

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

In re	)	
	)	
MIRABILIS VENTURES, INC.,	)	Case No. 6:08-bk-04327-KSJ
	)	Chapter 11
Debtor.	)	
	)	

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ORDER GRANTING CASTLEPOINT INSURANCE  
COMPANY’S MOTION FOR RELIEF FROM THE AUTOMATIC STAY  
AND DENYING DEBTOR’S MOTION TO COMPEL COMPLIANCE WITH THE STAY

Almost two years ago, the debtor, Mirabilis Ventures, Inc. (“Mirabilis”), sued CastlePoint National Insurance Company f/k/a SUA Insurance Company (“CastlePoint”) seeking to recover an alleged overpayment. CastlePoint filed a timely compulsory counterclaim. Now, on the eve of a summary judgment hearing in the underlying litigation, Mirabilis asserts the automatic stay prevents CastlePoint from pursuing its counterclaim and asks this Court to enforce the stay.<sup>1</sup> CastlePoint opposes this request and, alternatively, seeks retroactive relief from the automatic stay.<sup>2</sup> For the reasons explained below, the Court denies Mirabilis’ motion and will modify the automatic stay, to the extent it exists, to allow CastlePoint to continue to pursue its counterclaims.

The relevant facts are not disputed. Mirabilis’ Chapter 11 Liquidation Plan (“the Plan”) was confirmed October 16, 2009. Mirabilis did not identify CastlePoint as a creditor on its bankruptcy schedules. CastlePoint did not receive any formal notice of the bankruptcy or an opportunity to object to the Plan prior to confirmation.

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<sup>1</sup> Doc. No. 719.

<sup>2</sup> Doc. No. 735.

On May 12, 2010 (almost seven months after the Plan was confirmed), Mirabilis sued CastlePoint in the United States District Court, Middle District of Florida, Orlando Division. The case is styled *Mirabilis Ventures, Inc. v. Specialty Underwriters' Alliance Insurance Company a/k/a CastlePoint Insurance Company, et al.*, Case No. 6:10-cv-737-ORL-18-KRS. In Mirabilis' amended complaint, the debtor alleges breach of contract and breach of the duty of good faith. CastlePoint timely answered the amended complaint and interposed counterclaims on March 14, 2011. CastlePoint's counterclaims seek, in part, an accounting, declaratory relief as to the scope of the insurance coverage, and damages for breach of contract (failure to pay all premiums due). Mirabilis answered the amended counterclaims on April 4, 2011. The parties have engaged in discovery for the last year. Mirabilis served requests for production and interrogatories on CastlePoint, and CastlePoint responded. The parties currently are conducting depositions.

On December 12, 2011, CastlePoint filed a Motion for Summary Judgment in the District Court case on all four counts of the amended complaint and Count II of CastlePoint's amended counterclaims. Nine days after CastlePoint filed its Motion for Summary Judgment (nineteen months after Mirabilis initiated the lawsuit, almost seventeen months after it was first faced with counterclaims by CastlePoint, and fifteen months after Mirabilis first answered the counterclaims), Mirabilis raised the issue as to whether the automatic stay of 11 U.S.C. § 362 acted to bar CastlePoint's counterclaims.

The parties disagree as to whether the automatic stay prevents CastlePoint from pursuing its counterclaims. Mirabilis argues the stay remains in effect because no discharge has issued and the confirmed plan extends the stay. CastlePoint argues the stay *is not* in effect as to its counterclaims for several reasons. The Court makes no specific finding as to whether the

automatic stay remains in effect, because even if it were in effect, CastlePoint is entitled to retroactive relief from the stay to prosecute its counterclaims against Mirabilis. Relief is granted retroactively to July 30, 2010 (the date on which CastlePoint originally filed its counterclaims against Mirabilis).

CastlePoint has demonstrated cause exists to lift the stay pursuant to § 362(d)(1). It has participated in nineteen months of litigation in District Court, which litigation was initiated by Mirabilis. The parties have engaged in discovery, which closes March 1, 2012, and litigated the District Court case to the precipice of summary judgment. It is set for trial in August of this year.

CastlePoint's counterclaims, with the exception of Count X, which is a post-petition claim, are compulsory counterclaims that must be pursued in the same case as the claims in Mirabilis' amended complaint.<sup>3</sup> They are inextricably intertwined with Mirabilis' lawsuit. At bottom, the parties disagree as to the scope of coverage afforded by an insurance policy. Mirabilis' complaint is that it overpaid insurance premium to CastlePoint and is owed a refund. While Mirabilis claims it overpaid for a narrow scope of coverage, CastlePoint's counterclaims seek determinations the coverage was broad, and Mirabilis still owes premium.

Granting CastlePoint relief does not unjustly prejudice any other creditor. CastlePoint has acknowledged that, with the exception of recovery on its Count X claim for abuse of process,

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<sup>3</sup> See Fed. R. Civ. P. 13(a)(1) ("A pleading must state as a counterclaim any claim that--at the time of its service--the pleader has against an opposing party if the claim:

- (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
- (B) does not require adding another party over whom the court cannot acquire jurisdiction.

any recovery CastlePoint might obtain would be for a pre-petition claim subject to the bankruptcy court's jurisdiction and a pro-rata distribution.<sup>4</sup>

Accordingly, it is

ORDERED:

1. CastlePoint is granted relief from the automatic stay, retroactive to July 30, 2010, to pursue its counterclaims against Mirabilis in *Mirabilis Ventures, Inc. v. Specialty Underwriters' Alliance Insurance Company a/k/a CastlePoint Insurance Company, et al.*, Case No. 6:10-cv-737-ORL-18-KRS. Should CastlePoint succeed in obtaining a monetary judgment against Mirabilis, CastlePoint must return to this bankruptcy court to file a claim in the bankruptcy case or seek any other remedy.
2. CastlePoint's Motion for Order Retroactively Lifting the Automatic Stay<sup>5</sup> is GRANTED, retroactive to July 30, 2010.
3. Debtor's Motion to Compel Compliance with the Automatic Stay as to CastlePoint National Insurance Company f/k/a SUA Insurance Company ("CastlePoint")<sup>6</sup> is DENIED.

DONE AND ORDERED in Orlando, Florida, on February 21, 2012.

A handwritten signature in black ink, appearing to read "Karen S. Jennemann" with a stylized flourish and the letters "exc" written to the right.

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KAREN S. JENNEMANN  
Chief United States Bankruptcy Judge

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<sup>4</sup> Doc. No. 735 at 18 (“[W]ere CastlePoint to obtain a monetary judgment on any of its Counterclaims, it would be required to share pro rata with those creditors who have asserted claims in this bankruptcy case.”).

<sup>5</sup> Doc. No. 735.

<sup>6</sup> Doc. No. 719.

Copies provided to:

Debtor: Mirabilis Ventures, Inc., c/o R.W. Cuthill, Jr., 341 N. Maitland Avenue #210, Maitland, FL 32751

Counsel for Debtor: Roy S. Kobert, 390 N. Orange Avenue, Suite 1400, Orlando, FL 32801

Counsel for CastlePoint: Harley E. Riedel, Stichter, Riedel, Blain & Prosser, PA, 110 Madison Street, Suite 200, Tampa, FL 33602

Michael R. Morris, Morris & Morris, PA, Suite 800-West Tower, 777 S. Flagler Drive, West Palm Beach, FL 33401

Kevin M. Lougachi and Edward F. Ruberry, Ruberry Stalmack & Garvey, 500 W. Madison Avenue, Suite 2300, Chicago, IL 60661

Gabrielle Sara Goodyear Osborne, Burton Beytin & McLaughlin, PA, One Tampa Cety Center, 201 N. Franklin Street, Suite 2900, Tampa, FL 33602

United States Trustee, Attn: Elena L. Escamilla, 135 W. Central Blvd., Suite 620, Orlando, FL 32801

All parties receiving CM/ECF electronic mail and the LBR 1007-2 Parties in Interest

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:11-cv-00060-MP-GRJ

WILLIAM J DICKERT,

Defendant.

ORDER

This matter is before the Court on Doc. 49, defendant's Motion for Enlargement of Time to File Motion for Summary Judgment, seeking an extension of time until March 9, 2012. This matter has not yet been set for trial, and this brief delay is not likely to affect the eventual trial date. Also, the pretrial conference, set for March 9, 2012, will still be held at the currently set date and time. In its response at Doc. 50, the government does not object to the enlargement of time for filing the motion for summary judgment. Also, although defendant touches upon certain discovery issues in the motion, he has not actually requested any relief regarding discovery or the discovery deadline at this time.

Accordingly, it is now **ORDERED** as follows:

The motion for extension of time to file a motion for summary judgment, Doc. 49, is granted, and defendant shall have until March 9, 2012, to file his motion. All other dates and deadlines, including discovery and the pretrial conference date, remain in full force and effect.

**DONE AND ORDERED** this 21<sup>st</sup> day of February, 2012.

*s/ Gary R. Jones*

GARY R. JONES  
United States Magistrate Judge

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4 UNITED STATES DISTRICT COURT  
5 WESTERN DISTRICT OF WASHINGTON  
6 AT TACOMA

7 UNITED STATES OF AMERICA,

8 Plaintiff,

CASE NO. C10-5333BHS

9 v.

10 PAUL W. HIATT and MARILEEN J.  
11 MCMAHON,

ORDER

12 Defendants.

13 This matter comes before the Court on the Court's request for further briefing  
14 (Dkt. 152), Plaintiff United States of America's ("Government") response (Dkt. 154),  
15 Defendant Marileen McMahon's ("McMahon") motion to set trial date and response  
16 (Dkt. 155), Defendant Paul Hiatt's ("Hiatt") motion to set trial date and response (Dkt.  
17 156), Hiatt's motion for reconsideration (Dkt. 159), Hiatt's motion to file overlength brief  
18 (Dkt. 160), and McMahon's motion to alter or amend partial summary judgment and to  
19 dismiss (Dkt. 161). The Court has reviewed the briefs filed in support of and in  
20 opposition to the motions, the parties' additional responses, and the remainder of the file  
21 and hereby denies Hiatt's motions, denies McMahon's motions, and directs the Clerk to  
22 set this matter for a one-day bench trial.

23 **I. PROCEDURAL HISTORY**

24 On May 11, 2010, the Government filed a complaint seeking to reduce federal tax  
25 assessments to judgment and foreclose federal tax liens against Hiatt and McMahon. Dkt.  
26

27 1.

1 On August 8, 2011, the Government filed a motion for summary judgment. Dkt.  
2 106. On December 14, 2011, the Court granted the motion in part and denied the motion  
3 in part. Dkt. 152. The Court granted the motion as to all interests that Hiatt has in the  
4 property commonly known as “7111 Raft Island Rd. NW, Gig Harbor, Washington  
5 98335,” or in the alternative, “9702 Kopachuck Dr. NW, Gig Harbor, Washington 98335”  
6 (hereinafter “Subject Property”). *Id.* The Court denied the motion as to McMahon’s  
7 interest in the Subject Property. *Id.* The Court requested further briefing on how the  
8 parties intend to proceed with the remaining issues. *Id.*

9 On December 20, 2011, the Government filed a response. Dkt. 154. On  
10 December 22, 2011, Hiatt and McMahon filed responses and included motions to set a  
11 trial date. Dkts.155 & 156.

12 On January 4, 2012, Hiatt filed a motion for reconsideration. Dkt. 159. On  
13 January 11, 2011, Hiatt filed a motion for overlength brief (Dkt. 160) and McMahon filed  
14 a motion to alter and amend partial summary judgment and to dismiss McMahon (Dkt.  
15 161).  
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## 17 II. FACTS

18 Although the majority of the facts are set forth in the Court’s summary judgment  
19 order, a few facts are relevant to the consideration of the Government’s response. On  
20 February 25, 2003, Hiatt filed a quitclaim deed purporting to convey a one-half interest in  
21 the Subject Property to McMahon. Dkt. 108, Declaration of Nathaniel B. Parker (“Parker  
22 Decl.”), ¶ 20, Exh. 19. The Government claims that just prior to the conveyance on  
23 February 25, 2003 and just six days before Hiatt’s filing of the quitclaim deed, the IRS  
24 sent Mr. Hiatt notices of deficiency relating to the 1993, 1994, 1995, 1999, and 2000 tax  
25 years. Dkt. 107, Declaration of Revenue Agent Sean Flannery (“Flannery Decl.”), Exhs.  
26 A-E. It is unknown when Hiatt actually received these notices, but he did attach them to  
27 a letter addressed to the IRS dated March 5, 2003. *See* Dkt. 42-3 at 1-19. The  
28



1 Government also contends that Hiatt had previously received notices of delinquent tax  
2 returns and penalties from the IRS, and Hiatt had begun his defense to the liability with  
3 correspondence to the IRS. *See, e.g.*, Dkts. 42-1 at 59-99 & 42-2 at 22-29. The  
4 Government, however, has either failed to direct the Court’s attention to the previously  
5 received notices in the record or has not submitted the previously received notices.

### 6 III. DISCUSSION

#### 7 A. Trial

8 The Government contends that the Court may set aside the transfer under  
9 applicable case law and statutes governing interspousal transfers. Specifically, the  
10 Government argues that the intent of the transfer is irrelevant if the transferring spouse  
11 does not have “ample means readily and conveniently accessible to his or her creditors . .  
12 . . .” Dkt. 154 at 2 (citing *Clayton v. Wilson*, 145 Wn. App. 86, 102 (2008)). The *Clayton*  
13 court found as follows:  
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15 Because Andrew was a known creditor at the time the Wilsons agreed to  
16 divide their property, Mr. Wilson did not receive reasonably equivalent  
17 value, the division rendered Mr. Wilson insolvent, and the Wilsons did not  
18 prove that the transfer was made in good faith, the trial court’s conclusions  
19 on the various theories of fraudulent transfer are adequately supported. The  
20 remedy of voiding the transfer and freezing the assets was properly  
21 imposed.

22 *Id.* at 105.

23 Even if the Court ignores the intent or good faith element, there are still material  
24 questions of fact on the element of knowledge of the creditor. The Court is unaware of  
25 any authority for the proposition that a transfer may be set aside to satisfy an unknown  
26 debt. The Court recognizes that the Government is a creditor at the end of the tax year.  
27 However, the Government’s evidence that Hiatt knew he owed unpaid taxes is the  
28 previously received notices that are not in the record and the assessments that were sent to  
Hiatt five days before the transfer. This creates a material question of fact that may be  
resolved in a short bench trial.

1 Therefore, the Court directs the Clerk to set this matter for a one-day bench trial to  
2 resolve the issues of knowledge and good faith. At this point it appears that there are only  
3 two relevant witnesses: Hiatt and McMahon. In the unlikely event that more witnesses  
4 are necessary, the Court will consider adding more trial days.

5 **B. Hiatt's Motions**

6 Motions for reconsideration are governed by Local Rule CR 7(h), which provides  
7 as follows:

8 Motions for reconsideration are disfavored. The court will ordinarily deny  
9 such motions in the absence of a showing of manifest error in the prior  
10 ruling or a showing of new facts or legal authority which could not have  
been brought to its attention earlier with reasonable diligence.

11 Local Rule CR 7(h)(1).

12 In this case, Hiatt argues that the Court's decision that Hiatt is not entitled to a jury  
13 trial is erroneous. Dkt. 159. This motion is moot because the Court has granted the  
14 Government summary judgment on all of Hiatt's interests in this matter. Therefore, the  
15 Court denies the motion for reconsideration (Dkt. 159).

16 Hiatt's other motions (Dkts. 156 & 160) are similarly denied as moot.

17 **C. McMahon's Motions**

18 The Court has reviewed McMahon's motions and they are mostly frivolous. The  
19 Court does recognize McMahon's concerns and arguments regarding the issue of ordering  
20 foreclosure on the property if her separate property interest is found to be a valid  
21 conveyance from Hiatt. The Court will consider these issues after the bench trial on the  
22 validity of the transfer. Therefore, the Court denies McMahon's motions (Dkts. 155 &  
23 161).  
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25 **IV. ORDER**

26 Therefore, it is hereby **ORDERED** that McMahon's motion to set trial date and  
27 response (Dkt. 155), Hiatt's motion to set trial date and response (Dkt. 156), Hiatt's  
28

1 motion for reconsideration (Dkt. 159), Hiatt's motion to file overlength brief (Dkt. 160),  
2 and McMahon's motion to alter or amend partial summary judgment and to dismiss (Dkt.  
3 161) are **DENIED**. The Clerk is directed to set this matter for a one-day bench trial on  
4 May 1, 2012 and issue an abbreviated scheduling order.

5 DATED this 21st day of February, 2012.

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8 BENJAMIN H. SETTLE  
9 United States District Judge  
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**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**Case No. 8:10-cv-02415-MSS-TBM**

**MARIA L. IPPOLITO (a/k/a/ MARIE  
IPPOLITO), individually and as personal  
representative of the ESTATE OF  
ROBERT C. SINGLETON; AND  
POLK COUNTY, FLORIDA.**

**Defendants.**

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**AMENDED ORDER**<sup>1</sup>

**THIS CAUSE** comes before the Court for consideration of Plaintiff's Motion for Partial Summary Judgment. (Dkt. 79) Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **GRANTS** Plaintiff's Motion (Dkt. 79), as described herein.

**I. BACKGROUND**

**A. Case History**

This case arises out of Plaintiff's action to reduce to judgment federal income tax assessments (including penalties and interest) against defendant Robert Singleton pursuant to 26 U.S.C. §§ 7401 and 7403. (Dkt. 1 at 1) The Plaintiff filed the instant action on October 27, 2010. (Dkt. 1) The Plaintiff joined Defendants Maria Ippolito,

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<sup>1</sup> This Amended Order corrects the street address of Fox Place 1 from 7698 Fox Place, Lake Wales, Florida to 7699 Fox Place, Lake Wales, Florida. Additionally, this Order no longer closes this case as there remain issues as to other properties that must be tried. (Dkt. 79-n. 1)

Christopher Ippolito, Charlie's Seafood Enterprises Inc., Citrus County, Polk County and Richard Ulvestad as parties who may claim an interest in the Subject Properties: 6731 W. Linden Drive, Homosassa Springs, Florida ("Linden Drive") and 7699 Fox Place, Lake Wales, Florida ("Fox Place 1"). ("Subject Properties") (Dkt. 1 at ¶ 5) Christopher Ippolito and Citrus County have both disclaimed any interest in the Subject Properties and have been dismissed from this action. (Dkt. 34, 35) On February 17, 2011, the Clerk entered default against Charlie's Seafood. (Dkt. 33) On October 11, 2011, the Clerk entered default against Richard Ulvestad. (Dkt. 71) Maria Ippolito and Polk County remain in the action and claim an interest in the Subject Properties. The parties stipulated to the priority of Polk County's lien on the Subject Property, 7699 Fox Place, Lake Wales, Florida ("Fox Place 1"). (Dkt. 42)

The Court entered default judgment against defendant Mr. Singleton on Count I of the complaint on March 18, 2011, in the amount of \$2,961,308.72 for his unpaid federal income tax liabilities for the years 1993 through 1998. (Dkt. 44) Defendant subsequently died on May 29, 2011. (Dkt. 64) Ms. Ippolito was substituted for Robert Singleton as personal representative of his Estate on September 2, 2011. Id. The Plaintiff wishes to foreclose its liens on the Subject Properties. (Dkt. 1 at ¶ 5)

### **B. Undisputed Facts**

The following facts are undisputed in this case:

Robert Singleton is indebted to the United States for his unpaid federal income tax liabilities for the years 1993 through 1998 in the amount of \$2,961,308.72 as of March 18, 2011. (Dkt. 44) The IRS began an examination of Singleton's 1993 and 1994 federal income tax liabilities in 1997 and subsequently added the 1995 through 1998 tax years into the examination. (Dkt. 1 at ¶¶ 13-16) Notice of the assessments

and demands for payment were made on Defendant; however, he refused to pay the entire amount of tax liabilities. (Dkt. 1 at ¶ 19)

Maria Ippolito has known Robert Singleton for many years. (Dkt. 79-4 at 4) They met when Ippolito was working during the summer for Singleton's father's packing company. (Dkt. 79-4 at 4) Ippolito and Singleton married in September 2008. (Dkt. 79-3 at 25)

Singleton purchased fourteen properties in Citrus County, Florida between the years 1993 and 1997. (Dkt. 79-3 at ¶ 4) The public records of Citrus County, Florida reflect that Singleton transferred nine of those properties to Maria Ippolito between 1997 and 1998. (Dkt. 79-3 at ¶ 4; Dkt. 79-3 at 9) Singleton sold the remaining properties in 1997 and 1998. (Dkt. 79-3 at ¶ 4) In 2001, the IRS recorded a Notice of Federal Tax Lien in Citrus County against Singleton. (Dkt. 79-3 at ¶ 5) In 2004, Ippolito transferred the Linden Drive property back to Singleton. (Dkt. 79-3 at ¶ 5; Dkt. 79-3 at 12) Subsequently, Mr. Singleton transferred the Linden Drive property back to Ms. Ippolito. (Dkt. 82 at 11)

In January of 2005, Singleton, through Charlie's Seafood Enterprises, Inc., purchased Fox Place 1. (Dkt. 79-3 at ¶ 6) Singleton purchased Fox Place 1 with his own money, and Fox Place 1 became Singleton's personal residence. (Dkt. 79-4 at 10-11) Maria Ippolito and Christopher Ippolito deny any involvement in Charlie's Seafood, although they were both listed as directors or officers of Charlie's Seafood Enterprises. (Dkt. 79-3 at 14-19)

## II. LEGAL STANDARDS

### A. Summary Judgment

Summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fennell v. Gilstrap, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007)). Which facts are material depends on the substantive law applicable to the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Evidence is reviewed in the light most favorable to the non-moving party. Fennell, 559 F.3d at 1216 (citing Welding Servs., Inc., 509 F.3d at 1356).

A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the Court that there is an absence of evidence to support the non-moving party's case. Denney v. City of Albany, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted). When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. Porter v. Ray, 461 F.3d 1315, 1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value."). If material issues of fact exist that would not allow the Court to resolve an issue as a matter of law, the Court must not

decide them, but rather, must deny the motion and proceed to trial. Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999).

**B. Robert C. Singleton's ownership interest in Linden Drive**

The Plaintiff argues that a lien arose in its favor, based on the October 2000 and October 2001 assessments, immediately upon Singleton's acquisition of Linden Drive in January 2004. They contend that absent a lien entitled to priority under 26 U.S.C. § 6323, the United States' tax lien obtains priority. The Defendant responds by claiming that she is a "purchaser" of Linden Drive. For the reasons stated, infra, the Court **GRANTS** Plaintiff's Motion on this issue.

Pursuant to Sections 6321 and 6322 of the Internal Revenue Code, when a taxpayer, despite demand for payment, neglects or refuses to pay an assessed federal income tax liability, federal tax liens arise upon all property and rights to property belonging to that taxpayer. 26 U.S.C. §§ 6321-6322. Federal law determines priority of competing liens asserted against taxpayer's property once a tax lien is established. Aquilino v. U.S., 363 U.S. 509, 513-14 (1960). Priority for purposes of federal law is governed by the common-law principle that "the first in time is the first in right." United States v. McDermott, 507 U.S. 447, 449 (1993); See *also* 26 U.S.C. § 6323(a). With respect to tax liens, 26 U.S.C. § 6323 provides that a federal tax lien shall not be valid against a purchaser, holder of security interests, mechanic's lienor and judgment lien creditor until a notice of federal tax lien is filed in the designated recording office. Id. § 6323(a).

To be a "purchaser" under 26 U.S.C. § 6323(h)(6), a person must acquire an interest in property which is valid under local law against subsequent purchasers



without actual notice of a federal tax lien. Under Florida law, “no transfer of real property shall be good and effectual in law or equity against creditors or subsequent purchasers for valuable consideration and without notice unless the same is recorded.” Fla. Stat. § 695.01.

Against this standard, the Defendant’s contention that she is a “purchaser” of Linden Drive fails. Defendant contends that she has 100 percent ownership of Linden Drive and that all properties transferred from Mr. Singleton to Defendant were purchased by her in good faith and as a bona fide purchaser. (Dkt. 82 at 4-12) Supporting her claim, the Defendant has supplied a deed<sup>2</sup> transferring Linden Drive from Singleton to her in 2007. (Dkt. 82 at 11) As noted previously, however, Mr. Singleton acquired title to Linden Drive in 1997 and transferred it to Defendant in 1998. (Dkt. 79-3 at 2-3 ¶ 5(a)-(b)) Subsequently, Defendant transferred Linden Drive back to Singleton in 2004. (Dkt. 79-3 at 3 ¶ 5(d)) Once the property was transferred back to Mr. Singleton a lien in favor of the United States arose. The acquired lien was based on the October 2000 and October 2001 assessments<sup>3</sup> levied by the United States and subsequently recorded in 2001. (Dkt. 79-3 at 3 ¶ 5(c); Dkt. 79-3 at 11) The law presumes that a subsequent purchaser is on notice of validly recorded liens. See, e.g., United States v. Feinstein, 717 F.Supp. 1552, 1557 (S.D. Fla. 1989) (stating that a federal tax lien is sufficient when a reasonable inspection of public records would have

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<sup>2</sup> To successfully resist a motion for summary judgment, the party against whom summary judgment is sought must demonstrate, by affidavits or other relevant and competent evidence that a genuine issue of fact exists. United States v. Spitzer, 245 Fed. Appx. 908, 910 (11th Cir. 2007) (citing Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991)). Even though Defendant’s documentary evidence does not meet this evidentiary standard in many respects, for purposes of this order the Court will extend leniency toward the Defendant in regard to evidence presented because the Defendant is a pro se litigant. Nevertheless, it is to no avail because the evidence submitted, even if accepted true, does not defeat the United States’ prior lien.

<sup>3</sup> (Dkt. 41-1 at ¶¶4,5,7)

revealed existence of notice). Thus, even if determined to be valid, Singleton's transfer to Defendant in 2007 was ineffectual to defeat the prior lien of the United States. The 2007 transfer occurred and the related deed was recorded after the lien of the United States attached to the property. Accordingly, Plaintiff's motion for summary judgment that Singleton was the sole owner of Linden Drive at the time its lien attached and that the priority established thereby prevails over Defendant's claimed subsequently acquired interest is **GRANTED**.

**C. Charlie's Seafood's status as a nominee for Robert Singleton; The United States' Tax Liens Priority over Fox Place 1**

Plaintiff next seeks to foreclose Charlie's Seafood's interest in the Subject Property claiming it was only acting as a nominee for Mr. Singleton when Fox Place 1 was purchased. Defendant rebuts this contention by stating that she is good faith, bona fide purchaser for value. She concedes that she had no knowledge of Mr. Singleton's tax liability and she had no involvement in Charlie's Seafood. (Dkt. 79-4 at 6-7) For the reasons stated, *infra*, the Court **GRANTS** Plaintiff's Motion on this issue.

A taxpayer's federal tax lien attaches to any interest they hold in property, including property held by a nominee. G.M. Leasing Corp. v. Unites States, 429 U.S. 338, 350-351 (1977). A nominee holds bare legal title to property for the benefit of another. United States v. Dornbrock, 2008 WL 769065 \*4 (S.D. Fla. 2008) (citing United States v. Gilbert, 244 F.3d 888, 902 (11th Cir. 2001). The court in Dornbrock addressed the nominee theory stating that "the theory attempts to discern whether a taxpayer has engaged in a sort of legal fiction, for federal tax purposes, by placing legal title to property in the hands of another while, in actuality, retaining all or some of the benefits of being the true owner." 2008 WL 769065 \*4 (S.D. Fla. 2008) (citing In re

Richards, 231 B.R. 571, 578 (E.D. Pa. 1999)). Generally federal courts apply the law of the forum state; however, Florida does not have a bright-line test for determining nominee ownership. Dornbrock, 2008 WL 769065 at 5. Therefore, federal law will apply in determining nominee ownership in this case. Grippio v. Perazzo, 357 F.3d 1281, 1222 (11th Cir. 2004).

Factors that the Dornbrock court considered in determining whether property is being held by a nominee of the taxpayer include: (1) whether the taxpayer exercised dominion and control over the property; (2) whether the property of the taxpayer was placed in the name of the nominee in anticipation of collection activity; (3) whether the purported nominee paid any consideration for the property, or whether the consideration paid was inadequate; (4) whether a close relationship exists between the taxpayer and the nominee; and (5) whether the taxpayer pays the expenses (mortgage, property taxes, insurance) directly, or is the source of the funds for payments of the expenses. See Dornbrock, 2008 WL 769065 \*5, aff'd per curiam, 309 Fed. Appx. 359 (11th Cir. 2009).

Robert Singleton purchased Fox Place 1 in January 2005 through Charlie's Seafood. (79-3 at ¶ 6(a)) There is no dispute that Singleton's money was used to purchase Fox Place 1, even though he purchased the property through Charlie's Seafood. (Dkt. 79-4 at 10-19) Fox Place 1 was Robert Singleton's personal residence. (Dkt. 79-4 at 11) Singleton paid the bills for Fox Place 1 from 2005 through 2007, including taxes and electricity. (Dkt. 79-4 at 13-14) Therefore, undisputed evidence shows that Charlie's Seafood held Fox Place 1 as Singleton's nominee. Accordingly,

Plaintiff's motion for summary judgment as to Charlie's Seafood's status as a nominee for Robert Singleton is **GRANTED**.

Additionally, the Plaintiff contends that its liens attach to Singleton's Interest in Fox Place 1. Pursuant to Sections 6321 and 6322 of the Internal Revenue Code, liens attach to all property and rights to property belonging to, or subsequently acquired by, taxpayer. *Id.* §§ 6321-6322. As mentioned *supra*, there is no dispute that Singleton's money was used to purchase Fox Place 1. (Dkt. 79-4 at 10-11) At the time of purchase, the IRS had already assessed income tax, interest and penalties against Singleton for the years 1993 through 1998. (Dkt. 41-1 at ¶¶ 4,5,7) Consequently, the federal tax liens attached to Fox Place 1 at the time of Singleton's purchase in 2005. (79-3 at ¶ 6(a)) Defendant contends that Singleton transferred Fox Place 1 to her as payment for providing care and assistance to him during his illness and that she is therefore a bona fide purchaser entitled to priority over the lien of the United States. (Dkt. 79-4 at 12-15)

Defendant does not qualify as a "purchaser" under 26 U.S.C. § 6323(h)(6). As stated previously, to qualify as a "purchaser" under Section 6323(h)(6), a person must acquire an interest in property that is valid under local law against subsequent purchasers without actual notice of a prior interest. Under Florida law, "no transfer of real property shall be good and effectual in law or equity against creditors or subsequent purchasers for valuable consideration and without notice unless the same is recorded." Fla. Stat. § 695.01. The Defendant does not offer evidence of a transfer of Fox Place 1 to her, no proof that such a transfer was duly recorded, and no proof of consideration paid for it other than her unverified contentions. Therefore, the Plaintiff's

tax liens, which attached to Fox Place 1 simultaneously with Singleton's January 2005 purchase through his nominee, Charlie's Seafood, are entitled to priority over any interest Defendant claims to have acquired subsequently. Accordingly, Plaintiff's motion for summary judgment that the United States possesses a valid and enforceable lien interest Fox Place 1 and that its lien interest has priority over Defendant's claimed interest **GRANTED**.

### **III. CONCLUSION**

Upon consideration of the foregoing, it is hereby **ORDERED** as follows:

1. Plaintiff United States of America's Motion for Summary Judgment (Dkt. 79) is **GRANTED** as to Count II of Plaintiff's Complaint (To foreclose federal tax lien on Linden Drive);
2. Plaintiff United States of America's Motion for Summary Judgment (Dkt. 79) is **GRANTED** as to Count III of Plaintiff's Complaint (To foreclose federal tax lien on Fox Place 1 held by Charlie's Seafood as the nominee of Singleton) and to establish that its lien interest has priority over Defendant's claimed interest;
3. The **Clerk** is directed to vacate the judgment in favor of the Plaintiff entered at Dkt. 92; and,
4. The **Clerk** is directed to **REOPEN** this case.

**DONE** and **ORDERED** in Tampa, Florida, this 21st day of February 2012.



MARY S. SCRIVEN  
UNITED STATES DISTRICT JUDGE

Copies furnished to:  
Counsel of Record  
Any unrepresented party



invaded the province of the jury and would not have been helpful to the jury's determination of any fact in issue. *See* Fed. R. Evid. 701(b). Third, the Court properly admitted Defendant's prior conviction to impeach Janet Jaensch. The government was permitted to impeach its own witness. *See* Fed. R. Evid. 607. Defendant's prior conviction required proof of "a dishonest act or false statement" by Defendant. *See* Fed. R. Evid. 609(a)(2). For these reasons, and the reasons stated in open Court on December 5, 2011, and February 17, 2012, it is hereby

ORDERED that Defendant's Rules 29 and 33 Motion is DENIED.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 21<sup>st</sup> day of February, 2012.

Alexandria, Virginia  
2/21/2012

\_\_\_\_\_  
/s/  
Gerald Bruce Lee  
United States District Judge



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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

BRIAN KENNER, et al.,  
  
vs.  
  
ERIN KELLY, et al.,  
  
Plaintiffs,  
  
Defendants.

CASE NO. 11-CV-2520 BEN (BGS)  
  
**ORDER GRANTING CAPITAL  
ONE’S MOTION TO DISMISS**  
  
[Docket No. 14]

Presently before the Court is Defendant Capital One’s Motion to Dismiss. (Docket No. 14.)  
For the reasons stated below, the Motion is **GRANTED**.

**BACKGROUND**

In October 2010, Plaintiffs Brian Kenner and Kathleen Kenner (husband and wife) filed suit against individual Internal Revenue Service employees David Alito, Charlotte Becerra, Patricia Blizzard, C. John Crawford, Erin Kelly, Mindy Meigs, Mary Kay Pittner, Jennifer Plasky, Carol Rose, and Sylvia Shaughnessy (“IRS Defendants”), as well as Barbara Dunn and Lacy Dunn and Do (“First RICO Action”). (*Kenner v. Kelly*, 10-CV-2105 AJB (WVG), Docket No. 1.) The complaint alleged that the IRS Defendants engaged in unauthorized collection actions by accepting payment of settlement funds, by their offer in compromise, and by improperly collecting settlement funds, in violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961 *et seq.*

When the First RICO Action was filed, it was assigned to Judge Barry T. Moskowitz. The

1 district court later transferred the action to Judge Anthony J. Battaglia. (*Id.*, Docket No. 61.) On May  
 2 27, 2011, Judge Battaglia granted the IRS Defendants' motion to dismiss, and entered judgment. (*Id.*,  
 3 Docket Nos. 64, 65.) On June 21, 2011, Plaintiffs filed a Notice of Appeal challenging the order  
 4 granting the motion to dismiss. (*Id.*, Docket No. 66.) The appeal is currently pending before the  
 5 Ninth Circuit. (*See Kenner v. Kelly*, No. 11-56062 (9th Cir.).)

6 On July 12, 2011, Plaintiffs filed a new action in district court, which is similar to the First  
 7 RICO Action ("Second RICO Action"). (*See Kenner v. Kelly*, 11-CV-1538 AJB (WVG), Docket No.  
 8 1.) On August 9, 2011, this action was transferred to Judge Battaglia pursuant to the Court's low  
 9 number rule. (*Id.*, Docket No. 13.) On August 11, 2011, this action was stayed pending resolution  
 10 of the appeal of the First RICO Action. (*Id.*, Docket No. 15.)

11 Concerning Plaintiffs' allegations against Capital One, Plaintiffs had a property interest in  
 12 17550 Harrison Park Road, Julian, California. (Compl. ¶ 91.) Capital One attempted to institute a  
 13 non-judicial foreclosure proceeding sixty days before Plaintiffs' appellate brief deadline in the appeal  
 14 of the First RICO Action. (Compl. ¶¶ 38(a), 69(a).) Capital One was not a party to the First RICO  
 15 Action. On September 26, 2011, a trustee's sale was held pursuant to a Deed of Trust executed by  
 16 Plaintiffs on April 9, 2007. (Capital One RJN [Docket No. 14-2], Exh. A.)<sup>1</sup>

17 On October 14, 2011, Plaintiffs filed the present action in the San Diego County Superior  
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19 <sup>1</sup> Capital One requests that the Court take judicial notice of the Trustee's Deed Upon Sale,  
 20 recorded in the Office of San Diego County as Document No. 11-509552 on September 30, 2011.  
 (Docket No. 14-2.) This request is **GRANTED**. *See* FED. R. EVID. 201.

21 Plaintiffs request that the Court take judicial notice of several court document filed in *Kenner*  
 22 *v. Kelly*, Case No. 11-56062 (9th Cir.); *Kenner v. Kelly*, Case No. 11-CV-1538 AJB (WVG) (S.D.  
 23 Cal.); *Kenner v. Kelly*, Case No. 10-CV-2105 AJB (WVG) (S.D. Cal.); *Capital One, N.A. v. Kenner*,  
 24 Case No. 37-2011-00036248-CL-UD-EC (Cal. Super. Ct.); and the present action. (Docket No. 24.)  
 25 The Court **GRANTS** the request for judicial notice, but only for purposes of noticing the existence  
 26 of these lawsuits and the claims made therein. *See In re Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp.  
 27 2d 1052, 1067 (N.D. Cal. 2010) ("**[T]he court may take judicial notice of the existence of**  
 28 **unrelated court documents, although it will not take judicial notice of such documents for the**  
**truth of the matter asserted therein.**"). In addition, Plaintiffs request that the Court take  
 judicial notice of a Press Release by United States Senator Patrick Leahy, dated March 7, 2011,  
 a v a i l a b l e a t  
[http://www.leahy.senate.gov/press/press\\_releases/release/?id=c6732350-779f-4093-a805-10ca](http://www.leahy.senate.gov/press/press_releases/release/?id=c6732350-779f-4093-a805-10ca)  
 d3b555ca. (Docket No. 24.) This request is **GRANTED**. *See* FED. R. EVID. 201. Lastly,  
 Plaintiffs request that the Court take judicial notice of: (1) a letter from the Internal Revenue  
 Service to Kathleen Kenner regarding notice of intent to levy, dated July 25, 2011; and (2) a  
 foreclosure activity list from a San Diego real estate multiple listing service. (Docket No. 24.)  
 These requests are **DENIED**, as these documents cannot be "accurately and readily determined  
 from sources whose accuracy cannot reasonably be questioned." *See* FED. R. EVID. 201.

1 Court against the IRS Defendants<sup>2</sup> in their individual capacities, Capital One, Judge Battaglia, and  
2 Judge Moskowitz. (Docket No. 1.) As to Capital One, Plaintiffs assert four causes of action: (1)  
3 conspiracy to violate the Bane Act, CAL. CIV. CODE § 52.1; (2) conspiracy to abuse process; (3)  
4 conversion; and (4) intentional interference with economic relationships. The United States and the  
5 IRS Defendants removed this action on October 31, 2011.

6 Presently before the Court is Capital One's Motion to Dismiss. Being fully briefed, the Court  
7 finds the Motion suitable for determination on the papers without oral argument, pursuant to Civil  
8 Local Rule 7.1.d.1.

### 9 DISCUSSION

10 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if, taking all factual  
11 allegations as true, the complaint fails to state a plausible claim for relief on its face. FED. R. CIV. P.  
12 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *see also Ashcroft v. Iqbal*, 129 S.  
13 Ct. 1937, 1949 (2009) (requiring plaintiff to plead factual content that provides “more than a sheer  
14 possibility that a defendant has acted unlawfully”). Under this standard, dismissal is appropriate if  
15 the complaint fails to state enough facts to raise a reasonable expectation that discovery will reveal  
16 evidence of the matter complained of, or if the complaint lacks a cognizable legal theory under which  
17 relief may be granted. *Twombly*, 550 U.S. at 556.

18 Each of Plaintiffs' causes of action against Capital One will be addressed in turn.

#### 19 I. CONSPIRACY TO VIOLATE THE BANE ACT

20 In the fourth cause of action, Plaintiffs allege conspiracy to violate the Bane Act against  
21 Capital One, claiming that Capital One—conspiring with Judge Battaglia—attempted to foreclose on  
22 Plaintiffs' property in order to disrupt Plaintiffs' pursuit of the appeal of the First RICO Action.

23 “A complaint for civil conspiracy states a cause of action only when it alleges the commission  
24 of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the  
25 wrong, the conspiracy itself is not actionable without a wrong.” *Okun v. Super. Ct.*, 29 Cal. 3d 442,  
26 454 (1981). A claim for a violation of the Bane Act, CAL. CIV. CODE § 52.1, requires “an attempted  
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28 <sup>2</sup> On January 13, 2012, the United States was substituted into the action as a defendant in place  
of the IRS Defendants. (Docket No. 28.)

1 or completed act of interference with a legal right, accompanied by a form of coercion.” *Austin B. v.*  
2 *Escondido Union Sch. Dist.*, 149 Cal. App. 4th 860, 882 (4th Dist. 2007) (internal quotation marks  
3 omitted). Specifically, the necessary elements for a Section 52.1 claim are: “(1) defendants interfered  
4 with plaintiff’s constitutional rights by threatening or committing violent acts; (2) that plaintiff  
5 reasonabl[y] believed that if she exercised her constitutional rights, defendants would commit violence  
6 against her property; (3) plaintiff was harmed; and (4) defendants’ conduct was a substantial factor  
7 in causing plaintiff’s harm.” *Arres v. City of Fresno*, No. CV F 10-1628 LJO SMS, 2011 WL 284971,  
8 at \*25 (E.D. Cal. Jan. 26, 2011) (internal quotation marks omitted).

9 Here, Plaintiffs have not sufficiently stated a claim for relief under the Bane Act, the  
10 underlying claim. Plaintiffs appear to allege that Capital One’s attempt to foreclose on their property  
11 interfered with their ability to prepare an appellate brief in the appeal of the First RICO Action.  
12 Plaintiffs, however, do not show that Capital One’s action was connected to the appellate brief, or that  
13 Capital One threatened to foreclose on Plaintiffs’ property in order to prevent them from preparing  
14 the brief. Plaintiffs also do not allege that the foreclosure was not lawfully undertaken pursuant to the  
15 Deed of Trust. Although Plaintiffs cite to their Answer filed in a previous unlawful detainer suit  
16 brought by Capital One, their Answer is not evidence that the foreclosure sale was wrongfully  
17 undertaken. In addition, Plaintiffs have not alleged that either Capital One or Judge Battaglia  
18 threatened or committed a violent act. *See Marsh v. Cnty. of San Diego*, 771 F. Supp. 2d 1227, 1234  
19 (S.D. Cal. 2011) (“[T]he lack of threats, violence, or intimidation is fatal to Plaintiff’s [Section 52.1.]  
20 claim.”).<sup>3</sup> Accordingly, Plaintiffs have failed to state a claim for conspiracy to violate the Bane Act  
21 against Capital One.

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25 <sup>3</sup> Plaintiffs argue that “[t]he element of violence is required when ‘threat,’ ‘intimidation’ and  
26 ‘coercion’ is by speech alone,” citing *Doe By and Through Doe v. Petaluma City School District*, 830  
27 F. Supp. 1560, 1582 (N.D. Cal. 1993). (Opp. at 7.) *Doe* in fact states that “to prevail on a claim under  
28 section 52.1, **plaintiff must prove that the defendant(s) interfered (or attempted to interfere) with her rights by threats, intimidations, or coercion (and that the defendant(s) did so other than by speech alone, unless the speech itself threatened violence).**” 830 F. Supp. at 1582. In addition, **Plaintiffs’ arguments regarding the Massachusetts Civil Rights Act of 1979; the Fair Housing Act, 42 U.S.C. § 3617; and California Government Code § 12955.7 are inapposite.**

1           **II.       CONSPIRACY TO ABUSE PROCESS**

2           In the ninth cause of action, Plaintiffs allege conspiracy to abuse process against Capital One,  
3 claiming that Capital One—conspiring with Judge Battaglia—attempted to foreclose on Plaintiffs’  
4 property in order to disrupt Plaintiffs’ pursuit of the appeal of the First RICO Action. The tort of  
5 abuse of process “arises when one uses the court’s process for a purpose other than that for which the  
6 process was designed.” *Brown v. Kennard*, 94 Cal. App. 4th 40, 44 (3d Dist. 2001). The elements of  
7 abuse of process are: “the defendant (1) contemplated an ulterior motive in using the process; and (2)  
8 committed a willful act in the use of the process not proper in the regular conduct of the proceedings.”  
9 *Id.*

10           Here, the underlying claim for abuse of process is not adequately pled. In regards to actions  
11 undertaken by Capital One, Plaintiffs do not show that Capital One’s action was connected to the  
12 appellate brief or that Capital One threatened to foreclose on Plaintiffs’ property in order to prevent  
13 them from preparing the brief, as explained above. Furthermore, the Trustee’s Deed Upon Sale  
14 establishes that the alleged action was a non-judicial foreclosure proceeding taken pursuant to a Deed  
15 of Trust. Because they are not undertaken pursuant to litigation, “actions taken in non-judicial  
16 foreclosure proceedings cannot form the basis of an abuse of process claim.” *Minichino v. Wells*  
17 *Fargo Bank, N.A.*, No. C 11-01030 SI, 2011 WL 4715153, at \*8 (N.D. Cal. Oct. 7, 2011). In regards  
18 to actions undertaken by Judge Battaglia, the Complaint does not allege that Judge Battaglia  
19 committed willful acts not proper in the regular conduct of proceedings. Although Plaintiffs argue  
20 that Judge Battaglia attempted to “improperly force Kenner to quit the RICO lawsuit and abandon  
21 their timely filed appeal” by ruling against them in the First RICO Action (Compl. ¶ 69), Plaintiffs  
22 could not have filed an appeal of the First RICO Action without first obtaining a ruling from the  
23 district court. Accordingly, Plaintiffs have failed to state a claim for conspiracy to abuse process  
24 against Capital One.

1           **III.     CONVERSION**

2           In the twelfth cause of action, Plaintiffs allege conversion against Capital One, based on  
3 Capital One’s attempted foreclosure on Plaintiffs’ property. “Conversion is the wrongful exercise of  
4 dominion over the property of another.” *Oakdale Vill. Group v. Fong*, 43 Cal. App. 4th 539, 543 (3d  
5 Dist. 1996). To establish conversion, a plaintiff must show: “the plaintiff’s ownership or right to  
6 possession of the property at the time of the conversion; the defendant’s conversion by a wrongful act  
7 or disposition of property rights; and damages.” *Id.* at 543-44.

8           Although Plaintiffs allege that Capital One attempted a foreclosure sale on their property, they  
9 do not set forth sufficient allegations suggesting that the foreclosure sale was undertaken wrongfully.  
10 Plaintiffs allege that “Capital One *and Does* 1-50 did not follow the laws, specifically Cal. Civ. Code  
11 § 2924” (Compl. ¶ 93), but do not assert any factual allegations in support of their claim. In addition,  
12 Plaintiffs cite to their Answer filed in a previous unlawful detainer suit brought by Capital One.  
13 Plaintiffs’ Answer is not evidence that the foreclosure sale was wrongfully undertaken. Accordingly,  
14 Plaintiffs have failed to state a claim for conversion against Capital One.

15           **IV.     INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONSHIP OR**  
16           **PROSPECTIVE ECONOMIC ADVANTAGE**

17           In the fourteenth cause of action, Plaintiffs allege intentional interference with economic  
18 relationships against Capital One, based on Capital One’s attempted foreclosure on Plaintiffs’  
19 property.<sup>4</sup> The elements of intentional interference with contractual relationship or prospective  
20 economic advantage are: “(1) an economic relationship between the plaintiff and some third party,  
21 with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the  
22 relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4)  
23 actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the  
24 acts of the defendant.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003)  
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26           <sup>4</sup> Although Plaintiffs do not specify in the Complaint whether their claim against Capital One  
27 is for negligent or intentional interference with economic relationships, Plaintiffs argue that Capital  
28 One intentionally interfered with their prospective economic advantage in their Opposition. (*See* Opp.  
at 15-16.)

1 (internal quotation marks omitted). In addition, a plaintiff must show that “defendant’s conduct was  
2 wrongful by some legal measure other than the fact of interference itself.” *Id.* (internal quotation  
3 marks omitted).

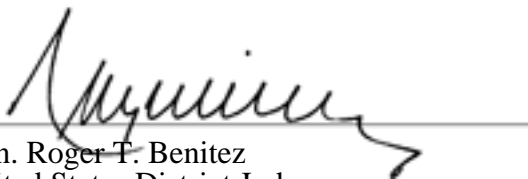
4 Here, the Complaint does not specifically identify existing or prospective economic  
5 relationships that were harmed by Capital One’s actions. Although the Complaint alleges that  
6 “Kenner runs a business off the Kenner Horse Ranch” (Compl. ¶ 107), this creates only the possibility  
7 that existing or prospective economic relationships existed at the time of foreclosure. Such vague  
8 allegations are insufficient under *Ashcroft v. Iqbal*. See 129 S. Ct. at 1949 (requiring plaintiff to plead  
9 factual content that provides “more than a sheer possibility that a defendant has acted unlawfully”).  
10 In addition, the Complaint does not allege that Capital One’s conduct was wrongful. Specifically, the  
11 Complaint only conclusorily states that Capital One acted wrongfully by initiating foreclosure  
12 proceedings on the subject property. Accordingly, Plaintiffs have failed to state a claim for intentional  
13 interference with contractual relationship or prospective economic advantage against Capital One.

14 **CONCLUSION**

15 For the reasons stated above, Capital One’s Motion to Dismiss is **GRANTED**. All of  
16 Plaintiffs’ claims against Capital One are **DISMISSED WITH PREJUDICE**.

17 **IT IS SO ORDERED.**

18 DATED: February 21, 2012

19   
20 Hon. Roger T. Benitez  
21 United States District Judge

1 KERRY W. FRANICH (State Bar No. 245857)  
2 kwf@severson.com  
3 SEVERSON & WERSON  
4 A Professional Corporation  
5 19100 Von Karman Ave., Suite 700  
6 Irvine, CA 92612  
7 Telephone: (949) 442-7110  
8 Facsimile: (949) 442-7118

9 MARY KATE SULLIVAN (State Bar No. 180203)  
10 mks@severson.com  
11 SEVERSON & WERSON  
12 A Professional Corporation  
13 One Embarcadero Center, Suite 2600  
14 San Francisco, CA 94111  
15 Telephone: (415) 398-3344  
16 Facsimile: (415) 956-0439

17 Attorneys for Defendant  
18 GMAC MORTGAGE, LLC (erroneously  
19 sued as GMAC Mortgage Corporation)

**FILED**

FEB 22 2012

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY   
DEPUTY CLERK

20 UNITED STATES DISTRICT COURT  
21 EASTERN DISTRICT OF CALIFORNIA


22 UNITED STATES OF AMERICA,  
23 Plaintiff,

24 vs.

25 KENNETH J. MALINOWSKI; PATRICIA I.  
26 MALINOWSKI; KENNETH J.  
27 MALINOWSKI and PATRICIA I.  
28 MALINOWSKI as trustees of the BOAZ  
FOUNDATION; THE POPULAR SOCIETY  
OF SOVERIGN ECCLESIA aka THE  
POPULAR SOCIETY OF THE SOVEREIGN  
ECCLESIA, KENNETH J. MALINOWSKI as  
Patriarch; STAN HOKENSON as trustee of  
TIERRA LAND TRUST, aka TIERRA  
TRUST; GMAC MORTGAGE  
CORPORATION; STATE OF CALIFORNIA  
FRANCHISE TAX BOARD; CITIBANK  
SOUTH DAKOTA, N.A.; SACRAMENTO  
COUNTY,

Defendants.

Case No.: 2:11-cv-01187 JAM (JFMx)  
Hon. John A. Mendez  
Ctrm. 6

STIPULATION FOR LIEN PRIORITY  
AND ~~PROPOSED~~ ORDER  




1 Plaintiff United States of America, Defendant GMAC Mortgage, LLC, and Defendant  
2 Sacramento County stipulate as follows:

3 1. Plaintiff's lawsuit is an action to reduce tax assessments to judgment and to  
4 foreclose tax liens that are recorded against real property. *See* 26 U.S.C. §§ 6502 and 7403.

5 2. It is agreed that Defendant GMAC Mortgage, LLC is servicing a deed of trust  
6 recorded on December 6, 1995 in the Sacramento County Recorder's Office as instrument  
7 number 199511091009, which encumbers certain real property located at 6037 White Cloud  
8 Court, Citrus Heights, CA 95621 ("Property").

9 3. It is agreed that Defendant Sacramento County claims an interest in the Property  
10 by virtue of statutory liens for delinquent real property taxes assessed against the Property.

11 4. It is agreed that the statutory liens of Sacramento County referred to in paragraph  
12 3 above are prior and paramount to GMAC Mortgage LLC's deed of trust referred to in paragraph  
13 2 above, as well as the Internal Revenue Service federal tax liens described in paragraphs 54 and  
14 55 of the Complaint.

15 5. It is agreed that Defendant GMAC Mortgage, LLC's deed of trust referred to in  
16 paragraph 2 above is prior and paramount to the Internal Revenue Service federal tax liens  
17 described in paragraphs 54 and 55 of the Complaint.

18 6. Neither Sacramento County nor GMAC Mortgage, LLC oppose judicial  
19 foreclosure of the Property by Plaintiff should it prevail in this action. However, because the  
20 Plaintiff's interest in the Property is subordinate to the interests of Sacramento County and  
21 GMAC Mortgage, LLC, any proceeds from the sale of the Property, as among these three parties,  
22 will be used to first pay off the statutory liens held by Sacramento County and then to pay off the  
23 loan secured by the GMAC Mortgage, LLC deed of trust before they are used to satisfy the  
24 Internal Revenue Service federal tax liens referred to in paragraphs 54 and 55 of the Complaint.  
25 Prior to filing an application for final order of the Court, Plaintiff agrees to provide an accounting  
26 to GMAC Mortgage, LLC and Sacramento County setting forth the full disposition of the  
27 proceeds from the sale of the Property.

28

1 7. GMAC Mortgage, LLC and Sacramento County agree to provide Plaintiff with a  
2 payoff quote for the amount owing on each loan secured by the deed of trust referred to in  
3 paragraph 2 above upon Plaintiff's request prior to the sale of the Property

4 8. The parties to this stipulation agree to bear their own costs and attorney fees.

5 9. The parties to this stipulation agree that its contents will bind all their assigns and  
6 successors in interest.

7 10. Upon the execution of this stipulation by all parties and entry of the proposed  
8 order by the Court, neither GMAC Mortgage, LLC nor Sacramento County shall be required to  
9 appear at any future hearings in this litigation and shall be treated as non-parties for all purposes  
10 including discovery purposes, unless ordered by the Court.

11 IT IS SO STIPULATED.

12 DATED: February 17, 2012

JOHN A. DiCICCO  
Principal Acting Assistant Attorney General

13  
14 By: /s/Adam R. Smart  
ADAM R. SMART  
15 Trial Attorney, Tax Division  
U.S. Department of Justice

16 Of Counsel:  
BENJAMIN B. WAGNER  
17 United States Attorney

18 Attorneys for Plaintiff  
UNITED STATES OF AMERICA

19 DATED: February 17, 2012

SEVERSON & WERSON, APC

20  
21 By: /s/Kerry W. Franich  
KERRY W. FRANICH

22 Attorneys for Defendant  
GMAC MORTGAGE, LLC

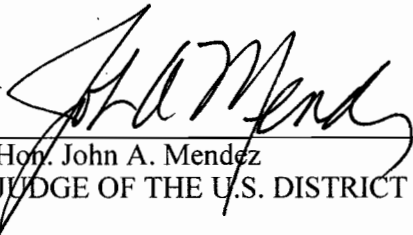
23  
24 DATED: February 17, 2012

ROBERT A. RYAN, Jr., County Counsel  
25 Sacramento County, California

26  
27 By: /s/ Diane McElhern  
DIANE McELHERN  
28 Deputy County Counsel

1 **IT IS SO ORDERED.**

2  
3 DATED: 2-21, 2012

  
\_\_\_\_\_  
Hon. John A. Mendez  
JUDGE OF THE U.S. DISTRICT COURT

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 17, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Diane McElhern  
Scott Fera  
County of Sacramento  
700 H Street, Suite 2650  
Sacramento, CA 95814  
*Attorney for Sacramento County*

Jill Bowers  
Attorney General Of California  
1300 I Street, Suite 125  
PO Box 944255  
Sacramento, CA 94244  
*Attorney for State of California Franchise Tax Board*

Kerry William Franich  
Severson & Werson  
19100 Von Karman Avenue  
Suite 700  
Irvine, CA 92612  
*Attorney for GMAC Mortgage LLC*

and that service was made on this date by causing a copy of the foregoing to be sent via postage paid United States first class mail to the following:

Kenneth John Malinowski  
General Post Office 6630 Fountain Square Lane  
Citrus Heights, CA 95621  
*Pro Se*

Kenneth John Malinowski  
Post Office Box 483  
Citrus Heights, CA 95611  
*Pro Se*

Patricia I. Malinowski  
General Post Office 6630 Fountain Square Lane  
Citrus Heights, Ca 95621  
*Pro Se*

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Patricia I. Malinowski  
Post Office Box 483  
Citrus Heights, CA 95611  
*Pro Se*

Tierra Land Trust, aka Tierra Trust  
c/o Stan Hokenson  
5431 Auburn Blvd #135  
Sacramento CA 95842

Boaz Foundation  
c/o Kenneth John Malinowski  
6034 White Cloud Ct.  
Citrus Heights, CA 95621

Popular Society of Sovereign Ecclesia,  
aka the Popular Society of the Sovereign Ecclesia  
c/o Kenneth John Malinowski  
6034 White Cloud Ct.  
Citrus Heights, CA 95621

Citibank South Dakota, N.A.  
701 E. 60<sup>th</sup> Street N., MC 1251  
Sioux Falls, SD 57117

/s/ Adam R. Smart  
ADAM R. SMART  
Trial Attorney, Tax Division

UNITED STATES BANKRUPTCY COURT  
District of Colorado

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In re: Alan R. Messer and Drenda L. Messer  
Debtor(s)

Case No.: 05-33841-SBB  
Chapter: 7

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ORDER ACCEPTING TRUSTEE'S REPORT AND CLOSING CASE

It appearing to the Court that the Trustee has filed a report certifying that the estate in the above-captioned case has been fully administered and that no objections to the report have been filed within 30 days thereafter, it is

ORDERED:

1. that pursuant to Rule 5009, Fed.R.Bank.P., there is a presumption that the estate has been fully administered;
2. that the trustee be and hereby is discharged;
3. that all nonexempt property listed by the Debtor and not administered by the trustee is hereby deemed abandoned pursuant to 11 U.S.C. 554(c); and
4. the case shall and it hereby is closed pursuant to 11 U.S.C. 350(a).

IT IS FURTHER ORDERED that pursuant to L.B.R. 9013-1(f), all pending uncontested motions requiring notice and a hearing for which no certificate has been tendered in accordance with L.B.R. 9013-1(c)(1) or (2) are deemed abandoned for want of prosecution and denied without prejudice.

IT IS FURTHER ORDERED that pursuant to L.B.R. 401(a)(4), all pending uncontested motions seeking relief from the automatic stay for which no certificate seeking entry of an order has been tendered are hereby deemed moot.

Dated: 2/21/2012

Bradford L. Bolton  
Clerk, U.S. Bankruptcy Court

**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2  
Eastern Division**

United States of America

Plaintiff,

v.

Case No.: 1:12-cv-00563

Honorable Samuel Der-Yeghiayan

James Ming-Fang Chen, et al.

Defendant.

---

**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Tuesday, February 21, 2012:

MINUTE entry before Honorable Samuel Der-Yeghiayan: Joint motion for Stipulation of Lien Priorities between United States of America and HSBC Bank USA, National Association is granted. As stated on the record, Defendant HSBC Bank's responsive pleading is stayed until further order of the Court. Mailed notice(mw, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at [www.ilnd.uscourts.gov](http://www.ilnd.uscourts.gov).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION


IN RE: )  
)  
MARY SCOTT and ) Bk. No. 08-22858-kl  
WILLIAM SCOTT, ) Judge Kent Lindquist  
) Chapter 13  
Debtors. )  
)  
)

ORDER

This matter is before the Court on the creditor United States of America, Department of the Treasury, Internal Revenue Service's motion to participate telephonically in the status conference currently set for Tuesday, February 21, 2012, at 11:50 a.m., in the above-captioned matter. For good cause shown, the motion is **GRANTED**. The United States may participate in the February 21, 2012, status conference by telephone.

**SO ORDERED.**

Enter: February 21, 2012

  
\_\_\_\_\_  
KENT LINDQUIST  
United States Bankruptcy Judge



UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE ) CHAPTER 13  
 )  
BRADIE L. SPELLER ) CASE NO. 10-68544-MHM  
 )  
Debtor )  
 )

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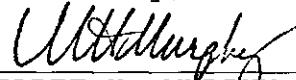
BRADIE L. SPELLER ) ADVERSARY PROCEEDING  
 ) NO. 11-5030-MHM  
Plaintiff )  
v. )  
INTERNAL REVENUE SERVICE ) ORDER AND NOTICE OF  
 ) STATUS CONFERENCE  
Defendant )  
 )

NOTICE IS HEREBY GIVEN that a status conference for the complaint to determine dischargeability will be held at 11:45 a.m. on the 16th day of April, 2012, Chambers 1290, U. S. Courthouse, 75 Spring Street, S. W., Atlanta, Georgia. Before the status conference, the parties should have engaged in substantial discovery. The parties should be prepared to fully discuss any problems with discovery and time, if any, needed for further discovery. It is further

ORDERED that, on or before 14 days before the date of the status conference, Counsel for Plaintiff and Counsel for Defendant are required to confer in a good faith effort to settle the case. Counsel for Plaintiff shall initiate arrangements for scheduling the date of the conference and Counsel for Defendant shall reply and cooperate promptly. It is further

ORDERED that, on or before 5 days prior to the date scheduled for the status conference, Counsel for Plaintiff and Counsel for Defendant shall file a joint statement certifying that a settlement conference has been held, whether the conference was in person or by telephone, the date of the meeting, the names of all participants, and that any offers of settlement were communicated to the clients. The certificate shall also set forth opinions of each counsel as to the prospects of settlement of this adversary proceeding; specific problems, if any, which are hindering settlement; whether counsel intend to schedule additional settlement conferences; and whether counsel desire a conference with the Court regarding settlement problems. The substance of the settlement discussions should not be disclosed unless, in the opinion of each counsel, such disclosure would not be prejudicial to the trial of the case.

SO ORDERED this the 17<sup>th</sup> day of February, 2012.



MARGARET H. MURREHY  
UNITED STATES BANKRUPTCY JUDGE

BRADIE L. SPELLER  
v.  
INTERNAL REVENUE SERVICE

11-5030-MHM

DISTRIBUTION LIST

William Rountree, Esquire  
Macey Wilensky Kessler & Hennings, LLC  
Suite 2700  
230 Peachtree Street, N. W.  
Atlanta, GA 30303

David Zisseron, Esquire  
U. S. Department of Justice  
Tax Division  
P. O. Box 14198  
Ben Franklin Station  
Washington, DC 22044

Benjamin L. Tompkins, Esquire  
U. S. Department of Justice  
Tax Division  
P. O. Box 14198  
Ben Franklin Station  
Washington, DC 20044

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-00060-AP

**JAMES CHARLES VAUGHN,**

**Appellant,**

v.

**UNITED STATES OF AMERICA  
INTERNAL REVENUE SERVICE,**

**Appellee**

U.S. Bankruptcy Court for the  
State of Colorado Case Nos.  
06-18082-MER and  
08-1095

---

**ORDER GRANTING JOINT MOTION FOR EXTENSION OF BRIEFING SCHEDULE**


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THIS MATTER comes before the Court upon the parties' Joint Motion for Extension of Briefing Schedule, the Court having reviewed the same, hereby finds as follows:

1. Appellant's brief is due on or before May 14, 2012
2. Appellee's brief is due by June 4, 2012; and
3. Appellant's reply brief is due by June 11, 2012.

DATED this 21 day of February, 2012.

BY THE COURT

  
\_\_\_\_\_  
District Court Judge



The Defendant's motion reflects that additional time is required to investigate this case, to sufficiently review the discovery materials and evidence, discuss the case with the Government, and otherwise prepare. The Government does not oppose the motion. (Doc. # 17.) Consequently, the court concludes that a continuance of this case is warranted and that the ends of justice served by continuing this case outweigh the best interest of the public and the defendant in a speedy trial.

Accordingly, it is hereby ORDERED that:

1. The Motion to Continue Trial (Doc. # 13) is GRANTED.
2. The trial of this case is continued from the March 19, 2012 Montgomery trial term to the **October 1, 2012** Montgomery trial term.
3. The Magistrate Judge shall conduct a pretrial conference prior to the October 1, 2012 Montgomery trial term and enter a pretrial conference order.

DONE this 21st day of February, 2012.

/s/ W. Keith Watkins  
CHIEF UNITED STATES DISTRICT JUDGE