IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FLOORGRAPHICS, INC.,	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 04-3500 (AET)**
	:	
NEWS AMERICA MARKETING IN-STORE SERVICES, INC., *et al.*	:	**Judge Anne E. Thompson**
Defendants.	:	

PLAINTIFF FLOORGRAPHICS, INC.'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION FOR RELIEF PURSUANT TO RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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Dated: March 29, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Rules

In offering its hodgepodge of technical excuses, NAM's Response avoids the point – Rule 60 is intended to prevent a judgment from becoming a vehicle of injustice. Tellingly, NAM does not deny the existence of dramatic video recordings referencing FGI and/or the Rebhs which have only come to light through the Valassis litigation. In fact, NAM admits that Video P 0015-7 was responsive and that it was not produced despite NAM's representation that it would "produce non-privileged, responsive documents related to FLOORgraphics' allegations, if any."[1] In this video, NAM CEO and Chairman Paul Carlucci boasts about having FGI "on the run" and FGI being bought out by a competitor (a prescient statement given that NAM did exactly that), and jokes that NAM attorneys, who were present, would give Carlucci plausible deniability of his statements. The Carlucci video is hardly "innocuous and immaterial" as NAM claims.[2] To the contrary, this and other videos with FGI content are not just relevant evidence improperly withheld, they constitute evidence qualitatively more powerful than printed documents, because they convey additional context of the speaker's tone, facial expressions and even audience reaction.[3] FGI

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[1] Ex. E to FGI's motion.

[2] If the material were innocuous, then there would be no reason for NAM to fight so vigorously to prevent its disclosure. Nor is NAM credible when it argues that producing the materials would be burdensome as they have already been produced not once – but twice – in litigation involving Valassis and another competitor of NAM, Insignia Systems, Inc. *See* Order from Insignia matter, Ex. R hereto.

[3] The importance of the videos is evident from the fact that they were shown in the opening and closing of the Valassis trial, and were used with every NAM witness.

respectfully requests that the Court view the videos to confirm for itself their content and impact.

The video of Carlucci quoted above provides critical new evidence, in stark contrast to Carlucci's deposition testimony where he repeatedly denies ever having had discussions about driving FGI out of business:

> Q. Internally at News America, have you ever had discussions where you've discussed driving FLOORgraphics out of business?
>
> A. No.
>
> Q. Have you ever had any internal discussions about trying to destroy FLOORgraphics?
>
> A. No.
>
> Q. Have you had discussions internally about what would happen in the marketplace if FLOORgraphics did go out of business?
>
> A. No.
>
> Q. Have you ever given any - - had any internal consideration or discussion about FLOORgraphics going out of business?
>
> A. I have not.[4]

Again, this is not some low level employee – it is NAM's CEO and Chairman – a

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[4] November 15, 2006 transcript of the Carlucci deposition in this matter, Ex. S hereto, pp. 75-76. A major issue was NAM's attempt to drive FGI out of business, and no less than 23 paragraphs of FGI's Fourth Amended Complaint are dedicated to recounting these facts. See Ex. T hereto, Fourth Amended Complaint, ¶¶ 11-33, under heading "News' Attempt to Destroy FGI".

central figure in the FGI/NAM litigation.[5] Carlucci's unvarnished statements captured on the video, coupled with his contradictory testimony, are precisely the kind of evidence that is sufficient to grant relief under Rule 60(b). *See Rosebud Sioux Tribe v. A & P Steel*, 733 F.2d 509, 511 (8th Cir. 1984) (reversing denial of plaintiff's 60(b) motion where a key witness, the chairperson of a tribal organization, perjured himself in his deposition).[6]

NAM's Response is also striking for what it does not say. NAM fails to address its demonstrably misleading responses to FGI's Document Requests. Even more significant, NAM does not deny that there are more such videos. Its silence is deafening on this point. ***That is because, since filing its Motion on March 9, 2010, FGI has uncovered evidence that more such videos exist.*** FGI recently discovered[7] a transcript of a 2004 videotaped speech by Carlucci to a NAM conference that refers

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[5] Carlucci's credibility was critical to FGI's case. FGI alleged that Carlucci had stated NAM would "destroy" FGI at a meeting with the Rebhs. Ex. T, ¶13. NAM obviously knew the importance of this issue as it specifically denied, in its opening statement to the jury, that Carlucci threatened to destroy FGI. See Ex. U hereto, excerpts from March 4, 2009 transcript, p. 319.

[6] *See also Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1132-33 (9th Cir. 1995) (upholding ruling setting aside a judgment under Rule 60(b) when defendant failed to produce videotape, noting that the issue is not whether movant "would have prevailed had the original video been produced," but rather that defendant's actions in failing to produce the video "undermined the judicial process").

[7] *See* the March 29, 2010 Supplemental Affidavit of George Rebh, Ex. V hereto, ¶¶8-9.

to FGI numerous times.[8] This new evidence clearly shows that more relevant documents, including videos of Carlucci, were created during the pertinent time frame and were likewise improperly withheld by NAM. The existence of this new evidence, coupled with inconsistent testimony by NAM's CEO, compels relief under Rule 60(b).

ARGUMENT

NAM's Response ignores that Rule 60 is "intended to preserve the delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts. Thus, the Rule is intended to prevent a judgment from becoming the vehicle of injustice. [T]he Rule is to be given a liberal construction and is to be construed liberally to do substantial justice." *Rosebud*, 733 F.2d at 515 (internal citations omitted). Critically, key witnesses' "inconsistent stories are material evidence in the case" that "demonstrate that [the witness] is a liar . . . whose testimony should be discredited." *Id.* at 517. Where such inconsistencies exist, the "entire complexion of the case has been changed." *Id*. at 516.

A. NAM's Discovery Response

NAM admits that the crucial Carlucci video was "encompassed by FGI's Request No. 20" but misleadingly suggests that FGI was not diligent in moving to

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[8] *See* Ex. W hereto, Valassis Trial Ex. P-273 (noting the video is available in "DVD and VHS").

compel production after NAM objected. NAM's Response, p. 11. NAM neglects to mention that it actively misled FGI by representing that it would produce any documents that were relevant. NAM argues that FGI should have moved to compel. That excuse was soundly rejected in *Canady v. ERBE Electromedizin GmbH,* 99 F. Supp. 2d 37 (D.C. Cir. 2000). There, the court granted plaintiff's motion to open the judgment under both Rule 60(b)(2) and 60(b)(3) based on defendant's improper withholding of relevant documents responsive to plaintiff's discovery requests. Like NAM, the defendant in *Canady* interposed objections, but stated that responsive documents would be produced subject to the objections. *Id.* at 44. Seven months after judgment for defendant, plaintiff's counsel discovered directly responsive documents that had not been produced. *Id.* at 45. In response to defendant's argument that plaintiff was not diligent in discovering the evidence, the court held that defendant's objections reasonably led plaintiff to believe that defendant had produced all relevant documents. *Id.* at 48. The court disagreed that plaintiff should have inquired as to whether documents were withheld based on the objections, and found that plaintiff was not required to investigate further or file a motion to compel and was justifiably under the impression that all responsive documents had been produced. *Id.* That is precisely what occurred here.

Further, NAM does not even try to distinguish *Catskill Development, LLC v.*

Park Place Entertainment Corp., 286 F. Supp. 2d 309 (S.D.N.Y. 2003).[9] In *Catskill*, plaintiffs moved to vacate the judgment based on defendant's failure to produce six audio tapes that were specifically requested during discovery and were produced in a different, pending state court action. Defendant argued that the parties agreed to limit the scope of discovery to documents in the parties' files prior to litigation. *Id.* at 313. The court disagreed and held that defendant's failure to produce the tapes amounted to "other misconduct" under Rule 60(b)(3), explaining that the term "misconduct" covers accidental omissions, or would otherwise be subsumed within the "fraud" and "misrepresentation" prongs. *Id.* at 314-5. The *Catskill* court also found the clear and convincing standard met by showing that the undisclosed material either would have been important as evidence at trial or would have been a valuable tool in obtaining additional discovery or establishing an alternate theory of liability. NAM also incorrectly states that, under Rule 60(b)(3), the court must find that the result would have been altered had the evidence been produced. *Id.; see also, Anderson v.*

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[9] NAM's attempt to distinguish *MMAR Group, Inc. v. Dow Jones & Co.*, 187 F.R.D. 282 (S.D. Tex. 1999) actually underscores how on point *MMAR* is. The defendant in *MMAR* complained that the production of requested information, including incriminating audio tapes, was too burdensome, and the court allowed only limited documents to be produced. When a large number of tapes were discovered after the judgment, the court granted plaintiff's Rule 60(b) motion even though no court order had required the tapes to be produced. NAM simply cannot hide evidence from FGI and the Court and then claim that it should not have to produce documents absent a court order.

Cryovac, Inc., 862 F.2d 910, 924 n. 10 (1st Cir. 1988).[10]

B. The Videos And Other Documents Referring To FGI Are The Tip Of The Iceberg And Demonstrate The Need For A Complete Review Of The Evidence And A Hearing

Despite that abundant materials are currently shielded by the Valassis confidentiality order, FGI has nevertheless uncovered many publicly available documents that were relevant to FGI's claims, but which were not produced by NAM. *See* Valassis' Trial Exhibit List with 83 references to videos, presentations or transcripts of sales summits and Budget Books for the years 2000-2008, Ex. X hereto; *see also* Ex. W (P-273). Among those documents are evidence directly related to allegations that NAM intended to destroy FGI,[11] that NAM circulated false and disparaging statements about FGI and its financial condition, and that NAM bundled services, staggered contracts and entered into non-economic deals in order to drive its smaller competitors, who were less able to pay higher prices to retailers for a

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[10] While Rule 60(b)(2) does require that analysis, the movant does not need to prove this with certainty. *See Seaboldt v. Pennsylvania R.R. Co.*, 290 F.2d 296, 300 (3d Cir. 1961).

[11] Proof of this corporate plan of destruction exists in ***core*** business documents for which there can be no reasonable excuse by NAM for their lack of production – (1) NAM's annual Budget Books submitted to its parent corporation for approval and (2) videos of speeches (and related material such as transcripts, written drafts of speeches and PowerPoint presentations) given at NAM's biannual company-wide sales conferences. These are not random documents found in some file located in an out of the way cabinet. Rather, these were the fundamental records of NAM's core business operations.

significant period of time, out of business.[12] Ex. C to Motion, P-0019 and P-0027-3; Ex. Y hereto (P-2109). Evidence of stark contradictions and misleading statements by CEO Carlucci and other NAM executives have come to light from reviewing the Valassis materials. *Compare* Carlucci's testimony in Ex. Z hereto, excerpts from Valassis Trial Transcript, Vol. VIII, pp. 52-3 and Ex. S, p. 48 (admitting bundling of the In-Store and FSI products in one instance and denying it in another). NAM repeatedly denied losing money on its in-store retail contracts.[13] Yet, evidence from the Valassis trial supports FGI's claims that the opposite is true. *See* Ex. Y (P-2109) and Ex. AA hereto, excerpts from testimony of NAM Vice President of Business Operations, Thomas Leprine, Vol. VI, pp. 32-34 (admitting NAM was losing money on its Floortalk program which competed with FGI's primary in-store product) and Ex. S, pp. 36, 40 (Carlucci denying that NAM ever entered into non-economic deals).

Valassis trial excerpts reference other documents that were clearly relevant to FGI's claims. In one colloquy, Valassis Trial Ex. P-450 is described as an example of

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[12] Further, NAM's Response erroneously suggests that the videos that do not mention FGI are irrelevant. The videos FGI included in its Motion demonstrate NAM's pattern of wrongful conduct, such as NAM's desire to drive Valassis "to the brink of utter desperation." See Ex. C to Motion, P-0016. These videos (by NAM's own admission) also mention NAM's practice of staggering contracts, and they support FGI's claims that NAM intended to drive out competition by entering into long term, uneconomic deals so that its competitors will not be able compete. *See* Ex. C to Motion, Videos P-0019-3 and P-0027-3.

[13] "[T]here is no evidence that [NAM's] bids were unprofitable. Rather, [NAMS] made money on all of its contracts with retailers." Ex. L to FGI's Motion.

"documents whereas [sic] part of the tactics to exclude Insignia and Floorgraphics, News America employees made disparaging comments about their financial ability and their ability to meet their financial commitments...." *See* Ex. BB, Valassis trial excerpt, Vol. XXII, p. 183. That exhibit was not admitted into evidence and is currently shielded from review by the confidentiality order.

C. Assuming, *Arguendo*, That There Was A Discovery Cut-Off Of April 2006, NAM Has Not Produced Documents Referring To FGI Created Before That Date -- And Documents Created After The Alleged Cut Off Would Still Warrant Relief Under Rule 60(b)(2)

As NAM admits, the Carlucci video, wherein he says he has the FGI "on the run", was created prior to any alleged discovery cut-off. Additionally, FGI has found evidence of more video recordings created prior to such discovery cut off which specifically refer to FGI and/or the Rebhs. *See* Ex. W hereto. However, to circumvent the fact that NAM did not produce other obviously relevant videos and documents mentioning FGI and/or the Rebhs in disparaging ways (including P-0027 where Marty Garafalo, NAM's Executive Vice President of Trade, states that NAM has "delivered quite a blow to the Rebh brothers"), NAM offers an affidavit contending that Magistrate Judge Hughes purportedly only required production of documents created before April 11, 2006.

Letters exchanged by counsel shortly after the April 11, 2006 hearing suggests otherwise. On April 18, 2006, Ms. Green-Kelly sent a letter to FGI's attorneys calling for the parties to follow the discovery parameters that Judge Hughes

"suggested" on April 11, yet she fails to mention a purported end-date limiting discovery to documents created before April 2006. *See* Ex. CC hereto. In his response of April 25, 2006, FGI's counsel noted that Ms. Green-Kelly incorrectly described the alleged "parameters", and stated: "Judge Hughes made this very simple for News: produce every document in News's possession or control that mentions or refers to our client (FGI, Floorgraphics, Inc., and necessarily, the Rebhs).... This request includes documents going back to January 1, 2000." Ex. DD hereto. Likewise, this letter does not mention any other time limitation, which would obviously have been a significant point.

Finally, even assuming there was a discovery cut off of April 2006, the video recordings are still newly discovered evidence whether they were created after the close of discovery or not. The videos and other documents were crucial to FGI's evaluation of its case, and they were not turned over despite FGI's requests. Thus, FGI is entitled to relief under Rule 60(b)(2).

D. The Release Agreement Does Not Prevent The Court From Granting The Relief Requested By FGI

It is axiomatic that Rule 60(b) can be used as a vehicle to open a judgment entered upon a settlement. For instance, in *Judith Ripka Creations, Inc. v. Rubinoff Imports, Inc.*, 2004 WL 1609338 (S.D.N.Y.), No. 03 Civ. 9377 (BSJ) (July 16, 2004), the court vacated the settlement agreement under Rule 60(b)(3) after it was determined that defendant failed to produce documents where plaintiff would not

have "settled at the time or for the amount that it did." *Id*. at *4. *See also Home Box Office, Inc. v. Spectrum Electronics, Inc.*, 100 F.R.D. 379 (E.D. Pa. 1983) (opening settlement under Rule 60(b)(3) based on misrepresentations during settlement discussions); *Conerly v. Flower*, 410 F.2d 941 (8th Cir. 1969) (affirming decision to vacate a settlement under Rule 60(b)(3) because of defendants' failure to produce requested insurance policies).

NAM tries to avoid this result by contending that the governing law provision in the parties' Release requires application of New York law, and that a "disclaimer clause" would prevent opening the settlement under New York law. Notably, none of the cases cited by NAM involved relief under Rule 60(b), which is governed by Third Circuit law, not New York's law of contracts. Indeed, where a party seeks to open a release on the basis of fraudulent inducement, it is clear that a governing law provision does not apply. *See Flexi-Van Corp. v. Orzeck*, 1990 WL 119308, Civ No. A88-5015, *3 (D.N.J. Aug. 14, 1990) (Although a general release called for application of New York law, plaintiff's claim for fraudulent inducement would not be decided under New York law, as "the issue before the Court is not the interpretation of the release, it is a determination as to whether that release was fraudulently induced.") Claims for "fraudulent inducement and inducement by negligent misrepresentations emanate from events that occurred before the [settlement] agreement even came into being and are separate and distinct from any breach of contract, which presupposes the existence of a valid [settlement]

agreement. Thus, the fraud and negligent misrepresentation claims are not subject to the parties' contractual choice of law since the "fair import of the provision [does not] embrace[ ] all aspects of the legal relationship" between the parties. *Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc.*, 94 F. Supp. 2d 589, 593 (E.D. Pa. 1999); *see also Black Box Corp. v. Markham*, 127 Fed. Appx. 22, 25 (3d Cir. 2005) (holding that a choice of law provision limited to "This Agreement,"[14] is narrowly drafted to encompasses only the underlying agreement itself, and not necessarily the parties' entire relationship).

Moreover, the disclaimer of reliance language in ¶8 of the Mutual Release stating that the parties "have not relied upon any other statements or representations regarding this matter," is too general to prevent FGI from claiming the settlement agreement was fraudulently induced or that material omissions were made by NAM. *See St. Matthews Baptist Church v. Wachovia Bank Nat'l Ass'n*, 2005 WL 1199045, No. A. 04-4540, at *4 (FLW) (D.N.J. May 18, 2005) (holding that disclaimers of reliance in the settlement agreement were too general to prevent evidence of allegedly fraudulent representations from being introduced); *Travelodge Hotels, Inc. v. Honeysuckle Enter., Inc*., 357 F. Supp. 2d 788, 795-96 (D.N.J. 2005) (same); *Caiola v. Citibank, N.A.*, 295 F.3d 312, 330 (2d Cir. 2002) (finding disclaimer of reliance

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[14] The Release in this case similarly limits application of New York law to construction of the "Mutual Release", as defined. Ex. 1 to NAM's Response, introductory paragraph and ¶11.

clause too general to prohibit introduction of fraud); *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402, 407 fn. 5 (3d Cir. 1981) (stating that New York Court of Appeals decision holding that a specific disclaimer of reliance barred evidence of fraudulent representations was "uniformly criticized as permitting a party to immunize [itself] from responsibility for fraud, contrary to public policy.").

E. FGI Did Not Unreasonably Delay In Filing Its Rule 60(b) Motion, And NAM Will Not Be Prejudiced If Relief Is Granted

Finally, NAM argues that FGI's Motion, which was filed within one year of the settlement and judgment, was nonetheless untimely. Motions under Rule 60(b)(1) through (3) must be filed within a "reasonable time" and in no event more than one year after the entry of judgment or order. Factors to be considered in determining what is a "reasonable time" include: (1) reason for delay; (2) interest in finality; and (3) prejudice to the non-movant. *See Hailey v. City of Camden*, 631 F. Supp. 2d 528, 552 (D.N.J. 2009) (cited at pp. 14-15 of NAM's Response). FGI offers the Supplemental Affidavit of George Rebh to further clarify that FGI acted diligently. As previously stated, at the end of January 2010, George Rebh read several news accounts about the $500 million settlement between Valassis and NAM. Around the same time, he also read the January 30, 2010 Press Release by NAM's Deputy Chairman, President and Chief Operating Officer, which stated: "It has become evident to our legal advisors from pre-trial proceedings over the past couple of weeks that significant risks were developing in presenting this case to a jury." Ex. V, ¶¶3-4.

While he had read generally about the $300 million verdict against NAM in the Valassis litigation in 2009 and was generally familiar with the matters at issue in the litigation, it was the combination of the settlement for significantly more than the verdict and the "significant risks" language of the Press Release, that caused Mr. Rebh to question what had caused NAM to perceive such "significant risks" in presenting its case to the jury in the Valassis litigation. Ex. V, ¶5. Although he recalled being previously aware that Valassis had presented a video in its case to the jury, his understanding was that this video did not reference FGI or the Rebhs. It was not until the $500 million settlement and the Press Release that he asked his attorneys if they could obtain the discovered evidence from the Valassis public record to determine if documents existed relevant to FGI's claims which had not been produced to FGI by NAM. Ex. V, ¶¶6-7. Thus, FGI's actions were reasonable and it acted diligently to pursue the information necessary to evaluate whether a motion for relief should be filed. Further, prejudice to the non-movant is a factor that must be considered by the Court. *See Hailey, supra.* NAM does not even suggest that it will be prejudiced in any way. Such a failure is fatal to its timeliness argument. *Venture Industries Corp. v. Autoliv ASP, Inc.*, 457 F.3d 1322 (Fed. Cir. 2006).

CONCLUSION

Despite NAM's provocative adjectives describing FGI's Motion as "preposterous", "absurd", "laughable", “patently ridiculous”, "utterly meritless" and "strain[ing] credulity", the bottom line is that the truth is the truth, and a lie is a lie. When NAM chose not to provide critical, relevant evidence to FGI pursuant to clear discovery mandates, it subverted the truth and gave life to its lies. Credibility was a crucial consideration in evaluating FGI's case. If FGI had received the video recordings and other evidence and had the benefit of the contradictory statements by NAM's CEO and others, FGI’s litigation position would have materially improved and undoubtedly would have changed the complexion of FGI’s case against NAM.

Respectfully submitted,

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