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
Superior Court No. ST-13-CV-101
HON. MICHAEL C. DUNSTON

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In his opposition brief, Appellee Waheed Hamed ("Appellee" or "Hamed") makes four principal arguments, all of which miss the mark. First, he argues that Appellant United Corporation ("Appellant" or "United") failed to preserve the Superior Court's "denial" of United' Rule 59(e) Motion for Reconsideration. Next he claims that United has no "standing" because the Plaza Extra Partnership, rather than United is the real party in interest in this case, and therefore that the Superior Court never had jurisdiction to hear this case. Appellee faults Appellant's counsel for not earlier learning of Hamed's prior briefs in the criminal case which take precisely the opposite position regarding document access that he took in the instant case, along with the Judge Finch July 2009 Order in the criminal case that rejects the unfettered document access allegations in the FBI affidavits. Finally, Appellee argues that because the motions and briefs in the criminal case and Judge Finch Order are not new evidence, in the sense that they did not come into existence after the entry of the September 2014 Order of the Superior Court dismissing all claims, they could not be considered by the Superior Court in a motion for reconsideration or considered by this Court on appeal as a ground for reversal of the Superior Court's Order.

As will be shown, Appellee's arguments are legally wrong, laced with inaccurate facts, contain unnecessary accusations against Appellant, all in an effort to obscure what is now clear: Hamed played "fast and loose" with the Superior Court by relying on FBI affidavits in the instant case that he challenged as untruthful in the prior criminal proceeding, a litigation tactic that is barred by the doctrine of judicial estoppel. Moreover, Judge Finch's Order, which accepted Hamed's arguments in the criminal case and rejected the truth of the "unfettered access" allegations in the FBI affidavits, means that the Superior Court's reliance on those affidavits as a ground for concluding

that United's claims were time-barred is clear error. As for the Superior Court's June 24, 2013 Order granting judgment on the pleadings, Hamed does not even attempt to defend the Superior Court's peculiar ruling (at JA 14-24) that United did not act with reasonable diligence to discover its claims against Hamed because it failed to insist on the right to make contemporaneous copies of hundreds of thousands of pages of its documents as they were being seized by the FBI pursuant to ex parte search warrants. Nor does Hamed offer any cogent explanation of how an indictment that accused various members of the Hamed and Yusuf families of conspiring to under-report United's gross receipts and other business taxes could possibly have put United on notice that Hamed was stealing from it. Each of Appellee's arguments are addressed separately below.

II. ARGUMENT

A. APPELLANT UNITED PROPERLY PRESERVED ALL ISSUES ON APPEAL.

Appellee first argues, by way of a footnote, that United failed to preserve on appeal the Superior Court's denial of its Motion for Reconsideration. This strained argument about what must be included in a Notice of Appeal ignores the fact that the Superior Court never decided the Motion for Reconsideration and the fact that the filing of the Motion and the Superior Court's failure to rule on it is expressly mentioned in the Notice of Appeal.

In its Notice of Appeal, United appealed all orders issued by the Superior Court, including the June 24, 2013 Order granting Appellee's Rule 12(c) motion in part, and the September 2, 2014 Order granting Appellee's summary judgment motion. The Notice of Appeal points out that United filed a Motion for Reconsideration of both Orders, but that the Superior Court did not decide the Motion within the 120-day time period established by VISCR 5(a)(4). Appellant's Notice of Appeal further explained that the Superior Court's failure to dispose of United's Motion for

Reconsideration in its Brief is treated as a denial under VISCR 5(a)(4) only for purposes of determining when the 30-day appeal period begins to run. Since there was no actual order denying the Motion, let alone any opinion supporting such an Order, it would be an elevation of form over substance to argue that, in addition to mentioning the filing of the Motion for Reconsideration and the Superior Court's failure to rule on it, the Notice of Appeal must also specifically treat the fiction of a denial under Rule 5(a)(4) as an actual denial that must be referenced as a separate order being appealed.

Appellee's argument in support of its contention that "United voluntarily elected to cause denial of its motion rather than wait for Judge Dunston to rule, and . . . then failed to appeal that denial" reveals a fundamental misunderstanding of Rule 5(a)(4). (Appellee's Brief at 6, n.5). As the plain language of the Rule makes clear, the 30-day period for perfecting an appeal began to run on the 120th day, because the Motion is treated as having been denied for that purpose on that day. The denial is a fiction created by the Rule, and the obligation to appeal within 30 days of that date is mandatory. Failure to do so would have resulted in a forfeiture of United's right to appeal. Appellee's claim that United "voluntarily elected to cause denial," and for that reason should have specifically identified that denial in its Notice of Appeal as an order it was appealing makes no sense.[3]

[3]Appellee cites the case of *St. Croix, Ltd. v. Shell Oil Co.*, 60 V.I. 468 (V.I. 2014) in support of the argument that United failed to preserve the issue on appeal. The facts of that case are obviously distinguishable from those in the instant appeal. *St. Croix* concerns discovery motions that the Superior Court actually disposed of, and which Appellants in *St. Croix* failed to properly raise on appeal. Here, the Superior Court never disposed of United's Motion for Reconsideration, and thus there was no decision of the Superior Court from which to appeal.

B. APPELLANT UNITED HAD STANDING TO BRING THIS CASE.

Appellee then argues that Appellant had no standing to bring this case because the partnership, rather than United, is the real party in interest, and the Superior Court (and, therefore, this Court, on appeal) therefore lack jurisdiction to hear the case. Appellee raised this same argument in a parallel Motion to Dismiss for lack of jurisdiction, which this Court denied in an Order entered earlier today on the grounds that the case relied on by Hamed to support his claim that standing is jurisdictional has been overruled by this Court. To the extent that there are any colorable issues regarding the far more relaxed doctrine of prudential standing, the record on those issues is undeveloped because the Superior Court expressly refrained from ruling on the standing arguments made by Hamed in that Court. (JA 5). Because of the undeveloped record, any prudential standing issues are best addressed by the Superior Court in the first instance, on remand, insofar as they need to be decided at all,[4] United does wish to point out that there are ample reasons why it can be regarded as the real party in interest in this case.[5] And even if this Court or the

[4] *See e.g., Diebold v. USA*, 947 F.2d 787, 789 (6th Cir. 1991) ("The parties also raised but the District Court did not reach the question whether displaced federal employees have standing[.] . . . Therefore, we do not reach the standing issue or any issue on the merits. We remand to the District Court for further proceedings, including development of the facts and law governing standing for the plaintiffs."); *see also Enercon v. U.S. Intern'l Trade Comm.*, 1997 U.S. App. LEXIS 11779, at *3 (Fed. Cir. April 24, 1997) ("The more important question[] presented in the motion papers [is] whether Zond should be substituted for Kenetech . . . [This question] should be presented to and decided by the [lower tribunal] in the first instance. Thus, the court will remand the case to the [lower tribunal] to allow it to consider the issues raised by the parties.")

[5]During the relevant time period, United operated the Plaza Extra supermarket business under the name of United Corporation d/b/a Plaza Extra. In its operational role, among other things, United: 1) hired and fired people working for the Plaza Extra supermarket business; 2) administered the payroll and cut the paychecks for the people working for that business; 3) maintained bank accounts for that business; 4) paid the worker's compensation insurance premiums for that business; 5) paid the premiums for the commercial general liability insurance policy(ies) for the business, which policies were held in United's name; 6) was the named defendant in and defended lawsuits arising from people's employment with the Plaza Extra supermarket business; 7) was the named defendant in and defended personal injury lawsuits arising from injuries sustained at Plaza Extra supermarkets; and 8) filed tax returns for receipts and income earned in connection

Superior Court had any doubts about whether United is a real party in interest, the appropriate remedy at the trial court level, under Fed.R.Civ.P. 17, or at the appellate level, under VISCR 34(b) would not be dismissal, but rather an order allowing substitution.[6]

C. THE SUPERIOR COURT ERRED IN GRANTING APPELLEE'S RULE 12(C) MOTION BECAUSE THE THIRD SUPERCEDING INDICTMENT DID NOT PROVIDE UNITED WITH NOTICE OF APPELLEE'S FINANCIAL MISCONDUCT.

Appellee does not even try to defend the Superior Court's June 24, 2013 finding that United should be charged with notice of any inculpatory documents at the time of the 2001 raid because it should have insisted that the FBI agent allow it to make copies of documents as they were being

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with the Plaza Extra supermarket business. In fact, as the Court is aware, United and certain members of the Yusuf and Hamed families were indicted in the District Court of the Virgin Islands for tax evasion concerning some of those tax returns. *See Yusuf v. Hamed*, 2013 V.I. Supreme LEXIS 67, at *3 (V.I. Sept. 30, 2013). Tellingly, the partnership was never named as a party in the criminal case. United has also been before this Court as a party in two other appeals in a case involving the Plaza Extra supermarket business: Supreme Court Case Nos. 2015-0001 and 2015-0009. Notably, the partnership was not a party in either of those cases either. These facts concerning United's operation of the Plaza Extra supermarkets may be gleaned from the pleadings in the case that has been appealed to this Court twice, in light of the longstanding rule that an appellate court "may . . . take judicial notice of pleadings in another case . . ." *Doe v. Wohlgemuth*, 1974 U.S. App. LEXIS 5709, p. *5, n.5 (3d Cir. 1974); *Nantucket Investors II v. California Fed. Bank*, 61 F.3d 197, 205 (3d Cir. 1995).

[6]Fed. R. Civ. P 17(a)(3) states, in relevant part, "[t]he court **may not dismiss an action** for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join or be substituted into the action.") (emphasis supplied.) V.I.S.CT.R 34(b) states, in relevant part, "[i]f substitution of a party in the Supreme Court is necessary for any reason other than death, **substitution shall be effected** in accordance with the procedure prescribed in paragraph (a) of this Rule 34, and by order of the Supreme Court.") (emphasis supplied.) Hamed claims that without an ownership interest in the Plaza Extra supermarket business United does not have standing to bring this case. *See generally*, Motion. Thus, Hamed impliedly concedes that the party with an ownership interest in the business, *i.e.*, the partnership, would have standing. Currently, the partnership is being liquidated and wound up by Fathi Yusuf as the liquidating partner in a separate Superior Court case that has been on appeal to this Court twice. *See Yusuf v. Hamed*, 2015 V.I. Supreme LEXIS 6, at *3 (V.I. Feb. 27, 2015). Assuming *arguendo* that the lower court had reached the issue of standing and concluded that that Fathi Yusuf, as liquidating partner of the Yusuf-Hamed partnership – and not United – is the only real party in interest, the court would have simply ordered substitution of Yusuf (in his capacity as liquidating partner) for United.

seized (JA 22, n.31). By not responding to United's argument that this finding was clearly erroneous, Appellee concedes the point.

Appellee does address the Superior Court's alternative finding that United's claims regarding the theft of monies in United's possession to issue a cashier's check for $70,000 are time-barred because Appellant knew or should have known through the Third Superseding Indictment issued in September 2004 (the "indictment") that Appellee might be stealing from it. (Appellee's Brief at 19). But Appellee's argument does not respond to United's critical point, which is that an indictment accusing Hamed, his brother Waleed, and three Yusuf sons of conspiring to underpay United's business taxes would not put United on notice that Hamed was stealing from it. Hamed agrees that the indictment charged the individuals with engaging collectively in a scheme to underpay United's taxes on Plaza Extra store revenues. Indeed, he goes even further, by characterizing the indictment as alleging that Hamed was acting at "at Fathi Yusuf's direction" when he took cash from Plaza Extra store safes, used the funds to purchase "certified checks," and then "sen[t] the checks to third parties. . . ." (Appellee's Brief at 22). If Hamed was being accused of acting at Fathi Yusuf's direction, in an attempt to underpay taxes on a grocery store business in which Yusuf and Hamed's father, Mohammad Hamed, were partners, then how or why could this possibly put Yusuf (or United, or the partnership) on notice that Hamed might be stealing from Yusuf (or United or the partnership)?

In his 2-page brief in support of his Motion to Dismiss, Hamed never even made the arguments that Yusuf and United had notice of the claims in either 2003 (because it should have insisted on the right to make copies of documents during the FBI raid that would have included the $70,000 check), or in 2004 (because of the issuance of the indictment). Instead, Hamed simply

invoked the six-year statute of limitations, without even addressing the discovery rule. (JA 43-44). United argued in opposition that Yusuf discovered the claims in 2011, when the FBI finally began returning, by way of scans on a hard drive, copies of the nearly 1,000,000 pages of documents it had seized from the stores and homes of the Yusufs and Hameds nine years earlier (documents that before 2011 the FBI had severely limited access to). And Hamed argued in his Reply that, even without any suspicion of wrongdoing whatsoever, United had the 1995 check in its voluminous files until the time of the raid in 2001, and therefore should have discovered the claim before the raid took place. (JA 55).

The Superior Court could not accept Hamed's argument that United could not avail itself of the discovery rule because it should have looked for the $70,000 check in its voluminous files prior to the raid, even without any grounds whatever for suspecting Hamed of converting money. Instead, the Superior Court did something that can be risky from an appellate perspective – namely, it went outside the four corners of the briefing and came up with its own independent reasons for dismissing the claims that were not tested by the adversarial process. The Superior Court obtained the indictment on its own, presumably from the district court's electronic case filing system. Then, apparently without understanding the true nature of the indictment, the Superior Court overlooked the crucial fact that the criminal wrongdoing alleged against Hamed involved a conspiracy by him and all other defendants to underpay taxes on the revenues generated by the three Plaza Extra supermarkets. Had the Superior Court understood the collective nature of the accusations against the Hamed and Yusuf sons to underpay taxes for the business owned by Hamed's father and by Fathi Yusuf (even if operated by United), it is doubtful that it would have concluded that the

indictment put United and its principal Fathi Yusuf on notice that Hamed might be misappropriating monies from it.

D. THE SUPERIOR COURT ERRED IN GRANTING APPELLEE'S SUMMARY JUDGMENT MOTION WITH RESPECT TO THE UNAUTHORIZED COMPETING BUSINESS CLAIMS.

1. The Motion and Briefs Signed by Hamed that Contravene the Unfettered Access Assertions in the FBI Affidavits -- and the Judge Finch Order Rejecting Those Assertions -- Were Properly Placed Before the Superior Court on Reconsideration, and Should be Considered by this Court in Reviewing the Superior Court's Summary Judgment Ruling.

Appellee first argues that the 2009 motion and briefs signed by Hamed in the criminal case and July 2009 Order of Judge Finch criminal case granting that motion could not properly have been included in a motion for reconsideration -- and thus cannot properly be considered by this Court in deciding whether the Superior Court erred in granting summary judgment on the basis of the unfettered access assertions in the FBI affidavits. (Appellee's Brief at 12). According to Hamed, the mere fact that these documents could have been brought to the Superior Court's attention during the summary judgment briefing forecloses reliance upon them in a motion for reconsideration and on this appeal. (*Id*. at 12). Of course, Appellee also deserves a fair share of the blame for failing to disclose the existence of both the motion to dismiss based on deprivation of access to documents and the Judge Finch Order accepting the access deprivation arguments.[9] Appellee tries to sidestep responsibility for that lapse by making the conclusory assertion in a footnote that his counsel "knew nothing of them."[10] (Appellee's Brief at 12).

[9]Indeed, the failure to disclose the Judge Finch Order in Hamed's briefs relying on the unfettered access affidavits, if done knowingly, would be a violation of VISCR 211.3.3(2) (Candor Toward The Tribunal).

[10]Insofar as Hamed is arguing that his counsel did not know of the motions and briefs signed by him in the criminal case that flatly contradicted terms the FBI agents' assertions of unfettered access to documents, this claim is brand new, and for that reason is entitled to little or no deference by this Court. In the lower

United's motion to reconsider the Court's September 4, 2014 Opinion and Order granting Hamed summary judgment on all remaining claims was brought under Fed.R.Civ.P. 59(e), and specifically the prong of that Rule that permits reconsideration to prevent "avoid clear error of law or prevent manifest injustice." It is well-accepted that in granting a motion under that prong, the Court has discretion to consider arguments and evidence that could have been presented earlier, but were not, 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

court proceedings, Hamed claimed only that his counsel was unaware of the Judge Finch Order. (JA 313, n. 4). Hamed also argues that United's counsel was in a better position than him to know about the motion and order because the latter is an attorney in the criminal proceeding. As stated in Yusuf's reply brief in support of the motion for reconsideration, he appeared for Mr. Yusuf in the criminal case as it was winding down, in February 2013, nearly three years after the plea agreement with United was entered in March 2010. (JA 324, n.2). Attorney Smock was Mr. Yusuf's attorney during the 2003 to February 2013 period. There are a staggering total of 1,417 docket entries in this twelve-year old criminal case, and contrary to Hamed's assertions, a lawyer who came into that case near its conclusion cannot be "presumed to know" even a small fraction of the docket entries that preceded his appearance.

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) ("because 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 a party 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").[11]

Hamed argues that these cases are inapplicable because none of them "relieved a party from a conscious decision to avoid arguing a position." (Appellee's Brief at 26). There is no evidence whatsoever of a conscious decision on the part of United or its counsel to not make an argument they knew about in opposing Appellee's motion for summary judgment. United has made it perfectly clear in the proceedings below and in its opening brief on appeal that its counsel did not know of the motion and briefs seeking dismissal of the criminal case on the grounds of deprivation of access to seized

[11] As the Third Circuit has made clear, the doctrine of judicial estoppel is designed to prevent a party from "playing fast and loose" with the Courts by taking one position in one case, and the opposite position in another. *See Mintze v. American General Financial Services, Inc.*, 434 F.3d 222, 232 (3d Cir. 2006).

documents, and likewise that he did not know of the order entered by Judge Finch. As stated in United's reply brief in support of its motion for reconsideration, "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." (JA 323). The same is true of the Judge Finch Order. (JA 324).

Hamed also strains to argue that this "conscious decision" was manifested by United having "ignor[ed] two orders" of the Superior Court. (Appellee's Brief at 26). Hamed mischaracterizes the facts regarding the only relevant order, which was the order that United's counsel obtain affidavits from the U.S. Attorney's Office contradicting the unfettered access FBI affidavits. As United argued below (JA 146, n. 4), and as argued in its opening brief on appeal (at page 24), its counsel did talk to Assistant U.S. Attorney Ishmael Meyers about obtaining such affidavits, and learned, not surprisingly, that this would not be possible (just as it is not possible for a party whose records are being seized by the FBI pursuant to search warrants to make copies before the records are carted away). So counsel for United did attempt to comply with the Order, but compliance was impossible. Counsel's mistake, which he freely acknowledges, was in failing to advise the Superior Court of his attempts at compliance. That mistake hardly justifies the injustice of a summary judgment ruling against his client that is based on findings that are foreclosed by the doctrine of judicial estoppel and by the order of Judge Finch.[12]

[12]The other order to which Hamed alludes is an order regarding a separate motion to dismiss for lack of standing that the Superior Court never decided. That order -- and United's compliance or non-compliance with it -- has no relevance whatever to the issues regarding Hamed's claim of deprivation of access to

2. For Discovery Rule Purposes, Access to Documents Cannot be Treated as Knowledge of Every Document in One's Voluminous Files that Could Support a Claim against Another Person.

Hamed does not contest United's estimate, based on statements in the motion to dismiss filed in the criminal case, that approximately 1,000,000 documents were seized by the FBI in its October 2001 raid. He does, however, make a weak attempt to distinguish the cases cited by United for the proposition that, even if the FBI had provided full access to documents, the Superior Court's ruling would still be erroneous because it presumes on the basis of access to documents that a plaintiff or prospective plaintiff has knowledge of every document in its files. (Appellee's Brief at 24). Appellee argues that in this case, in contrast to those cases, United had a reason to begin sending lawyers and paralegals to the FBI to look for evidence that Hamed was stealing from it. (*Id*. at 24). Hamed comes back to the fallacious argument that the indictment provided the reason to begin hunting for such documents for which it allegedly had access. (*Id*. at 24-25).

Finally, Hamed ignores the massively detailed motion, affidavits and briefs in the criminal case that show that access deprivations were so serious at to warrant dismissal of the case, and then speculates that because some documents were Bates stamped by the Government, it necessarily follows that all Bates-stamped documents were provided to United, Waheed Hamed and the other defendants. (Appellee's Brief at 22-23). There is nothing in the motion to dismiss joined by Hamed that supports this speculation, and it is significant that, in granting the motion in part, Judge Finch ordered all of the approximately 1,000,000 pages of documents copied at Government expense, including documents that had been Bates stamped. At the very least, Hamed's motion and briefs in the criminal case, together

documents in the criminal case, and Hamed's contention that this Court may not consider the motions, briefs and orders in the criminal case that show the Superior Court's reliance on the FBI's unfettered access assertions to be error.

with Judge Finch's order accepting Hamed's access deprivation arguments, demonstrate beyond peradventure that there are genuine issues of material fact regarding when United had notice of its claims that should have precluded the Superior Court's grant of summary judgment on statute of limitations grounds as a matter of law.

III. Conclusion and Relief Requested

This Honorable Court should reverse the Superior Court's June 24, 2013 Order of Dismissal and its September 2, 2014 Order Granting Summary Judgment on all remaining claims, and then remand this case for further proceedings consistent with its ruling.

Respectfully submitted,

DATED: May 15, 2015 By: */s/ Nizar A. DeWood*

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CERTIFICATE OF BAR MEMBERSHIP

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

Dated: May 14, 2014

/s/ Nizar A DeWood
Nizar A. DeWood

AMENDED CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2015, I caused the foregoing UNITED'S REPLY BRIEF to be served upon Appellee/Defendant via Electronic Filing:

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