income in the amount listed below, whereas he then and there knew and believed that he received substantial income in addition to the amount reported.

Count	Date	Tax Year	Reported Total Income
71	04/17/98	1997	\$14,700
72	04/15/99	1998	\$16,300
73	04/14/00	1999	\$25,189
74	04/17/01	2000	\$31,293

All in violation of Title 26, United States Code, Section 7206(2).

COUNT 75
(Conduct of Criminal Enterprise)

46. Paragraphs 1 through 22 of this Indictment are hereby realleged and incorporated as if fully set forth herein.

47. Beginning at least as early as in or about January 1996 and continuing through at least in or about September 2002, in the District of the Virgin Islands and elsewhere, defendants

**FATHI YUSUF
WAHEED HAMED
WALEED HAMED
and UNITED**

together and with others known and unknown to the Grand Jury, being persons employed by and associated with the enterprise described in paragraph 48, unlawfully, intentionally, and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of criminal activity, as defined in Title 14, Virgin Islands Code, Sections 604(e)&(j), to wit: the violations described in Counts 1, 2, 3, 15, 27, 39, and 55-60.

48. The enterprise consisted of defendant UNITED and the following corporations, that is, a group of corporations associated in fact:

a. Peter's Farm Investment Corp., a Virgin Islands corporation that was owned and controlled by FATHI YUSUF and others;

b. Plessen Enterprises, Inc., a Virgin Islands corporation that was owned and controlled by FATHI YUSUF, WALEED HAMED, and others; and

c. Sixteen Plus Corporation, a Virgin Islands corporation that was owned and controlled by FATHI YUSUF, WALEED HAMED, and others.

49. The purposes of the enterprise included unlawfully enriching the members and associates of the enterprise by obtaining and concealing money belonging to the Virgin Islands in the form of gross receipts tax revenue and corporate and individual income tax revenue.

50. The defendants participated in the operation and management of the enterprise, as follows:

a. The defendant FATHI YUSUF, an owner and officer of UNITED, was a leader of the enterprise who directed other members of the enterprise in carrying out unlawful and other activities in furtherance of the conduct of the enterprise's affairs;

b. The defendant WAHEED HAMED, a manager of a Plaza Extra supermarket, was a leader of the enterprise who directed other members of the enterprise in carrying out unlawful and other activities in furtherance of the conduct of the enterprise's affairs;

c. The defendant WALEED HAMED, a manager of a Plaza Extra supermarket, was a leader of the enterprise who directed other members of the enterprise in carrying out unlawful and other activities in furtherance of the conduct of the enterprise's affairs; and

d. Under the direction of the leaders of the enterprise, defendant UNITED participated in unlawful and other activities in furtherance of the conduct of the enterprise's affairs.

51. Among the means and methods by which the defendants and their associates conducted and participated in the conduct of the affairs of the enterprise are the acts described in paragraphs 10-22 above, which are incorporated herein as if set forth in full.

In violation of Title 14, Virgin Islands Code, Section 605(a).

COUNT 76
(Conspiracy to Conduct Criminal Enterprise)

52. Paragraphs 1 through 22 of this Indictment are hereby realleged and incorporated as if fully set forth herein.

53. Beginning at least as early as in or about January 1996 and continuing through at least in or about September 2002, in the District of the Virgin Islands and elsewhere, defendants

FATHI YUSUF
WALEED HAMED
WAHEED HAMED
and **UNITED**

together with other persons known and unknown to the Grand Jury, being persons employed by and associated with the enterprise described in paragraph 48 above, knowingly and intentionally conspired to violate Title 14, Virgin Islands Code, Section 605(a), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of criminal activity, as that term is defined by Title 14, Virgin Islands Code, Sections 604(e)&(j). The pattern of criminal activity through which the defendants agreed to conduct the affairs of the enterprise consisted of the acts forth in paragraph 47 of this Indictment, which are incorporated as if fully set forth herein.

54. It was a part of the conspiracy that the defendants agreed that a conspirator would commit at least two acts of criminal activity in the conduct of the affairs of the enterprise.

All in violation of Title 14, Virgin Islands Code, Section 605(d).

COUNT 77
(Structuring Financial Transactions)

55. The allegations of paragraphs 1 through 21 are realleged as if fully set forth here.

56. Beginning on or about December 22, 1998, and continuing through on or about December 23, 1998, in the District of the Virgin Islands, defendant

NEJEH F. YUSUF

knowingly structured and assisted in structuring, and attempted to structure and assist in structuring, the following transaction with the domestic financial institutions listed below for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), and the regulations promulgated thereunder, for currency transactions involving more than \$10,000 by purchasing the following checks with currency at the following institutions:

Date	Amount	Financial Institution
12/22/98	\$9,000	Banco Popular
12/22/98	\$9,000	Bank of St. Croix
12/22/98	\$9,000	Scotiabank
12/22/98	\$9,000	Scotiabank
12/23/98	\$9,000	Scotiabank

All in violation of Title 31, United States Code, Sections 5324(a)(3) and (d)(2), and Title 18, United States Code, Sections 2 and 3551 *et seq.*

COUNT 78
(Obstruction of Justice)

57. On or about September 19, 2003, in the District of the Virgin Islands, defendant

NEJEH YUSUF

did corruptly endeavor to influence, obstruct and impede the due administration of justice, in that defendant NEJEH YUSUF did knowingly and willfully make false and misleading declarations in the District Court of the Virgin Islands with intent to obstruct and impede the federal grand jury investigation and criminal prosecution involving FATHI YUSUF, MAHER YUSUF, NEJEH YUSUF, UNITED, and others, including in case no. 2003-147, then pending in the Virgin Islands.

58. On the date stated above, during a pre-trial hearing in case no. 2003-147, defendant NEJEH YUSUF gave false and misleading testimony while under oath, including the following underscored declarations:

Q: While you were working at Plaza Extra, cash sales were being withheld from deposit into the company bank accounts, isn't that correct?

A: Not that I can remember.

* * *

Q: Were all the cash sales deposited into the company's bank account while you working there?

A: Like I said, I'm a front end manager and, uh, I have access to the safe, but as far as deposits and so forth, that was no my job directly.

Q: Let me ask the question again. As far as you know, while you were working at Plaza Extra, were all the cash sales deposited into the company's bank accounts?

A: I don't know how you want me to answer that, I mean . . . were all the cash sales deposited into Plaza Extra's bank account?

Q: That's correct.

Court: Of which you have knowledge.

A: I would say eventually yes, they were. I mean that . . . To my knowledge, as far as what I can remember.

* * *

Q: While you were working at Plaza Extra, did you ever instruct or direct anyone to withhold cash from the company's bank account?

A: As far as I can remember, no.

In violation of Title 18, Sections 1503 and 3551 *et seq.*

CRIMINAL FORFEITURE ALLEGATION 1
(18 U.S.C. § 982)

59. The allegations contained in Counts 1, 2 and 27 through 52 of this Indictment are re-alleged and incorporated by reference as if fully set forth herein, for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 982.

60. Upon conviction of one or more of the offenses charged in Counts 1, 2 and 27 through 52 of this Indictment, the defendants FATHI YUSUF, WALEED HAMED, WAHEED HAMED, ISAM YOUSUF and UNITED shall forfeit to the United States pursuant to Title 18, United States Code, Section 982, any property, real or personal, involved in such offenses, or any property traceable to such property, or any property constituting or derived from proceeds which the defendants obtained directly or indirectly as a result of the commission of said violations.

61. Such forfeitures shall include, but are not limited to:

Money Judgment

62. The sum of at least approximately \$60 million in United States currency and all interest and proceeds traceable thereto, in that such sum, in the aggregate, was involved in and is traceable to, and constitutes and is derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of, the criminal offenses alleged in Counts 1, 2 and 27 through 52, for which the defendants are jointly and severally liable.

Real Property

63. Real property located at 14 and 28-29 Estate Plessen, St. Croix, Parcel 4-06200-0408-00, including all of its appurtenances, improvements, fixtures, attachments, and easements, which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United

States Code, Sections 371 and 1341.

64. Real property located at 3AA-1 and 4AA St. Joseph and Rosendahl, St. Thomas, Parcels 1-05501-0148-00 and 1-05501-0107-00, including all of its appurtenances, improvements, fixtures, attachments, and easements, which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 371 and 1341.

65. Real property located at 4-15, No. 5 and 6 Tabor and Harmony, St. Thomas, Parcels 1-03104-234-00 and 1-03104-265-00, including all of its appurtenances, improvements, fixtures, attachments, and easements, which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 371 and 1341.

66. Real property located at Remainder Spring Garden, St. Croix, Parcel 4-01900-0101-00, including all of its appurtenances, improvements, fixtures, attachments, and easements, which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and (h).

67. Real property located at Parcel 2, Estate Longpoint and Cotton Garden, St. Croix, Parcel 2-03500-0414-00, including all of its appurtenances, improvements, fixtures, attachments, and easements, which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and (h).

68. Real property located at Estate Peter's Farm, St. Croix, Parcel 2-04900-0404-00, including all of its appurtenances, improvements, fixtures, attachments, and easements,

which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and (h).

69. Real property located at Estate Perseverance, St. Thomas, Parcel 1-02503-0101-00, including all of its appurtenances, improvements, fixtures, attachments, and easements, which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and (h).

70. Real property located at 6 and 9 Estate Thomas, St. Thomas, Parcel 05404-1505-00, including all of its appurtenances, improvements, fixtures, attachments, and easements, which is property constituting and derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and (h).

71. Real property known as Diamond Keturah Land on St. Croix, consisting of:

- a. Estate Cane Garden, Parcel Nos. 8, 9, 10, Remainder No. 46A, Remainder Matriculate No. 32B, Road Plots 11 and 12;
- b. Estate Retreat Parcel 11, Peter's Matriculate No. 37B of Company Quarter and Peter's Matriculate No. 37A and 37BA of Company Quarter, No. 54 of Queen's Quarter;
- c. Estate Granard Remainder Matriculate 32A, Parcel No. 40, Road Plot 41;

and

- d. Estate Diamond, Remainder Matriculate 31, Parcel Nos. 1, 2, 3, 4, Road Plot No. 6; including all appurtenances, improvements, fixtures, attachments, and easements; all of which is property constituting and derived from proceeds which the defendants obtained

directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 1956(a)(1)(B)(i), (a)(2)(B)(i) and (h).

Bank Account

72. All United States currency, funds, or other monetary instruments credited to Account No.140-21722 in the name of Fathieh Yousuf (or Yousef), held by Merrill Lynch, which is property involved in and traceable to, and constitutes and is derived from proceeds which the defendants obtained directly and indirectly as a result of the commission of violations of Title 18, United States Code, Sections 371, 1341, and 1956(a)(1)(B)(i) and (h).

SUBSTITUTE ASSETS

73. Pursuant to Title 21, United States Code, Section 853(p), as incorporated by reference by Title 18, United States Code, Section 982(b), if any of the forfeitable property, and any portion thereof, described in the forfeiture section of this Indictment, as a result of any act or omission of the defendants:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property, including but not limited to the following:

- f. Real property located at 92C and D, La Grande Princess, St. Croix, Parcel 2-02611-0215-00, including all appurtenances, improvements, fixtures, attachments, and

easements;

g. Real property located at 7 Southgate, St. Croix, Parcel 2-03000-0412-00, including all of its appurtenances, improvements, fixtures, attachments, and easements;

h. Real property located at 92B La Grande Princess, St. Croix, Parcel 2-02611-0214-00, including all appurtenances, improvements, fixtures, attachments, and easements; and

i. Real property located at Green Cay Plantation Subdivision, Frenchman's Bay, St. Thomas, Parcel 07404-0280-00, including all of its appurtenances, improvements, fixtures, attachments, and easements.

j. Real property located at Estate Charlotte Amalie, No. 3 New Quarter, St. Thomas, Parcel No. 2-Remainder, including all of its appurtenances, improvements, fixtures, attachments, and easements.

CRIMINAL FORFEITURE ALLEGATION 2
(14 V.I.C. § 606)

74. The allegations contained in Counts 75 and 76 of this Indictment are re-alleged and incorporated by reference as if fully set forth herein for the purpose of alleging forfeitures pursuant to Title 14, Virgin Islands Code, Section 606.

75. Through the pattern of criminal activity alleged in Counts 75 and 76, defendants FATHI YUSUF, WALBED HAMED, WAHEED HAMED, and UNITED have acquired and maintained real and personal property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of Title 14, Virgin Islands Code, Section 605, including property constituting an interest in, or means of control or influence over, the enterprise involved in the conduct in violation of Title 14, Virgin Islands Code, Section 605, and including property constituting proceeds derived from the conduct in violation of Title 14, Virgin Islands Code, Section 605, which is subject to forfeiture to the Government of the Territory of the United States Virgin Islands pursuant to Title 14, Virgin Islands Code, Section 606(c). That forfeitable property includes, but is not limited to:

Corporate Assets and Interests

76. All assets, tangible and intangible, of UNITED, including, but not limited to: all United States currency, funds, or other monetary instruments credited to the following accounts in the name of defendant United Corporation:

- a. Account No. 191-063789 at Banco Popular;
- b. Account No. 191-013307 at Banco Popular;
- c. Account No. 192-026143 at Banco Popular;
- d. Account No. 65811 at Bank of Nova Scotia;

- e. Account No. 55312010 at Bank of Nova Scotia;
- f. Account No. 60086413 at Bank of Nova Scotia;
- g. Account No. 60092918 at Bank of Nova Scotia;
- h. Account No. 55356719 at Bank of Nova Scotia; and
- i. Account No. 140-07759 at Merrill Lynch.

77. The interests of individual defendants FATHI YUSUF, WALEED HAMED, and WAHEED HAMED in the enterprise, including individual shares and rights and entitlements to profits and funds from UNITED and other corporate members of the enterprise.

78. As a result of the commission of the offenses charged in Counts 75 and 76 of this Indictment, the defendants FATHI YUSUF, WALEED HAMED, and WAHEED HAMED shall forfeit to the Government of the Territory of the United States Virgin Islands assets, including, but not limited to, the assets described in paragraphs 62, 64 through 73.

SUBSTITUTE ASSETS

79. Pursuant to Title 14, Virgin Islands Code, Section 606(e), if any of the forfeitable property, and any portion thereof, described in Criminal Forfeiture Allegation One of this Indictment, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been sold to a bona fide purchaser for value;
- c. has been placed beyond the jurisdiction of the Court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty or injury to third persons;

it is the intent of the United States to seek forfeiture of any other property of said defendants up

to the value of the above forfeitable property, including, but not limited to the property described in paragraphs 68(f) through 68(i).

All in accordance with Title 14, Virgin Islands Code, Section 606.

SENTENCING ALLEGATIONS

80. With respect to count 1 of the Indictment with which each defendant is charged:
- a. The loss from the mail fraud described in count 1(a) was more than \$2,500,000;
 - b. The amount of funds structured described in count 1(b) was more than \$2,500,000;
 - c. The offense otherwise involved sophisticated means; and
 - d. Defendants **FATHI YUSUF, WALEED HAMED, and WAHEED HAMED,** were organizers and leaders of a criminal activity that involved five or more participants and was otherwise extensive.
81. With respect to count 2 of the indictment with which each defendant is charged:
- a. The value of the laundered funds was more than \$1,000,000;
 - b. The offense involved sophisticated laundering; and
 - c. Defendants **FATHI YUSUF, WALEED HAMED, and WAHEED HAMED,** were organizers and leaders of a criminal activity that involved five or more participants and was otherwise extensive.
82. With respect to counts 3 through 43 of the indictment with which each defendant is charged:
- a. The loss from the mail fraud described in counts 3 through 43 more than \$2,500,000;
 - b. The offense otherwise involved sophisticated means; and
 - c. Defendants **FATHI YUSUF, WALEED HAMED, and WAHEED HAMED,** were organizers and leaders of a criminal activity that involved five or more participants and was otherwise extensive.

83. With respect to counts 44 through 52 of the indictment with which each defendant is charged:
- a. The value of the laundered funds was more than \$1,000,000; and
 - b. The offense involved sophisticated laundering.
84. With respect to count 53 of the indictment with which each defendant is charged:
- a. The value of the funds structured was more than \$70,000;
 - b. Defendant **WAHEED HAMED** knew and believed that the funds were proceeds of unlawful activity and were intended to promote unlawful activity; and
 - c. Defendant **WAHEED HAMED** committed the offense as part of a pattern of unlawful activity involving more than \$100,000 in a 12 month period.
85. With respect to count 54 of the indictment with which each defendant is charged:
- a. The value of the funds structured was more than \$30,000;
 - b. Defendant **MAHER YUSUF** knew and believed that the funds were proceeds of unlawful activity and were intended to promote unlawful activity; and
 - c. Defendant **MAHER YUSUF** committed the offense as part of a pattern of unlawful activity involving more than \$100,000 in a 12 month period.
86. With respect to counts 61 through 65 of the indictment with which each defendant is charged:
- a. The tax loss was more than \$7,000,000;
 - b. The offense involved sophisticated means and/or sophisticated concealment; and
 - c. Defendant **FATHI YUSUF** failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity.

87. With respect to counts 66 through 70 of the indictment with which each defendant is charged:
- a. The tax loss was more than \$1,000,000;
 - b. The offense involved sophisticated means and/or sophisticated concealment; and
 - c. Defendant **WALEED HAMED** failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity.
88. With respect to counts 71 through 74 of the indictment with which each defendant is charged:
- a. The tax loss was more than \$400,000;
 - b. The offense involved sophisticated means and/or sophisticated concealment; and
 - c. Defendant **WAHEED HAMED** failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity.
89. With respect to count 77 of the indictment with which each defendant is charged:
- a. The amount of structured funds was more than \$30,000; and
 - b. The offense otherwise involved sophisticated means.
90. With respect to count 78 of the indictment with which each defendant is charged:
- a. The offense involved substantial interference with the administration of justice.

A TRUE BILL

C. A. Casey
FOREPERSON

ANTHONY J. JENKINS
ACTING UNITED STATES ATTORNEY

Nelson L. Jones
NELSON L. JONES
ASSISTANT UNITED STATES ATTORNEY

William J. Love
WILLIAM J. LOVE
TRIAL ATTORNEY
UNITED STATES DEPARTMENT OF JUSTICE

SEP 10 6 11 AM '04

Thomas J. Pinder
THOMAS J. PINDER
TRIAL ATTORNEY
UNITED STATES DEPARTMENT OF JUSTICE

DISTRICT OF THE VIRGIN ISLANDS: *Sept. 8, 2004*

Returned into the District Court by Grand Jurors and filed.

Claudette P. Pinner
DEPUTY CLERK

For the year Jan. 1–Dec. 31, 1992, or other tax year beginning

1992, ending

19

OMB No. 1545-0074

Label

Use the IRS label. Otherwise, please print or type.

WAHEED HAMED
FIRYAL HAMED
P.O. BOX 2926 F' STED
ST. CROIX, VI 00841

Your social security number

[Redacted Social Security Number]

For Privacy Act and Paperwork Reduction Act Notice, see page 4.

Presidential Election Campaign

Do you want \$1 to go to this fund?

Yes

X No

Note: Checking "Yes" will not change your tax or reduce your refund.

If a joint return, does your spouse want \$1 to go to this fund?

Yes

X No

Filing Status

1

Single

2

X

Married filing joint return (even if only one had income)

3

Married filing separate return. Enter spouse's social security no. above and full name here.

4

Head of household (with qualifying person). (See page 11.) If the qualifying person is a child but not your dependent, enter this child's name here. ▶

5

Qualifying widow(er) with dependent child (year spouse died ▶ 19). (See page 11.)

Exemptions

6a

X

Yourself If your parent (or someone else) can claim you as a dependent on his or her tax return, do not check box 6a. But be sure to check the box on line 33b on page 2

No. of boxes checked on 6a and 6b

2

b

X

Spouse

No. of your children on 6c who:

c

Dependents:

(1) Name (first, initial, and last name)

(2) Check if dependent's principal residence

(3) Age

(4) Dependent's relationship to you

(5) No. of mos. lived in your home in 1992

Table with 5 columns: (1) Name, (2) Check if dependent's principal residence, (3) Age, (4) Dependent's relationship to you, (5) No. of mos. lived in your home in 1992. Includes entry for ROSEMARY BRANCE dated JUL 29 1993.

• lived with you

• didn't live with you due to divorce or separation (see page 13)

No. of other dependents on 6c

d

If your child didn't live with you but is claimed as your dependent under a pre-1985 agreement, check here ▶

Add numbers entered on lines above

2

e

Total number of exemptions claimed

Income

Table for Income section with lines 7-23. Includes entries for wages, interest, dividends, and total income of 3,886.

Adjustments to Income

(See page 18.)

Table for Adjustments to Income section with lines 24a-30. Includes IRA deductions and other adjustments.

Adjusted Gross Income

31 Subtract line 30 from line 23. This is your adjusted gross income. If this amount is less than \$22,370 and a child lived with you, see page EIC-1 to find out if you can claim the "Earned Income Credit" on line 58

3,886-

WAHEED & FIRYAL HAMED

Tax Computation

(See page 22.)

If you want the IRS to figure your tax, see page 23.

Credits

(See page 23.)

Other Taxes

Payments

Attach Forms W-2, W-2G, and 1099-R on the front.

Refund or Amount You Owe

Attach check or money order on top of Form(s) W-2, etc., on the front.

Sign Here

Keep a copy of this return for your records.

Paid Preparer's Use Only

32	Amount from line 31 (adjusted gross income)	32	3,886
33a	Check if: <input type="checkbox"/> You were 65 or older, <input type="checkbox"/> Blind; <input type="checkbox"/> Spouse was 65 or older, <input type="checkbox"/> Blind. Add the number of boxes checked above and enter the total here	33a	
	b If your parent (or someone else) can claim you as a dependent, check here	33b	
	c If you are married filing separately and your spouse itemizes deductions or you are a dual-status alien, see page 22 and check here	33c	
34	Enter the larger of your: Itemized deductions from Schedule A, line 26, OR Standard deduction shown below for your filing status. But if you checked any box on line 33a or b, go to page 22 to find your standard deduction. If you checked box 33c, your standard deduction is zero. • Single—\$3,600 • Head of household—\$5,250 • Married filing jointly or Qualifying widow(er)—\$8,000 • Married filing separately—\$3,000	34	6,000
35	Subtract line 34 from line 32	35	9,886
36	If line 32 is \$78,950 or less, multiply \$2,300 by the total number of exemptions claimed on line 6e. If line 32 is over \$78,950, see the worksheet on page 23 for the amount to enter	36	4,600
37	Taxable income. Subtract line 36 from line 35. If line 36 is more than line 35, enter -0-	37	0
38	Enter tax. Check if from a <input checked="" type="checkbox"/> Tax Table, b <input type="checkbox"/> Tax Rate Schedules, c <input type="checkbox"/> Schedule D, or d <input type="checkbox"/> Form 8615 (see page 23). Amount, if any, from Form(s) 8814	38	0
39	Additional taxes (see page 23). Check if from a <input type="checkbox"/> Form 4970 b <input type="checkbox"/> Form 4972	39	
40	Add lines 38 and 39	40	0
41	Credit for child and dependent care expenses. Attach Form 2441	41	
42	Credit for the elderly or the disabled. Attach Schedule R	42	
43	Foreign tax credit. Attach Form 1118	43	
44	Other credits (see page 24). Check if from a <input type="checkbox"/> Form 3800 b <input type="checkbox"/> Form 8396 c <input type="checkbox"/> Form 8801 d <input type="checkbox"/> Form (specify)	44	
45	Add lines 41 through 44.	45	
46	Subtract line 45 from line 40.	46	0
47	Self-employment tax. Attach Schedule SE. Also, see line 25.	47	
48	Alternative minimum tax. Attach Form 6251	48	
49	Recapture taxes (see page 25). Check if from a <input type="checkbox"/> Form 4255 b <input type="checkbox"/> Form 8011 c <input type="checkbox"/> Form 8028	49	
50	Social security and Medicare tax on tip inc not reported to employer. Attach Form 4137	50	
51	Tax on qualified retirement plans, including IRAs. Attach Form 5329	51	
52	Advance earned income credit payments from Form W-2	52	
53	Add lines 46 through 52. Total tax	53	0
54	Federal income tax withheld. If any is from Form(s) 1099, check	54	
55	1992 estimated tax payments and amount applied from 1991 return	55	
56	Earned income credit. Attach Schedule EIC	56	
57	Amount paid with Form 4868 (extension request)	57	
58	Excess social security, Medicare, and RRTA tax withheld (see page 28)	58	
59	Other payments (see page 28). Check if from a <input type="checkbox"/> Form 2439 b <input type="checkbox"/> Form 4136	59	
60	Add lines 54 through 59. Total payments.	60	0
61	If line 60 is more than line 53, subtract line 53 from line 60. This is the amount you OVERPAID	61	
62	Amount of line 61 you want REFUNDED TO YOU	62	
63	Amount of line 61 you want APPLIED TO YOUR 1993 ESTIMATED TAX	63	
64	If line 53 is more than line 60, subtract line 60 from line 53. This is the AMOUNT YOU OWE. Attach check or money order for full amount payable to "Internal Revenue Service." Write your name, address, social security number, daytime phone number, and "1992 Form 1040" on it	64	
65	Estimated tax penalty (see page 27). Also include on line 64	65	

COPY

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature: [Signature] Date: 9/27/93 Your occupation: SELF-EMPLOYED

Spouse's signature: [Signature] Date: 7/27/93 Spouse's occupation: HOMEMAKER

Preparer's signature: [Signature] Date: 6/14/93 Check if self-employed: [] Preparer's social security no. [REDACTED]

Firm's name (or yours if self-employed) and address: BRAMMER, CHASEN & O'CONNELL CERTIFIED PUBLIC ACCOUNTANTS P.O. BOX 3016, CHRISTIANSTED ST. CROIX, IA 52702-3016 E.I. No. 66-0350119

6/14/93

**SCHEDULE C
(Form 1040)**

Profit or Loss From Business

(Sole Proprietorship)

OMB No. 1545-0074

1992

Attachment
Sequence No. 09

Department of the Treasury
Internal Revenue Service

▶ Partnerships, joint ventures, etc., must file Form 1065.

▶ Attach to Form 1040 or Form 1041. ▶ See instructions for Schedule C (Form 1040).

Name of proprietor
WAHEED MOHAMMAD

A Principal business or profession, including product or service (see page C-1)
GROCERY STORE

C Business name
5 CORNER'S MINI MART

E Business address (including suite or room no.) ▶ **5 CORNER PRINCESS**
City, town or post office, state, and ZIP code ▶ **C STED. ST. CROIX 00823**

F Accounting method: (1) Cash (2) Accrual (3) Other (specify) ▶

G Method(s) used to value closing inventory: (1) Cost (2) Lower of cost or market (3) Other (attach explanation) (4) Does not apply (if checked, skip line H)

H Was there any change in determining quantities, costs, or valuations between opening and closing inventory? If "Yes," attach explanation

I Did you "materially participate" in the operation of this business during 1992? If "No," see page C-2 for limitations on losses

J Was this business in operation at the end of 1992?

K How many months was this business in operation during 1992? ▶ **3**

L If this is the first Schedule C filed for this business, check here

Part I Income

1	Gross receipts or sales. Caution: If this income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked, see page C-2 and check here	1	37,250
2	Returns and allowances	2	
3	Subtract line 2 from line 1	3	37,250
4	Cost of goods sold (from line 40 on page 2)	4	24,212
5	Gross profit. Subtract line 4 from line 3	5	13,038
6	Other income, including Federal and state gasoline or fuel tax credit or refund (see page C-2)	6	
7	Gross income. Add lines 5 and 6	7	13,038

Part II Expenses (Caution: Do not enter expenses for business use of your home on lines 8-27. Instead, see line 30.)

8	Advertising	8		21	Repairs and maintenance	21	
9	Bad debts from sales or services (see page C-3)	9		22	Supplies (not included in Part III)	22	
10	Car and truck expenses (see page C-3—also attach Form 4502)	10		23	Taxes and licenses	23	
11	Commissions and fees	11		24	Travel, meals, and entertainment:	24a	
12	Depletion	12			a Travel		
13	Depreciation and section 179 expense deduction (not included in Part III) (see page C-3)	13			b Meals and entertainment		
14	Employee benefit programs (other than on line 19)	14			c Enter 20% of line 24b subject to limitations (see page C-4)		
15	Insurance (other than health)	15			d Subtract line 24c from line 24b	24d	
16	Interest:			25	Utilities	25	4,500
	a Mortgage (paid to banks, etc.)	16a		26	Wages (loss jobs credit)	26	
	b Other	16b		27a	Other expenses (list type and amount):		
17	Legal and professional services	17					
18	Office expense	18					
19	Pension and profit-sharing plans	19					
20	Rent or lease (see page C-4):			27b	Total other expenses	27b	
	a Vehicles, machinery, and equipment	20a					
	b Other business property	20b		28	Total expenses before expenses for business use of home. Add lines 8 through 27b in columns	28	15,300
28	Total expenses before expenses for business use of home. Add lines 8 through 27b in columns	28		29	Tentative profit (loss). Subtract line 28 from line 7	29	-2,262
29	Tentative profit (loss). Subtract line 28 from line 7	29		30	Expenses for business use of your home. Attach Form 8829	30	
30	Expenses for business use of your home. Attach Form 8829	30		31	Net profit or (loss). Subtract line 30 from line 29. If a profit, enter here and on Form 1040, line 12. Also, enter the net profit on Schedule SE, line 2 (statutory employees, see page C-5). If a loss, you MUST go on to line 32 (fiduciaries, see page C-5)	31	-2,262
31	Net profit or (loss). Subtract line 30 from line 29. If a profit, enter here and on Form 1040, line 12. Also, enter the net profit on Schedule SE, line 2 (statutory employees, see page C-5). If a loss, you MUST go on to line 32 (fiduciaries, see page C-5)	31		32a	If you have a loss, you MUST check the box that describes your investment in this activity (see page C-5)	32a	<input checked="" type="checkbox"/> All investment is at risk.
32	If you have a loss, you MUST check the box that describes your investment in this activity (see page C-5)	32		32b	If you checked 32a, enter the loss on Form 1040, line 12, and Schedule SE, line 2 (statutory employees, see page C-5). If you checked 32b, you MUST attach Form 8198.	32b	<input type="checkbox"/> Some investment is not at risk.

Part III Cost of Goods Sold (see page C-5)

33	Inventory at beginning of year. If different from last year's closing inventory, attach explanation . . .	33	
34	Purchases less cost of items withdrawn for personal use	34	49,327.
35	Cost of labor. Do not include salary paid to yourself	35	
36	Materials and supplies	36	
37	Other costs	37	
38	Add lines 33 through 37.	38	49,327.
39	Inventory at end of year.	39	25,115.
40	Cost of goods sold. Subtract line 39 from line 38. Enter the result here and on page 1, line 4	40	24,212.

Part IV Principal Business or Professional Activity Codes

Locate the major category that best describes your activity. Within the major category, select the activity code that most closely identifies the business or profession that is the principal source of your sales or receipts. Enter this 4-digit code on page 1, line 8. For example, real estate agent is under the major category of "Real Estate," and the code is "5520." Note: If your principal source of income is from farming activities, you should file Schedule F (Form 1040), Profit or Loss From Farming.

<p>Agricultural Services, Forestry, Fishing Code</p> <p>1990 Animal services, other than breeding</p> <p>1933 Crop services</p> <p>2113 Farm labor & management services</p> <p>2246 Fishing, commercial</p> <p>2238 Forestry, except logging</p> <p>2212 Horticulture & landscaping</p> <p>2469 Hunting & trapping</p> <p>2974 Livestock breeding</p> <p>3836 Logging</p> <p>3958 Veterinary services, including pets</p>	<p>1552 Oil & gas</p> <p>1719 Quarrying & nonmetallic mining</p> <p>Real Estate</p> <p>5538 Operators & lessors of buildings, including residential</p> <p>5553 Operators & lessors of other real property</p> <p>5520 Real estate agents & brokers</p> <p>5579 Real estate property managers</p> <p>5710 Subdividers & developers, except cooperatives</p> <p>6155 Title abstract offices</p>	<p>7708 Surveying services</p> <p>8730 Teaching or tutoring</p> <p>7880 Other business services</p> <p>6882 Other personal services</p> <p>Hotels & Other Lodging Places</p> <p>7237 Camps & camping parks</p> <p>7096 Hotels, motels, & tourist homes</p> <p>7211 Rooming & boarding houses</p> <p>Laundry & Cleaning Services</p> <p>7450 Carpet & upholstery cleaning</p> <p>7419 Coin-operated laundries & dry cleaning</p> <p>7435 Full-service laundry, dry cleaning, & garment service</p> <p>7476 Janitorial & related services (building, house, & window cleaning)</p>	<p>Food & Beverages</p> <p>0612 Bakeries selling at retail</p> <p>3086 Catering services</p> <p>3095 Drinking places (bars, taverns, pubs, saloons, etc.)</p> <p>3079 Eating places, meals & snacks</p> <p>3210 Grocery stores (general line)</p> <p>3251 Liquor stores</p> <p>3236 Specialized food stores (meat, produce, candy, health food, etc.)</p> <p>Furniture & General Merchandise</p> <p>3588 Computer & software stores</p> <p>3970 Furniture stores</p> <p>4317 Home furnishings stores (china, floor coverings, drapes)</p> <p>4119 Household appliance stores</p> <p>4333 Music & record stores</p> <p>3996 TV, audio & electronic stores</p> <p>3715 Variety stores</p> <p>3731 Other general merchandise stores</p> <p>Miscellaneous Retail Stores</p> <p>4812 Boat dealers</p> <p>5017 Book stores, excluding newsstands</p> <p>4853 Camera & photo supply stores</p> <p>3277 Drug stores</p> <p>5058 Fabric & needlework stores</p> <p>4654 Florists</p> <p>5090 Fuel dealers (except gasoline)</p> <p>4630 Gift, novelty & souvenir shops</p> <p>4838 Hobby, toy, & game shops</p> <p>4671 Jewelry stores</p> <p>4895 Luggage & leather goods stores</p> <p>5074 Mobile home dealers</p> <p>4879 Optical goods stores</p> <p>4697 Sporting goods & bicycle shops</p> <p>5033 Stationery stores</p> <p>4614 Used merchandise & antique stores (except motor vehicle parts)</p> <p>5884 Other retail stores</p>
<p>Construction</p> <p>0018 Operative builders (for own account)</p> <p>Building Trade Contractors, Including Repair</p> <p>0414 Carpentry & flooring</p> <p>0455 Concrete work</p> <p>0273 Electrical work</p> <p>0290 Masonry, dry wall, stone, & tile</p> <p>0257 Painting & paper hanging</p> <p>0232 Plumbing, heating, & air conditioning</p> <p>0430 Roofing, siding & sheet metal</p> <p>0885 Other building trade contractors (excavation, glazing, etc.)</p> <p>General Contractors</p> <p>0075 Highway & street construction</p> <p>0059 Nonresidential building</p> <p>0034 Residential building</p> <p>3989 Other heavy construction (pipe laying, bridge construction, etc.)</p>	<p>Services: Personal, Professional, & Business</p> <p>Amusement & Recreational Services</p> <p>9670 Bowling centers</p> <p>9588 Motion picture & tape distribution & allied services</p> <p>9597 Motion picture & video production</p> <p>9639 Motion picture theaters</p> <p>8557 Physical fitness facilities</p> <p>9691 Professional sports & racing, including promoters & managers</p> <p>9811 Theatrical performers, musicians, agents, producers & related services</p> <p>9613 Video tape rental</p> <p>9837 Other amusement & recreational services</p> <p>Automotive Services</p> <p>8813 Automotive rental or leasing, without driver</p> <p>8953 Automotive repairs, general & specialized</p> <p>8839 Parking, except valet</p> <p>8896 Other automotive services (wash, towing, etc.)</p> <p>Business & Personal Services</p> <p>7658 Accounting & bookkeeping</p> <p>7716 Advertising, except direct mail</p> <p>7682 Architectural services</p> <p>8318 Barber shop (or barber)</p> <p>8110 Beauty shop (or beautician)</p> <p>8714 Child day care</p> <p>7872 Computer programming, processing, data preparation & related services</p> <p>7922 Computer repair, maintenance, & leasing</p> <p>7208 Consulting services</p> <p>7799 Consumer credit reporting & collection services</p> <p>8755 Counseling (except health practitioners)</p> <p>7732 Employment agencies & personnel supply</p> <p>7518 Engineering services</p> <p>7773 Equipment rental & leasing (except computer or automotive)</p> <p>8532 Funeral services & crematories</p> <p>7633 Income tax preparation</p> <p>7914 Investigative & protective services</p> <p>7617 Legal services (or lawyer)</p> <p>7856 Mailing, reproduction, commercial art, photography, & stenographic services</p> <p>7245 Management services</p> <p>8771 Ministers & chaplains</p> <p>8334 Photographic studios</p> <p>7260 Public relations</p> <p>8733 Research services</p>	<p>Medical & Health Services</p> <p>9274 Chiropractors</p> <p>9233 Dentist's office or clinic</p> <p>9217 Doctor's (M.D.) office or clinic</p> <p>9456 Medical & dental laboratories</p> <p>9472 Nursing & personal care facilities</p> <p>9296 Optometrists</p> <p>9250 Osteopathic physicians & surgeons</p> <p>9241 Podiatrists</p> <p>0415 Registered & practical nurses</p> <p>9431 Offices & clinics of other health practitioners (dietitians, midwives, speech pathologists, etc.)</p> <p>9886 Other health services</p> <p>Miscellaneous Repair, Except Computers</p> <p>0019 Auto equipment & TV repair</p> <p>0035 Electrical & electronic equipment repair, except audio & TV</p> <p>0050 Furniture repair & upholstery</p> <p>2881 Other equipment repair</p>	<p>Trade, Wholesale—Selling Goods to Other Businesses, etc.</p> <p>Durable Goods, Including Machinery Equipment, Wood, Metals, etc.</p> <p>2634 Agent or broker for other firms—more than 50% of gross sales on commission</p> <p>2618 Selling for your own account</p> <p>Non-durable Goods, Including Food, Fiber, Chemicals, etc.</p> <p>2675 Agent or broker for other firms—more than 50% of gross sales on commission</p> <p>2659 Selling for your own account</p> <p>Transportation, Communications, Public Utilities, & Related Services</p> <p>6619 Air transportation</p> <p>6312 Bus & limousine transportation</p> <p>6676 Communication services</p> <p>6395 Courier or package delivery</p> <p>6361 Highway passenger transportation (except chartered service)</p> <p>6536 Public warehousing</p> <p>6114 Taxis</p> <p>6510 Trash collection without own dump</p> <p>6635 Travel agents & tour operators</p> <p>6338 Trucking (except trash collection)</p> <p>6692 Utilities (dumps, snow plowing, road cleaning, etc.)</p> <p>6551 Water transportation</p> <p>6650 Other transportation services</p> <p>8888 Unable to classify</p>
<p>Finance, Insurance, & Related Services</p> <p>0064 Brokers & dealers of securities</p> <p>0080 Commodity contracts brokers & dealers; security & commodity exchanges</p> <p>4148 Credit institutions & mortgage bankers</p> <p>5702 Insurance agents or brokers</p> <p>5744 Insurance services (appraisal, consulting, inspection, etc.)</p> <p>5130 Investment advisors & services</p> <p>5777 Other financial services</p>	<p>Trade, Retail—Selling Goods to Individuals & Households</p> <p>3038 Catalog or mail order</p> <p>3012 Selling door to door, by telephone or party plan, or from mobile unit</p> <p>3053 Vending machine selling</p> <p>Selling From Showroom, Store, or Other Fixed Location</p> <p>Apparel & Accessories</p> <p>3921 Accessory & specialty stores & fashions for women</p> <p>3930 Clothing, family</p> <p>3772 Clothing, men's & boys'</p> <p>3913 Clothing, women's</p> <p>3756 Shoe stores</p> <p>3954 Other apparel & accessory stores</p> <p>Automotive & Service Stations</p> <p>3558 Gasoline service stations</p> <p>3319 New car dealers (franchised)</p> <p>3533 Tires, accessories, & parts</p> <p>3335 Used car dealers</p> <p>3517 Other automotive dealers (motorcycles, recreational vehicles, etc.)</p> <p>Building, Hardware, & Garden Supply</p> <p>4416 Building materials dealers</p> <p>4457 Hardware stores</p> <p>4473 Nurseries & garden supply stores</p> <p>4432 Paint, glass, & wallpaper stores</p>	<p>Manufacturing, Including Printing & Publishing</p> <p>0679 Apparel & other textile products</p> <p>1115 Electric & electronic equipment</p> <p>1073 Fabricated metal products</p> <p>3638 Food products & beverages</p> <p>3410 Furniture & fixtures</p> <p>0695 Leather footwear, handbags, etc.</p> <p>0836 Lumber & other wood products</p> <p>1099 Machinery & machine shops</p> <p>0877 Paper & allied products</p> <p>1057 Primary metal industries</p> <p>2351 Printing & publishing</p> <p>2312 Stone, clay, & glass products</p> <p>0653 Textile mill products</p> <p>883 Other manufacturing industries</p>	<p>Mining & Mineral Extraction</p> <p>537 Coal mining</p> <p>511 Metal mining</p>