IN THE SUPREME COURT OF THE VIRGIN ISLANDS

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

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

APPELLEE WAHEED HAMED'S BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

Appellee Waheed ("Willie") Hamed agrees that Appellant United Corporation correctly describes how the appeal reached this Court. However, he respectfully disagrees that this Court has jurisdiction to hear the appeal. Therefore, a companion *Motion to Dismiss for Lack of Jurisdiction* is filed simultaneously.[1]

Briefly, the companion motion addresses the fact that the claims here are raised by United as Hamed's employer in 1992-1995, for damages "arising out of Defendant Hamed's [employment] at the Plaza Extra Supermarket store[s]. . . ." *See United's First Amended Complaint*, at ¶ 1 (emphasis added). JA 63.[2]

> This is a civil action. . . 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[s]**. . . .

United alleges (i) a 1992 conversion and breach of fiduciary duty based on Hamed's alleged operation of a mini-market that competed with the Plaza Extra Supermarket and (ii) a 1995 conversion whereby Hamed used a $70,000 cashier's check to "skim" and then transfer Plaza Extra's money to a third party school for his own benefit. *Id*.

However, in April of 2014, United admitted (in an action before another Superior Court judge[3]) that it was *not* Willie Hamed's employer and had *no ownership interest*

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[1] A similar motion to dismiss for lack of standing/jurisdiction was filed in the trial court, as discussed in detail below.

[2] References to the *Joint Appendix* of April 20, 2015, are denoted "JA__."

[3] *Mohammad Hamed v. Fathi Yusuf and United Corp*., SX-12-cv-370 (Brady, J.).

whatsoever in the Plaza Extra Supermarkets. JA 126-138 at ¶ 7, JA 128-129. As a result, United's counsel then conceded "United is not and *has never been* a partner in the Plaza Extra 'partnership'. . ." JA 138 (emphasis added). Thereafter, on November 17, 2014, that court entered United's concessions as a summary judgment and the parties are half of the way through winding up with the partnership as the sole historical owner of the Plaza Extra Supermarkets from 1986 on.[4] *See* Summary Judgment Order, *Hamed v. Yusuf and United Corp.*, SX-12-cv-370 at 3 (V.I.Super. Nov. 17, 2014).

> ORDERED that the Court finds and declares that a partnership was formed in 1986 by the oral agreement between Plaintiff [Mohammad] and Defendant [Fathi] Yusuf for the ownership and operation of the three Plaza Extra Stores, with each partner having a 50% ownership interest in all partnership assets and profits, and 50% obligation as to all losses and liabilities.

As a consequence, although United initially argued that it had standing and there was purported jurisdiction when the two orders here were entered, since November 17, 2014, it has become a settled, uncontested matter of fact and law that United was nothing more than a landlord to Hamed's employer. While the orders below were decided when standing was disputed, the appeal must be dismissed for the lack of jurisdiction now.

STATEMENTS OF ISSUES, STANDARD OF REVIEW AND RELATED CASES

Hamed agrees with United as to the *Standard of Review* and *Related Cases*. However, he disagrees that new issues (and related documents) are properly before this Court as they were solely raised after judgment, in United's motion for reconsideration.

[4] Both United and Appellee Waheed Hamed are parties to that proceeding as well.

STATEMENT OF THE CASE

Appellee generally agrees with the *Statement of the Case*, but several additional points need to be added to complete that statement. Before the Court are (1) an order dismissing the 1995 $70,000 conversion on the pleadings and (2) a summary judgment as to the 1992 "competing store" acts. What are *not* before the Court, importantly, are: (i) the denial of United's post-judgment motion for reconsideration[5] and (ii) issues not raised below.[6] Relevant to both of these points, as explained in detail below, is the fact

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[5] United's intent to appeal the denial of its motion for reconsideration is neither listed in its *Notice of Appeal* (JA 1-3) nor is it argued (or any legal authority cited) in the Brief-in-Chief. The only mention of that motion (other than in procedural recitations) is in the very last line of the brief. United requests a remand to the Court below to allow it "to consider the facts and arguments raised in Appellant's Sep. 29, 2014 Motion. . . ."

In this regard, United voluntarily elected to 'cause' denial of its motion rather than wait for Judge Dunston to rule, and *by so doing made the denial ripe for appeal*. It then failed to appeal that denial—and, therefore, this appeal proceeds only as to the Rule 12(c) order and the summary judgment. *St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468, 2014 WL 235994, at *5 (V.I. Jan. 22, 2014) (Appellants "failed to designate. . .in their notice of appeal and waived these arguments by failing to cite any legal authority in their appellate brief") and *Harvey v. Christopher*, 55 V.I. 565, 2011 WL 3489991, at *2 (V.I. July 19, 2011). Appellant understood the motion was denied, as it observed, at 1 of its *Jurisdictional Statement,*

> the Superior Court had failed to dispose of Appellant's Motion to Reconsider, resulting in an effective denial of that Motion pursuant to VISCR Rule 5(4)(a). As such, the Superior Court *is deemed to have denied Appellant's Motion for Reconsideration* on January 27, 2015. (Emphasis added).

[6] United also seeks to raise two new issues. First, at p. 23: "The Superior Court's Directive That Appellant Obtain An Affidavit From The U.S. Attorney's Office Contradicting the FBI Affidavits Was An Impossibility" and thus "[t]he Superior Court imperssibly [sic.] engaged in the role of fact finder in adjudicating Appellee's Motion for Summary Judgment." This issue was not raised below, in the motion for reconsideration or in the Notice of Appeal.

Second, judicial estoppel was not raised before final judgment. It was then argued only in the denied motion for reconsideration.

Therefore, Hamed will address these issues only in passing unless the Court requests that he do otherwise.

that United ignored *two separate orders* pertinent to these matters—one on May 12, 2014, ordering it to respond to Hamed's motion challenging standing (JA 139) and one on April 25, 2014 ordering it to submit a counter-affidavit to an FBI agent's declaration. JA 121.

Even absent the outright jurisdictional dismissal Hamed seeks, the appeal should be denied on additional procedural grounds:

(1) United's appeal is based on documents submitted after judgment was entered—appended solely to its motion for reconsideration. United concedes that those documents and issues ***were*** in existence prior to final judgment, and that it did not advance those issues or documents earlier because of either: (i) its counsel's tactical decision regarding what he "believe[d] that the Court would attach dispositive significance" to, or (ii) its counsel's tactical decision not to "investigat[e] the [context] in which those affidavits had been presented, until "[a]fter the Superior Court summary judgment ruling" despite a explicit court order that it do exactly that investigation. See quotes and citations regarding those assertions by United's counsel below.

(2) Prior to the issuance of the summary judgment, United was given a specific invitation by the trial court to raise the issues and documents it sought to introduce on reconsideration. These are the same issues and documents it now seeks to rely on here. As discussed below, United simply ignored that second order as well. Thereafter, the court entered summary judgment. Only then did United file a motion for reconsideration and seek to submit these additional documents and issues.

STATEMENT OF FACTS

Several clarifications need to be made to Appellant's *Statement of Facts*.

A. United erroneously states as a 'fact' that it was Hamed's employer. United begins its *Statement of Facts* with this surprising assertion:

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

Id. at 4 (emphasis added). As discussed above and in the accompanying jurisdictional motion, this is simply not true. More importantly, it is intentionally inaccurate. This factual misstatement forms the basis for the appeal. Both United[7] and a Superior Court judge have independently stated that "a partnership was formed in 1986 by the oral agreement between [Mohammad Hamed] and [Fathi] Yusuf for the ownership and operation of the three Plaza Extra Stores, with each partner having a 50% ownership interest in all partnership assets and profits, and 50% obligation as to all losses and liabilities." *See* Order, *Hamed v. Yusuf and United Corp*., SX-12-cv-370 at 3 (V.I.Super. Nov. 7, 2014) (Brady, J.) and Hamed's companion jurisdictional motion. Judge Brady issued that summary judgment based on *what United had expressly conceded in writing before him*: United was not the owner of the Plaza Extra Supermarkets—and was, therefore, not the employer of the Plaza Extra Supermarkets' employees.

[7] Reference is to United's concessions of April 7 and 8, 2014, which Judge Brady used as the basis of his summary judgment. Those statements are set out in detail in the companion motion regarding jurisdiction, which is incorporated herein.

Thus, Willie Hamed was an employee of (and a manager for) *the partnership* between his father and Fathi Yusuf known as Plaza Extra Supermarkets; it is now conceded (and ordered) that United was always just the partnership's East Store landlord.

B. The Third Superseding Indictment alleged "skimming" by Hamed

Hamed agrees with United's *Statements of Fact* in its first two sections, "A. The U.S. Government Raid" and "B. The Indictments & Criminal Proceedings (2003–2014)," with one important correction. "The primary thrust of the Third Superseding Indictment was" *NOT* simply "that the Hamed and Yusuf family members named in the indictment had acted collectively to underpay United's gross receipt taxes." The defendants were alleged to have been involved in a sophisticated scheme that took millions of dollars from the grocery business, used certified checks and other means to move the funds and sent those funds to third parties to avoid taxes. As Judge Dunston put it,

> 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. . .[and] would have *at least* put a reasonable person in Plaintiff's position, as Defendant's employer, on notice that Defendant may have engaged in some wrongful activity regarding the use of cashier's checks to transfer money to unknown third parties. . . .

JA 22 (footnotes omitted).

C. United asserts unsupported facts based solely on materials attached to its motion for reconsideration which was denied and not appealed

As for United's factual rendition of what happened with the *two documents*[8] at issue here, several important facts are left out. It is undisputed that United relies on a $70,000 certified check and Hamed's 1992 tax returns. United contends (and Hamed agrees) that the documents had been seized by the federal government (FBI) in raids in late 2001, and that those "raids unearthed no evidence to support any terrorist charges. But some two years later, in September of 2003, the U.S. Government indicted [the defendants]…." However, United's "factual" description of what happened next regarding those two documents is incorrect.

First, *none* of the facts on which United seeks to rely (all of which are from the Andreozzi criminal motion (JA 162-185) and the 2009 Finch Order (JA 263-265)) were

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[8] There is no issue that pursuant to 5 V.I.C. §31 the applicable statutes of limitations for a breach of contract and conversion committed in 1992 or a conversion of $70,000 in 1995 had already run long before the 2001 seizure of the documents. Undeterred, United argues that it could not have known about *two specific seized documents* it received back from the government in 2011 by exercising reasonable diligence. Brief-in-Chief at 6-7 (emphasis added).

> In 2011, Appellant received from the U.S. Attorney's Office numerous boxes of documents previously seized by the U.S. Government in the raid on Oct. 2001 (JA 107). Shortly afterwards Appellant United's Treasurer, Fathi Yusuf, began making an inventory and review of the returned documents (JA 310). In late November of 2011, while reviewing documents, Mr. Yusuf noticed two specific transactions organized by the Government in Appellee's electronic folder (JA 35). **The first transaction was a $70,000 check** made payable to a school attended by Appellee in Orlando, Florida (JA 58). **The second, which was reflected in the 1992 Tax Returns of Appellee**, showed him to have operated a wholesale food business (Five Corners Wholesale) back in 1992 without United's knowledge (JA 107). Appellant had never before been aware of either the $70,000 dollar check or Appellee's 1992 U.S. Tax Returns (JA 93, 107-108).

before the court when this case was decided. They were all contained in United's motion for reconsideration, the denial of which United has not appealed.

Second, even if the motion for reconsideration *is* before this Court, it was properly denied. United has twice conceded that the "new" facts related to the effect of the Andreozzi criminal motion, Judge Finch's Order and collateral estoppel, were not newly discovered. More importantly, United admitted that these new facts had not been raised before final judgment was entered because of the tactical decisions of counsel. The initial explanation was advanced at page 5, footnote 4 of the brief in support of 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 <u>believe</u> 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….

Memorandum in Support at 5, *United Corp. v Hamed*, STT-13-cv-101 (V.I.Super. Sept. 29, 2014) (emphasis added). This explanation is consistent with the fact that *United's counsel here is also United's counsel in that same criminal case*. *See, e.g.,* ECF Docket, *United States v. United Corp.* However, in the Brief-in-Chief, at 9-10, United avers (also without declaration or other record support) another, slightly different, explanation:

> Appellant and his counsel were likewise unaware of these significant reasons why the "unfettered access" allegations were entitled to no weight. **<u>After</u> the Superior Court summary judgment ruling, Appellant <u>began investigating</u> the contacts [sic.] in which those affidavits had been presented.** Appellant, having found these affidavits on the ECF system as part of a Government's opposition to Appellee's Motion to dismiss in the criminal matter, timely filed its Motion for Reconsideration showing why the affidavits could not be a proper basis for grant of summary judgment to Appellee. (Emphasis added).

Unexplained is why United did not "begin investigating" when the motion and supporting affidavit were filed, or month later after receiving the *two separate orders* it ignored that would have required it to do so—one on May 12, 2014, *specifically* ordering United to respond to Hamed's motion regarding standing (JA 139) and one on April 25, 2014, ordering United to submit a counter-affidavit to the Pertri Declaration. JA 121. Also unexplained is why, for four more months after the orders, United did nothing—until *after* summary judgment. Thus, there is no allegation that anything "found" after the summary judgment could not have been located before it issued.[9] Also unexplained is why no declarations were filed with the motion for reconsideration or here as to these 'facts.'

As a result, there are no facts of record as to why the issues and documents submitted to support the need for reconsideration could not have been filed before the summary judgment was decided. Thus, the applicable legal standard in such circumstances is not in dispute:

> 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.

See United's *Motion for Reconsideration*, *United Corp. v Hamed*, STT-13-cv-101 (V.I.Super. Sept. 29, 2014) (emphasis added). JA 140-311, at 144. United stated it was

[9] United attempts to blame Hamed for not having 'disclosed' the existence of the Andreozzi motion and the Finch order. However, while United's counsel here IS counsel in that criminal proceeding and is presumed to know what documents are in that file, Hamed's counsel is not. Hamed's counsel knew nothing of them, as the Petri affidavit happened to be mixed in with tens of thousands of items in a massive, bulk document drop of old criminal materials by the Yusufs in another case. *See, e.g.*, JA 313 at fn. 4.

proceeding under the third element: "the need to correct clear error of law or prevent manifest injustice." *Id*. However, "motions 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 <u>*elected*</u> not to act until after a final order had been entered." *Agrocomplect, AD v. Republic of Iraq*, 262 F.R.D. 18, 21-22 (D.D.C. 2009) (emphasis added). Again, United had to ignore <u>*two*</u> orders in order to fail to begin to investigate documents from a criminal proceeding where its counsel here is also its counsel there.

Third, even if the "new facts" in the motion for reconsideration are taken as true and applicable, they do not impact the declaration of the FBI agent who was present in 2003 and 2004. His declaration reveals that in those years United and its counsel *were* given access to the seized documents. *See Declaration* of FBI Special Agent Thomas L. Petri, *U.S.A. v. Fathi Yusuf Mohammad Yusuf et. al*., Crim. No. 2005-015 (D.V.I. July 8, 2009), ECF No. 1148-1, JA 92-93.

> 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.

In response, United submitted only one counter-affidavit—from United's treasurer, Fathi Yusuf. He *did not contest the access the FBI agent described in detail relating to United's 2003-2004 access to the seized documents.* Fathi Yusuf's *Affidavit* at ¶ 4, JA 108. He said nothing about what his lawyers had actually done or seen or copied in 2003-2004, only that "[n]one 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*." *Id*. (emphasis added). Nor were any contesting affidavits submitted from United's several counsel who repeatedly accessed those documents in 2003-2004. Nor, importantly were any such affidavits contesting that extensive 2003-2004 access attached to the Andreozzi criminal motion submitted with the motion for reconsideration. JA 140-311. As Judge Dunston observed in the summary judgment decision:

> 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.*

United v Hamed, STT-13-cv-101 (V.I.Super. Sept. 2, 2014) (emphasis added), JA 8.

In fact, Judge Dunston allowed United *extra* time to respond to the Petri declaration or to file counter-affidavits.[10] He did not need to do so as contesting affidavits should have been filed in a timely manner with the opposition. Thus, despite months of an additional "grace" period, United ignored the helping 'nudge' by the court—and it complains now (without any record support) that getting an affidavit *from the DOJ* was problematic—but does not explain why no other responsive counter-affidavits were possible *from Yusuf, its several other counsel or any other source* for months.

Fourth, summary judgment was entered based solely on the 2003-2004 access. It references only access/document reviews in 2003-2004. There is nothing about access at a later time. *See, e.g.*, JA 6-9. In fact, the court's section heading is:

> 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.*

Id. at JA 9 (emphasis added). The decision, on its face, dealt only with the 2003-2004 access and the two, specific Bates stamped documents on which United was relying—no non-Bates stamped documents were before the court or discussed in its opinion. *Id*.

Only after that judgment was entered did United raise the unsupported averments contained in Andreozzi's criminal motion[11] and the Finch order from the criminal proceeding for the first time, solely *in United's motion for reconsideration*. JA 140-311.

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[10] Though Judge Dunston attempted to assist opposing counsel by allowing counter-affidavits out of time, United now turns on him and suggests he illegally ordered them to do something that could not be done. This argument is not only unsupported by anything of record, it also was not raised either below or in the *Notice of Appeal*. JA 1-3.

[11] Like United here, Andreozzi submitted no affidavits, declarations or other support of record for his allegations of interference with access after 2006.

However, Andreozzi's motion dealt with 2008 events when non-bates numbered documents were allegedly moved or lost and access was obstructed for a time. Judge Finch's 2009 order had nothing to do with the Bates-stamped documents at issue here, as it dealt with boxes of *non-Bates stamped* documents and interference that began well after the 2003-2004 reviews on which both Hamed and Judge Dunston relied. *Id*. The Petri Declaration established that all of the Bates stamped documents ***were*** extensively reviewed in 2003-2004 (JA 92-93) and were (according to ***both*** Andreozzi's recitation (JA 162-185) and Judge Finch's Order (JA 263-265)) available to United and properly indexed/sourced. Andreozzi summarizes what allegedly went wrong *in 2008,* at page 14 of his motion (JA 162-185, at 175-176) (emphasis added):

> 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.

Fifth, Andreozzi's motion is not an affidavit (JA 162-185), it is merely an argument by counsel. Even if taken as 'true' because the topic is addressed in Judge Finch's

subsequent order, neither the text of his motion nor Judge Finch's order states that any of the Bates stamped documents were in any way lost or shuffled in 2008 as was allegedly the case with the non-bates stamped documents. To the contrary, there is no dispute that the $70,000 check (JA 58, Bates No. 054-0133[12]) and 1992 Tax Returns (JA 378-381 Bates No. 307-0235) *were* Bates stamped documents. As Judge Dunston observed:

> 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. . . . .

Order at JA 10 (emphasis added).

Sixth, Judge Finch specifically noted the availability and indexing of the Bates stamped documents in his Order at 2 (JA 264), which documents had *not* been mixed up:

> 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, there is nothing of record to even suggest the Bates stamped documents were mixed up in 2008[13], as they were all specifically coded as to source and box location,

[12] Bates numbered reference is to Box 54, document beginning at page 133.

[13] The Andreozzi motion (JA 162-185) described in detail the ways in which Defendants had been *subsequently* denied access to their documents. For example, when defense team visits *resumed* in November 2008, the 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, JA 166-167. "[T]he Government agents - not defense counsel - would decide which boxes the team would be permitted to review." *Id*. at ¶ 18, JA 167. Agents "reorganized and rearranged documents by removing some documents from their original boxes. *Id*. at ¶ 23, JA 168.

identified as trial documents and remained properly indexed.[14] Petri's declaration stands uncontradicted in the record as to the extensive 2003-2004 access.[15] Contrary to United's factual rendition now, there is nothing in the summary judgment memorandum that mentions access after 2003-2004—as the opinion is based solely on that period.

Seventh, although United now seeks to change its position, it conceded below that full access was available prior to 2006 and that Judge Finch's order involves only the two year period from 2006-2008, in its *Memorandum for Reconsideration*, at 7. JA 142-160 at 148. United concedes that the defense teams did have unimpeded visits to the FBI offices up to 2006, and only that from then "until November of 2008, the Government denied the Defendants access to their documents despite numerous requests." *See* Exhibit A to United's *Motion for Reconsideration* at ¶¶ 9 and 13, JA 165-166.

Therefore, as a matter of the facts of record, the documents relied upon by the trial court here were not involved in the mixed-up of documents raised in the Andreozzi motion or the 2009 Finch Order, and are not applicable to the Petri Declaration or the 2003-2004 access.

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[14] Nor is there any estoppel issue. Andreozzi's joint defense brief, even if taken as fact and then ascribed to Hamed here, is not contrary to Hamed's arguments about 2003-2004 access, or the trial court's decision regarding what happened in 2003-2004.

[15] In the earlier motion to dismiss on the pleadings, before submission of the Petri Declaration, the court had refused judgment on this same issue. JA at 23-24. Thus, United was on notice that this was a critical issue. The Petri Declaration was absolutely clear that it applied to the 2003-2004 access. JA 92-93. Moreover, United took what it described as "voluminous discovery" thereafter, and on March 6, 2014, requested and was given *extra time* to review anything that might be *apropos* of the declaration. (Order of March 7, 2014—unopposed). Motion and Order referenced at JA 27. (United stated that: "2. Further, to properly oppose Defendant's Motion for Summary Judgment, filed on February 5, 2014, Plaintiff's counsel needs to review voluminous discovery.")

III. ARGUMENT

A. The Superior Court did not err in dismissing the claim related to the 1995 $70,000 check pursuant to Rule 12(c)

As the trial court observed at 6 of its Rule 12(c) order (JA 20): "Plaintiffs Complaint alleges that 'Defendant Waheed Hamed converted $70,000 in cash belonging to Plaintiff United by purchasing a Certified Check'.".[16] Judge Dunston noted:

> 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.

Id. at JA 21. On September 9, 2004, the federal government served United with an indictment that stated in detail that this Appellee, Waheed Hamed, had taken unreported cash from the Plaza Extra business and secretly used certified checks to skim and disguise the funds by transfers to third persons.[17] Although the charges against Appellee were dropped many years later—as far as 'notice' that Hamed had possibly taken tens of

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[16] United refers to this check as having issued in various years. Hamed will use the date from Court's Order of June 24, 2013, and the Complaint, which averred the following at page 4, ¶ 14 at JA 34 (emphasis added).

> 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.

[17] The *Third Superseding Indictment* is at JA 330-377. It was referenced in the Amended Complaint (JA 63-71 at 65) and the Court properly referenced it as part of the public record. *See, e.g., In re Kelvin Manbodh Asbestos Litig. Series*, 47 V.I. 375, 2006 WL 1084317 (V.I.Super. Mar. 6, 2006).

thousands of dollars, converted the funds to a certified check and then sent the funds to a third party, it would be difficult to top the indictment.

The sole question before the trial court was whether United knew or should have known from the allegations in the indictment that Hamed may have taken unreported cash in the amount of $70,000 from the supermarket business and used certified checks to move and disguise the transfers to individuals and entities other than himself. The applicable legal standard is not in dispute. As to the level of notice necessary to a reasonable plaintiff, see Judge Dunston's footnotes 29-31 at JA 22, including the discussion of, *Whitaker v. Merrill Lynch, Pierce Fenner, & Smith, Inc.*, 36 V.I. 75, 79 (Terr. V.I. Apr. 21, 1997) (*quoting Zeleznik v. U.S.*, 770 F.2d 20, 23 (3d Cir. 1985)).

At 10 of its brief, United counters with the argument that "[i]t is well-settled that the discovery rule and equitable tolling issues are rarely resolved at the pleadings stage." Oddly, at p. 12, fn. 7, United then goes on to concede that the case law in this jurisdiction and the Third Circuit allows just that:

> *Burton v. First Bank of Puerto Rico*, 49 V.I. 16 (V.I. Superior 2007), a case cited in the Superior Court's June 24 Opinion (JA 16, footnote 10), decided a discovery rule issue at the pleadings stage. . .

Burton, in turn, relies on *Vitalo v. Cabot Corp.,* 399 F.3d 536, 543 (3d Cir. 2005).

> While the expiration of the Statute of Limitations often presents a question of fact, "where the facts are so clear that reasonable minds cannot differ, the commencement period may be determined as a matter of law." *Vitalo v. Cabot Corp.,* 399 F.3d 536, 543 (3d Cir. 2005).

Burton, 2007 WL 2332084, at *3.

United's attempt to distinguish *Burton* and *Vitalo* is quite creative.[18] However, the similarities are remarkable. Here plaintiff had written notice of the activity alleged, by the specific person who acted—from the federal government—which eight years later became the subject of its lawsuit. In *Burton* it was the *defendant* that gave the plaintiff written notice of the act which eight years later became the subject of the lawsuit. There is one difference; there, the "[p]laintiff [was] an elderly woman who is not very sophisticated about financial matters." *Burton,* 2007 WL 2332084, at *5. Here, United is a sophisticated financial holding corporation which has many lawyers and accountants.

Similarly, in *Vitalo* a beryllium worker was mailed an informational packet *by the government* that contained a study relating to his potentially having an illness. The packet was not specific to him—it was mailed to anyone who, like him, was being warned because they had been exposed. The court noted that it was "clear that he received and reviewed the packet." *Vitalo v. Cabot Corp.*, 399 F.3d at 544. United has never argued that it did not receive or read the indictment, or didn't know that the government alleged Hamed had done *exactly* what United complains of here.

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[18] The appellant in *Burton* attempted a similar argument.

> Plaintiff argues that the Defendant can only raise the expiration of the Statute of Limitations as a defense to the extent it is readily apparent on the face of the complaint. Although an affirmative defense is normally asserted in a responsive pleading, a Motion to Dismiss may also test the timeliness of a complaint if the relevant facts are apparent therein. Fed.R.Civ.P. 8; *see also Pepper–Reed Co. v. McBro Plan & Dev. Co.,* 19 V.I. 534, 537 (D.C.V.I. 1983) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure,* §§ 1277, 1349, 1357 (1st ed.1969)).

Burton, 2007 WL 2332084, at *2.

Ultimately, what United covertly attempts to argue is that while it *did* have notice that Hamed was taking large amounts of money from the business, converting the funds to certified checks and then sending the checks to third parties at Fathi Yusuf's direction—United never got notice of this *specific* $70,000 used to buy a check that was supposedly obtained by Appellee for his own use rather than as part of Fathi's tax scheme. However, as *Vitalo* makes clear, the proper standard is what a reasonable employer would have done if it had notice from the government via an indictment that one of its employees was taking money and using certified checks to disguise what was occurring.

B. The Superior Court properly granted summary judgment as to the second claim, "The 1992 Competing Business"

1. There is nothing of record that contradicts Judge Dunston's Holding

United's initial Complaint was filed on March 5, 2013 (JA 31-40), more than twenty years after the alleged acts. United alleges that the documents at issue here were seized on or soon after September 30, 2001. That is more than eight years after any funds or assets would have been missing from United's 1992 accounting records.

United cannot dispute that its lawyers reviewed or were given the ability to review all Bates stamped documents in 2003-2004. It concedes that the two documents on which United relies are Bates stamped with the FBI's stamps identifying box and document number. Nor has United ever argued that it did not significantly avail itself of that opportunity. The declaration of the supervising FBI agent, Petri, who was present in 2003-2004, makes it clear that United's counsel accessed the seized documents *many* times, with *many* people. They brought scanners and copiers. They copied/scanned a great deal. *Petri Declaration* at ¶¶ 7-9, JA 92-93.

i. "In 2003. . .complete access to seized evidence. . . .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." *Id*. at ¶ 7.

ii. "In 2004. . . .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." *Id*. at ¶ 8.

iii. "During the 2004. . . .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." *Id*. at ¶ 9.

The two documents at issue here were Bates stamped. Fathi Yusuf's affidavit does not dispute this. Nor does his affidavit say anything—much less contradict anything—about the 2003 and 2004 access. Andreozzi's motion (even if it were of record and even if taken as an affidavit) does not address the 2003 and 2004 access at all.[19] Thus, it is undisputed, even if documents from the motion to reconsider are allowed, Yusuf and United had access in 2003-2004 to the documents it now claims gives rise to this action.

Nor is there any requirement that *Hamed somehow prove United's lawyers actually looked at these two documents when it had such access.*

[19] That is why there is no estoppel. The Andreozzi motion states nothing with regard to what happened in the 2003 and 2004 visits by United's lawyers. It does not mention those visits. It does not suggest that those visits were anything other than what Petri describes.

At 21-23 of United's brief, it attempts to argue that mere access to the documents does not impute knowledge of what is in the documents. It cites *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor,* 115 F.3d 1332 (7th Cir. 1997), *Pirelli Armstrong Tire Corp., Retiree Medical Benefits Trust v. Walgreen Co*., 209 U.S. Dist. LEXIS 77648, *19-*20 (N.D. Ill. 2009) and *Thompson v. Butler,* 2013 Ohio App. LEXIS 957, *22-*23 (Ohio App. 2013) for the proposition that "the Superior Court's ruling would still be erroneous because it presumes on the basis of access to documents that a plaintiff or prospective plaintiff has knowledge of every document in its files."

This reflects a gross misunderstanding of what those cases hold. It is true that having a document "somewhere" in one's files does not *in and of itself* require one to go looking for it *absent some external reason to do so*. However, if the government states that a specific employee is actively taking tens of thousands of dollars from your business, converting it to certified checks to third parties and then absconding with it, if you do have access to your documents, a reasonable employer would certainly have a duty to see if there were any such documents in what it has. The Seventh Circuit held:

> 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**. . . .

Fujisawa, 115 F.3d at 1335 (emphasis added).

Moreover, Judge Dunston did not decide that "mere access" was sufficient to impute knowledge to a reasonable person. What United is arguing is that while it knew from the government that Hamed was taking funds by certified checks as part of a skimming scheme—this was not a "suspicious circumstance to trigger the duty to exploit

the access," that it had no reasonable basis to suspect Hamed was *also* taking some extra *without Fathi Yusuf directing it*. In other words, United wants to apply the "reasonable-criminally-acting-Fathi Yusuf" standard[20] and that simply does not exist.

As one final note, it is not as if either of these two documents were later "lost," or mixed in with other documents—as Judge Finch's order recognized, as they *were* Bates stamped, they had been identified and indexed as the trial documents.

2. There was no basis for the motion to reconsider before Judge Dunston

This appeal is based almost solely on the trial court's refusal to reconsider its decision based on materials submitted by United in its *Motion for Reconsideration*. That motion failed to comport with the limited reasons for considering such motions. As noted above, the parties agree on the applicable standard, and that sub-sections (1) and (2) of that standard do not apply.

> 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.

United *Motion for Reconsideration*, *United Corp. v Hamed*, STT-13-cv-101 at 3 (V.I.Super. Sept. 29, 2014). JA 140-311, at 144. Since there is no argument in United's brief about reconsideration here, out of an abundance of caution, Appellee will look to United's motion for reconsideration below for something to which he can respond.

[20] While charges against Hamed were dropped, United Corporation (of which Fathi Yusuf's family was the controlling shareholder and he the treasurer) *was* convicted of this specific method criminal skimming to avoid taxes.

Even a cursory reading of the cases cited by United in its motion—particularly the Third Circuit's *Guttierrez* decision—demonstrates there is no manifest injustice here. *Guttierez* is a decision the Third Circuit marked "Non-Precedential." It does *not* deal with a situation where a conscious decision was made such as Plaintiff admits here—ignoring two orders. Rather, it 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 decision to avoid arguing a position. To the contrary, in *Ford Motor Company v. Bright,* the problem was that, as was true in Guttierez, the trial Court initially identified "professional carelessness" as the cause of the problem. *Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994). But the Circuit Court *did then consider whether Rule 59(e) was met*—and decided no relief should be given under the Rule as a specific decision not to plead a particular defense led to the non-submission.

> 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.

Id. at 324-325 (emphasis added). Put another way, the *Ford Motor* decision completely supports Hamed here—and completely undercuts United's own argument. When a conscious decision is made by counsel to either not submit materials or not research the matter until after summary judgment despite being ordered to, right or wrong, it is not the sort of situation for which reconsideration is 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 held:

> [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 Labs*, 545 F. Supp. 2d 447, 549-450 (D.N.J. 2008) (emphasis added):

> **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 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). . . .

The Andreozzi criminal motion and the Finch Order were matters of record in a case where United's counsel here was counsel there. Requested extra time was allowed.

In sum, this is not information that was overlooked in a late-arriving mass of documents. Without any supporting declaration, United's counsel has stated both to the court below and here (in a slightly varying alternative) that either: (1) 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: "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" or (2) he simply decided not to research pleadings in his own criminal case for several months *despite a Court Order requiring his response on that specific issue within one month*—and did so only after the summary judgment was issued: "After the Superior Court summary judgment ruling, Appellant began investigating the contacts [sic.] in which those affidavits had been presented."

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.

CONCLUSION

It is respectfully requested that this Court affirm the decisions below.

Dated: April 30, 2015

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CERTIFICATE OF GOOD STANDING

I certify that I am a member (No. 48) in good standing of the Virgin Islands Bar.

Dated: April 30, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2015, I electronically filed the foregoing **APPELLEE'S BRIEF IN OPPOSITION** with the Clerk of the Court using the VISCEFS system, which will send a notification of such filing (NEF) and I caused a true and exact copy of the foregoing to be served by hand, to:

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Dated: April 30, 2015

/s/ Carl J. Hartmann III