UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ELIYAHU MIRLIS,	:	**CIVIL ACTION NO.**
	:	**3:16-CV-00678-MPS**
Plaintiff,	:	
V.	:	
	:	
RABBI DANIEL GREER and YESHIVA OF NEW HAVEN, INC.,	:	
	:	
Defendants.	:	**NOVEMBER 2, 2017**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR RELIEF FROM FINAL JUDGMENT

INTRODUCTION

On the basis of an affidavit of one of their lawyers containing nothing but inadmissible and irrelevant hearsay from a witness they refuse to identify, the defendants make a time-barred attempt to undo the jury's May 18 verdict in this case. They have failed to satisfy *any* of Rule 60(b)(2)'s requirements for relief from the final judgment. The motion must be denied.

LEGAL STANDARD

> "Rule 60(b)(2) provides relief when the movant presents newly discovered evidence that could not have been discovered earlier and that is relevant to the merits of the litigation." *Boule v. Hutton*, 328 F.3d 84, 95 (2d Cir. 2003). Relief pursuant to Rule 60(b) should be granted "only upon a showing of exceptional circumstances." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001). In particular, to prevail on a Rule 60(b) motion, "[t]he movant must demonstrate that (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant [was] justifiably ignorant of them despite due diligence, (3) the evidence [was] admissible and of such importance that it probably would have changed the outcome, and (4) the

> evidence [was] not merely cumulative or impeaching." *Id.* at 392 (internal quotation marks omitted). We review the district court's denial of a Rule 60(b) motion for abuse of discretion. *Rodriguez v. Mitchell*, 252 F.3d 191, 200 (2d Cir. 2001).

Victorinox AG v. B&F Sys., 2017 U.S. App. LEXIS 18070 *13-14 (2d Cir. 2017).

The standard under Rule 60(b)(2) is "onerous." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001). "A motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001); *accord Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004). *See also Lorusso v. Borer*, 260 Fed. Appx. 355, 356-57 (2d Cir. 2008) (citation and internal quotation marks omitted) (“Because this rule allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances."). "Generally, courts require that the evidence in support of [a Rule 60(b) motion] be highly convincing, that a party show good cause for the failure to act sooner, and that no undue hardship be imposed on other parties." *Kotlicky v. U.S. Fid. & Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987) (internal quotation marks and citations omitted). "The burden of proof is on the party seeking relief from judgment." *Int'l Bhd. of Teamsters*, 247 F.3d at 391.

ARGUMENT

I. The Defendants’ “Evidence” Was Discovered In Time To Move For A New Trial, And Their Motion Is Not Made Within A Reasonable Time

Rule 60(b)(2) requires that the alleged new evidence “could not have been discovered in time to move for a new trial.” Attorney Ward learned about the alleged new witness on July 26, 2017 (Defs’ Mem. at 5), four weeks before the Motion for New

Trial pleadings were closed. (Defendants filed their Reply Brief, Doc. 194, on August 24, 2017.) Nothing prevented the defendants from asserting this alleged "new evidence" in support of their motion; but they failed to do so. They then waited another three months to file the current motion. "A motion under Rule 60(b) must be made within a reasonable time…." Fed.R.Civ.P. 60(c)(1). It is inherently unreasonable for a party to learn about alleged "new evidence" and then, with no excuse or justification, to wait three months before filing a motion to overturn the final judgment on the grounds that the evidence "would have dramatically changed" the outcome of the trial. Defs' Mem. at 6.[1]

II. The Defendants Have Failed to Show that the "Evidence" Could Not with Due Diligence Have Been Discovered Earlier

To obtain relief under Rule 60(b)(2), "the movant must present evidence that is truly newly discovered or could not have been found by due diligence." *U.S. v. Potamkin Cadillac Corp*., 697 F.2d 491, 493 (2d Cir. 1983) (internal quotation omitted). *See also O'Reilly v. Conn. Power & Light Co.*, 2009 U.S. Dist. LEXIS 27673 *2-3 (D. Conn. 2009). "[T]he case law requires that a movant provide specific examples of the attempts, if any, undertaken to locate the evidence at an earlier date." *Lorusso v. Borer*, 2006 U.S. Dist. LEXIS 16623 * 20 (D. Conn. 2006). *See also id.* (citing 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 2859, at 303-04 (2d ed. 1995) ("The rule speaks of 'due diligence,' and the moving party must show

[1] If the defendants really thought that the unidentified witness's testimony had the importance they now claim, they would have disclosed it and sought relief at the earliest possible time, not waited three months while the Court considers multiple other dispositive and non-dispositive motions.

why he did not have the evidence at the time of the trial or in time to move under Rule 59(b)."). *See Mpala v. Funaro*, 2017 U.S. Dist. LEXIS 56397 * 9 (D. Conn 2017) (citation and internal quotation marks omitted) ("To the extent plaintiff seeks to reopen on the basis of the discovery of new evidence, he must establish, in pertinent part, that he was justifiably ignorant of the transcript's existence despite due diligence."); *Palmer v. Sena*, 474 F. Supp. 2d 353, 355-56 (D. Conn. 2007) ("[A]lthough [the movant] states that [the witness's] affidavit was 'not available at the time of the Court's ruling,' there is no evidence indicating that [the movant] exercised due diligence in order to obtain such a statement….").

Here, the alleged new evidence is the testimony of a former agent and employee of defendant Yeshiva concerning his purported observations of the plaintiff between 2002 and 2004. Ward Aff. ¶ 5. Nothing prevented the defendants and their counsel from simply calling this individual and asking him his impressions of the plaintiff. Indeed, during the entire time that Mr. Mirlis attended the Yeshiva school, only a small handful of teachers taught there; and the defendants could easily have called every one of them in search of evidence to support their defense. The defendants have described no "specific examples" of any attempts undertaken to locate this testimony, as the law requires. *Lorusso*, 2006 U.S. Dist. LEXIS 16623 *20.

As this Court has held, "[t]his evidence … is not 'truly newly discovered,' … and could have been found and presented to the court earlier with the exercise of due diligence…. [The defendants] have not provided any reason why this evidence was not gathered before the close of discovery and brought to the Court's attention before…." *O'Reilly*, 2009 U.S. Dist. LEXIS 27673 *2-3 (quoting *Potamkin Cadillac*, 697 F.2d at

493). "Where, as here, the movant fails to make even a 'colorable claim' for Rule 60(b) relief, the district court is not required to consider evidence offered in support of that motion." *United States v. United States Currency in the Sum of $660,200*, 242 Fed. APPX. 750, 752 (2d Cir. 2007) (citing *Rothenberg v. Kamen*, 735 F.2d 753, 754 (2d Cir. 1984) (*per curiam*)). *See also Palmer v. Sena*, 474 F. Supp. 2d 353, 355-56 (D. Conn. 2007) ("The court agrees with the defendant that this 'new' evidence would have been available to [the movant] had she asked [the witness for it], and thus it finds that this is not the kind of 'new evidence not previously available' that is contemplated under the Rule.").

III. The Defendants' "Evidence" Is Inadmissible Hearsay

To prevail on a Rule 60(b) motion, "[t]he movant must demonstrate that … the evidence [was] admissible …." *Victorinox AG,* 2017 U.S. App. LEXIS 18070 *13-14. The defendants fail to satisfy that requirement. The alleged "newly discovered evidence" is an affidavit from one of their lawyers containing nothing but inadmissible hearsay from a witness they refuse to identify. *See* Defs' Mem. at p. 2 n. 2 (name and contact information purposefully redacted). *See also* emails between Attorneys Ponvert and Grudberg, attached as Exhibit A to the Affidavit of Antonio Ponvert III, filed herewith.[2] As in *Mazzei v. Money Store*, 656 Fed. Appx. 558, 560 (2d Cir. 2016), the

[2] The defendants state that they have "no obligation" to identify their alleged witness, and they refuse to do so because of "the history of the intense publicity and scrutiny for anyone associated with this case". Grudberg Nov. 1 email, Ponvert Aff. Exh. B. They also refuse to state when Attorney Ward allegedly spoke to the secret witness, they refuse to identify "the other counsel for the Defendants" (Def's Mem. at 2) who are alleged to have participated in those discussions, and they admit that information produced by the defendants in discovery that should have identified the witness and the

defendants have "failed to articulate … a hearsay exception or exclusion pursuant to which admission of the affidavit would have been proper." The Second Circuit has held that, "because there is a substantial danger of false claims in forfeiture proceedings, … more was required than the conclusory, hearsay, on-information-and-belief statement of [a party's] lawyer." *Mercado v. U.S. Customs Service*, 873 F.2d 641, 645 (2d Cir. 1989) (citations omitted). *See id.* ("Affidavits such as this by an attorney would be given no weight in summary judgment proceedings."); *id.* ("Claims in *in rem* forfeiture proceedings usually involve substantial sums of money and lend themselves readily to the filing of false claims. Where, as here, the claimant is available to verify his own claim, he should not be permitted to rely upon a hearsay and conclusory verification by his lawyer.").

The same concerns exist here, where the judgment sought to be overturned is over $20 million dollars. But, even if the amount of the judgment were very small, the defendants have offered no legitimate excuse for refusing to identify their purported witness, and have stated no exception to Rule 802's prohibition of hearsay testimony. The Court cannot possibly determine the alleged witness's credibility, ability to observe, bias, or anything else on the current record. The defendants state that the witness has

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years he taught at Yeshiva may be inaccurate. *See* Grudberg Nov. 1 email, Ponvert Aff. Exh. C. Not only does the defendants' refusal to provide this basic information cast serious doubt on Attorney Ward's Affidavit and on the witness himself, it is profoundly wrong of a party, especially in a high-profile case, to publicly accuse a person of being a liar and of wanting to kill members of a religious group while refusing to support such defamatory accusations with admissible evidence or to otherwise stand behind them. Indeed, inasmuch as the "kill all Christians" accusation (Ward Aff. ¶ 5) is entirely irrelevant to any claim or defense in the case, it does not qualify for the "published in the course of judicial proceedings" privilege, and may subject the witness and Attorney Ward to a suit for defamation if they fail to prove that it is true. *See*, e.g., *Hopkins v. O'Connor*, 282 Conn. 821, 839 (2007).

"no allegiance to either side." Defs' Mem. at 5. But something compelled him to reach out to defense counsel, and even Ward's Affidavit asserts that the witness was forced to resign his teaching position as a result of Hack's alleged demand to change Mirlis's grade, revealing at least one reason why the witness might invent a "very unusual" relationship between Hack and the plaintiff. Moreover, according to the defendants, the witness was motivated to call defense counsel "after he learned of the massive verdict in this case" (Def's Mem. at 5), revealing animosity toward the plaintiff, bias toward the defendants, jealousy, or other possible motives for lying. The defendants' refusal to identify the witness heightens these concerns; if he is not even willing to be identified and the defendants' lawyers refuse to identify him, how can the witness's bias and credibility and motivations and memory be tested by the plaintiff or trusted by the Court, and how can the Court ever consider his alleged testimony for any purpose?

IV. The Defendants' "Evidence" Is Irrelevant to Any Claim or Defense in the Case, and Even If Relevant Is More Prejudicial Than Probative

According to Attorney Ward's Affidavit, the unidentified witness told him that:

- Mr. Mirlis was one of his students
- Mr. Mirlis "would throw tantrums in class", but "tantrum" is not defined or explained, and no examples or support is offered for this purported observation
- On one occasion Mr. Mirlis "engaged in destructive behavior while shouting he wanted to 'kill all the Christians'", but "destructive behavior" is not further explained and no context is given for this purported observation

- Mr. Mirlis "had a poor character for truthfulness" and was "a frequent liar", but no examples or support is offered for these alleged assessments
- Mr. Mirlis and Aviad Hack had a "very unusual" and "not a normal" relationship, but no definitions, examples or support is offered for these assessments except that Mr. Mirlis often sat on Hack's desk or table, and the witness "saw them embrace once"
- Mr. Hack told the witness he had to change Mr. Mirlis's failing grade in Math to "a much higher passing grade", and he (the witness) refused to make the change

Ward Affidavit ¶ 5.

Even if all of this purported testimony were not inadmissible hearsay of an unidentified witness, none of it is relevant to whether Rabbi Greer sexually molested Mr. Mirlis, whether the Yeshiva was negligent in allowing that abuse to occur, or the nature and extent of the injuries inflicted on the plaintiff by the abuse.[3] To the extent that it is

[3] In the event that the Court is inclined to consider the proffered hearsay testimony on this current Motion, or is inclined to grant the defendants' Motion for New Trial or, in the Alternative, for Remittitur (Doc. 172), the plaintiff moves the Court to first grant his Motion to Compel, filed separately this date, and to re-open discovery for the purpose of deposing the witness and, if necessary, Attorney Ward. The secret witness's proffered testimony is relevant to all of the liability and damages issues raised in the defendants' post-trial motions. For example, Mr. Mirlis's alleged "tantrums" and "destructive behavior" may have been caused by, and are certainly consistent with, Greer's contemporaneous sexual abuse, and may be evidence of the emotional distress caused by the abuse. They may also constitute a call for help that should have alerted the witness and other Yeshiva employees of reportable misconduct. The alleged "very unusual" and "not normal" relationship between Aviad Hack and Mr. Mirlis, and their alleged one-time "embrace" may support the plaintiff's claim that the Yeshiva and its administrators were negligent in their care and custody of the plaintiff. And the proffered testimony about Mr. Mirlis's grade of "F" in Math may be evidence of his suffering, and directly addresses the defendants' credibility attack on the plaintiff at trial. *See* Tr. Transcript at 380-385, Ponvert Aff. Exh. B (defendants sought to impeach the

marginally relevant (it is not), some of it (the alleged "tantrums", alleged "destructive behavior", and alleged statement "kill all the Christians", for example) is precluded under Rule 403. To the extent that it goes to Mr. Mirlis's credibility, it is merely cumulative or impeaching, and thus explicitly *not* the kind of evidence that supports a Rule 60(b)(2) motion. *See* Section VI, *infra.* And, even if it were not cumulative and impeaching (it is), the alleged witness's statements that Mr. Mirlis "had a poor character for truthfulness" and was "a frequent liar" would never be admitted under Rule 608(a) without a proper foundation (*see, e.g.*, Rule Evid. 701); and no foundation for the unidentified witness's testimony has been laid in Ward's Affidavit and cannot be laid without an opportunity for cross-examination. *See, e.g., United States v. Augello*, 452 F,2d 1135, 1140 (2d Cir. 1971) ("[E]vidence of poor reputation for truth and veracity … should be viewed by the trial judge with caution…. [E]xcept in the rare case where the testimony appears to be well supported, it should be rejected. Being at best in the nature of unsubstantiated community gossip, the probative value of such evidence is doubtful when weighed against the prejudice that it might create in the minds of jurors."); *United States v. Elmaroudi*, 2007 U.S. Dist. LEXIS 47123 * 13 (N.D. Iowa 2007) (citation omitted) ("The court finds that Defendant is unable to lay an adequate

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plaintiff's testimony on direct examination that his grades suffered as a result of the abuse); *id.* at 384-85 ("Q. Fair to say your grades weren't suffering when you tried to cut [Greer] off?"). If the Assistant Principal of the school falsely substituted a "much higher passing grade" for what should have been a failing grade, this both supports the plaintiff' direct testimony, and calls into question the truth and accuracy of the alleged "six A's and two B pluses" that the defendants relied on for their accusation in closing argument that Mr. Mirlis is a liar. *See* Trial Tr. at 500, Ponvert Aff Exh. B ("That's another lie. That's all it is.").

foundation, that is, he has not demonstrat[ed] that the opinion witness[es] know[] the relevant witness well enough to have formed an opinion.").

V. The Defendants' "Evidence" Is Not of Such Importance that It Probably Would Have Changed the Outcome

"[T]o prevail on a Rule 60(b) motion, [t]he movant must demonstrate that … the evidence [was] admissible and of such importance that it probably would have changed the outcome." *Victorinox AG v. B&F Sys.*, 2017 U.S. App. LEXIS 18070 *13-14 (2d Cir. 2017) (citations and quotation marks omitted). The defendants fail to meet that burden here.

The defendants argue that "it does not take a great leap of faith to conclude that testimony from the distinguished former teacher probably would have changed the result in this case." Defs' Mem. at 7. Putting aside that there is no basis whatsoever to describe the unidentified witness as "distinguished" (unless every person with a Ph.D. in chemistry is "distinguished"), and putting aside that the defendants have not offered any "testimony from the … teacher" (only their lawyer's description of what the teacher purportedly told him), judgments are not overturned based on "leaps of faith", whether great or small.

> In considering the effect newly discovered evidence might have on the outcome of a trial, the proper inquiry is whether the evidence makes a prima facie showing that a different result should have been reached. [The movant] must make [m]ore than a showing of the potential significance of the new evidence ... to justify the granting of a new trial after judgment has become final.

Leniart v. Bundy, 2017 U.S. Dist. LEXIS 47570 *13-14 (D. Conn. 2017) (citations and internal quotation marks omitted). Where, as here, the jury's resolution of the case depended on their assessment of the witnesses' credibility, a stronger showing of

significance is required. *See id.* ("[P]laintiff has failed to establish that the evidence would probably produce a different result upon a new trial, particularly where, as here, the resolution of this matter largely depended on the jury's credibility assessments of the witnesses.").[4]

VI. The Defendants' "Evidence" Is Merely Cumulative or Impeaching

To prevail on a Rule 60(b) motion, "[t]he movant must demonstrate that … the evidence [was] not merely cumulative or impeaching." *Victorinox AG v. B&F Sys.*, 2017 U.S. App. LEXIS 18070 *13-14 (2d Cir. 2017) (citations omitted). Here, *all* of the defendants' evidence at trial – their exhibits, their witnesses, their cross-examination of the plaintiff's witnesses – was offered to prove that Mr. Mirlis was lying about Greer's abuse. This was the entire thrust of the defendants' case. *See, e.g.*, Attorney Ward's closing argument at Tr. 498, Ponvert Aff Exh. B ("[Mr. Mirlis] admitted he lied. He admitted he's a cheat. And his wife told you he lied. And his wife told you he's a

[4] The defendants argue that the proffered hearsay testimony has added significance because the jury was "deadlocked on all matters" after a number of hours of deliberations. Defs' Mem. at 7. In fact, the jury's momentary inability to reach its unanimous verdict was solved by the Court instructing them that they could take the liability questions in a different order. Trial Tr. at 545, attached as Exhibit B to the Ponvert Affidavit, filed herewith. A mere two hours and 42 minutes later, the jury returned a unanimous verdict on all counts, including a unanimous finding for punitive damages, and a unanimous award of $15 million. *See id.* at 546 (jury out at 12:56 p.m.) and 547 (jury in at 3:38 p.m.). Part of that time includes the minutes after the jury actually reached its verdict and its notification of the verdict to the Clerk, and part of that time includes the minutes between when the jury handed out its note and the actual taking of the verdict in open court. It is simply inaccurate – and pure speculation at best – to argue that the jury "was struggling in its evaluation of the plaintiff's testimony" (they never asked for any of it to be re-read), or to surmise that, because of this speculative "struggle", "[t]he testimony of the former teacher likely would have tipped the balance in Defendants' favor…." Defs' Mem. at 7.

cheat."); Defs' Memorandum in Support of Motion for New Trial (Doc. 172) at 23 (arguing that Mr. Mirlis lied to Dr. Ford). And the defendants admit that the unidentified witness's hearsay statements are similarly offered "to undermine[] the credibility of the plaintiff…." Motion at 1. *See also* Ward Affidavit ¶ 5 (Mr. Mirlis "had a poor character for truthfulness" and was "a frequent liar"). Thus, the witness's testimony is both cumulative and impeaching. As in *Tr. of the Estate of Bolin & Co., LLC v. Ogden*, 2012 U.S. Dist. LEXIS 136396 *9 (D. Conn. 2012), the defendants "fail[] to show that [the proffered evidence] serves a purpose other than merely to impeach [the plaintiff's] credibility."

CONCLUSION

The defendants have failed utterly to satisfy the "onerous" burden on their motion. Their purported "new evidence" is unconvincing, they have shown no due diligence or good cause for their failure to act sooner, they present no exceptional circumstances justifying the extraordinary relief they seek, and even if their secret witness's testimony were not inadmissible hearsay, entirely irrelevant to any claim or defense in the case, and more prejudicial than probative, the defendants have failed to show that it probably would have changed the outcome of the trial. The Court should deny the defendants' Motion.

Respectfully submitted,

BY s/Antonio Ponvert III
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CERTIFICATION

I hereby certify that a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ _____
Antonio Ponvert III