UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
UNITED STATES OF AMERICA,

Plaintiff,

-against-

DISTRICT COUNCIL OF NEW YORK CITY AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al.,

Defendants.
---X

90 Civ. 5722 (CSH)

MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S JANUARY 12, 2006 DECISION AND ORDER

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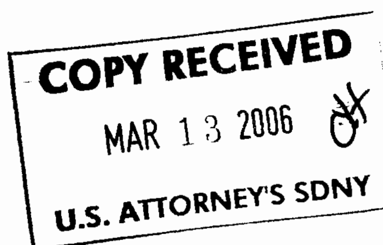

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Preliminary Statement

This memorandum is submitted on behalf of the District Council and Peter Thomassen in opposition the Government's motion for reconsideration of the Court's January 12, 2006 Memorandum Opinion and Order ("Order") denying the Government's motion to hold the District Council and Peter Thomassen in contempt and to modify the consent decree.

The Order at Issue on this Motion

In August 2005, the government moved this Court for an order adjudging the District Council and its president, Peter Thomassen, in contempt of the Consent Decree. The government asserted that president Thomassen and the District Council violated paragraph 12 of the Consent Decree when it did not provide the government prior notice of changes to the Request System it negotiated with employers in the 2001 collective bargaining

agreements ("CBAs"). Following the submission of memoranda, declarations and voluminous exhibits, and after lengthy oral argument, the Court denied the government's motion in a thirty page Order dated January 12, 2006.

In considering the government's contempt motion, the Court had to determine whether the government had established that "(1) the order the alleged contemnor failed to comply with is clear and unambiguous; (2) the proof of noncompliance is clear and convincing; and (3) the contemnor has not diligently attempted to comply in a reasonable manner." Order, pp.18-19. The Court held that while the District Council is not free to change the Job Referral Rules in any manner it chose without prior notice to the government (Order, pp. 20-21), such prior notice was not required when it bargained for changes in Job Referral Rule 5(B), the specific rule impacted by the Request System included in the 2001 CBAs. Order, pp. 25-26. The Court agreed with the District Council that, "[T]he government, in the guise of claiming a violation of the existing Decree, is really trying to amend and enlarge it to cover conduct, namely the Union's negotiation of collective bargaining agreements, which the Consent Decree and the Complaint excluded from coverage." Order, p. 29. The Court went on to observe, "While a different construction of the Consent Decree is possible…the very most that can be said for the government is that the language of the Decree is ambiguous in that regard. But that is equally fatal to the government's contempt motion…". Order, p. 29.

In reaching these conclusions and denying the government's contempt motion, the Court considered all of the relevant language of the Decree, its purposes and history of the underlying civil RICO complaint. With respect to the language of the Decree, after a detailed analysis the Court concluded the government's reading of ¶ 2 of the Decree, which

requires prior notice by the District Council of, inter alia, proposed amendments to the job referral rules, did not apply to changes in Job Referral Rule 5 (B), the rule regarding the Request System at issue herein, made through collective bargaining. The specific exclusion of this reporting requirement under Job Referral Rule 5 (B) was consistent, the Court held, "with the Consent Decree's withholding from the IRO of any authority to review present or proposed collective bargaining agreements." Order, p. 25-26. The Court held:

> Given these exclusions from and limitations of power, it is difficult to accept the government's reading of ¶ 12 of the Consent Decree as requiring the District Council to give the IRO prior notice of a proposed change to a collective bargaining agreement that the IRO had no authority to review in the first place.

Id., at 26.

The Court also considered and rejected the government's contention that the Decree required prior notice of negotiating any changes in the Request System because that System "increases the potential for corruption". Order, p. 27, note 5. Moreover, on the record before it the Court rejected any relation between the District Council's purpose in negotiating the 2001 Request System changes and the government's concerns about improper influences on CBAs negotiated by former District Council officers alleged in its 1991 civil RICO complaint.

> There is no suggestion in the record on this motion that the 2001 CBAs were tainted by extortion or other impropriety, or were influenced in any way by organized crime, the target of the governments [1991] civil RICO action as spelled out in the complaint and in the opening statement of government's counsel at the beginning of the [1993] trial. On the contrary, the District Council negotiators agreed to include the Request System in the CBA's because they thought it would benefit more union carpenters in the long run.

Order, p. 27

Standards Applicable to this Motion

The government's motion papers fail to identify the rule pursuant to which the motion is made, they simply state an order granting reconsideration is sought. This terminology suggests they are moving pursuant to Rule 6.3 of the Local Rules of the District Courts for the Southern and Eastern Districts of New York ("Local Rule 6.3").[1]

"Under Rule 6.3, reconsideration of an opinion 'will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" Valentine v. Metropolitan Life Ins. Co., 2005 WL 1278524, *2 (S.D.N.Y. 2005) (Haight, J., citing Shrader v. CSX Transport, Inc., 70 F.3d 255, 257 (2d Cir.1995). "Nor may the moving party use [a reconsideration motion] 'to advance new facts, issues or arguments not previously presented to the court.'" Id., citing Bank Leumi Trust Co. of New York v. Istim, Inc., 902 F. Supp. 46, 48 (S.D.N.Y.1995). Moreover, a movant under Local Rule 6.3, "[M]ust demonstrate that the Court overlooked controlling decisions or factual matters **that were put before it on the underlying motion**." Koehler v. Bank of Bermuda Limited, 2005 WL 1924746*1 (S.D.N.Y. 2005).

[1] It is possible the government maintains this application pursuant to Fed. R. Civ. P. Rule 59(e). Regardless, the Southern District applies the same standard for motions under Local Rule 6.3 and Rule 59(e). Ruiz v. Commissioner of Dept. of Transp. of City of New York, 687 F. Supp. 888, 890, n.3 (S.D.N.Y. 1988), citing McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir.1983) (stating "A motion pursuant to Rule 59(e) raises the same concerns regarding judicial economy and the finality of judgments as does a motion pursuant to local Rule 3(j) [the predecessor to Rule 6.3]. Accordingly, in the exercise of its discretion, the Court will apply the Rule 3(j) standard to the Rule 59(e) motion and will consider plaintiffs' motions under both rules together.")

See, C & D Restoration, Inc. v. Laborers Local 79, 2004 WL 1234035 *2 (S.D.N.Y. 2004) (Haight, J.), where the Court stated, in addition to the rules set forth above, "[T]he rule 'is to be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court.' [citation omitted]."

As is particularly apt with respect to the government's motion here, the Court has repeatedly observed, "These limitations [on motions for reconsideration] are designed to ensure finality and prevent the rule from becoming a vehicle by which a losing party may examine a decision and then plug[ ] the gaps of the lost motion with additional matters." Carolco Pictures, Inc. v. Sirota, 700 F.Supp. 169, 170 (S.D.N.Y. 1988)." C & D Restoration, Inc. v. Laborers Local 79, supra, 2004 WL 1234035*2. See also, Valentine v. Metropolitan Life Ins. Co., supra, 2005 WL 1278524*2; Koehler v. Bank of Bermuda Limited, 2005 WL 1924746*1 (S.D.N.Y. 2005)(so stating in the context of a reargument motion where the movant failed to "satisfy these demanding criteria").

It is apparent from the government's submission it has read the order and is trying to plug the gaps of its lost motion with reference to material and arguments which did not prevail on the original motion.

Point I

THE MOTION MUST BE DENIED BECAUSE IT IS BASED UPON EVIDENCE NOT PREVIOUSLY SUBMITTED TO THE COURT

In contravention of the rules governing motions for reconsideration, in this motion the government seeks to do exactly what is prohibited. It relies on evidence that was available to it at the time of the original motion and not previously submitted to the Court in support of

that motion.[2] Thus, at page 3 of its memorandum in support the government cites the Scarvalone declaration of February 24, 2005 to introduce documents submitted to the Court on the government's motion to extend the term of Walter Mack, Esq. as Independent Investigator, that is Exhibits "32 and "34" thereof. There was no reference to these exhibits in the record of the underlying contempt motion.

Footnotes one and two of the government's memorandum in support of reconsideration (pages 2 and 3) reference legal periodicals and newspaper articles not contained in the record on the contempt motion. Page 4 of the government's memorandum references the docket sheet in United States v. Moscatiello. This document was not submitted as part of the record on the contempt motion. On page 5 of the memorandum, the government relies on the decision of United States District Judge Gleeson in Drywall Tapers and Pointers, Local 1974 v. Local 530 of the Operative Plasterers' and Cement Masons' Int'l Ass'n, 2005 WL 638006 (E.D.N.Y. March 17, 2005). Even if Judge Gleeson's decision constitutes "evidence", it was published prior to the time the government made its contempt motion and there is no reason the government could not have relied on it previously. For purposes of this motion for reconsideration, this decision constitutes "new evidence" and is therefore proscribed.

[2] The government states at page 3 of its memorandum in support, its motion is based on "evidence in the record before the Court, as well as in reported decisions and the public record subject to judicial notice..." Apparently, the government uses "record before the Court" in the broadest possible terms, meaning every document ever submitted under docket 90 Civ. 5722 whether or not submitted or relied on as a part of the record on its contempt motion. Defendants submit this construction is overly broad on a motion for reconsideration. In addition, the government's reference to "the public record" apparently includes incompetent evidence such as newspaper accounts of events, as well as law review articles and governmental agency reports also not previously submitted in connection with the motion for contempt.

Similarly infirm is the government's reliance on the 1986 Report of the President's Commission on Organized Crime and the McClellan Report of 1960. (Government's mem., p. 6)

The government's motion for reconsideration is premised upon the contention that the Court overlooked facts, data or evidence (the government has not cited any law the Court allegedly overlooked). However, since the government never brought these facts or data to the Court's attention, it can not be said the Court overlooked this data. To suggest, as the government does implicitly, that the Court must search the entire record in 90 Cv. 5722 every time it makes a motion stretches the purposes of a reconsideration motion beyond reason. Instead, the government's motion is a classic example of a losing party having examined a decision and then trying to plug the gaps of the lost decision with additional matters. See, C & D Restoration, Inc. v. Laborers Local 79, supra.

Point II

THE GOVERNMENT'S MOTION SOUNDS IN APPEAL, NOT RECONSIDERATION, AND DEMONSTRATES IT IS ANOTHER EFFORT TO AMEND THE CONSENT DECREE

The government's motion asserts three grounds for granting reconsideration: (1) that the Court overlooked evidence; (2) that the Court misconstrued the consent decree; and (3) that the Court failed to consider alternative remedies. None of these present a basis for reconsideration of the Order.

A. The Alleged Failure to Consider Evidence is not Grounds for Reconsideration

The government submits the Order failed to appreciate the connection between the Consent Decree's job referral rules and organized crime allegedly demonstrated in the

record. Memorandum in Support, p.2-9. But, even putting aside for the moment the inaccuracy of some of the evidence presented or whether any of the evidence relied on is compelling today, the government's argument loses connection with the contempt motion it urges be reconsidered. The contempt motion presented a very specific question arising out of the Decree itself – did the Decree unequivocally require prior notice of negotiating a change in Job Referral Rule 5(B), relating to the Request System? The government fails, however, now as before, to demonstrate how any alleged connection between employer corruption and organized crime created a prior notice requirement in the Decree alleged to have been violated in the contempt motion. Absent a clear and unequivocal prior notice requirement, there can not have been contempt and this motion must be denied.

The present motion relies on "new" evidence available to it on the prior motion and seeks to recast its arguments to meet the rationale of the order.[3] Therefore, it does not merit reconsideration of the prior Order. It is instead, just one more attempt by the government to "amend and enlarge [the Decree] to cover conduct, namely the Union's negotiation of

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[3] The government relies on information from as far back as 1960 to support its asserted link between employee selection and organized crime, all of which was available to the government when making its original motion and much of which was available when the Decree was written in 1994. "Armed with this information, it would have been easy enough for the drafters of the Consent Decree to include language authorizing the IRO (and the government) to review and approve future CBAs that might impact the Job Referral Rules. But the explicit denial of authority to the IRO to review collective bargaining agreements, alone among all possible contracts, strongly supports the inference that the parties did not intend the Consent Decree to bring future collective bargaining agreements within its purview." Order, p.26. Some of the information is incorrect, such as describing Robert Alvarez as a District Council employee. Alvarez was employed in the stamp collection department of the Benefits Funds and was discharged in early 2002, along with the rest of that department, after an investigation conducted for the trustees of the Funds by Kroll and Assoc. on the operations of that department. Melvin Eckhaus, a former elected business agent of a Carpenters' Union, before the 1998 restructuring of the District Council and its constituent Locals, has never been employed as a business representative by the District Council.

collective bargaining agreements, which the Consent Decree and the Complaint explicitly excluded from coverage." Order, p. 29.

B. The Court Did Not Misconstrue the Consent Decree

The government's claim that the Court misread the Decree's exclusion of its right to prior notice of collectively bargained changes to the Request System presents a position that is more appropriate for its intended appeal than a motion for reconsideration.[4] The government essentially asserts there is nothing inconsistent with the prior notice requirements of ¶12 and ¶4(f), the provision which excluded the right of review of collective bargaining agreements by the IRO, and prior notice of all Job Referral Rule changes by whatever means, including collective bargaining, is required by the Decree. Significantly however, the government omits any consideration of Job Referral Rule 5(B), the particular provision relating to the Request System and the Complaint in the underlying civil RICO action, both of which cannot be and were not ignored in the Court's analysis of the Decree. Thus, the Court observed,

> The Complaint's principled exclusion of the collective bargaining agreements from the reviewing and negotiating powers of prospective court officers was implemented in practice by the provision in ¶4.f. of the Consent Decree, which authorized IRO to review the Union's contracts or proposed contracts "except for collective bargaining agreements"... Job Referral Rule 5(B), the very rule impacted by the Request System included in the 2001 CBAs, provides that employer requests for specific carpenters shall be fulfilled "as required by applicable collective bargaining arguments".

Order, p. 25.

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[4] The government has already communicated its intention to file a notice of appeal of the Order and the District Council has stipulated to entry of an Order by this Court extending its time to do so, pending determination of this motion for reconsideration.

The government argues at page 10 of its memorandum that the exclusion of CBA review authority from the IRO in ¶4.f. does not mean CBAs were excluded from his rules and by-laws review power. Here again, the government fails to acknowledge the specific relief prayed for in the complaint, the exclusion of CBA review from the IRO's authority in ¶4.f and the absence of future CBA review authority in ¶12. With a sleight of hand not lost on the reader, the government asserts there is no ambiguity in the Decree while denying its explicit terms and history, by arguing its drafters would not have intended such a result. It is not only wrong, as its presently stated intention is belied by the history and words of the Decree itself, but even if it was correct it would not be sufficient to prevail on this motion for reconsideration, because at best it would make the terms of the Decree ambiguous and support the continued denial of the underlying motion for contempt.

What the government really urges here is a reversal of the Court's decision as incorrectly decided. That is a matter for appeal, not a motion for reconsideration.

C. Remedies Flow From a Finding of Liability, Not Vice Versa

The government's argument that the Order should be reconsidered because the Court failed to consider alternative remedies suggested by the government is also unavailing on this motion for reconsideration. The government again ignores that it brought a contempt motion to hold the District Council and its president in contempt of the alleged clear dictates of the Decree. That motion required certain burdens and proofs, which the government failed to sustain. Unsuccessful in that effort, the government now asks the Court to "...address the need for other prospective relief to ensure the integrity of the Consent Decree...[and to] enter prospective relief even if the Consent Decree is ambiguous ." Memorandum in Support, p. 11-12. That is to say, even though its motion was denied the Court should craft appropriate

relief anyway without a finding of wrongdoing. This request for relief is not merely inappropriate on a motion for reconsideration of the denial of its contempt motion, it inverts our system of jurisprudence, where remedies flow from findings of liability, not vice versa.

The government seeks in this argument to resurrect its attempt to amend the Decree, "to enlarge it to cover conduct...explicitly excluded from coverage", without making the showing needed to achieve such an amendment. Order, p.29, citing Handschu v. Special Services Division, 273 F. Supp. 2d 327, 336-337 (S.D.N.Y. 2003) (citing Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992)). This it cannot do on this motion for reconsideration.

For these reasons, the government's motion must be denied.

Conclusion

For all of the foregoing reasons, the Government's motion should be denied in all respects.

Dated: New York, New York
March 13, 2006

Respectfully submitted,

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