EMERGENCY INJUNCTION

Filed March 24, 2014

IN THE UNTIED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Filed March 14, 2014

Civil Action No. 14-CV-714

Civil Action No. 2014-CV-714

MICHELLE DAWN HANSEN

A/k/a Michelle Hansen

Plaintiff,

Vs.

JP MORGAN CHASE,

TSCHETTER HAMRICK SULZER P.C.,et al

Honorable Judge Justin Mark Hannen,

ARAPAHOE COUNTY DISTRICT COURT, et al.

Defendants,

EMERGENCY INJUNCTION

COMPLAINT FOR INJUNCTIVE RELIEF AGAINST ARAPAHOE COUNTY DISTRICT COURT, et al.

PETITION FOR EMERGENCY INJUNCTION

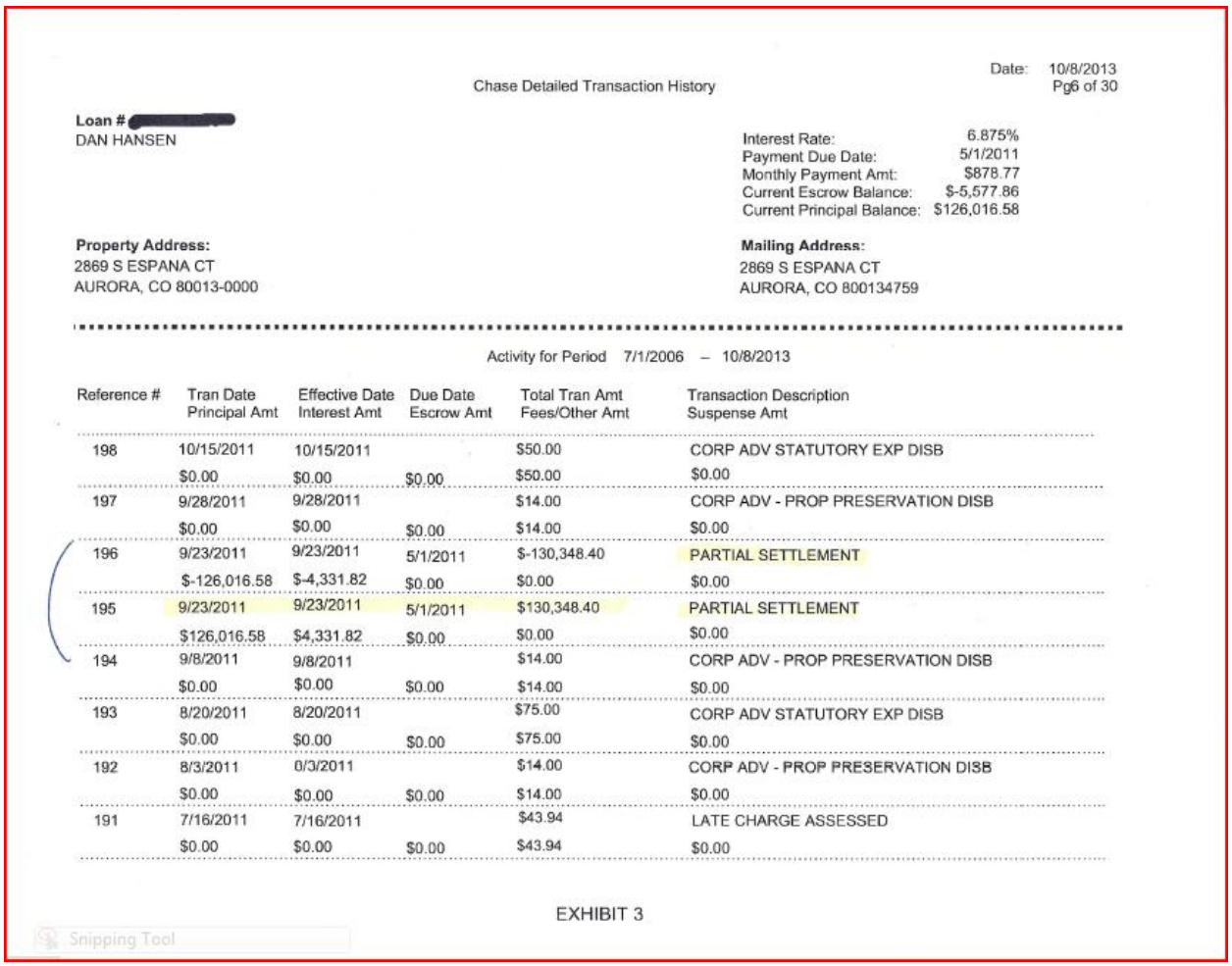
EMERGENCY MOTION FOR HEARING

AFFIDAVIT IN SUPPORT OF MICHELLE DAWN HANSEN COMPAINT FOR INJUNCTIVE RELIEF AGAINST ARAPAHOE COUNTY DISTRICT COURT, et al.

EMERGENCY PRELIMINARY TEMPORARY RESTRANING ORDER

EX PARTE MOTION FOR PRELIMINARY INJUNCTION

Comes now the Plaintiff Michelle Dawn Hansen appearing pro se and in forma pauperis and files this action for Emergency Injunctive Relief against the Honorable Judge Justin Mark Hannen of ARAPAHOE COUNTY DISTRICT COURT , et al. the court, filed herein THE UNTIED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO for prospective injunctive relief , solely in equity under the United States Constitution to Restrain the ARAPAJOE COUNTY DISTRCT COURT from illegal foreclosure and to order a Stay Emergency Injunction against said court and its Illegal Write to remove Plaintiff from Plaintiffs home and allow the Plaintiff Michelle Hansen to present the evidence herein that shows that the property in question 2869 S. Espana court in Aurora Colorado 80013 has been paid in full to the original lender J.P. Morgan Bank and that the ARAPAJOE COUNTY DISTRICT COURT HAS ISSUES AN ILLEGAL ERONIOUS WRITE ORDERING THE PLAINTIFF TO VACATE THE PLAINTIFFS HOME, based on Eccentric Frauds (RICO) (COCA) involving the Defendant's Named herein.



Chase Detailed Transaction History

Date: 10/8/2013
Pg6 of 30

Loan # [redacted]
DAN HANSEN

Interest Rate: 6.875%
Payment Due Date: 5/1/2011
Monthly Payment Amt: $878.77
Current Escrow Balance: $-5,577.86
Current Principal Balance: $126,016.58

Property Address:
2869 S ESPANA CT
AURORA, CO 80013-0000

Mailing Address:
2869 S ESPANA CT
AURORA, CO 800134759

Activity for Period 7/1/2006 – 10/8/2013

Reference #	Tran Date / Principal Amt	Effective Date / Interest Amt	Due Date / Escrow Amt	Total Tran Amt / Fees/Other Amt	Transaction Description / Suspense Amt
198	10/15/2011	10/15/2011		$50.00	CORP ADV STATUTORY EXP DISB
	$0.00	$0.00	$0.00	$50.00	$0.00
197	9/28/2011	9/28/2011		$14.00	CORP ADV - PROP PRESERVATION DISB
	$0.00	$0.00	$0.00	$14.00	$0.00
196	9/23/2011	9/23/2011	5/1/2011	$-130,348.40	PARTIAL SETTLEMENT
	$-126,016.58	$-4,331.82	$0.00	$0.00	$0.00
195	9/23/2011	9/23/2011	5/1/2011	$130,348.40	PARTIAL SETTLEMENT
	$126,016.58	$4,331.82	$0.00	$0.00	$0.00
194	9/8/2011	9/8/2011		$14.00	CORP ADV - PROP PRESERVATION DISB
	$0.00	$0.00	$0.00	$14.00	$0.00
193	8/20/2011	8/20/2011		$75.00	CORP ADV STATUTORY EXP DISB
	$0.00	$0.00	$0.00	$75.00	$0.00
192	8/3/2011	8/3/2011		$14.00	CORP ADV - PROP PRESERVATION DISB
	$0.00	$0.00	$0.00	$14.00	$0.00
191	7/16/2011	7/16/2011		$43.94	LATE CHARGE ASSESSED
	$0.00	$0.00	$0.00	$43.94	$0.00

EXHIBIT 3

Snipping Tool

The write ordered by Judge Justin Mark Hanne, ARAPAHOE COUNTY DISTRICT COURT, et al

ISSUED BY COURT
COUNTY COURT, Arapahoe COUNTY, COLORADO *03/2012014*
1790 W Littleton Blvd, Littleton, CO 80120 DATE FILED: March 20, 201411:59 Arv

Court Tel. No. 303.798.4591 *~~(j~"veO(D* Plaintiff(s): SRP Sub LLC

v. Tammy Herivel
Clerk of the Court
Defendant(s): Michelle D Harris And All Other Occupants.
~ FOR COURT USE ONLY ~
Mark N. Tschetter # 18433
Tschetter Hamrick Sulzer, P.c. Case Number: 20 14C34346
3600 S Yosemite St. # 828
Denver CO, 80237
Phone No. 303.766.8004
WRIT OF RESTITUTION

The people of the State of Colorado, to the Sheriff of said County:
WHEREAS, Plaintiff SRP Sub LLC obtained ajudgment on 3/18/2014, against the Defendant(s) Michelle D Harris AND ALL OTHER OCCUPANTS in the above titled action of unlawful detainer, for restitution of the premises following to wit:
2869 S Espana Ct, Aurora, CO 80013
THESE ARE THEREFORE TO COMMAND YOU, in the name and by the people, to dispossess the said befendant(s) Michelle D Harris AND ALL OTHER OCCUPANTS and restore the said Plaintiff SRP Sub LLC to the possession of the said premises.
THE COUNTY CLERK SEAL ABOVE SIGNIFIES THAT THIS DOCUMENT WAS ISSUED ELECTRONICALLY ACCORDING TO COLORADO COUNTY COURT RULES
Contact: Mikael Bjork
Apartment: SRP Sub LLC
Mikael Bjork
303.327.9070 - 720.466.3774
RETURN OF SERVICE
I hereby declare that I served the foregoing Writ of Restitution on the Defendants at the above address.
This Writ was served on (date) in Arapahoe County by
__ Posting it in a conspicuous place upon the premises described therein
__ Personally handing it to a person identified to me as _
I am over the age of 18 years and not a party to this case
Signed: _ Date _
Signed: _
NOTARY
Date, _

*"1 1 11 1 1 "" 11 1 *" 3111/2014

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The Plaintiff MICHELLE DAWN HANSEN is entitled to injunctive relief for the following reasons:

If the Write and order to vacate from ARAPAHOE COUNTY DISTRICT COURT, et al, is a not stopped by the DISTRICT COURT FOR THE DISTRICT OF COLORADO through an Emergency Injunction the Plaintiff will suffer irreparable injury.

The Plaintiffs Affidavit enclosed herein below:

This case of Eccentrics Frauds and RICO, COCA is currently being investigated by the Arapahoe District Attorney.

The Plaintiff is entitled to injunctive relief for the following reasons:

1) Plaintiff is endangered by continuing Eccentric Frauds, extortion and retaliation by Defendant's named herein and operating as an illegal Organized Criminal Enterprise under (RICO) 18 U.S.C. 1961 et al, and the Colorado Organized Crime Act.
2) The threatened injury to Plaintiff Michelle Hansen outweighs whatever damage the proposed injunction may cause the opposing party.
3) No injury to the Defendant's including its officials acting as part of an ongoing criminal enterprise can outweigh the pro se Plaintiff's interest in competent legal pleadings attaching the proof to the criminal statutes privately actionable under the RICO and FCA statutes, the latter for which the plaintiff must have an attorney and the former are too complex for the vast majority of pro se Plaintiffs to adequately plead.

4) The injunction, if issued, would not be adverse to the public interest.

5) The violations of federal criminal statutes and Colorado Criminal statues described in the Plaintiff's affidavit vindicate the only recognizable public interest, the enforcement of the nation's laws.

I. NATURE OF THE CASE

The Plaintiff Michelle Hansen filed the follow on

See Full exhibit below:
Enclosed herein Exhibit 1

IN THE UNTIED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Case Number:_____

MICHELLE DAWN HANSEN

A/k/a Michelle Hansen

Plaintiff

v

JP MORGAN CHASE,

TSCHETTER HAMRICK SULZER P.C.,et al

Defendants

ARAPAHOE COUNTY DISTRICT COURT

3-6-2014

Emergency Preliminary injunction including a TRO/Injunction to stay the recording of beneficiary deed to high bidder in alleged illegal rule 120 hearing and possible eminent eviction of Michelle Dawn Hansen from her Property and her home located at 2869 S. ESPANA CT. Aurora, CO. 80013 pending verifiable evidence of entitlement and capacity foreclose, and cause sale and evict.

Comes now the Plaintiff Michelle Hansen appearing pro se, and files this action for Emergency Preliminary injunction to stay pending verifiable evidence of entitlement and capacity to evict and foreclose for the entire previous court proceedings and the sale are all based upon FRAUD. To allow me to have an uncompromised qualified legal counsel should one exist, represent me in the Supreme Court for a civil RICO action I will file.

The Plaintiff is entitled to Emergency Preliminary injunction to stay pending verifiable evidence of entitlement and capacity to foreclose for the following reasons:

1. Roof over head
2. Due process rights under the constitution
3. District attorney has been presented evidence of fraud
4. Violations of the Garns St. Germain Act
5. Intrinsic Fraud
6. Extrinsic Fraud
7. Colorado Organized Crime Control Act (COCCA)

Michelle Hansen is seeking the order will suffer irreparable injury unless the injunction is issued. The Public at large is in danger of the allegations against the JP MORGAN and their Attorneys members of the B.A.R.

The attached affidavit of the plaintiff and accompanying evidence. SEE EXHIBIT 1

Shows that the plaintiff is endangered by continuing frauds and retaliation by JP MORGAN and the ATTORNEYS that are members of the B.A.R.

1. The threatened injury to Michelle Hansen outweighs whatever damage the proposed injunction may cause the opposing party,
2. No injury to the parties including JP Morgan (Lenders/Servicer)

as part of an ongoing criminal enterprise can outweigh the pro se Plaintiff's interest in competent legal pleadings attaching the proof to the criminal statutes privately actionable under the RICO and FCA statutes, the latter for which the plaintiff must have an attorney and the former are too complex for the vast majority of pro se Plaintiffs to adequately plead.

The affidavit and the Plaintiff's evidence:

3) The injunction, if issued, would not be adverse to the public interest, and

The violations of federal criminal statutes described in the Plaintiff's affidavit vindicate the only recognizable public interest, the enforcement of the nation's laws.

4) There is a substantial likelihood that Michelle Hansen will eventually prevail on the merits.

A hearing in this proceeding will determine that Plaintiff Michelle Hansen has been a victim RICO against under the Colorado RICO Statues by Organized Crime.

5.)The Plaintiff does not bring this action or claim under the civil rights laws of 42 USC § 1981et seq., instead the Plaintiff brings this action for Emergency Preliminary injunction to Stay pending verifiable evidence of entitlement and capacity to foreclose pursuant to the 1st and 6th Amendments of the U.S. Constitution.

6). The Plaintiff prays that the court enjoin the Plaintiff, Michelle Hansen.

from being an instrument of Organized Crime in RICO acts against the Plaintiff Michelle Hansen. Those actors, agents, subcontracted agents, et al., and not deny the Plaintiff the constitutional right to redress her

grievances regarding her mistreatment under Crime family RICO enterprise, so that the constitutional questions of law will take precedence over all other matters, and to prevent the corrupt influence agents, et al., as well as, the law have corruptly used the U.S. District Courts for the District of Colorado,

Seeking to sanction or arrest on the Plaintiff, as a chill effect to violate the redress of her grievances. 18 USC 1513 Retaliation against a witness, victim or an informant

18 USC 4 Federal Reporting Crime Act (whoever having knowledge of the actual commission of a felony cognizable by a court of the united States, conceals and does not, as soon as possible, make known the same to some judge or other person in civil or military authority under the united States shall be fined not more than $500.00 or imprisoned not more than three years or both). 18 USC 1927 through 18 USC 1967 (RICO) Racketeering, Influence, Corruption, Organization Act

18 USC 1960, 1901, 1905, 1911, 1952, 1956, 1957, 1961, 1962, 1963, 1964 (RICO)

Civil RICO

Continuous Criminal Enterprise Act (CCE)

18 USC 241 Conspiracy

18 USC 242 Conspiracy

31 USC 3729 False Claims Act

7). The Plaintiff prays that the court enjoin Michelle Hansen from being an instrument of the State of Colorado actors, agents, subcontracted agents, et al., and not sanction or place the chill effect upon the Plaintiff for redress of her grievances by continuing to prevent her from presenting evidence to support these allegations. See Exhibit #1 AFFIDAVIT of MICHELLE HANSEN.

8. Michelle Hansen's Previous Counsel Mr. Fielder was hired in November 2013, along with his legal team and Mr. Jeff Brode was to have been working on critical filings, reportedly under a rule 105, and has waited until the 11th hour to withdraw on February 18th 2014 leaving the plaintiff vulnerable as to remedy under alleged violations. SEE EXHIBIT #1 AFFIDAVIT of MICHELLE HANSEN

9. On February 19th, 2014 Michelle Hansen's property sold at an illegal auction held by Arapahoe County Trustee. Michelle Hansen received Notice to Quit on her front door, demanding "surrender" of her property within three days. SEE EXHIBIT #1 AFFIDAVIT of MICHELLE HANSEN

I reserve the right to amend the TRO/Injunction as necessary and upon further discovery and to add other parties as discovered.

WHEREFORE the above stated reasons and accompanying evidence, the Plaintiff respectfully requests that the Court Grant the Plaintiff's Emergency Preliminary injunction to stay pending verifiable evidence of entitlement and capacity to proceed in this alleged Illegal Eviction under and through fraud upon the victim Michelle Hansen and the Honorable Judicial System and Court.

Respectfully submitted,

Michelle Hansen

Pro se,

2869 S Espana CT.

Aurora Colorado

303-868-5097

Mdhansen81@comcast.net

Certificate of service and the above has been sent registered mail to the following:

JP Morgan Chase
C/o Highest Ranking Officer
10790 Rancho Bernardo Road
San Diego, CA 92127

The Castle Law Group, LLC
C/o Kim Martinez
999 18th Street, Suite 2201
Denver, CO 80202

TSCHETTER HAMRICK SULZER P.C.
3600 SO. Yosemite STE 828,
Denver, CO 80237

Denver Home Group
2000 S Colorado BLVD. Tower 2
Suite 700
C/o Michael Bjork
Denver, CO 80222

I have sent the copies of this TRO injunction to stop eviction and process to the above via certified mail

SIGN

Michelle D Hansen

II. JURISDICTION AND VENUE

The ends of justice require this matter to be heard in this District.

12 U.S. Code § 1976 -Injunctive relief for persons against threatened loss or damages; equitable proceedings; preliminary injunctions

Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by reason of a violation of section 1972 of this title, under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity and under the rules governing such proceedings. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

15 U.S. CODE § 26 - INJUNCTIVE RELIEF FOR PRIVATE PARTIES; EXCEPTION; COSTS

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this

section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

The Plaintiff does not bring this action or claim under the civil rights laws of 42 USC § 1981et seq., instead the Plaintiff brings this action for injunctive relief pursuant to the 1st and 6th Amendments of the U.S. Constitution.

Plaintiff wishes to notice the Court and that it would be a MISPRISION OF FELONY under 18 USC 4 to fail to disclose felonious acts that have been witnessed by or that have come to the attention of the Plaintiff.

This court has federal question jurisdiction 28 U.S.C. § 1331. properly lies in this Court pursuant to 28 U.S.C. 1331 (Federal question), and Plaintiff invokes this Court's supplemental jurisdiction pursuant to 28 U.S.C. 1367 to hear Plaintiff's pendent state tort claims; venue properly lies in the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO of the State of Colorado pursuant to 42 U.S.C. 1391 (b) and (2) in that Defendants reside in Denver, Colorado and Englewood, Colorado and a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Aurora, Colorado.

Additional jurisdictional and venue claims merit this Complaint to be afforded judicial review on behalf of Plaintiff Michelle Hansen.

Jurisdiction is further invoked pursuant to and is based upon:

Venue properly lays in this Court pursuant to 28 U.S.C. Section 1361 gives Citizen the right to obtain a Judicial Order addressing misconduct.

Venue properly lies in this Court pursuant to Due Process of Law, Obstruction of Justice

Venue properly lays in this Court pursuant to 49 U.S.C. Section 1487 Writ of Injunction.

Venue properly lays in this Court pursuant 18 U.S.C. 4 Federal Reporting Crimes Act.

28 U.S.C. 1331, in that it is a civil action arising under the laws of the United States, and the First, Fifth, Seventh, Ninth, Tenth, Amendments to the ***Constitution of the United States***, (federal question);

28 U.S.C. § 1361, An action to compel an officer of the United States to perform his duty;

28 U.S.C. § 1366, Construction of reference to laws of the United States or Acts of Congress;

28 U.S.C. § 1349, Corporation organized under federal law as party;

28 U.S.C. § 1343 (a)(2)(3), Civil rights and elective franchise and 42 U.S.C. §§ 1983, 1985 and 1986, in conspiracy and or failure to act and prevent criminal violations of civil rights;

18 U.S.C. §§ 1961(1) (A), (1)and (1) (D); and 1964(a)(c), Racketeer Influenced and Corrupt Organizations Act (RICO Act) civil remedies and Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971), compensation for victims of "constitutional torts" by federal actors; and

28 U.S.C. § 2201, declaratory and injunctive relief as deemed necessary.

Venue is proper in this Court pursuant to 18 U.S.C. Section 1965 (a) because Defendants reside, are found, operate under color of authority or office, have agents, or connected with or related to the aforesaid and transact affairs in this district.

Venue is also proper in this Court pursuant to 18 U.S.C. Section 1965 (b) because, to the extent any Defendants may reside outside this district, the ends of justice require such Defendant(s) to be brought before the Court.

Venue properly lies in this Court pursuant to 28 U.S.C. Section 1391 (b) (2) or, alternatively, pursuant to 28 U.S.C. Section 1391 (a) (2).

Further, certain of the conspiratorial acts alleged herein took place and continue to take place within this judicial district.

Any and all Defendants, named and unnamed who are employed with, were employed with, contracted with and connected to Defendant, can be compelled through order and/or subpoena power of this federal court to be subjected to discovery or otherwise appear before the court under federal law, or the Code of Federal Regulations or other process to establish venue in this Honorable Court.

18 USC § 1951 - INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and

any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 ofTitle 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

This action arises under the Racketeer Influenced And Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq*

III. PARTIES

MICHELLE DAWN HANSEN

a/k/a Michelle Hansen

Plaintiff,

v

JP MORGAN CHASE,

TSCHETTER HAMRICK SULZER P.C.,et al

Honorable Judge Justin Mark Hannen,

ARAPAHOE COUNTY DISTRICT COURT, et al.

Defendants,

IV. STATEMENT OF FACTS

Plaintiff wishes to notice the Court and that it would be a MISPRISION OF FELONY under 18 USC 4 to fail to disclose felonious acts that have been witnessed by or that have come to the attention of the Plaintiff. Plaintiff and others are also aware that Treason and Sedition against the United States of America and its

People have been committed by some of the named and unnamed defendants and Co-Conspirators named herein.

RACKETEERING IN VIOLATION OF 18 U.S.C. § 1962(c)

The plaintiff hereby brings an allegation of racketeering against the defendants for violating 18 U.S.C. § 1962(c), and makes the following averments that the Plaintiff alleging the defendants committed the (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Plaintiff incorporates by reference all prior allegations in this Complaint as if set forth fully herein at length.

Plaintiff asserts and will produce at trial, bona fide evidence showing Defendants have engaged in a long "pattern of criminal activity" and on-going pattern of "criminal obstruction of justice" constituting continual, long-term criminal modus operandi that have the same or similar purposes, results, participants, and victims and the threat of continuing activity, interrelated by distinguishing characteristics.

Plaintiff will establish a prima facie case under the RICO Act and due to her "standing" and the courage to put a halt to this destructive course of Defendants.

The following "patterns of criminal activity" and "obstruction of justice" based upon Defendants and their will set the foundation for this RICO claim for Injunctive Relief with a Temporary Restraining Order of any orders and Writs issued by **Honorable Judge Justin Mark Hannen, ARAPAHOE COUNTY DISTRICT COURT, et al., Defendant.**

V. Conspiracy to Steal Plaintiff's Property and Harass Plaintiff

Conspiracy to Stalk Plaintiff

Retaliation against a Witness or informant in violation of 18 U.S.C. 1010, 1011, 1012, 1013, 1014 and 1015.

VI

MEMORANDUM OF LAW

IN SUPPORT OF

VERIFIED COMPLAINT FOR: DECLARATORY JUDGMENT;

IMPOSITION OF A CONSTRUCTIVE TRUST; AN ACCOUNTING;

BREACH OF FIDUCIARY DUTY BY PUBLIC OFFICERS /

BREACH OF THE PUBLIC TRUST; QUO WARRANTO; AND,

REVOCATION OF CORPORATE CHARTER

The individual Respondents are public officers and as such are fiduciaries of the Public Trust(s) created by the Constitution of the United States of America and the Constitution of The state of Wisconsin. As fiduciaries of the Public Trust, public officers owe loyalty to the Constitutions which created the Public Trust(s) and are required to be bound by oath to said Constitutions. Respondents have a fiduciary duty to display honesty, integrity, and good faith to the beneficiaries of the public trust(s), who are the sovereign people they serve. As fiduciaries of the Public Trust, Public Officers must at all times, without exception, display honesty, integrity, and good faith toward the beneficiaries.

Fiduciaries have the duty to bear the utmost fidelity to the Public Trusts created by the Constitutions that were created, ordained, and established by the people, who are the grantors and the beneficiaries of the Public Trust. The limitations placed upon the actions of the fiduciaries by the Trust Instruments, the Constitutions, are absolute. These limitations include, but are not limited to:

a. The prohibition against impairing the obligation of contracts,
b. The prohibition against the taking of private property for public use without just compensation, and,
c. In general, the prohibition against trespass of another man's rights, liberty, or property.

Fiduciaries who, by acts of commission or omission, impair the obligations of contracts, especially contracts between the people and the United States of America, denigrate the good name of the state, instill reproach among the people for all men who occupy public office, are disloyal to the Constitutions, act dishonestly, lack integrity, act in bad faith, and are in breach of their fiduciary duty.

Fiduciaries who, by acts of commission or omission, take private property for public use without just compensation, denigrate the good name of the state, instill reproach among the people for all men who occupy public office, are disloyal to the Constitutions, act dishonestly, lack integrity, act in bad faith, and are in breach of their fiduciary duty.

Fiduciaries have a duty of full disclosure to beneficiaries. To conceal, or fail to disclose, that corporate statutes do not apply to the people in their private capacity exercising inherent rights is deceit, dishonesty, bad faith, and a breach of fiduciary duty. To conceal, or fail to disclose, that registration of private property with the corporate State, such as registering a private automobile or recording a deed to private land, presumptively grants the corporate State control over the private property is deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To conceal, or fail to disclose, that registering or recording private property with the corporate State creates an hypothecation to the corporate State of the private property which the corporate State then uses to make profits therefrom, such as using the private property as collateral for the issuance of bonds, the proceeds of which run the corporation's operations, is deceit, dishonesty, bad faith, and breach of fiduciary duty.

To conceal, or fail to disclose, that registration of private property with the corporate State, such as registering a private automobile or recording a deed to private land, is voluntary, and threatening to penalize those who "fail" to "volunteer" is deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To require private men and women exercising inherent property rights to register or record their private property with the corporate State, and then requiring them to pay for the "privilege" of the registration or recordation is extortion, deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To require those exercising inherent property rights to register or record their private property with the corporate State, and then not paying said "persons", i.e., beneficiaries of the Public Trust, the income or profits

generated from said hypothecated private property is theft or stealing, deceit, dishonesty, bad faith, and a breach of fiduciary duty.

To impose, or attempt to impose, penal statutes of the corporate body politic against a private man exercising inherent rights who is not a member of the corporate body politic, especially when said imposition or attempt to impose is politically motivated or retaliatory against a victim and witness of crime, is misconduct in public office, deceit, dishonesty, bad faith, a criminal act, and breach of fiduciary duty.

Acts in breach of fiduciary duty by public officers give rise to personal liability of the public officer(s). Acts of public officers, fiduciaries, which unjustly enrich said officers or a third party give rise to a constructive trust in favor of the beneficiaries or cestui que trust for restoration and restitution. Acts in breach of fiduciary duty are cause for removal from office. Further, pursuant to Section 4 of the 14th Amendment, assumption or payment of any debt, obligation, or claim, such as wages or pensions, by any State to a fiduciary in insurrection or rebellion against the Constitution is illegal and void.

I. Individual Respondents Are Public Officers

Individual Respondents named in Complainant's Complaint are public officers.

"[O]ne who holds a public office is a public officer".

> 63C Am. Jur. 2d *Public Officers and Employees* § 9 (Online Edition November 2011). *Murach v. Planning and Zoning Com'n of City of New London*, 196 Conn. 192, 491 A.2d 1058 (1985); *Raduszewski v. Superior Court In and For New Castle County*, 232 A.2d 95 (Del. 1967); *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, 63 S.W.2d 100, 88 A.L.R. 1099 (1933); *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952).

A member of the General Assembly is, of course, a "public officer" within the meaning of the Constitution. "Certainly, where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a public officer." (citations omitted): "An office is a public station or employment conferred by the appointment of the government. And any man is a public officer who is appointed by government, and has any duty to perform concerning the public; nor is he any the less a public officer because his authority or duty is confined to narrow limits."

When our Constitution declares that "[p]ublic officers are the trustees and servants of the people," we interpret that declaration to mean that public officers are the trustees and servants of the people.

All public officers, within whatever branch and at whatever level of our government, and whatever be their private vocations, are trustees of the people, and do accordingly labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts.

Nor are the proscriptions of the law confined to legislators who are lawyers. They extend to every public officer.

Georgia Dept. of Human Resources v. Sistrunk, 249 Ga. 543, 546-547, 291 S.E.2d 524, 528 (1982).

II. Individual Respondents, As Such Public Officers, Are Fiduciaries

Individual Respondents named in Complainant's Complaint are public officers and as such are defined as fiduciaries.

"'Fiduciary' includes a trustee under any trust, …[a] public officer…"

Uniform Fiduciaries Act, Section 1. www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufa22.pdf

"'Fiduciary' includes a trustee under any trust, …[a] public officer…"

Wisconsin Statutes § 112.01(b).

Register of deeds was "fiduciary" under Wisconsin law, for purpose of determining dischargeability of debt arising from misappropriation of collected fees, where Wisconsin statutory definition specifically included "public officer[s]," plain meaning of statute seemed to include any public officer. *Matter of Loken*, 32 B.R. 205, Bkrtcy.Wis.,1983.

"… a public officer, in holding a position of public trust, stands in a fiduciary relationship to the citizens that he or she has been elected to serve."

("See *Trist v. Child,* 88 U.S. (21 Wall.) 441, 450, 22 L.Ed. 623 (1874).") *Felkner v. Chariho Regional School Committee*, 968 A.2d 865, 874, R.I., 2009.

'It should not be forgotten that 'a public office is a public trust,' and all public officers should so conduct their official duties as to be like Caesar's wife, 'above suspicion' of irregularities in the administration of their offices, even though such irregularities may not, under the law, constitute such wilful misconduct, corruption, or maladministration as to merit removal from office.' *Parsons v. Steingut*, 185 Misc. 323, 327, 57 N.Y.S.2d 663, 666 (1945).

The statute is unique because only public officials can violate its provisions. These officials are held in public trust and owe a fiduciary duty to the people they represent. The high standard of conduct demanded of public officers, coupled with the broad sweeping language of the statute, permits no other interpretation as to its intent and meaning.

People v. Savaiano, 66 Ill.2d 7, 15, 359 N.E.2d 475, 480 (1976).

Syllabus by the Court:

1. The sheriff as the chief peace officer of his county is responsible both by common and statutory law to keep and conserve peace and good order within his county.

2. Neglect of official duty may consist of careless or intentional failure to exercise reasonable diligence in its performance.

3. Duties imposed upon a public officer are functions and attributes of the office to be performed by the incumbent.

4. A sheriff's official duty implies alertness and initiative to enforce the laws enacted by the people for their protection and well-being. Relator, who failed to meet these requirements, *held* properly removed from office.

A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent. *In re Olson*, 211 Minn. 114, 118, 300 N.W. 398, 400 (1941).

One is said to act in a 'fiduciary capacity' or to receive money or contract a debt in a 'fiduciary capacity,' when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to which he stands in a relations implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. The term is not restricted to technical or express trusts, but includes such offices or relations as those of an attorney at law, a guardian, executor, or broker, a director of a corporation, and a public officer. (Emphasis added)

Ducote Jax Holdings, L.L.C. v. Bradley, 2007 WL 2008505 (E.D.La.), (citing *State of Louisiana v. Hagerty,* 205 So.2d 369, 374-75 (La.1967) (internal citations omitted).

III. Individual Respondent Public Officers Are Fiduciaries of the Public Trust

Individual Respondents named in Complainant's Complaint are public officers, as such are defined as fiduciaries, and are fiduciaries of the Public Trust, and must observe the utmost loyalty to the Constitutions that created or erected the Public Trust(s).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. *The Constitution for the United States of America, Article VI.*

Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall before they enter upon the duties of their respective offices, take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of the state of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability.

The Constitution of The state of Wisconsin, Article IV, Section 28.

The legislature hereby reaffirms that a state public official holds his or her position **as a public trust**. *Wisconsin statutes § 19.45(1).*

Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

5 USC Sec. 7301, Section 101. (a), Part I, Ex. Ord. No. 12731, Oct. 17, 1990, 55 F.R. 42547.

The fundamental principle of supremacy of law, the crux of our constitutional government, requires that all public officials obey the

mandates of the Constitution and the lawful enactments of the Congress. See U.S.Const. art. VI; United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882).[FN2]

FN2. In the Lee case, the son of General Robert E. Lee sued successfully for the recovery of property of the Lee family against the commandant of Fort Myer and the superintendent of the national cemetery at Arlington. Mr. Justice Miller proclaimed the principle of supremacy of law in the following imperishable language: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government . . . . Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government ... ."

106 U.S. at 220, 1 S.Ct. at 261. *C.B.S. Imports Corp. v. U. S.*, 450 F.Supp. 724, 728 (1978).

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. …. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments. *Trist v. Child*, 88 U.S. 441, 450 (1874).

"The members of the board of chosen freeholders and of the bridge commission are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve."

> *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 474, 86 A.2d 201, (1951), citing: *Rankin v. Board of Education*, 135 N.J.L. 299, 303, 51 A.2d 194 (E. & A.1947); *Trist (Burke) v. Child*, 21 Wall. 441, 88 U.S. 441, 450, 22 L.Ed. 623, 625 (1875); *Edwards v. City of Goldsboro*, 141 N.C. 60, 53 S.E. 652, 653, 4 L.R.A.,N.S., 589 (Sup.1906); *Tuscan v. Smith*, 130 Me. 36, 153 A. 289, 294, 73 A.L.R. 1344 (Sup.Jud.1931); *State ex rel. Fletcher v. Naumann*, 213 Iowa 418; 239 N.W. 93, 99, 81 A.L.R. 483 (Sup.1931); *In re Marshall*, 363 Pa.

326, 69 A.2d 619, 625 (Sup.1949); 42 Am.Jur., Public Officers, s 8, p. 885; 43 Id. s 260, p. 77-78; 67 C.J.S., Officers, s 6, p. 118.

A public office is a public trust. Borough councilmen, as fiduciaries and trustees of the public interest, must serve that interest with the highest fidelity. The law tolerates no mingling of self interest; it demands exclusive loyalty. (citations omitted). The theory is that a public officer assumes the same fiduciary relationship toward the citizens of his community as a trustee bears to his Cestui que trust. (citations omitted). They have the right to expect that in everything that appertains to their business or welfare, he will exercise his best judgment, unaffected and undiluted by anything which might inure to his own interest as an individual.

Aldom v. Borough of Roseland, 42 N.J.Super. 495, 501, 127 A.2d 190, 193 (1957).

"Public officers hold positions of public trust, and stand in a fiduciary relationship to the people whom they have been appointed to serve."

State v. Markt, 156 N.J.Super. 486, 384 A.2d 162, 166 (N.J.Super.Ct.App.Div.1978) (citing *Driscoll v. Burlington-Bristol Bridge Co.,* 8 N.J. 433, 86 A.2d 201, 221 (N.J.1952)).

"They must serve the public with the highest fidelity." *Id.*

"The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution." *Driscoll,* 86 A.2d at 222. Whenever the acts of public officers fail to conform to the standard imposed by the fiduciary relationship in which they stand to the public, relief will be available in the civil courts.

Id. Marjac, L.L.C. v. Trenk, D.N.J., 2009 WL 2143686.

"The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are *never* to descend to a lower plane."

Trist v. Child, 88 U.S. 441, 450, 1874.

Of course, a public office is a public trust:

Constitution of Pennsylvania, Article VI, Section 3; *Taylor v. Beckman* (No.1), 178 U.S. 548, 577, 20 S.Ct. 1009, 44 L.Ed. 1187; *Commonwealth v. Gamble*, 62 Pa. 343, 349, 1 Am.Rep. 422; *Commonwealth v. Kirk*, 141 Pa.Super. 123, 145-146, 14 A.2d 914;

and the occupant of such an office is a fiduciary. Like any other fiduciary or trustee, he is required to exercise common skill and prudence, and when his conduct of the trust is not marked by these qualities, there is mismanagement. *In re Marshall*, 363 Pa. 326, 336, 69 A.2d 619, 625.

Jersey City v. Hague:

In *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, at page 474 et seq., (1952), this court said without dissent:

'The members of the board of chosen freeholders and of the bridge commission are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. (citations omitted); 42 Am.Jur., Public Officers, s 8, p. 885; 43 Id. s 260, p. 77-78; 67 C.J.S., Officers, s 6, p. 118. As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. (citations omitted); 43 Am.Jur., Public Officers, ss 260-261, pp. 77-78; 43 Id. s 267, p. 82; 67 C.J.S., Officers, s 114, p. 402. They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves and discharge their duties, their actions are inimicable to and inconsistent with the public interest, and not only are they individually deserving of censure and reproach but the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties. (citations omitted); 43 Am.Jur., Public Officers, s 291, p. 101.

'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which

exists for the benefit of the people who are its sovereign. Constitution of 1947, art. I, part. 2. The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. He may secure relief in the civil courts either through an action brought in his own name, (citations omitted), or through proceedings instituted on his behalf by the Governor, Constitution of 1947, art. V, sec. I, par. 11, or by the Attorney General, (citation omitted). Under the former practice the great prerogative writs, especially Certiorari, were generally available to the aggrieved citizen, but by art. VI, sec. V, par. 4 of the Constitution of 1947 the relief theretofore granted in such matters as a matter of judicial discretion became a matter of right, see (citation omitted). Nonfeasance, misfeasance, malfeasance and corruption in public office cannot prevail against an aroused citizenry who have it in their power to end the misconception of some public officials that their obligations are fully met so long as they obey the letter of the law and avoid its penal sanctions. That the shortcomings of some public officers may not make them accountable in our criminal courts does not mean that their nefarious acts cannot successfully be attacked through the processes of the civil law. * * * It is the potential for evil and not the actual financial loss or other injury incurred that renders a transaction illegal because of an abuse of discretion, (citations omitted)'

Manifestly the instant case falls within the pattern of the Driscoll case.

Restitution was likewise invoked in such cases as *United States v. Carter*, 217 U.S. 286, (1910), where the defendant, an army officer in charge of procurement, entered into an arrangement with two contractors by which he exercised his official discretion in such a way as to give them more contracts and more profits. The court traced his share in this enterprise into the hands of other defendants, who were not purchasers in good faith, and subjected the money to a constructive trust, saying:

'It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.

'The doctrine is well established and has been applied in many relations of agency or trust. The disability results not from the subject-matter, but from the fiduciary character of the one against whom it is applied. It is founded on reason and the nature of the relation, and is of paramount importance. 'It is of no moment,' said Lord Thurlow, in *The York Bldgs. Co. v. Mackenzie*, 3 Paton, 378, 'what the particular name or description, whether of character or office, situation or position, is, on which the disability attaches. " *United States v. Carter*, supra, 217 U.S. at page 306.

The other Massachusetts case, *City of Boston v. Dolan*, 298 Mass. 346, 10 N.E.2d 275, 277, 281 (Sup.Jud.Ct.1937), is to the same effect:

'But as city treasurer the defendant was a fiduciary. As such he could be compelled to account in equity like a trustee, regardless of a possible remedy at law, and could not be permitted to retain a secret profit made in transactions conducted for the city. The saying, 'Public office is a public trust,' is more than mere rhetoric. (citations omitted)

Lord Porter also based the case on the additional ground of a fiduciary relationship:

'As to the assertion that there must be a fiduciary relationship, the existence of such a connection is, in my opinion, not an additional necessity in order to substantiate the claim, but another ground for succeeding where a claim for money had and received would fail. In any case, I agree with Asquith, L.J., in thinking that the words 'fiduciary relationship' in this setting are used in a wide and loose sense and include, Inter alios, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.' (p. 620)

This view of the law is borne out by the American Law Institute Restatement on Restitution:

'Section 190, General Rule: Where a person in a fiduciary relation to another acquires property, and the acquisition or retention of the property is in violation of his duty as a fiduciary, he holds it upon a constructive trust for the other.'

As these decisions and the Restatement show, the development of the principle of restitution, both at law and in equity, as a remedy for breach by a public official of his fiduciary obligations has obviously been salutary. Restitution, by virtue of its adaptability to individual cases on equitable principles may, as we have seen, reach situations beyond the grasp of

other civil or criminal remedies and do justice on equitable principles; see (citation omitted) where various alternatives were weighed with a view to working out justice so far as possible to all concerned, but always on the fundamental basis of preventing the unfaithful public official or public body profiting from his or its wrongdoing. See 65 Harv.L.Rev. 502 (1952); Lenhoff, the Constructive Trust as a Remedy for Corruption in Public Life, 54 Col.L.Rev. 214 (1954).

END of citations from: *Jersey City v. Hague*, 18 N.J. 584, 593-596, 115 A.2d 8, 13-15 (1955).

The courts of this State are committed to the principle that public officials hold positions of public trust; they are under an inescapable obligation to serve the public with the highest fidelity, good faith, and integrity. (citations omitted). Such required conduct demands undivided loyalty and compels public officers to refrain from outside activities which interfere with proper discharge of their duties, or which may expose them to the temptation of acting in any manner other than in the best interests of the public. ….

These principles are imposed by law on all public officers and become effective upon their entering public office. If it be determined that such a conflict of interest exists, their agreements are against public policy and may be declared void; and this is so even though there is no proof of fraud, dishonesty, loss to the public or whether in fact they were influenced by their personal interest. *Newton v. Demas*, 107 N.J.Super. 346, 349, 258 A.2d 376, 378 (1969).

IV. Individual Respondent Public Officers Have Fiduciary Liabilities

Individual Respondents named in Complainant's Complaint are public officers, as such are defined as fiduciaries, and are fiduciaries of the Public Trust, and as fiduciaries assume greater liabilities upon themselves than do other persons. Public officers are required to serve with the highest fidelity and to display good faith, honesty and integrity toward beneficiaries of the Public Trust. Public officers are subject to compensatory *and* punitive damages for breach of fiduciary duty.

A. In General

In *Pressley v. Township of Hillsborough,* 37 N.J.Super. 486, 117 A.2d 646 (N.J.Super.Ct. App.Div.1955), the Appellate Division set forth the duty owed by a public official:

"As fiduciaries and trustees of the public weal they (municipal 3 officers) are under an inescapable obligation to serve the public with the

highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity." Under New Jersey law, breach of fiduciary duty is a tort claim requiring a showing of duty, breach, injury, and causation.

Marjac, L.L.C. v. Trenk, D.N.J., 2009 WL 2143686.

As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to good faith, honesty and integrity. citing:

> *City of Newark v. N.J. Turnpike Authority*, 7 N.J. 377, 381-382, 81 A.2d 705 (1951); *Ryan v. Paterson*, 66 N.J.L. 533, 535-536, 49 A. 587 (Sup.Ct.1901); *Schefbauer v. Board of Township Committee of Kearney*, 57 N.J.L. 588, 601, 31 A. 454 (Sup.Ct.1895); *Ames v. Board of Education of Montclair*, 97 N.J.Eq. 60, 65, 127 A. 95 (Ch. 1925); *United States v. Thomas*, 15 Wall. 337, 82 U.S. 337, 342, 21 L.Ed. 89, 91 (1873); *Paschall v. Passmore*, 15 Pa. 295, 304 (Sup.1850); *Inhabitants of Cumberland County v. Pennell*, 69 Me. 357, 365, 31 Am.Rep. 284 (Sup.Jud.1879); *Speyer v. School Dist. No. 1*, 82 Colo. 534, 261 P. 859, 860, 57 A.L.R. 203 (Sup.1927); 43 Am.Jur., Public Officers, ss 260-261, pp. 77-78; 43 Id. s 267, p. 82; 67 C.J.S., Officers, s 114, p. 402. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 475, 86 A.2d 201, (1951).

They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves and discharge their duties, their actions are inimicable to and inconsistent with the public interest, and not only are they individually deserving of censure and reproach but the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties. citing:

Brooks v. Cooper, 50 N.J.Eq. 761, 26 A. 978, 21 L.R.A. 617 (E. & A.

1893); *Cameron v. International, & c., Union No. 384*, 118 N.J.Eq. 11, 176 A. 692, 97 A.L.R. 594 (E. & A.1935); *Girard Trust Co. v. Schmitz*, 129 N.J.Eq. 444, 20 A.2d 21 (Ch.1941); *Allen v. Commercial Casualty Insurance Co.*, 131 N.J.L. 475, 477-478, 37 A.2d 37, 154 A.L.R. 834 (E. s A.1944); *Stone v. William Steinen Mfg. Co.*, 133 N.J.L. 593, 595, 45 A.2d 486 (E. & A.1946); *Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 500, 47 S.Ct. 416, 71 L.Ed. 734, 745 (1927); *Mammoth Oil Co. v. United States*, 275 U.S. 13, 48 S.Ct. 1, 72 L.Ed. 137 (1927); Edwards v. City of Goldsboro, supra, 141 N.C. 60, 53 S.E. 625, 4 L.R.A.,N.S., 589 (Sup.1906); *Tuscan v. Smith*, supra, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344 (Sup.Jud.1931); 43 Am.Jur., Public Officers, s 291, p. 101. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 475, 86 A.2d 201, 221, (1951).

A person may act in his own right from any motive if his act is lawful, but a public officer must act without malice or at least must in good faith pursue a right purpose.

The authorities are numerous: citing: *Jones v. Cody*, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160; *Lamb v. Redding*, 234 Pa. 481, 83 A. 362; *Moore v. Porterfield*, 113 Okl. 234, 241 P. 346; *Yealy v. Fink*, 43 Pa. 212, 82 Am. Dec. 556; *Dinsman v. Wilkes*, 12 How. 390, 13 L. Ed. 1036; *Wall v. McNamara*, cited and quoted in *Johnstone v. Sutton*, 1 T. R. 493, 536; *Black v. Linn*, 17 S. D. 335, 96 N. W. 697, citing many cases; *State v. Thornton*, 136 N. C. 610, 48 S. E. 602; *Kansas City v. Hyde*, 196 Mo. 498, 96 S. W. 201; *Fertich v. Michener*, 111 Ind. 472, 486, 11 N. E. 605, 60 Am. Rep. 709. See, also, *Smith v. Board*, 10 Colo. 17, 13 P. 917. *Speyer v. School Dist. No. 1, City and County of Denver*, 82 Colo. 534, 261 P. 859, 861, 57 A.L.R. 203 (1927).

It is unnecessary to discourse on the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Contracts made in violation of those duties are against public policy, are unenforceable, and will be canceled by a court of equity.

Tuscan v. Smith, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344 (1931).

"[I]f the law claimed to have been violated was clearly established, the qualified immunity defense ordinarily fails, 'since a reasonably competent public official should know the law governing his conduct.' " *Bearden v. Lemon*, 475 F.3d 926, 929 (2007).

A public official, clothed with qualified immunity, is not required to anticipate future development of constitutional doctrine, but he is required to respect the established constitutional rights of others. His qualified immunity is not available to him if he does not do that. *Bever v. Gilbertson*, 724 F.2d 1083, 1088 (1984).

In an early case in this court (Crocker v. Brown County, 35 Wis. 284), it was said that public officials take their offices cum onere; that is, they take them with all the responsibilities attached. *Forest County v. Poppy*, 193 Wis. 274, 213 N.W. 676, 677 (1927).

As already pointed out, the charges made by plaintiffs against the trustee are centered in the claim that the interests of the trustee conflict with the duties it owes to the beneficiaries. It is a cardinal rule that the welfare of the cestui que trust is the focal point of every consideration of duty and loyalty of the trustee. ….

'Since a trustee is a fiduciary of the highest order and is charged with the utmost fidelity to his trust, he must refrain from creating situations where his own interests are brought into conflict with those of the trust, and from doing those things which would tend to interfere with the exercise of a wholly disinterested and independent judgment. In accepting a trust, the trustee is presumed to know the obligations and limitations connected with his high office and, if he transgresses, must abide the consequences.'

Manchester v. Cleveland Trust Co., 95 Ohio App. 201, 210-211, 114 N.E.2d 242, 247-248 (1953).

B. Punitive Damages

In *Lane County v. Wood*, 298 Or. 191, 200, 691 P.2d 473, (1984) regarding punitive damages against public officers: McCormick on Damages sets forth additional sources from which to glean the meaning of the Restatement comments regarding public officials:

"Historically, oppressive conduct by public officers was the situation where early judges were most prone to sanction exemplary damages, and by which they justified and rationalized the doctrine."

The legal doctrine of punitive damages is founded on the theory that certain intentional acts should be punished or deterred. Punishment and

deterrence concern behavior that society finds undesirable. Punishment and deterrence are not related to actual or compensatory damages. Punitive damages are not to compensate an injured party, but to give bad actors a legal spanking.

The jury in Clackamas County chose to punish the behavior of defendant Wood as a public officer for official misconduct. It also chose to punish the behavior of Safley for inducing Wood to breach his official duties. We believe that the acts, as found by the jury-of Wood as a public servant attempting to make a personal profit from the sale and exchange of public lands in breach of Wood's fiduciary duty to the citizens who elected him, and of Safley in intentionally inducing a public official to breach his fiduciary duties - are so egregiously culpable that an award of nominal damages is sufficient to support the awards of punitive damages against them. *Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473, (1984).

V. Individual Respondents Fiduciary Duty To Beneficiaries

Individual Respondents, Public officers, as fiduciaries of the Public Trust, have fiduciary duties to the beneficiaries of the Public Trust, who are the sovereigns and who are the Grantors / Beneficiaries of the Public Trust. As fiduciaries of the Public Trust, Public Officers must at all times, without exception, display honesty, integrity, and good faith toward the beneficiaries. Fiduciaries have a duty of full disclosure to beneficiaries. To conceal the fact that corporate statutes do not apply to the people in their private capacity exercising inherent rights, or to conceal the fact that registration of private property with the corporate State, such as recording a deed to private land, creates an hypothecation to the corporate State of the private property which the corporate State then profits therefrom, such as using the private property as collateral for the issuance of bonds, is dishonest, bad faith, and breach of fiduciary duty.

These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign. Constitution of 1947, art. I, par. 2. The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. He may secure relief in the civil courts either through an action brought in his own name. citing:

Tube Reducing Corp. v. Unemployment Compensation Commission, 1 N.J. 177, 181, 62 A.2d 473, 5 A.L.R.2d 855 (1948); *Waszen v. City of Atlantic City*, 1 N.J. 272, 276, 63 A.2d 255 (1949); *Haines v. Burlington County Bridge Commission*, 1 N.J.Super. 163, 170-173, 63 A.2d 284 (App.Div.1949). *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 476, 86 A.2d 201, (1951).

Nonfeasance, misfeasance, malfeasance and corruption in public office cannot prevail against an aroused citizenry who have it in their power to end the misconception of some public officials that their obligations are fully met so long as they obey the letter of the law and avoid its penal sanctions. That the shortcomings of some public officers may not make them accountable in our criminal courts does not mean that their nefarious acts cannot successfully be attacked through the processes of the civil law.

Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 476, 86 A.2d 201, (1951).

… but the atmosphere of this case prompts us to direct attention to the integrity demanded of those who accept responsibility as public officials. It cannot be too often restated. The Administration of Government ought to be directed for the good of those who confer and not of those who receive the trust. The officers of Government are Trustees and both the trust and trustees are created for the benefit of the people.

Rankin v. Board of Educ. of Egg Harbor Tp., 135 N.J.L. 299, 303, 10 Abbotts 299, 51 A.2d 194, 197.

Although the general rule is that "one party to a transaction has no duty to disclose material facts to the other," an exception to this rule is made when the parties are in a fiduciary relationship with each other. *Klein v. First Edina National Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). " 'A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority on the other; and the relation and duties in it need not be legal but may be moral, social, domestic, or merely personal.' "

Kennedy v. Flo-Tronics, Inc., 274 Minn. at 331, 143 N.W.2d at 830 (quoting *Stark v. Equitable Life Assurance Society*, 205 Minn. 138, 145, 285 N.W. 466, 470 (1939)). *Midland Nat. Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (1980).

"Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.' (citation omitted). We have often announced the rule that, 'the burden of proof is upon a party holding a confidential or fiduciary relation to establish the perfect fairness, adequacy and equity of a transaction with the party with whom he holds such relation; * * *.' (citation omitted). 'But where a fiduciary relation exists between the parties to a transaction the burden of proof of its fairness is upon the fiduciary.'

Rettinger v. Pierpont, 145 Neb. 161, 197, 15 N.W.2d 393, 412 (1944).

Nondisclosure is tantamount to an affirmative misrepresentation where a party to a transaction is duty-bound to disclose certain pertinent information (24 N.Y.Jur., Fraud and Deceit, § 107, at 161 [1962]). Such duty to disclose may arise where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other (Fraud and Deceit, §§ 106-109, at 159-164 [1962]).

Even if a case of actual fraud has not been presented for lack of the element of scienter, or actual awareness on Wein's part that false representations were made, the allegations do establish a breach of duty actionable as constructive fraud. To recover for constructive fraud, plaintiff need not prove actual knowledge of falsity, but only that a fiduciary or confidential relationship existed between herself and Wein

(*id.; see,* 24 N.Y.Jur., Fraud and Deceit, §§ 2, 17, 109, at 35, 52-53, 163-164 [1962]). *Callahan v. Callahan*, 127 A.D.2d 298, 300-301, 514 N.Y.S.2d 819, 821-822 (1987).

It has long been the rule in this state that the trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his own interests where necessary. *St. Paul Fire and Marine Ins. Co. v. Truesdell Distributing Corp.*, 207 Neb. 153, 157, 296 N.W.2d 479, 483 (1980).

State ex rel. Nebraska State Bar Ass'n v. Douglas:

[R]espondent was the elected Attorney General of the State of Nebraska. … The charge in count I embodies, in part, an allegation that respondent engaged in conduct which involved "dishonesty, fraud, deceit, or misrepresentation."

"Although the general rule is that 'one party to a transaction has no

duty to disclose material facts to the other,' and [sic] exception to this rule is made when the parties are in a fiduciary relationship with each other."(citations omitted) When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud. See 37 C.J.S. *Fraud* § 16d (1943).

Regarding the law of trusts and disclosure by a fiduciary, we have said: "It is the duty of a trustee to fully inform the cestui que trust [beneficiary] of *all* facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests." (Emphasis supplied.) (citations omitted).

Throughout the United States, public officers have been characterized as fiduciaries and trustees, charged with honesty and fidelity in administration of their office and execution of their duties. See, (citations omitted). See, also, (citation omitted) (member of county board; public officials "owe a fiduciary duty to the people they represent"); (citation omitted) (state land commissioner; "The relationship between a state official and the state is that of principal and agent and trustee and cestui que trust"); (citation omitted) (sheriff; "A public office is a public trust. Such offices are created for the benefit of the public, not for the benefit of the incumbent").

"An affirmative statement is not always required, however, and fraud may consist of the omission or concealment of a material fact if accompanied by the intent to deceive under circumstances which create the opportunity and duty to speak." (citations omitted). See, also, (citation omitted) (fraud may arise not only from misrepresentation but from concealment as well, where there is suppression of facts which one party has a legal or equitable obligation to communicate to another). "Concealment" means nondisclosure when a party has a duty to disclose. See (citation omitted). "*Conceal* means to hide, secrete, or withhold from knowledge of others...." (citation omitted). See, also, (citations omitted). "The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact...." *State v. Copple, supra.*

It is a general principle in the law of fraud that where there is a duty to speak, the disclosure must be full and complete. **It is firmly established that a partial and fragmentary disclosure, accompanied with the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect, it is. Telling half a truth has been declared to be equivalent to concealing the other half. Even though one is under no obligation to**

speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all, he must make a full and fair disclosure. Therefore, if one wilfully conceals and suppresses such facts and thereby leads the other party to believe that the matters to which the statements made relate are different from what they actually are, he is guilty of a fraudulent concealment. 37 Am.Jur.2d *Fraud and Deceit* § 151 at 208-09 (1968).

Moreover, where one has a duty to speak, but deliberately remains silent, his silence is equivalent to a false representation.

> See, *Security St. Bk. of Howard Lake v. Dieltz,* 408 N.W.2d 186 (Minn.App.1987); *Callahan v. Callahan,* 127 A.D.2d 298, 514 N.Y.S.2d 819 (1987); *Holcomb v. Zinke,* 365 N.W.2d 507 (N.D.1985); *Anderson v. Anderson,* 620 S.W.2d 815 (Tex.Civ.App.1981); 37 C.J.S. *Fraud* § 16a (1943).

In passing upon the propriety of action by a commission council, the Supreme Court of Louisiana, in (citation omitted), stated: "Public officials occupy positions of public trust.... The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests."

As expressed in (citation omitted): "A public official is a fiduciary toward the public ... and if he deliberately conceals material information from them he is guilty of fraud."

"To reveal some information on a subject triggers the duty to reveal all known material facts." (citations omitted): "As expressed in 37 Am.Jur.2d, *supra,* § 150 at 207-08: A party of whom inquiry is made concerning the facts involved in a transaction must not, according to well-settled principles, conceal or fail to disclose any pertinent or material information in replying thereto, or he will be chargeable with fraud. The reason for the rule is simple and precise. Where one responds to an inquiry, it is his duty to impart correct information. Thus, one who responds to an inquiry is guilty of fraud if he denies all knowledge of a fact which he knows to exist; if he gives equivocal, evasive, or misleading answers calculated to convey a false impression, even though they are literally true as far as they go; or if he fails to disclose the whole truth."

State ex rel. Nebraska State Bar Ass'n v. Douglas, 227 Neb. 1, 23-26, 416 N.W.2d 515, 529-531, (1987)

End of citations from: *State ex rel. Nebraska State Bar Ass'n v. Douglas.*

Incident to said trust ["A public office is a public trust"]: 'They stand in a fiduciary relationship to the people (by) whom they have been elected and appointed to serve.' (citation omitted) The relationship between a state official and the State is that of principal and agent and trustee and cestui que trust. The relationship has been described as founded in the common law. (citations omitted) 'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.' (citation omitted). *Fuchs v. Bidwill*, 31 Ill.App.3d 567, 570, 334 N.E.2d 117, 120 (1975).

As duly elected public officials serving their constituencies in Plaquemines Parish, Judge Perez, Leander Perez, Jr., and Chalin Perez were bound to exercise their official functions with the utmost degree of honesty and fidelity. Public officials occupy positions of public trust. Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the protection, safety, prosperity, and happiness of the people; and not the profit, honor, or private interest of any one man, family, or class of men. And, of course, we subscribe to the principle that a public officer owes an undivided duty to the public whom he serves and is not permitted to place himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public.

Commenting on the high duty of trust and fidelity owed by public officials, the United States Supreme Court has noted: Law enforcement officials have furthermore been held to a higher responsibility than mere compliance with the law.

A fiduciary relationship has been further described as one that exists "when confidence is reposed on one side and there is resulting superiority and influence on the other."

The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.

Plaquemines Parish Com'n Council v. Delta Development Co., Inc., 502 So.2d 1034, 1039-1040 (1987).

The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. 'Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will

amount to fraud.'

'Cases in which the defendant stands in a fiduciary relationship to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that although the defendant makes no active misrepresentation, this element 'is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is a 'fraud'.''

Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 189, 491 P.2d 421, 429 (1971).

(Syllabus by the Court.)

Steinbeck v. Bon Homme Min. Co.:

One who occupies a fiduciary relation to another in respect to business or property, and who by the use of the knowledge he obtains through that relation, or by the betrayal of the confidence reposed in him under it, acquires a title or interest in the subject-matter of the transaction antagonistic to that of his correlate, thereby charges his title or interest with a constructive trust for the benefit of the latter, which the cestui que trust may enforce or renounce at his option.

The test of such a trust is the fiduciary relation and a betrayal of the confidence reposed, or some breach of the duty imposed under it.

Steinbeck v. Bon Homme Min. Co., 152 F. 333, 334, 81 C.C.A. 441 (1907).

Trice v. Comstock:

Syllabus by the Court. [A case exemplifying non-disclosure by public officers – fiduciaries of the Public Trust – of the presumptive hypothecation of the beneficiary's private property to the corporate State resulting from registration or recordation of said property with the State with benefits and profits to the State and injury to the beneficiary.]

Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.

A violation of this inhibition, and the acquisition by one of the parties, by means of interest or information acquired through the fiduciary relation of any property or interest, which prevents or hinders his correlate in accomplishing the object of the agency, charges the property thus acquired with a constructive trust for the benefit of the latter, which may be enforced or renounced by him, at his option.

The test of such a trust is the fiduciary relation, and a betrayal of the confidence imposed under it to acquire the property. Neither a legal nor equitable interest by either party, during the relation, in the property subsequently acquired, nor authority in either to buy or sell it, nor damage to the party betrayed, nor the existence of the fiduciary relation at the time the confidence is abused, is indispensable to the existence and enforcement of the trust. The existence of the relation, and a subsequent abuse of the confidence bestowed under it for the purpose of acquiring the property, are alone sufficient to authorize the enforcement of the trust.

For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. This inexorable principle of the law is not based upon, nor conditioned by, the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that sagacious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, so that one whose confidence has been betrayed may enforce the trust which arises under this rule of law although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed, although he had no legal or equitable interest in the property, and although his correlate who acquired it had no joint interest in or discretionary power over it. The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation.

And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and cestui que trust, principal and agent, client and attorney, employer and an employee, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his cestui que trust, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. …

But no interest or control of the property to which the agency relates is essential to the raising of the trust. The fiduciary relation and a breach of the duty it imposes are sufficient in themselves. ….

The truth is that the principle of law which controls the determination of this case is not limited or conditioned by the interests, powers, or injuries of the parties to the fiduciary relations. It is as broad, general, and universal as the relations themselves, and it charges everything acquired by the use of knowledge secured by virtue of these trust relations and in violation of the duty of fidelity imposed thereby with a constructive trust for the benefit of the party whose confidence is betrayed. It dominates and controls the relation of attorney and client, principal and agent, employer and trusted employe, as completely as the relation of trustee and cestui que trust. In Greenlaw v. King, 5 Jur. 19, Lord Chancellor Cottenham, speaking of this doctrine, says: ‘The rule was one of universal application, affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest when he had a duty to perform which was inconsistent with the character of a purchaser.‘ In Hamilton v. Wright, 9 Cl. & Fi. 111, 122, Lord Brougham declared that it is the duty of a trustee ‘to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust.‘ And on page 124 he said: ‘Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust.‘ The rule upon this subject was clearly and not too broadly stated in the American note to Keech v. Sandford, 1 White & T. Lead. Case. in Eq. (4th Am. Ed.) p. 62, *page 58, in these words: ‘Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he

becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.' *Trice v. Comstock*, 61 L.R.A. 176, 121 F. 620, 620-627. 57 C.C.A. 646 (1903).

VI. Taking of private property for public use without just compensation

Private property may not be taken for public use without just compensation. As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and "the self-executing character of the constitutional provision with respect to compensation is triggered." When public officers take private property without just compensation they are acting in violation of both federal and state Constitutional limitations, they are acting outside their delegated authority, they are acting in breach of their fiduciary duty, and, they are acting outside the scope of the limitations placed upon the entity for whom they are acting, therefore with respect to the entity for whom they are acting, such as a municipal corporation or government corporation, their acts are ultra vires.

The Fifth Article in Amendment to the Constitution of the United States of America states, in pertinent part: "Nor shall private property be taken for public use without just compensation." *The Constitution of the United States of America, Article in Amendment the Fifth*.

Article I (Declaration of Rights) of the Constitution of The state of Wisconsin states: "Private property for public use. Section 13. The property of no person shall be taken for public use without just compensation therefor."

The Constitution for The state of Wisconsin, Article I. Declaration of Rights.

"Private property. As protected from being taken for public uses, is such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed and tangible nature, capable of being had in possession and transmitted to another, such as houses, lands, and chattels. Homochitto River Com'rs v. Withers, 29 Miss, 21, 64 Am.Dec. 126, Scranton v. Wheeler, 21 S.Ct. 48, 179 U.S. 141, 45 L.Ed. 126."

Black's Law Dictionary, Revised Fourth Edition, page 1382.

We hold that under the facts alleged the plaintiff has stated a claim for relief under *Art. I, sec. 13 of the Wisconsin Constitution*. … [I]n order to trigger the "just compensation" clause there must be a "taking" of private property for public use. A "taking" in the constitutional sense occurs when the government restriction placed on the property " 'practically or substantially renders the property useless for all reasonable purposes.' " *Howell Plaza, Inc. v. State Highway Comm.,* 92 Wis.2d 74, 85, 284 N.W.2d 887 (1979), quoting *Buhler v. Racine County,* 33 Wis.2d 137, 143, 146 N.W.2d 403 (1966). A taking can occur short of actual occupation by the government if the restriction "deprives the owner of all, or substantially all, of the beneficial use of his property." *Howell Plaza, Inc. v. State Highway Comm.,* 66 Wis.2d 720, 726, 226 N.W.2d 185 (1975). However, "[a] taking can occur absent physical invasion only where there is a legally imposed restriction upon the property's use." *Howell Plaza,* 92 Wis.2d at 88, 284 N.W.2d 887.

Zinn v. State, 112 Wis.2d 417, 424, 334 N.W.2d 67, 70-71 (1983).

Because the DNR's ruling, which was within its statutory authority to make, converted Zinn's private property by operation of law into public lands, there can be no dispute that there was a "taking" within the meaning of Art. I, sec. 13. Contrary to the holding of the court of appeals, we find that this ruling which transferred title to Zinn's land to the state constituted a legally imposed restriction on Zinn's property under this court's decision in *Howell Plaza* (1979). It is difficult to conceive of a greater restriction on the property, in the absence of actual physical occupancy, than the loss of title to private land. *Zinn,* 112 Wis2d at 427.

"The language of the Fifth Amendment prohibits the 'tak[ing]' of private property for 'public use' without payment of 'just compensation.' As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and "the self-executing character of the constitutional provision with respect to compensation," *United States v. Clarke,* 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373 (1980), quoting 6 J. Sackman, Nichols' Law of Eminent Domain Sec. 25.41 (rev. 3d ed. 1980), is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded ....".

Zinn, 112 Wis2d at 429.

This case involves … an action against the state to receive the "just compensation" that is constitutionally mandated whenever private property is taken for public use. Once property is taken in the constitutional sense,

just compensation is constitutionally required.

Zinn, 112 Wis2d at 431.

However, sovereign immunity will not bar recovery for a taking, because just compensation following a taking is a "constitutional necessity rather than a legislative dole." In this sense, Article I, § 13 is a self-executing constitutional waiver of sovereign immunity. We therefore determine that sovereign immunity does not bar the plaintiffs' claims under Article I, § 13. (citations omitted)

Wisconsin Retired Teachers Ass'n, Inc. v. Employe Trust Funds Bd., 207 Wis.2d 1, 28, 558 N.W.2d 83, 95 (1997).

The takings clause is a self-executing constitutional provision.

Wisconsin Retired Teachers, 207 Wis.2d at 29.

It is the property owner's loss that Wis. Const. art. I, § 13 compensates.

Wisconsin Retired Teachers, 207 Wis.2d at 30.

VII. Unjust enrichment and Imposition of a constructive trust

When public officers who are fiduciaries of the Public Trust take private property for public use without just compensation in violation of the Constitutions creating the Public Trust(s) and in breach of their fiduciary duty, said public officers unjustly enrich the entity for whom they have acted, thereby giving rise to a constructive trust in favor of, and for the benefit of, the one whose interest has been taken, and against the entity that has been unjustly enriched.

A constructive trust arises where a person clothed with some fiduciary character, by fraud or other action upon his part, gains something for himself [or another] which, except for his act, he would not have procured and which it is inequitable for him, [or the third party, employer or otherwise,] to retain. If one obtains property by such arts, acts, or circumstances of circumvention, imposition, or fraud or by virtue of a confidential relationship and influence under such circumstances that he ought not, according to the rules of equity and good conscience, hold and enjoy the beneficial interest, the court, in order to achieve complete equity, will declare a trust by construction and convert the offending party into a trustee and order him to hold the same subject to a lien or direct him to execute the trust so as to protect fully the rights of the defrauded or deceived party. (Perry on Trusts (6th Ed.) Sec. 166, citations omitted)

Courts of equity declare trusts of this character and recognize equitable liens because of what they deem fraud, either actual or constructive, including acts or omissions in violation of fiduciary obligations. The constructive trust may be one resulting from actual fraud or one in which the existence of confidential relation and subsequent abuse of the confidence reposed produce a result abhorrent to equity.

Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank, 87 F.2d 934, 936 (1937).

Restatement, Restitution, § 1 [1937 - 2011] provides: "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." … "A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation. … a quasi-contractual obligation and a constructive trust closely resemble each other, the chief difference being that the plaintiff in bringing an action to enforce a quasi-contractual obligation seeks to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money, whereas the plaintiff in bringing a suit to enforce a constructive trust seeks to recover specific property."

This court has stated that a constructive trust is an implied trust, arising by operation of law to satisfy the demands of justice. *Hall v. Superior Federal Bank,* 303 Ark. 125, 794 S.W.2d 611 (1990). While a confidential or fiduciary relationship does not in itself give rise to a constructive trust, an abuse of confidence rendering the acquisition or retention of property by one person unconscionable against the other, suffices generally to ground equitable relief in the form of declaration and enforcement of a constructive trust. *Id.,*

J.W. Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 346-347, 836 S.W.2d 853, 20 UCC Rep.Serv.2d 542 (1992).

In 3 Pomeroy, Equity Jurisprudence (4th Ed.) pp. 2397-2401, it is said:

"*A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form.* If one person having money or any kind of property belonging to another in his hands

wrongfully uses it for the purchase of lands, taking the title in his own name, or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name, *in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come,* except into those of a bona fide purchaser for value and without notice; *and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded.* As a necessary consequence of this doctrine, whenever property subject to a trust is wrongfully sold and transferred to a bona fide purchaser, so that it is freed from the trust, the trust immediately attaches to the price or proceeds in the hands of the vendor, whether such price be a debt yet unpaid due from the purchaser, or a different kind of property taken in exchange, or even a sum of money paid to the vendor, as long as the money can be identified and reached in his hands or under his control. *It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrongdoer and the beneficial owner. Whereever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds.*" (Italics ours.)

It appears to us that the foregoing quotation from Pomeroy not only constitutes good logic, but sound law. The court rightly declared a lien upon the property for the amount of the trust fund actually used either in the purchase or in the improvement of the property. 2 Perry on Trusts (5th Ed.) p. 528. *Warsco v. Oshkosh Savings & Trust Co.*, 190 Wis. 87, 208 N.W. 886, 887 (1926).

***Fuchs v. Bidwill*:**

Since 1871, Illinois has had a statute defining the fiduciary nature of public office. (Ill.Rev.Stat.1971, ch. 102, par. 3.) As amended in 1949, it provides: We conclude that the Governmental Ethics Act, effective January 1, 1968, does not create a new obligation but states more explicitly the fiduciary status of a public official which equity has long asserted.

'No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance

of any work in the making or letting of which such officer may be called upon to act or vote. * * * Nor may any such officer take or receive, or offer to take or receive, Either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. * * *' (Emphasis supplied)

The principles of equity related to fiduciary liability do not require the discovery of actual harm or measurable injury to the public. The Restatement of Restitution, s 197, provides that a fiduciary who received profit in violation of his duty: '(H)olds what he receives upon a constructive trust for the beneficiary.'

Comment c explains: 'The rule stated in this Section is applicable although the profit received by the fiduciary is not at the expense of the beneficiary. * * * The rule stated in this Section, like those stated in the other Sections in this Chapter, is not based on harm done to the beneficiary in the particular case, but rests upon a broad principle of preventing a conflict of opposing interests in the minds of fiduciaries, whose duty it is to act solely for the benefit of their beneficiaries.'

Fuchs v. Bidwill, 31 Ill.App.3d 567, 571-572, 334 N.E.2d 117, 120 (1975) (citation omitted)

We believe that the amended complaint adequately pleads **the existence of a fiduciary relationship, the subsequent breach thereof, and sufficient facts, if proven, to justify the imposition of a constructive trust.** Even if we were to find that the pleading lacked specific allegations of fraud and the breach of a fiduciary duty, **the imposition of a constructive trust nonetheless would still be proper. …** The particular circumstances in which equity will impress a constructive trust are as numerous as the modes by which property may be obtained **through bad faith and unconscionable acts**. (County of Cook v. Barrett ; 4 Pomeroy's Equity Jurisprudence s 1045, at 97 (5th ed. 1941).) **A constructive trust is imposed** by a court because the person holding title to property would profit by a wrong or **would be unjustly enriched** if he were permitted to keep the property.

To impose a constructive trust, no fiduciary duty or relationship need exist between the person holding the property and the aggrieved party. "Restitution, by virtue of its adaptability to individual cases on equitable principles may * * * reach situations beyond the grasp of other civil or criminal remedies and do justice on equitable principles * * *. (Citation.)"

Village of Wheeling v. Stavros, 411 N.E.2d 1067, 1070 (1980).

Ross v. Specialty Risk Consultants, Inc.:

¶ 13 …. "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form." *Warsco v. Oshkosh Savings & Trust Co*., 190 Wis. 87, 90, 208 N.W. 886 (1926) (quoting 3 POMEROY, EQUITY JURISPRUDENCE § 1051, at 2397-2401 (4th ed.1918)). It is an equitable device employed to prevent fraud or abuse of a confidential relationship and is implied to accomplish justice. *See In re Massouras' Estate*, 16 Wis.2d 304, 312, 114 N.W.2d 449 (1962).

¶ 14 "In the constructive trust case, the defendant has legal rights in something that in good conscience belongs to the plaintiff." 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(1), at 587-88 (2d ed.1993). "The property is 'subject to a constructive trust,' and the defendant is a 'constructive trustee.' " *Id.* "The defendant is thus made to transfer title to the plaintiff who is, in the eyes of equity, the true 'owner.' " *Id.* "When equity imposes a constructive trust upon an asset of the defendant, the plaintiff ultimately gets formal legal title." *Id.* at § 4.3(2), at 589.

¶ 15 A constructive trust will be imposed only in limited circumstances. Legal title must have been obtained by means of fraud, commission of wrong or by any form of unconscionable conduct and must be held by someone who in equity should not be entitled to it. *See Wilharms v. Wilharms*, 93 Wis.2d 671, 678-79, 287 N.W.2d 779 (1980). It is not necessary that the person against whom the constructive trust is to be imposed be the wrongdoer or know of wrongdoing initially. If other elements for imposing a constructive trust have been satisfied and the holder of legal title is not a bona fide purchaser, a constructive trust may be imposed. *See id.*

¶ 16 A constructive trust imposed on wrongfully obtained property follows the property or its proceeds.

If one person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name, ... equity impresses a constructive trust **upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except into those of a bona fide purchaser for value and without notice; and** the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded**. ...** Wherever one person has wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its

proceeds.

Warsco, 190 Wis. at 90, 208 N.W. 886; *see also Truelsch v. Northwestern Mut. Life Ins. Co.*, 186 Wis. 239, 202 N.W. 352 (1925).[FN7]

FN7. In *Truelsch v. Northwestern Mut. Life Ins. Co.*, 186 Wis. 239, 252, 202 N.W. 352 (1925):

> It would be a signal failure of justice if one who has become a constructive trustee by reason of wrongfully receiving or securing the property of another could escape the consequences of his acts by changing the form of the property thus acquired. Hence, as between him and the *cestui que trust,* the latter may pursue the funds into the new investment and charge that investment with the trust. He may also assert and enforce the same right against third parties to whom the property has been transferred with knowledge of the trust or who have paid no consideration for it, provided the identity of the trust fund can be established.

¶ 17 An interest in land comprehends "every kind of claim to land which can form the basis of a property right." *Weber v. Sunset Ridge*, 269 Wis. 120, 126, 68 N.W.2d 706 (1955) (citations omitted). An action seeking the imposition of a constructive trust may ultimately change legal title. *See* DOBBS, *supra,* at 587-88. It follows, therefore, that a claim for the imposition of a constructive trust on real estate is an action seeking relief that "might confirm or change interests in the real property," as that term is used in WIS. STAT. § 840.10.

¶ 21 That the suit for the constructive trust was filed in Illinois and not Wisconsin is of no consequence. A "court outside this state having personal jurisdiction of a party may order that party to execute a conveyance of real property located in Wisconsin." *Belleville State Bank*, 117 Wis.2d at 577, 345 N.W.2d 405. To be consistent with *Belleville*, we must conclude WIS. STAT. § 840.10 permits a lis pendens to be recorded in connection with an out-of-state suit seeking title or possession of property in Wisconsin by means of a constructive trust.

END: *Ross v. Specialty Risk Consultants, Inc.*, 240 Wis.2d 23, 621 N.W.2d 669, (2000).

In re Massouras' Estate:

The facts in this case call for the imposition of a constructive trust. Such a trust is implied by operation of law as a remedial device for the protection of a beneficial interest against one who either by actual or constructive fraud, duress, abuse of confidence, mistake, commission of a

wrong, or by any form of unconscionable conduct, has either obtained or holds the legal title to property which he ought not in equity and in good conscience beneficially enjoy. Joerres v. Koscielniak (1961), 13 Wis.2d 242, 108 N.W.2d 569; Zartner v. Holzhauer (1931), 204 Wis. 18, 234 N.W. 508, 76 A.L.R. 396; Warsco v. Oshkosh S. & T. Co. (1926), 190 Wis. 87, 208 N.W. 886, 47 A.L.R. 366; Bogart, The Law of Trusts and Trustees, 2d ed., ch. 24, pages 3-10, sec. 471; Davitt, The Elements of Law, Ch. 18, Equity, p. 305; 54 Am.Jur., Trust, p. 167, sec. 218; 89 C.J.S. Trusts § 139, p. 1015.

It was pointed out in Masino v. Sechrest (1954), 268 Wis. 101, 66 N.W.2d 740, and in Nehls v. Meyer (1959), 7 Wis.2d 37, 95 N.W.2d 780, that a constructive trust is a device in a court of equity to prevent unjust enrichment which arises from fraud or abuse of confidential relationship and is implied to accomplish justice. In those cases, the grantee of property would have been unjustly enriched by a repudiation of an agreement. Similarly, here, the petitioner would be unjustly enriched by repudiation of the property settlement. Dean Pound observed, 'Thus constructive trust could be used in a variety of situations, * * * and sometimes to develop a new field of equitable interposition, as in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment.' The Progress of Law, Equity, 33 Harv.Law Rev. 420 (1920). Restatement of Law, Restitution, Constructive Trusts, page 640, sec. 160, states the rule as follows:

'Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.'

In re Massouras' Estate, 16 Wis.2d 304, 312-313, 114 N.W.2d 449, 453 (1962).

"When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." …

The constructive-trust device (a legal fiction if ever there was one) is ordinarily used to require a person who has acquired property by fraud or other misconduct to convey it to the true owner. …

But in Illinois, as in many other jurisdictions, constructive-trust principles apply with equal force to public fiduciaries. *U.S. v. Holzer*, 840 F.2d 1343, 1346-1347 (1988).

VIII. Disgorgement

An accounting is essentially an equitable remedy which is civil in nature. It is an extraordinary remedy, in which the court retains jurisdiction until the final determination, in order to render a comprehensive final judgment. An equitable accounting is a restitutionary remedy, designed to prevent unjust enrichment by requiring the disgorgement of any benefit or profit received as a result of a breach of fiduciary duty. While an accounting for profits is one of a category of traditionally restitutionary remedies in equity, and is often invoked in conjunction with a constructive trust, the two remedies differ, in that one seeking an equitable accounting rather than a constructive trust need not identify a particular asset or fund of money in the defendant's possession to which the plaintiff is entitled. An accounting implies that one is responsible to another for money or property, as a result of a fiduciary relation. The right to an equitable accounting arises generally from the respondent's possession of money or property, which, because of the fiduciary relationship with the complainant, the respondent is obliged to surrender.

"In all of these cases, only full disgorgement satisfies the principle of preventing unjust enrichment, and the remedy, though harsh, advances the goal of deterring others from inducing governmental employees to violate their public trust.

A rule of full disgorgement is also supported by these four cases. In *SEC v. Commonwealth Chem. Sec., Inc.,* 574 *F.*2d 90 (2d Cir.1978), Judge Friendly said that "the primary purpose of disgorgement is not to compensate investors. Unlike damages it is a method of forcing a defendant to give up the amount by which he was unjustly enriched...." *Id.* at 102. In *SEC v. Wang,* 944 *F.*2d 80 (2d Cir.1991), the court said that disgorgement "seeks to deprive the defendants of their ill-gotten gains to effectuate the deterrence objectives of the securities laws."

Id. at 85. *County of Essex v. First Union Nat. Bank*, 373 N.J.Super. 543, 552-553, 862 A.2d 1168.

This was not an action at law for conversion. Rather, it was an equity suit *for restitution …* who sought … "disgorgement" of their ill-gotten gains … The object of restitution is to put the parties back into the position in which they were before the tainted transaction occurred. Restitution can be had by harnessing either doctrines that have their origin in the common law or those which spring from the equity side of our jurisprudence. The unifying theme of various restitutionary tools is the prevention of unjust enrichment. Equity courts have fashioned the fiction of a constructive trust in order to force restitution from one who was unjustly enriched. The

Restatement of Restitution also uses the constructive trust device to explain the essence of this relief. It starts with the general principle that restitution will be available whenever one has received a benefit to which another is justly entitled. The inequity of retaining a benefit can spring from a variety of sources, such as fraud or other unconscionable conduct in which the recipient has received a benefit for which he has not responded with a quid pro quo. The remedy in restitution rests on the ancient principles of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to "disgorge" his gains. Disgorgement is designed to deprive the wrongdoer of *all gains flowing from the wrong rather than to compensate the victim of the fraud.* In modern legal usage the term has frequently been extended to include a dimension of deterrence. Disgorgement is said to occur when a "defendant is made to 'cough up' what he got, neither more nor less." From centuries back equity has compelled a disloyal fiduciary to "disgorge" his profits. He is held chargeable as a constructive trustee of the ill-gotten gains in his possession. A constructive trustee who consciously misappropriates the property of another is often refused allowance even of his actual expenses. Where a wrongdoer is shown to have been a conscious, deliberate misappropriator of another's commercial values, gross profits are recoverable through a restitutionary remedy. *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 852, 55 USLW 2494, 1987 OK 14.

Restitution based upon unjust enrichment cuts across many branches of the law, including contract, tort and fiduciary relationship. See 1 Palmer, The Law of Restitution § 1.1, p. 2 [1978]. *Id.* at 852.

Restatement, Restitution, § 1 [1937 - 2011] provides: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Id.* at 852.

Vorlander v. Keyes:

One who, acting in a fiduciary capacity, secretly and wrongfully, and therefore fraudulently, uses fiduciary funds to purchase real estate or personal property, including policies of life insurance, for his own benefit and puts it in his own name, takes the title and interest in it as a trustee ex maleficio for the owner of the misappropriated funds he thus uses, the cestui que trust. The equitable ownership and title of the misappropriated funds and the fruits thereof remain in the cestui que trust as long as they can be traced, and the trustee holds nothing but the naked title for the exclusive benefit of the cestui que trust.

In equity, not only the property which the trustee acquires with the

misappropriated funds, but all its fruits, in every form, its increase, its income, other property acquired by the trustee by the exchange or use of it in any way, become, at the option of the cestui que trust, his property, unless it has passed into the hands of a bona fide purchaser for value without notice of the misappropriation.

In no event is the trustee ex maleficio entitled in equity to any benefit to himself from the use of the trust funds. Public policy forbids that one who has corruptly thrust himself into the position of a trustee shall profit by his fraud.

Nor may another, in this case the wife, now the widow of the trustee ex maleficio, though herself innocent of the fraud, who has paid no consideration for the property purchased with the misappropriated funds or for their fruits, hold any of them against the cestui que trust, the owner thereof. A third person, unless he or she has in good faith acquired for value without notice a subsequent interest, seeking any benefit resulting from the misappropriation becomes a particeps criminis however innocent of the fraud in the beginning. Story's Equity Jurisprudence (14th Ed.) Secs. 1666, 1667, 1668, 1669, 1670; Perry on Trusts, Secs. 127, 166.

Vorlander v. Keyes, 1 F.2d 67, 69-70 (1924).

IX. Value of Private Property

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government; the last (the one in point here) being: 'Nor shall private property be taken for public use without just compensation.' *Monongahela Nav. Co. v. U S*, at 326.

"The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the `just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such `compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so."

What amount of compensation for each separate use of any particular property may be charged is sometimes fixed by the statute which gives

authority for the creation of the property; sometimes determined by what it is reasonably worth; and sometimes, if it is purely private property, devoted only to private uses, the matter rests arbitrarily with the will of the owner.

Monongahela Nav. Co. v. U S, 148 U.S. 312, 328-329, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

X. Quo Warranto

The common-law remedy of quo warranto is employed either to determine the right of an individual to hold public office or to challenge a public official's attempt to exercise some right or privilege derived from the state. It is a legal inquiry into the permission of a public official to perform acts about which complaint is made. It is also used to question the existence of a public corporation or district and its right to act.

When used by a governmental body, quo warranto is a remedy or proceeding by which the sovereign or state determines the legality of a claim that a party asserts to the use or exercise of an office or franchise. It ousts the holder from its enjoyment if the claim is not well-founded or if the right to enjoy the privilege has been forfeited or lost. Quo warranto proceedings are used by the State to protect itself and the good of the public through agents of the state who control the proceedings. Quo warranto demands that an individual or corporation show by what right it exercises some franchise or privilege appertaining to the state that, according to the constitution and laws of the land, it cannot legally exercise except by virtue of grant or authority from the state. Quo warranto is intended to prevent the exercise of powers that are not conferred by law.

It is an ancient common-law writ and remedy to determine the right to the use or exercise of a franchise or office and to oust the holder from its enjoyment if he or she has forfeited his or her right to enjoy the privilege. Primarily, the remedy of quo warranto belongs to the state, to protect the interests of the people as a whole and guard the public welfare. It is a preventative remedy addressed to preventing a continuing exercise of an authority unlawfully asserted rather than to correcting what has already been done under that authority.

Quo Warranto - Wisconsin:

Such action may be brought in the name of the state by a private person on personal complaint when the attorney general refuses to act or when the office usurped pertains to a county, town, city, village, school district or technical college district. *Wis. Stats. § 784.04*.

When a defendant against whom an action has been brought under this chapter shall be adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from the office, franchise or privilege and that the plaintiff recover costs against the defendant.

Wis. Stats. §784.13, Quo Warranto.

The question presented is one of law: Who, *under the law*, is entitled to hold and exercise the office?

At common law, an officer could only be removed for cause and after a hearing. Throop on Public Officers, sec. 362, p. 358. This was because at common law in England, a public office was considered as an incorporeal hereditament grantable by the Crown in which the holder acquired and had an estate. 42 Am.Jur., Public Officers, sec. 9, p. 886.

That conception of a public office does not obtain in this country. Here a public office is considered a public trust. (citation omitted) 'With us, a public office has never been regarded as an incorporeal hereditament, or as having the character or qualities of a grant. That a public office is the property of him to whom the execution of its duties is intrusted is repugnant to the institutions of our country, and at issue with that universal understanding of the community which is the result of those institutions. With us, public offices are public agencies or trusts, and the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them. The right, it has been said, is not the right of the incumbent to the place, but of the people to the officer. * * * The incumbent has no vested right in the office which he holds, * * *' 42 Am.Jur., Public Officers, sec. 9, pp. 886, 887. 'Public officers, in other words, are but the servants of the people, and not their rulers.' 42 Am.Jur., Public Officers, sec. 8, p. 885.

State ex rel. Bonner v. District Court of First Judicial Dist. in and for Lewis and Clark County, 122 Mont. 464, 470, 206 P.2d 166, 169 (1949).

Chief Justice Vanderbilt described the role of public officers holding positions of public trust in *Driscoll v. Burlington-Bristol Bridge Co.,* 8 *N.J.* 433, 86 *A.*2d 201 (1952):

> They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. (Citations omitted.) As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of

their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. [at 474-475, 86 *A.*2d 201] (citations omitted.)

And, at 476, 86 *A.*2d 201, said:

These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign.

Recently that language was referred to by Judge Baime in *State v. Gregorio,* 186 *N.J.Super.* 138, 451 *A.*2d 980 (Law Div.1982), who further stated:

Perhaps it bears repeating that our government is founded upon trust. We entrust those who govern with broad powers to formulate and implement public policy and "we have faith that they will properly perform their obligation." Hyland, "Combatting Official Corruption in New Jersey", 3 *Crim.J.Q.* 164 (1975).... These principles are not mere platitudes. They represent the first rule of good government. [at 143, 451 *A.*2d 980]. ….

…. For all of the foregoing reasons the court has concluded that defendant has failed to show good cause why the forfeiture of his offices should be stayed. Accordingly, a judgment will be entered in favor of plaintiff declaring that defendant Robert C. Botti forfeited his office …. *State v. Botti*, 189 N.J.Super. 127, 140, 458 A.2d 1333, 1340-1341 (1983).

XI. Constitution As the Enduring Foundation of Law

In England there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision.

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the

death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.

Such an act would be a monster in legislation, and shock all mankind. The legislature, therefore, had no authority to make an act devesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution. In short, it is what every one would think unreasonable and unjust in his own case.

Omnipotence in Legislation is despotism. According to this doctrine, we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our landed property at the mere pleasure of the Legislature. Wretched situation, precarious tenure! And yet we boast of property and its security, of Laws, of Courts, of Constitutions, and call ourselves free!" *VanHorne's Lessee v. Dorrance*, 2 U.S. 304 (1795).

XII. Origin of Complainant's Private Land

In 1776 when our American Founding Fathers threw off the yoke of tyranny from the Old World and declared freedom in the New World they gave recognition to the truth that men are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and Property. And, that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Definitive Treaty of Peace signed September 3, 1783 contains recognition of the independence of the states of the United States of America as declared in 1776, and in Article II declares the geographical boundaries of the United States. Complainant's private land is situated within those geographical boundaries, and more specifically within the

territory governed under the *Ordinance of 1787: The Northwest Territorial Government*, established prior to the adoption of the Constitution for the United States of America.

The unappropriated lands recognized by the Definitive Treaty of Peace were held in trust by the United States *for the people* of the United States, the majority of which was subsequently sold to the people.

Article II of the "Northwest Ordinance" states, in pertinent part, "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be paid for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed."

On August 7, 1789, in the First Session of Congress, in 1 Stat. 50 ch. 8, Congress adopted the "Northwest Ordinance" in an Act titled "*An Act to provide for the Government of the Territory North-west of the river Ohio."* Thus, immediately after the adoption of the Constitution for the United States of America, Congress proclaimed that a man's property could not be taken for public use without full compensation, and, that no law could ever be enacted or enforced that would interfere with or affect *private contracts*. Complainant's private land was sold and conveyed out of the public domain by the United States of America in just such a private contract, *termed a Land Patent*, which can never be interfered with, without violating 1 Stat. 50 and Article I, Section 10, Clause 1 of the Constitution for the United States of America which prohibit impairing the Obligation of Contracts.

On April 24, 1820, the Congress of the United States enacted "*An act making further provision for the sale of public lands*" which set forth the terms and conditions for the sales. Complainant's private land was part of the public lands sold by the United States of America pursuant to the Act of April 24, 1820. Land Patents for the lands, of which Complaint's private lands are a subset, were issued by the United States of America on August 10, 1837 and December 10, 1840. *Both Land Patents were issued prior to the incorporation of Wisconsin into the Union in 1848*. Both Land Patents, of which Complainant is "heir" or assignee, are contracts executed, and are protected by the constitutional prohibition against the impairment of the obligation of contracts.

The relevant and operative provisions of both of the Land Patents of which Complainant is heir or assignee are as follows:

> *"NOW KNOW YE. That the United States of America, in consideration of the Premises, and in conformity with the several acts of Congress, in such case made and provided, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said [Grantees named William Jones and George Chamberlain, respectively] and to his heirs, the said tract above described: TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging, unto the said [respective Grantee] and to his heirs and assigns forever."*

As evidenced by an Abstract of Title, by and through the Land Patent bearing Certificate No. 1435 dated August 10, 1837 issued to William Jones by the United States of America, Complainant is heir and assignee as follows:

> The United States of America to William Jones; William Jones and Anna, his wife, to Joseph. H. Dwight; Joseph H. Dwight to John P. Huntington; William H. Huntington as Administrator of the estate of John P. Huntington to Charles Walker; Charles Walker and Nancy B., his wife to Rufus Washburn; Rufus Washburn to William B. Walker; William B. Walker to John Jacob Graf and Margaretta Graf, his wife; John Jacob Graf et al. heirs of Margaretta Graf, deceased to Chas. G. Meyer, administrator of said Estate; Chas. G. Meyer Administrator of the estate of Margaretta Graf, deceased, to Philipp Greeneisen; Philipp Greeneisen to Michael E. Harrington and Helen I. M. Harrington, his wife; Michael E. Harrington and Helen I. M. Harrington, his wife to Harry W. Bolens; Harry W. Bolens to Ella Hill Bolens; Ella Hill Bolens to Gilbert M. Schucht and Virginia Schucht, his wife; Gilbert M. Schucht and Virginia Schucht, his wife, to Dolores Fischer; Dolores Fischer to Virginia Schucht; Gilbert M. Schucht and Virginia Schucht, his wife, to Chester W. Browne and Edith A. Brown, his wife; Virginia Schucht to Chester W. Browne and Edith A. Brown, his wife; Chester W. Browne and Edith A. Brown, his wife to Alfred S. Magritz and Betty Jane Magritz, his wife; Betty Jane Magritz to Steven Alan Magritz, Complainant.

The relevant pages of the aforesaid Abstract are an exhibit to, and are incorporated by reference in, Complainant's Affidavit in Support of Complaint.

XIII. The Intent of Congress – Public Land Sales

The intent of Congress is the controlling factor in interpreting any legislation, especially in areas regarding the rights of the people in and to

property. It must be presumed that Congress intended to fully comply with all restrictions and prohibitions placed upon it by the Constitution of the United States of America.

The Senate of the United States set forth the intent of Congress prior to the enactment of 3 Stat. at L. 566, chap. 51, April 24, 1820, titled "*An act making further provision for the sale of public lands*."

The senate debate of March 6, 1820 recorded in *The Debates and Proceedings in the Congress of the United States* reports the following:

> "Mr. [Senator] King, of New York, observed that, if the change of system were favorable to speculators, he should be found in the negative. But, so far from this being the fact, he considered the change as highly favorable to the poor man; and he argued at some length, that it was calculated to plant in the new country a population of independent, unembarressed freeholders; that by offering the lands in eighty-acre lots, it would place in the power of almost every man to purchase a freehold, the price of which could be cleared in three years; that it would cut up speculation and monopoly; that the money paid for the lands would be carried from the State or country from which the purchaser should remove; that it would prevent the accumulation of an alarming debt, which experience proved never would and never could be paid." (emphasis added)

As evidenced by the statements of Senator King, it was the intent of Congress to enable the men in America, who recently had thrown off the yoke of tyranny to become free men, to further become independent landowners free from the bondage of debt as well as free from the feudal obligations and tenures which existed in the Old World. Congress recognized that the free men, the sovereigns on the land, had *the right of property*, in and of themselves, *with no feudal obligations to the state that they had created by and through their own sovereignty*.

FREEHOLD, estates. [Definition] An estate of freehold is an estate in lands or other real property, held by a free tenure, for the life of the tenant or that of some other person; or for some uncertain period. It is called liberum tenementum, frank tenement or freehold; it was formerly described to be such an estate as could only be created by livery of seisin, a ceremony similar to the investiture of the feudal law. But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient.
2. There are two qualities essentially requisite to the existence of a freehold estate. 1. Immobility; that is, the subject-matter must either be land, or some interest issuing out of or annexed to land. 2. A sufficient legal

indeterminate duration; for if the utmost period of time to which an estate can last, is fixed and determined, it is not an estate of freehold. For example, if lands are conveyed to a man and his heirs, or for his life, or for the life of another, or until he shall be married, or go to Europe, he has an estate of freehold; but if such lands are limited to a man for one hundred or five hundred years, if he shall so long live, he has not an estate of freehold. Cruise on Real Property t. 1, s. 13, 14 and 15 Litt. 59; 1 Inst. 42, a; 5 Mass. R. 419; 4 Kent, Com. 23; 2 Bouv. Inst. 1690, et seq. Freehold estates are of inheritance or not of inheritance. Cruise, t. 1, s. 42. Bouvier's LAW DICTIONARY, 1856.

FREEHOLD. [Definition] An estate in land or other real property, of uncertain duration ; that is, either of inheritance or which may possibly last for the life of the tenant at the least, (as distinguished from a leasehold;) and *held by a free tenure*, (*as distinguished from copyhold or villeinage*.) Black's Law Dictionary, page 520, WEST PUBLISHING CO. 1891.

XIV. Right of Property is in the People

Sovereignty, and thus the right of property, resides in the people.

There is a natural order of things in the universe. Our Creator created man. Man formed or established the state (often incorrectly "the government") for the protection of himself and his property. Everything in the natural order of things is subservient to the being who created it. There can be *no exceptions*. In these United States, both the state and federal entities were created by the People. The People themselves retained "sovereignty" under the true Sovereign, our Creator, even though they delegated some of their power to their creatures for the purpose of protecting their rights.

The people created constitutional republics via the founding documents called constitutions. "*All that government does and provides legitimately is in pursuit of its duty to provide protection for private rights*."

(*Wynhammer v. People*, 13 N.Y. 378.)

"Sovereignty itself is, of course not subject to laws for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, *sovereignty itself remains with the people, by whom and for whom all government exists and acts*. And the law is the definition and limitation of power."

(*Yick Wo v. Hopkins*, 118 U.S. 356 (1886))

"…at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are *sovereigns without subjects* - with none to govern but themselves …"

(*Chisholm v. Georgia*, 2 Dall 419 (1793)). (emphasis added)

President James Monroe, in his Second Inaugural Address, March 5, 1821 stated: "…a government which is founded by the people, who possess exclusively the sovereignty…" "In this great nation there is but one order, that of the people, whose power, by a peculiarly happy improvement of the representative principle, is transferred from them, without impairing in the slightest degree their sovereignty, to bodies of their own creation, and to persons elected by themselves, in the full extent necessary for all the purposes of free, enlightened and efficient government. The whole system is elective, the complete sovereignty being in the people, and every officer in every department deriving his authority from and being responsible to them for his conduct."

In Europe, the Executive is almost synonymous with the Sovereign power of a State; … Such is the condition of power in that quarter of the world, where it is too commonly acquired by force, or fraud, or both, and seldom by compact. In America, however, the case is widely different. Our government is founded upon compact. Sovereignty was, and is, in the people.

The Betsey, 3 U.S. 6, 13 (1794).

[T]hen the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, 'We the people of the United States, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. …

If then it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State, it may be useful to compare these sovereignties with those in Europe, …

It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; …The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such

ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.

From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their Princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

Chisholm v. Georgia, 2 U.S. 419, 470, 471, 472 (1793).

These references clearly show the right to dispose of real estate, by will in *England,* previous to the statute of *Henry* the eighth. And it is worthy of remark, that while this right continued, the tenure by which lands were held in *England* was allodial; the precise tenure by which they are held here.

All tenures of land granted by the people of this state, &c. shall be and remain allodial and not feodal. (1 *R. L.* 71.)

Allodium, as defined by *Blackstone,* is the land possessed by a man in his own right, without owing any rent or service to any superior. (2 *Bl. Com.* 104.)

The absolute rights of each individual are the right of personal security, the right of personal liberty, and the right of private property. (3 *Bl. Com.* 119.)

It is the last, that of private property, which has been invaded by the exception in the statute concerning wills.

The very definition of municipal law limits the power of the legislature to commanding what is right, and prohibiting what is wrong.

If the legislature can restrain us as it respects our charitable donations, they may also compel us to make them; for whatever is a

subject of legislation may be commanded as well as prohibited.

And if the legislature can declare a devise to the *Orphan Asylum* invalid, they may, upon the same principle, make us pay tithes of all we possess.

This is a free representative government; and one of the prominent features by which it is distinguished from a despotic one is, the preservation and protection of individual right; for it can make no difference with the citizen what the form of government is that oppresses him, and deprives him of his right; whether it consists of one tyrant or 160, if his suffering and deprivation are the same.

It is difficult to conceive on what principle men elected by the people for public purposes, can limit and restrain individuals in the exercise of their legitimate rights.

If individuals give up any part of their rights by becoming members of society, it is that they may obtain protection for such as remain; and on the same principle that allegiance is demanded by the government, protection is claimed by the citizen; and if not granted, the original compact is broken.

If courts of justice have occasion to advert to first principles, the object should be the protection of individual right; and not to confirm legislative usurpation. And in a government founded on principle, it is the duty of the judiciary department to decide in favor of individual right, when it is required to be done, on fundamental principles, though it should be to declare invalid an act of the legislature. The contest which ended in the separation of these *United States* from *Great Britain,* was a contest for individual right, intended to be secured by the constitution of the *United States.* But of what avail is it, that no law shall be passed impairing the obligation of a contract, or that private property shall not be taken for public use, without a just compensation, if the paramount right to dispose of our property by will is denied us?

McCartee v. Orphan Asylum Soc., 9 Cow. 437, (1827). (emphasis added).

The people of this state, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the king by his prerogative.

Lansing v. Smith, 4 Wend. 9, 20 (1829).

Gaines v. Buford, Judge Nicholas:

The patentee having held the title free from any such condition at the

time of the adoption of the federal constitution, no act of either government, or of both of them combined, could, thereafter, superadd that, or any other new term, to the contract growing out of the patent, without the assent of the patentee. The federal constitution, at its adoption, clothed the contract with an inviolable sanctity that could not be infringed by any legislation of either of the states, or by any compact thereafter entered into between them. For nothing can be better settled by authority than that an executed contract, such as a grant, comes as fully within the constitutional protection, as any executory contract, and that it makes no difference that a state is one of the parties to the contract. Judge Nicholas, in *Gaines v. Buford*, 1 Dana 481, 31 Ky. 481 (1833). (emphasis added)

Gaines v. Buford, Judge Underwood:

I think no inference drawn from the fourth condition of the compact, can sustain the act in question, when applied for the purpose of forfeiting lands unconditionally granted to individuals in fee simple. Lands thus granted become the absolute property of the grantee, in virtue of a contract made with the government, of which the patent is the evidence. I know of no principle which will allow the government, any more than an individual, after fairly selling and conveying land, to take back the land and resume the title, at its own pleasure against the assent of the grantee. Neither am I acquainted with any principle which will allow the government to annex new conditions, unknown at the time of the original contract; and for a violation of them seize the land, divest the citizen of his title, and retain the consideration which the citizen paid or rendered, without remunerating him therefor. Those constitutional provisions, which were intended to secure the inviolability of contracts, apply as well to contracts made between the government of a State and its citizens, as to contracts between individuals. In the nature of things there is as much reason for providing that a State shall not impair the obligation of its own contracts, as to provide that it should not impair the obligation of contracts between individuals. Indeed, there is greater necessity for putting a State under restrictions in regard to her own contracts, than in relation to the contracts of individuals; for as it respects the contracts of individuals, a State may be considered as impartial; but concerning its own contracts, it may be affected by a principle of selfishness. It is enough, however, that the constitution of the United States and of this State makes no distinction between contracts to which the State is a party, and those to which she is not. If, therefore, the grant or patent to Harvie, should be considered in the light of a contract, by which Virginia transferred her title to him, Virginia, and consequently Kentucky, claiming under Virginia, can no more resume the title, without the assent of Harvie, or those claiming under him, than Harvie could take it from Barrett and Duvall, to whom he conveyed, or from those claiming under him, without their assent.

The patent of Harvie, made the subject of forfeiture in this case, was founded on land office treasury warrants, and these were granted in consideration of money paid into the public treasury. The patent upon its face is unconditional, and purports to grant or convey the land in consideration of land warrants. I think the act in question violates that clause in the constitution of the United States which prohibits every State in the union from passing laws impairing the obligation of contracts, and likewise that clause in our State constitution which declares that no law impairing contracts shall be made. That the steps taken by Harvie to obtain the patent, and the issuing thereof to him, amounted to a contract between him and the State, can admit of no doubt. The point is settled alike by reason and authority. Fletcher v. Peck, 6 Cranch, 87; 2 Cond. Rep. 308; New Jersey v. Wilson, 7 Cranch, 164; 2 Cond. Rep. 457; Town of Pawlet v. Clarke &c. 9 Cranch, 292; 3 Cond. Rep. 422; Dartmouth College v. Woodward, 4 Wheaton, 518. These decisions of the supreme court fully establish the position, that the modes adopted by the State governments, whether ordinary letters patent, or acts of assembly, for granting titles to the unappropriated public domain, are contracts within the meaning of the constitution of the United States. The contract in the present case, as intended by the parties, was this, that Harvie and his heirs or assigns should enjoy the land granted, forever, in consideration of so much paid to the State for land warrants. The mode and manner of enjoyment was not prescribed; they were therefore left to the volition of the grantee. His dominion was not limited at the time of his purchase. The use to which he should apply the property, to administer to his happiness, was not then designated. In these matters he was left, by the contract, free. He had as a free man, all those rights and privileges which constitute the birthright of an American citizen.

I do not admit that there is any sovereign power, in the literal meaning of the terms, to be found any where in our systems of government. *The people possess*, as it regards their governments, *a revolutionary sovereign power*; but so long as the governments remain which they have instituted, *to establish justice and "to secure the enjoyment of the right of life, liberty and property*, and of pursuing happiness;" sovereign power, or, which I take to be the same thing, power without limitation, is no where to be found in any branch or department of the government, either state or national; nor indeed in all of them put together. The constitution of the United States expressly forbids the passage of a bill of attainder, or *ex post facto law,* or the granting of any title of nobility, by the general or state governments. The same instrument likewise limits the powers of the general government to those expressly granted, and places many other restrictions upon the power of the state governments. The constitutions of the different states

likewise contain many prohibitions and limitations of power. The tenth article of our state constitution, consisting of twenty eight sections, is made up of restrictions and prohibitions upon legislative and judicial power, and concludes with the emphatic declaration, "that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void." These numerous limitations and restrictions prove, that the idea of sovereignty in government, was not tolerated by the wise founders of our systems. "Sovereign state" are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is an appropriate phrase when applied to an absolute despotism. I firmly believe, that the idea of sovereign power in the government of a republic, is incompatible with the existence and permanent foundation of civil liberty, and the rights of property. The history of man, in all ages, has shown the necessity of the strongest checks upon power, whether it be exercised by one man, a few or many. Our revolution broke up the foundations of sovereignty in government; and our written constitutions have carefully guarded against the baneful influence of such an idea henceforth and forever. Judge Underwood, in *Gaines v. Buford*, 1 Dana 481, 31 Ky. 481 (1833). (emphasis added)

The sovereignty of a state does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state governments. *Spooner v. McConnell*, 22 F.Cas. 939, 943 (1838).

The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights. *Hale v. Henkel*, 201 U.S. 43, 74 (1906).

XV. Prohibition Against Impairing the Obligation of Contracts, and, The Inviolability of Land Patents Issued by

The United States of America

Complainant's private land and private property does not belong to the body politic of the State of Wisconsin. A Land Patent is an express contract, and when granted by the United States of America prior to statehood, is enforceable against the subsequent State. Any subsequent restriction imposed by the State on the use or possession of said private property constitutes an absolutely prohibited impairing of the Obligation of Contracts.

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination *to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed*. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. *Fletcher v. Peck*, 10 U.S. 87 (1810). (emphasis added).

Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries; and this right must remain, until it yields it up by compact or conquest. When once a title to lands is asserted under the laws of a territory, the validity of that title can be judged of by no other rule than those laws furnish, in which it had its origin; for no title can be acquired contrary to those laws: and a title good by those laws cannot be disregarded but by a departure from the first principles of justice.

Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property.

The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.

Having thus endeavoured to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the duty, not less than the power of this Court, as well as of every other Court in the Union, to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken; and that those decisions entirely cover the present case.

The principles laid down in [*Fletcher* v. *Peck*] are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.

Green v. Biddle, 21 U.S. 1 (1823). (emphasis added).

In Virginia, the patent is the completion of title, and establishes the performance of every pre-requisite. No inquiry into the regularity of these preliminary measures which ought to precede it, is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud; not legal and technical, but actual and positive, fraud in fact, committed by the person who obtained it; and even this is questioned.

This court said, 'It is not doubted that a patent appropriates the land. Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all whose rights did not commence previous to its emanation.' *Stringer v. Young's Lessee*, 28 U.S. 320 (1830). (emphasis added).

It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.

> Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 14 S. Ct. 548, 38 L. Ed. 331; Scott v. Lattig, 227 U. S. 229, 242, 33 S. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63, 41 S. Ct. 237, 65 L. Ed. 500; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 43 S. Ct. 60, 67, L. Ed. 140.
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> *U.S. v. Holt State Bank*, 270 U.S. 49, 54, 55 (1926.)

Still, we are of opinion the patent would have been the better legal title … and having obtained the patent, Robertson had the best title, (to wit, the fee,) known to a Court of law.

Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal

government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance, the fee is in the government, which, by the patent, passes to the grantee; and he is entitled to recover the possession in ejectment.

All who claim under a patent are entitled to the same rights as the patentee.

Bagnell v. Broderick, 38 U.S. 436 (1839). (emphasis added).

A legislative act, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act. Such repealing act being void under that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.

He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it. *State v. Wilson*, 11 U.S. 164 (1812). (emphasis added).

The decision of the Register and Receiver of a land office, in the absence of fraud, would be conclusive as to the facts that the applicant for the land was then in possession, and of his cultivating the land during the preceding year, because these questions are directly submitted to those officers.

Appropriation of land by the government is nothing more or less than setting it apart for some particular use.

Whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands: and no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it: although no other reservation were made of it.

Nothing passes a perfect title to public lands, with the exception of a few cases, *but a patent*. The exceptions are, where Congress grants lands, in words of present grant. The general rule applies as well to pre-emptions as to other purchases of public lands.

A state has a perfect right to legislate as she may please in regard to the remedies to be prosecuted in her Courts; and to regulate the disposition of the property of her citizens, by descent, devise, or alienation. But Congress are invested, by the Constitution, with the power of disposing of the public land, *and making needful rules and regulations respecting it*.

Where a patent has not been issued for a part of the public lands, a state has no power to declare any title, less than a patent, valid against a claim of the United States to the land; or against a title held under a patent granted by the United States.

Whenever the question in any Court, state or federal, is, whether the title to property which had belonged to the United States has passed, that question must be resolved by the laws of the United States. But whenever the property has passed, according to those laws, then the property, like all other in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States. *Wilcox v. Jackson ex dem. McConnel*, 38 U.S. 498 (1839).

The subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are exempt from taxation. *McCulloch* v. *The State of Maryland*, 4 Wheat., 316. The power of legislation, and consequently of taxation, operates on all the persons and property *belonging* to the body politic. Citing *Providence Bank* v. *Billings & Pitman*, 4 Pet., 563.

The exemption extends to the lands in controversy, unless the inchoate title acquired by the applicant for the purchase of them subjects them to taxation.

The patents issued by the United States for the public lands contain the words ‘give and grant.’ These words imply a warranty. See Cai. (N. Y.), 188; 7 Johns. (N. Y.), 258; 8 Cow. (N. Y.), 36; 1 Co., 384 a; 4 Kent Com. (ed. of 1844,) 474, and cases there cited. If the complainant can be compelled to pay these taxes, he has a right to be reimbursed by the United States.

Carroll v. Safford, 44 U.S. 441, (1845). (emphasis added).

The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself.

The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally. This principle was laid down in the case of M'Cullough *vs.* The State of Maryland, and in Osborn et al. *vs.* The Bank of the United States. Both those cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation, than an unincorporated company would be, carrying on the same business. [A Land Patent is an express contract, and when granted before statehood, is enforceable against the State].

Providence Bank v. Billings, 29 U.S. 514 (1830). (emphasis added).

It is not material to inquire whether the title of the Shawnees would be correctly described by the technical term 'fee simple.' The true test is, what was the *intention* of the parties, as derivable from the treaty and the provisions of the patent, all taken together, considered with reference to circumstances existing at the time they were made and issued. [Lands held in severalty by individual Indians under patents issued under the treaties of 1854, 10 Stat. 1053, 1082, 1093, with the Shawnee, Miami, and Wea tribes are not taxable by the state.]

In re Kansas Indians, 72 U.S. 737 (1866). (emphasis added).

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee.

Packer v. Bird, 137 U.S. 661 (1891). (emphasis added).

WHEELER v. United States:

The Brewer-Elliott Oil & Gas Company Case and Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331, are cited with approval in United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465, for the holding that:

'It is settled law in this country that lands underlying navigable waters

within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.' *Klais v. Danowski*, 129 N.W.2d 414 (1964). (emphasis added).

The question here is what title, if any, the Osages took in the river bed in 1872 when this grant was made, and that was thirty-five years before Oklahoma was taken into the Union and before there were any local tribunals to decide any such questions. As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a federal question. The title of the Indians grows out of a federal grant when the Federal government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a nonnavigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title. It is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission, under the constitutional rule of equality here invoked.

It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee. Brewer-Elliott Oil & Gas Co. v. U.S., 260 U.S. 77 (1922). (emphasis added).

First, in 1891, the court concluded that title to an unsurveyed 80- acre island in a navigable river remained in the United States even after the government transferred title to the adjacent riparian tracts. *Packer v. Bird,* 137 U.S. 661, 673, 11 S.Ct. 210, 213, 34 L.Ed. 819 (1891). The court found that state law applies to "whatever incidents or rights attach to the ownership of property conveyed by the government ... subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee."

WHEELER v. United States, 770 F.Supp. 1205 (1991). (emphasis added).

It is very clear, that in the form in which this case comes before us (being a writ of error to a state court), the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle, that the law divests vested rights. It is well settled, by the decisions of this court, that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. In *Satterlee* v. *Matthewson*, 2 Pet. 413, this court, in speaking of the state law then before them, and interpreting the article in the constitution of the United States which forbids the states to pass laws impairing the obligation of contracts, uses the following language: 'It (the state law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument' (the constitution of the United States).

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837). (emphasis added).

The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. … But, in the action of ejectment in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title. … Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until its issuance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment.

Gibson v. Chouteau, 80 U.S. 92 (1871). (emphasis added).

The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. Moore v. Wilkinson, 13 Cal. 478; Beard v. Federy, 3 Wall. 478, 492.

St. Louis Smelting & Refining Co. v. Kemp, 104 U.S. 636 (1881). (emphasis added).

It is among the elementary principles of the law that in actions of ejectment the legal title must prevail. The patent of the United States passes that title. Whoever holds it must recover against those who have only unrealized hopes to obtain it, or claims which it is the exclusive province of a court of equity to enforce. However great these may be they constitute no defense in an action at law based upon the patent. That instrument must first be got out of the way, or its enforcement enjoined, before others having mere equitable rights can gain or hold possession of the lands it covers. This is so well established, so completely imbedded in the law of ejectment, that no one ought to be misled by any argument to the contrary.

It is this unassailable character (of the patent) which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces.

Steel v. St. Louis Smelting & Refining Co., 106 U.S. 447 (1882). (emphasis added).

The case before us is much stronger than the ordinary case of an attempt to set aside a patent, or even the judgment of a court, because it demands of us that we shall disregard or annul the deliberate action of the Congress of the United States. The constitution declares (article 4, § 3) that 'the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property, was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress. Certainly the power of the courts can go no further than to make a construction of what Congress intended to do by the act, which we have already considered, confirming this grant and others.

U.S. v. Maxwell Land-Grant Co., 121 U.S. 325 (1887). (emphasis added).

An act of the state of Maine, which so changes the law of disseisin as to bar a legal title which was good and valid at the time of the passage of the act, is inoperative as against such title, since it takes away a vested right.

The Supreme Court of Maine held, that so far as this act attempted to change the law of disseisin in respect to titles existing when it was passed, the act was inoperative and void, because in conflict with the constitution of that State. … The result of the decision is, that the constitution of the State has secured to every citizen the right of 'acquiring, possessing, and enjoying property;' and that, by the true intent and meaning of this section, property cannot, by a mere act of the legislature, be taken from one man and vested in another directly; nor can it, by the retrospective operation of law, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce that effect.

> According to this decision, the act now in question is inoperative, as respects this action. *Webster v. Cooper*, 55 U.S. 488 (1852). (emphasis added).

The cases were then brought here, and this court held that the exemption was a vested property right which Congress could not repeal consistently with the Fifth Amendment, that it was binding on the taxing authorities in Oklahoma, and that the state courts had erred in refusing to enjoin them from taxing the lands. Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; Gleason v. Wood, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. 947; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949.

As these claimants had not disposed of their allotments and twenty-one years had not elapsed since the date of the patents, it is certain that the lands were nontaxable. This was settled in Choate v. Trapp, supra, and the other cases decided with it; and it also was settled in those cases that the exemption was a vested property right arising out of a law of Congress and protected by the Constitution of the United States. This being so, the state and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love county, no matter what was said in local statutes. The county did not respect it, but, on the contrary, assessed the lands allotted to these claimants, placed them on the county tax roll, and there charged them with taxes like other property. …

The right to the exemption was a federal right, …

To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.

Ward v. Board of County Com'rs of Love County, Okl., 253 U.S. 17 (1920). (emphasis added).

Claiming title from a royal patent of 1666, plaintiffs, in an attempt to construct a multi-family apartment house by filling in this approximately 11-acre pond, have brought a declaratory judgment action to declare the zoning classification permitting one-family dwellings as unconstitutional as it applies to plaintiffs' property. The City moves for summary judgment claiming that plaintiffs do not own the fee to the bed of the pond, either by tracing their title to the royal grant or by adverse possession.

In 1666, King Charles II, through Richard Nicholls, the first English governor of New York, confirmed Pell's treaty of 1654 with the Siwanoy by

issuing to Pell a royal patent. At Pell's death in 1669, the land obtained by royal patent was bequeathed to his nephew, John, who received a confirmatory grant by patent from Governor Dongan in 1687.

Motion for summary judgment by the City and by the intervenor State on its counterclaim is denied. Summary judgment is granted to plaintiffs declaring them to have good and valid title.

Romart Properties, Inc. v. City of New Rochelle, 324 N.Y.S.2d 277 (1971). (emphasis added).

We agree with the determination by the learned Justice at Special Term that the subject property was included within the 1666 Nicholls Patent and the 1687 Dongan Patent to the Pells and that plaintiffs' chain of title back to those patents gives them good title to the subject property. And if we were to assume the contrary, we would nevertheless find that they have good title thereto based upon almost 250 years of adverse possession by their predecessors in title.

Romart Properties, Inc. v. City of New Rochelle, 40 A.D.2d 987, (1972). (emphasis added).

The Northwest Ordinance is a part of the basic organic law of The United States of America enacted by a national legislative body before the existence of The Constitution of the United States. The Northwest Ordinance was re-enacted by the First Congress of the United States and is therefore a part of the federal statutory law which this Court has jurisdiction to interpret. See 1 Stat. 50, ch. 8 (1789). In re-enacting Article III of the Northwest Ordinance the First Congress clearly exercised its power under Article I, Section 8(3) of the Constitution of the United States.

The word “Indians” in Article III of the Northwest Ordinance does not refer merely to Indian Tribes. The term “Indians” there must be given its plain meaning and construed liberally. The immunity conferred by Article III is not limited to Indian Tribes but may, in appropriate cases, apply to individual Indians as well. There is no strict need to show tribal relations. The word must be given a racial meaning.

The tax exempt status of the plaintiff is a vested right which cannot be taken by the State of Indiana or its political subdivisions without just compensation. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912). See also, Carpenter v. Shaw, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930), and Ward v. Board of County Commissioners, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920).

Swimming Turtle v. Board of County Com'rs of Miami County, 441 F.Supp. 374 (1977).

The issue does not turn on the interim conveyances after the Crown patents, but solely on the patents themselves.

Kraft v. Burr, 476 S.E.2d 715 (1996).

The constitution does not prohibit a State from impairing the obligations of a contract unless compensation be made; but the inhibition is *absolute*. So that all acts coming within the prohibition are unconstitutional.

Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 687 (1853).

WHEREFORE, Plaintiff, Michelle Hansen Pro Se, prays this Honorable Court will grant judgment against Defendants as hereinafter and above set forth:

For such other and further relief as this Court deems just, equitable and proper under the circumstances.

For such other and further extraordinary declaratory and injunctive relief as this Honorable Court may deem just and proper on behalf of Plaintiff done by the Defendants named and unnamed herein.

For such other and further relief as this Court deems just, equitable and proper under the circumstances of Bad Faith done by Honorable Judge Justin Mark Hannen, ARAPAHONE COUNTY DISTRICT COURT, et al., In issuing a Writ to Vacate without proper service on Plaintiff and acting knowingly or not in Frauds under the RICO and COCA Acts.

Plaintiff wishes to notice the Court and that it would be a MISPRISION OF FELONY under 18 USC 4 to fail to disclose felonious acts that have been witnessed by or that have come to the attention of the Plaintiff.

That Plaintiff is the above-entitled-matter-complaint and knows the contents thereof; that the same is true to best of Plaintiffs knowledge except as to those matters therein stated in information and belief and, as those matters, he believes them to be true.

Dated this 24th Day of March 2014

Respectfully Submitted,

Michelle Hansen

Pro se,

2869 S Espana CT.

Aurora Colorado

303-868-5097

Mdhansen81@comcast.net

CERTIFICATE OF SERVICE

Certificate of service and the above has been sent registered mail to the following:

JP Morgan Chase
C/o Highest Ranking Officer
10790 Rancho Bernardo Road
San Diego, CA 92127

The Castle Law Group, LLC
C/o Kim Martinez
999 18th Street, Suite 2201
Denver, CO 80202

TSCHETTER HAMRICK SULZER P.C.
3600 SO. Yosemite STE 828,
Denver, CO 80237

Denver Home Group
2000 S Colorado BLVD. Tower 2
Suite 700
c/o Michael Bjork
Denver, CO 80222

I have sent the copies of this TRO injunction to stop eviction and process to the above via certified mail

SIGN

Michelle D Hansen

Enclosed herein Exhibit 1

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Plaintiff)

Jf07hjflJl1' Cinse Na tMl *(Defendant)*

er-n Action No *p!* - (!*V*- 7p!

SUMMONS IN A CIVIL ACTION

Xi *kM;ei* ,q *C,*

A laws uit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's~',

whose name and address are: ffir'D, fY\lc..he..\k \) IA<lJ\.<S-e.V\ NO

J'3(;q ~ Es~CkJ\O- C)--

t\\AVOva, CD. [900l3]

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date:

Signature of Clerk or Deps

u.s *D'cFILED*

DISTRI'CI:;:TORJCT COURT

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IN THE UNTIED STATES DISTRICT *COURIDIL!1"R I -GRADO*
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FOR THE DISTRICT OF COLORADO J£FFfF/ p n'-'1 . . *'CLERKv~WELL*
BY----DEP. eLK
MICHELLE DAWN HANSEN
a/kla Michelle Hansen

Plaintiff •

V
JP MORGAN CHASE,
TSCHETIER HAMRICK SULZER P.C.,et al
Defendants
EMERGENCY TRO
I
3-Ft-2014
Emergency Preliminary injunction including a TROllnjunction to stay the recording of beneficiary deed to high bidder in alleged illegal rule 120 hearing and possible eminent eviction of Michelle Dawn Hansen from her Property and her home located at 2869 S. ESPANA CT. Aurora, CO. 80013 pending verifiable evidence of entitlement and capacity foreclose, and causation of sale under FRAUD with intent to evict.

rUt/Mff Comes now the Plaintiff Michelle Hansen appearing , and files this action for Emergency Preliminary injunction to stay pending verifiable evidence of entitlement and capacity to evict and foreclose for the entire previous court proceedings and the sale are all based upon FRAUD. To allow me to have an uncompromised qualified legal counsel should one exist, represent me in the Supreme Court for a civil RICO action I will file. The Plaintiff is entitled to Emergency Preliminary injunction to Stay pending verifiable evidence of entitlement and capacity to foreclose for the following reasons:

1. Roof over head
2. Due process rights under the constitution
3. District attorney has been presented evidence of fraud
4. Violations of the' **Garns St. Germain Act**
5. Intrinsic Fraud
6. Extrinsic Fraud
7. Colorado Organized Crime Control Act (COCCA)

Michelle Hansen is seeking the order will suffer irreparable injury unless the injunction is issued. The Public at large is in danger of the allegations against the JP MORGAN and their Attorneys members of the B.A. R.
The attached affidavit of the plaintiff and accompanying evidence. SEE EXHIBIT 1
Shows that the plaintiff is endangered by continuing frauds and retaliation

by JP MORGAN and the ATTORNEYS that are members of the B.A.R.
1. The threatened injury to Michelle Hansen outweighs whatever damage the proposed injunction may cause the opposing party,
2. No injury to the parties including JP Morgan (Lenders/Servicer) as part of an ongoing criminal enterprise can outweigh the pro se Plaintiff's interest in competent legal pleadings attaching the proof to the criminal statutes privately actionable under the RICO and FCA statutes, the latter for which the plaintiff must have an attorney and the former are too complex for the vast majority of pro se Plaintiffs to adequately plead.
The affidavit and the Plaintiff's evidence:
3) The injunction, if issued, would not be adverse to the public interest, and

The violations of federal criminal statutes described in the Plaintiffs affidavit vindicate the only recognizable public interest, the enforcement of the nation's laws.
4) There is a substantial likelihood that Michelle Hansen will eventually prevail on the merits.
A hearing in this proceeding will determine that Plaintiff Michelle Hansen has been a victim RICO against under the Colorado RICO Statues by Organized Crime.
5.)The Plaintiff does not bring this action or claim under the civil rights laws of 42 USC § 1981et seq., instead the Plaintiff brings this action for Emergency Preliminary injunction to Stay pending verifiable evidence of entitlement and capacity to foreclose pursuant to the 1st and 6th Amendments of the U.S. Constitution.
6). The Plaintiff prays that the court enjoin the Plaintiff, Michelle Hansen. from being an instrument of Organized Crime in RICO acts against the Plaintiff Michelle Hansen. Those actors, agents, subcontracted agents, et aI., and not deny the Plaintiff the constitutional right to redress her grievances regarding her mistreatment under Crime family RICO enterprise, so that the constitutional questions of law will take precedence over all other matters, and to prevent the corrupt influence agents, et aI., as well as, the law have corruptly used the U.S. District Courts for the District of Colorado,
Seeking to sanction or arrest on the Plaintiff, as a chill effect to violate the redress of her grievances. 18 USC 1513 Retaliation against a witness, victim or an informant
18 USC 4 Federal Reporting Crime Act (whoever having knowledge of the actual commission of a felony cognizable by a court of the united States, conceals and does not, as soon as possible, make known the same to some judge or other person in civil or military authority under the united States shall be fined not more than $500.00 or imprisoned not more than

three years or both). 18 USC 1927 through 18 USC 1967 (RICO) Racketeering, Influence, Corruption, Organization Act
18 USC 1960,1901,1905,1911,1952,1956,1957,1961,1962,1963, 1964 (RICO)
Civil RICO
Continuous Criminal Enterprise Act (CCE)
18 USC 241 Conspiracy
18 USC 242 Conspiracy
31 USC 3729 False Claims Act
7). The Plaintiff prays that the court enjoin Michelle Hansen from being an instrument of the State of Colorado actors, agents, subcontracted agents, et al., and not sanction or place the chill effect upon the Plaintiff for redress of her grievances by continuing to prevent her from presenting evidence to support these allegations. See Exhibit #1 AFFIDAVIT of MICHELLE HANSEN.
8. Michelle Hansen's Previous Counsel Mr. Fielder was hired in November 2013, along with his legal team and Mr. Jeff Brode was to have been working on critical filings, reportedly under a rule 105, and has waited until the 11thhour to withdraw on February 18th2014 leaving the plaintiff vulnerable as to remedy under alleged violations. SEE EXHIBIT #1 AFFIDAVIT of MICHELLE HANSEN
9. On February 19th,2014 Michelle Hansen's property sold at an illegal auction held by Arapahoe County Trustee. Michelle Hansen received Notice to Quit on her front door, demanding "surrender" of her property within three days. SEE EXHIBIT #1 AFFIDAVIT of MICHELLE HANSEN
I reserve the right to amend the TRO/lnjunction as necessary and upon further discovery and to add other parties as discovered.
4
WHEREFORE the above stated reasons and accompanying evidence, the Plaintiff respectfully requests that the Court Grant the Plaintiff's Emergency Preliminary injunction to stay pending verifiable evidence of entitlement and capacity to proceed in this alleged Illegal Eviction under and through fraud upon the victim Michelle Hansen and the Honorable Judicial System and Court.
Respectfully submitted,

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u)oW-*r"*:

2869 S Espana CT.

Aurora Colorado
303-868-5097
Mdhansen81 @comcast.net
Certificate of service and the above has been sent registered mail to the following:
JP Morgan Chase
c/o Highest Ranking Officer
10790 Rancho Bernardo Road
San Diego, CA 92127
The Castle Law Group, LLC
c/o Kim Martinez
99918th Street, Suite 2201
Denver, CO 80202
TSCHETIER HAMRICK SULZER P.C.
3600 SO. Yosemite STE 828,
Denver,CO 80237
Denver Home Group(SRP Sub LLC)
5
2000 S Colorado BLVD. Tower 2
Suite 700
c/o Mickeal Bjork
Denver, CO 80222
I have sent the copies of this TRO injunction to stop eviction and process to the above via certified mail

SIGN *.JA* ***J/ ~-t-~~***

Michelle 0 Hansen 03 *()1/;,011*
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\C1R\C\C 00 AFFIDAVIT OF TRUTH AND FACT u.s. O('~ '"F COLORA

D\SiR\v \ 0

Pursuant to u.s. vs. KIS . . • Pfi 3~2.4

Now Comes michelle dawn of lawful age and competent to make this affid1!UA~~ ~PHerebY:

. . . .. . ~,.-.';? COL't~t.ll

I. I have recently discovered that I was tricked into thinking that I was engaged 1n:if1!1\ffU1 \ ~.,;J. contract;(my late husband and then myself, from here forward "I", "me" refers is botll,ts I his wld~ 8.,\ must report these frauds. lawful contract" consisting of these six elements: 0 ell!

Offer by a person qualified to make the contract. D(r . {\

Acceptance by party qualified to make and accept the contract. B'<----

Bargain or agreement and full disclosure and complete understanding by both parties.
Consideration given. (Conscionable)
Must have the element of time to make the contract lawful.
Both parties must be sui juris; that is, of lawful age, usually 2 I years old.
2. Almost no criteria for a lawful contract was satisfied.
3. SUNTRUST MORTGAGE INC never loaned any money to me.
4. SUNTRUST MORTGAGE lNC never had any money to loan.
5. I authorized a securitization for the property, but agents for PIONEER LENDING and PIONEER LENDING LLC concealed it from me.
6. SUNTRUST MORTGAGE INC. never produced any consideration for a loan.
7. 8 I am the .onlv one to Duttmgl.osideratian for.rhis nronenv and I've out in I11ytsweat . 1am me omy injured parry trom that ongmai rrauu, Now upon ciscovery tnat one equ..l\6·an" was turned into 9. Then this perpetuated fraud was continued on michelle dawn harris/hansen by identity theft and fraud.
9. One of the results of the original fraud and theft of security is that a fraudulent loan was sold and eventually made its way into JP MORGAN CHASE NA
10. Eventually lP MORGAN CHASE NA resold something related to the original fraud and theft of security back to themselves.
II. More recently, criminal agents or employees in lP MORGAN CHASE have perpetrated fraud by pretending to be the living PRINCIPAL in a misrepresentation of a DEAD ENTIlY called JP MORGAN CHASE NA
12. This criminal, pretend to be Principal-in-fraud in JP MORGAN CHASE NA then perpetrated another fraud when he pretended to bring life to a DEAD ENTIlY through some fraudulent means as he contracted with criminal, pretend to be AGENT-in-fraud attorney Castle, and Martinez in the law office of CASTLE STAWARSKI PC Aka CASTLE LA W GROUP LLC
13. Without proof of agency, proof ofa living breathing PLAINTIFF or proof of ownership of my property, a banker criminal and attorney criminal conspired to violate many Federal Rules of Civil Procedure and Rules of Evidence in their safe haven of their crime world, without fear of prosecution, as they created the fictitious INJURED PARIY/PRINCIPAL out of the DEAD ENTI1Y called lP MORGAN CHASE, like a ghost speaking through the banker, from the dead, JP MORGAN CHASE NA EMPLOYEE then contracted with willing co-conspirator, attorney Castle, and Martinez, to craft the fraud upon one of the people, me.
14. CASTLE LAW GROUP perpetrated another crime of interstate racketeering as they conspired with the ARAPAHOE COUNlY TRUSTEE in COUNTY OF ARAP AHOE, , to take a fraudulent instrument to the next level, Illegally sell property they could not sale. Then "investor" put of NOTICE OF QUIT, with which Mikeal Bjork acted as a private contractor AGENT-in-fraud, to serve me through his "law firm" at my home. TSCHETTER HAMRICK SULZER P.C. by taping said notice on my door where clearly a NO TRESSPASSING sign is Visible.
15. Throughout the commission of this crime, there have been other cases proving the fraud of agents at JP MORGAN CHASE
16. As criminal AGENT-in-fraud attorney Castle and Martinez perpetrates these felonies, this also proves by evidence that they are not competent to act as AGENT.
17. At the bottom of the fraudulent NOTICE TO QUIT is a signature (photocopied) from Mikeal Bjork for TSCHETTER HAMRICK SULZER P.c. who is anyone but a living, breathing injured party/PLAINTIFFIPRINCIPAL. Bjork represents SRP Sub LLC, another commission of this crime continually perpetrated upon me.
18. No matter how many times I've asked for the proof of subject matter jurisdiction to be put on the record to prove they have an injured party, a living PLAINTIFF, a lawful valid contract, a breach of contract, proof of consideration, proof of ownership, proof of agency between a living PRINCIPAL and AGENT, or anything resembling anything other than fraud, they refuse to produce the INSTRUMENT.
19. The reason none of them will produce the INSTRUMENT is they don't have one.
They provided a forged, doctored Promissory Note of my late husband.
20. I am michelle dawn one of the people, not the decedent (12 use 95a), not the INFANT, and i hereby instruct the court to order the criminal conspirators, PRINCIP AL-in-fraud JP MORGAN CHASE NA and AGENT -in-fraud attorney Castle, and Martinez and CASTLE LAW GROUP LLC to honor my demand to produce the INSTRUMENT immediately.

21. The fictitious, fraudulent pretend instrument presentment by the banker/attorney conspirators is refused for fraud my me, michelle dawn as I returned it to them.
22. Although I am citing the FEDERAL RULES which are mandatory for all the trustees in above mentioned corporations and courts, I am not in any way in their jurisdiction, and no one may presume that lam.
23. Rules of procedure 17 a, and rules of evidence 601, have been intentionally avoided in a criminal and conspiratorial manner by the PRINCIP AL-in-fraud with AGENT-in-fraud so they could perpetrate their crime to harm me.
24. Never at any time have either of them or both of them ever followed their requirements under UCC 3-501, or as it's reiterated in NH RSA 382-A:3-501, to produce a lawful INSTRUMENT, because they don't have one.
25. Said criminal agents are clearly in violation of 18 USC regarding securities fraud.
26. Said criminal agents are clearly in violation of 18 USC 2311 regarding securities.
27. My files in the County Records are replete with crimes of conspiracy and official oppression by bankers, attorneys, and court officers.
28. It is my right to face the accuser pretending to be an injured party so I can question their proof of jurisdiction and challenge their fraud and misrepresentation.
29. This entire crime is based upon the fact that there seems to be a comfortable climate here on Colorado for such a criminal enterprise to perpetrate fraud and misrepresentation and to operate without ever providing subject matter jurisdiction for and one the record.
30. I am making affidavits for criminal complaints against all involved in this RICO conspiracy pursuant to affiant's obligation Title 18 USC 4, and I'm taking action via INTERNATIONAL LAW NOTICE OF CLAIM since while acting in fraud, all perpetrators are without immunity.
As one of the people, michelle dawn, in common law action, i hereby instruct the Magistrate at this court under Article 32, Part the First in the Colorado Constitution, and UCC 3-501, to write an ORDER for PRINCIPAL-in-fraud in JP MORGAN CHASE NA and AGENT-in-fraud attorney Castle and Martinez in LAW OFFICES OF CASTLE LAW GROUP LLC to produce the INSTRUMENT immediately.
If as expected they cannot produce the INSTRUMENT immediately as ordered by this court, then i instruct this court to write an ORDER for the termination of their fraudulent action, the fraudulent NOTICE TO QUIT, and for all peace officers acting in fraud and conspiracy in private contract with fraud agents to cease and desist from their conspiracy to bring bodily harm against me should I lawfully resist their unlawful actions.
Once a fraud is revealed, everything related to it is null and void NUNC PRO TUNC. This entire series of events is based on fraud.
As one of the people, michelle dawn, i affirm my oath under the pain and penalty of perjury, that all statements in this affidavit are true.

(2) UPON DEMAND OF THE PERSON TO WHOM PRESENTMENT' IS MADE, the person making presentment MUST (i) EXHIBIT THE INSTRUMENT, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if u.11 payment is made.
(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.
(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-offhour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made alter the cut-otf'hour.
"ji"

NH RSA 382-A:3-50l Presentment
Las! revised 1993 §***Leave a*** *Comment*
(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.
(b) The following rules are subject to Article 4, agreement of the parties, and clearing-house rules and the like:
(l) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to anyone of 2 or more makers, acc~tors, drawees, or other payors.
(2) Upon demand ofthe person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument {Drany payment made or surrender the instrument if full payment is made.
(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.
(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour.
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18 use § 2311 - Definitions
As used in this chapter: "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air; "Cattle" means one or more bulls, steers, oxen, cows, heifers, or calves, or the

carcass or carcasses thereof; "Livestock" means any domestic animals raised for home use, consumption, or profit, such as horses, pigs, llamas, goats, fowl, sheep, buffalo, and cattle, or the carcasses thereof; "Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof; "Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails; "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; valid or blank motor vehicle title; certificate of interest in property, tangible or intangible; instnnnent or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instnnnent commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing; "Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a State, or evidence of the discharge thereof; "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof. "Vessel" means any watercraft or other contrivance used or designed for transportation or navigation on, under, or immediately above, water.

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roicbeJJe dawn' of the family bansen
Secured Party Creditor Executor fur the Estate MICHELLE D
HANSEN Social Security number for MICHELLE D. HANSEN is
522-27-2898* ALL RIGHTS RESERVED

*If infant has a social security number it cannot be a decedent (12 use 95a)

Use of Notary
Notice: Use of Notary is for identification purposes only and sball not be construed against the flesh and blood manlwoman as adhesion, Indicia, or submission to any foreign, domestic or municipal jurisdiction or public venue.
Notary Public
State of New Colorado.) f
) ss: County 0
Arapahoe)
JURAT
Subscribed and affirmed before me, a Notary Public in and for Arapahoe County on the State of Colorado, the above signator - michelle. dawn: hansen - having personally appeared before me on this .ia, day of March. 2014, proved to me on the basis of satisfactory evidence to be the living woman who appeared before me.

ROSALBA BOONE
NOTARY PUBLIC
STATE OF COLORADO
NOTARY 10 20134039813
MY COMMISSION EXPIRES JULY 9, 2017

My commission expires: .It \ Ot \ &0 \"l

APPENDIX:

12 use §95a - Regulation of transactions in foreign exchange of gold and silver; property transfers; vested interests, enforcement and penalties - If the infant has a social security number it cannot be a Decedent.

uee 3-501. PRESENTMENT.
(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.
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18 USC Sec. 513 - Securities of the States and private entities
(a) Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be filled under this title (! I) or imprisoned for not more than ten years, or both.
(b) Whoever makes, receives, possesses, sells or otherwise transfers an implement designed for or particularly suited for making a counterfeit or forged security with the intent that it be so used shall be punished by a fine under this title or by imprisonment for not more than ten years, or both.
(c) For purposes of this section - (I) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;
(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts

of two or more genuine documents;
(3) the term "security" means
(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act, money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement, collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;
an instrument evidencing ownership of goods, wares, or merchandise;
any other written instrument commonly known as a security;
a certificate. of interest in certificate of
participanon ill, cernncate tor, receipt tor, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or
(E) a blank form of any of the foregoing;
the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association of persons which operates in or the activities of which affect interstate or foreign commerce; and
the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.
SOURCE
(Added Pub. L. 98-473, title II, Sec. 1105(a), Oct 12, 1984,98 Stat. 2144, Sec. 511; renumbered Sec. 513, Pub. L. 99-646, Sec. 3I(a), Nov. 10,1986,100 Stat. 3598; amended Pub. L. 101-647, title XXXV, Sec. 3515, Nov. 29,1990,104 Stat. 4923; Pub. L. 103 322, title XXXIII, Sees. 330008(1), 330016(2)(C), Sept. 13, 1994, 108 Stat. 2142, 2148.)
REFERENCES IN TEXT
Section 916(c) of the Electronic Fund Transfer Act, referred to in paragraph (3)(A), is classified to section 1693n(c) of Title 15, Commerce and Trade.
AMENDMENTS
1994 - Subsec. (a). Pub. L. 103-322, Sec. 330016(2)(C), which directed the amendment of this section by substituting "under this title" for "of not more than $250,000", was executed by making the substitution for "not more than $250,000", to reflect the probable intent of Congress.
Subsec. (b). Pub. L. 103-322, Sec. 330016(2)(C), substituted "fine under this title" for "fine of not more than $250,000". Subsec. (c)(4). Pub. L. 103-322, Sec. 330008(1), substituted "association of persons" for "association or persons". 1990 - Subsec. (c)(3)(A). Pub. L. 101-647 struck out "(15 U.S.C. I 693(c»" after "Electronic Fund Transfer Act" and inserted comma after "profit-sharing agreement".
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Rule 601. Competency toTestify in General
Every person is competent to be a wituess unless these rules provide otherwise. But in a civil case, state law governs the wituess's competency regarding a claim or defense for which state law supplies the rule of decision.
Notes
(Pub. L. 93-595, §I, Jan. 2,1975,88 Stat. 1934; Apr. 26,2011, eff. Dec. 1,2011.)
Notes of Advisory Committee on Proposed Rules
This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief; conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.
The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 50 I.
No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash.L.Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigrnore §§501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on *voir dire* examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.
Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.
Notes of Committee on the Judiciary, House Report No. 93--{)50
Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision. Cf. Courtland v. Walston & Co., Inc., 340 F.Supp. 1076, 1087-1092 (S.D.N.Y. 1972).

Notes of Committee on the Judiciary, Senate Report No. 93-1277
The amendment to rule 60 I parallels the treatment accorded rule 50 I discussed immediately above.
Notes of Conference Committee, House Report No. 93-1597
Rule 60 I deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 2.S..I.LS,(:.§JJ~for f$..E..S..(_..§~..,.Ln~, or between citizens of different States and removed under 28 U.S.c. §.L4:!:JLhl the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."
The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.
For reasons similar to those underlying its action on Rule 50 I, the Conference adopts the House provision.
Committee Notes on Rules-20 II Amendment
The language of Rule 60 I has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.
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Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.
(I) Designation in General. An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:
(A) an executor;
(B) an administrator;
(C) a guardian;
(D) a bailee;
(E) a trustee of an express trust;
(F) a party with whom or in whose name a contract has been made for another's benefit; and
(G) a party authorized by statute.
(2) Action in the Name of the United States for Another's Use or Benefit. When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.
(3) Joinder of the Real Party in Interest. The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.
(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:
(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;
(2) for a corporation, by the law under which it was organized; and
(3) for all other parties, by the law of the state where the court is located, except that:
(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and
(B) 28 U.S.C. ~S754 and 9591a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.
(c) Minor or Incompetent Person.
(I) With a Representative. The following representatives may sue or defend on behalf of a minor or an incompetent person:
(A) a general guardian;
(B) a committee;
(C) a conservator; or
(D) a like fiduciary.
(2) Without a Representative. A minor or an incompetent person who does not have a duIy appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad Iitem=-or issue another appropriate order-to protect a minor or incompetent person who is unrepresented in an action.
(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.
Notes
(As amended Dec. 27,1946, eff. Mar. 19, 1948; Dec. 29,1948, eff. Oct. 20,1949; Feb. 28,1966, eff. July I, 1966; Mar. 2,1987, eff. Aug. I, 1987; Apr. 25,1988, eff. Aug. 1,1988; Pub. L. 100-690, title VII, §7049, Nov. 18, 1988,102 Stat. 4401; Apr. 30,2007, eff. Dec. 1,2007.)
Notes of Advisory Committee on Rules-I 937
Note to Subdivision (a). The real party in interest provision, except for the last clause which is new, is taken verbatim from [former] Equity Rule 37 (Parties Generally-Intervention), except that the word "expressly" has been omitted. For similar provisions see N.Y.C.P.A. (I937) §210; Wyo.Rev.Stat.Ann. (1931) §§89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 8. See also Equity Rule 41 (Suit to Execute Trusts of Will-Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.c., [former] Title 40, §270b (Suit by persons fi.unishing labor and material for work on public building contracts * * * may sue on a payment bond, "in the name of the United States for the use of the person suing") [now 40 U.S.C. §3 133(b), (c)]; and U.S.C., Title 25, §201 (Penalties under laws relating to Indians-how recovered). Compare U.S.C., Title 26, [former] §I 645(c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).
Note to Subdivision (b). For capacity see generally Clark and Moore, A New Federal Civil Procedure--II. Pleadings and Parties, 44 Yale LJ. 1291, 1312-1317 (1935) and specifically Coppedge v. Clinton, 72 F.(2d) 531 (C.C.A.lOth, 1934) (natural person); David Lupton's Sons Co. v. Automobile Club of America, 225 U.S. 489 (1912) (corporation); Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) (unincorporated ass'n.); United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule

follows the existing law as to such associations, as declared in the case last cited above. Compare Moffat Tunnel League v. United States, 289 U.S. 113 (1933). See note to RuIe 23, clause (I).
Note to Subdivision (c). The provision for infants and incompetent persons is substantially [former] Equity RuIe 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r.r. 16--21.
Notes of Advisory Committee on RuIes-1946 Amendment
The new matter [in subdivision (b)] makes clear the controlling character of Rule 66 regarding suits by or against a federal receiver in a federal court.
Notes of Advisory Committee on Rules-I 948 Amendment
Since the statute states the capacity of a federal receiver to sue or be sued, a repetitive statement in the rule is confusing and undesirable.
Notes of Advisory Committee on RuIes-1966 Amendment
The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right.)
The rule adds to the illustrative list of real parties in interest a bailee-meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word "bailee" is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. Cf. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.
This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake bas been made in choosing the party in whose name the action is to be filed-in both maritime and nonmaritime cases. See Levinson v. Deupree, 345 U.S. 648 (1953); Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C.Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Ricbard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice-in short, to codify in broad terms the salutary principle of Levinson v. Deupree, 345 U.S. 648 (1953), and Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C.Cir. 1963).
Notes of Advisory Committee on Rules-I 987 Amendment
The amendments are technical. No substantive change is intended.
Notes of Advisory Committee on Rules-I 988 Amendment
The amendment is technical. No substantive change is intended.
Committee Notes on Rules-2007 Amendment
The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.
Rule 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.
Amendment by Public Law
1988 -Subd. (a). Pub. L. 10()-{j90, which directed amendment of subd. (a) by striking "with him", could not be executed because of the intervening amendment by the Court by order dated Apr. 25, 1988, eff. Aug. I, 1988.
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658 F.2d 526
81-2 USTC P 9659
UNITED STATES of America and Special Agent Glenn J. Kulas, Petitioners- Appellees, v. John W. KIS, etc., et al., Respondents, v. George A. MEYERS, Intervenor-Appellant. UNITED STATES of America and Special Agent Richard E. Zagotta, Petitioners- Appellees, v. NELSEN STEEL & WIRE COMPANY, INC., etc., et al., Respondents-Appellants. UNITED STATES of America and Special Agent Joseph A. DeLeon, Petitioners- Appellants, Cross-Appellees, v. Jack SALKIN, etc., et aI., Respondents-Appellees, Cross-Appellants, UNITED STATES of America and Special Agent Donald Olsen, Petitioners- Appellants, v. FIRST STATE BANK of CHICAGO, Respondent-Appellee, and Jack Salkin, Intervenor-Appellee, Cross-Appellant. UNITED STATES of America and Special Agent Leonard H. Lupa, Petitioners- Appellees, v. Donald L. ANDERSON and Harriet H. Anderson, Respondents-Appellants.
Nos. 80-1710,80-1996,80-2164,80-1770,80-1771,80-1795, 80-1796, 80-1869.
United States Court of

Appeals, Seventh Circuit.
Argued Jan. 23, 1981. Decided
Sept. 4, 1981. Rehearing Denied
Nov. 17, 1981.

George A. Meyers, Racine, Wis., pro se.

James C. Murray, Jr., Bonita Stone, Katten, Muchin, Zavis, Pearl & Galler, for Nelsen Steel & Wire Co.

Daniel F. Ross, Atty., U. S. Dept. of Justice, Tax Div., Washington, D. C., for United States.

Before SWYGERT, Senior Circuit Judge, KUNZIG,':::: Judge and BAUER, Circuit Judge.

SWYGERT, Senior Circuit Judge.

1 These cases present appeals from Internal Revenue Service summons enforcement proceedings in several district courts. In three of the cases, the courts ordered enforcement of the summons. In the fourth, enforcement was denied. The wide disparity among these cases both in the final resolution and in the treatment of subsidiary issues such as the taxpayer's right to discovery indicates that we need to establish rules and procedures to be followed within our circuit.' Because these cases raise many issues in common regarding summons enforcement procedure, we treat them together in this one opinion as we consider the individual issues. We affirm the enforcement of the summonses in United States v. Kis, but we reverse for a limited remand the summons enforcement in United States v. Nelsen Steel & Wire Co. We reverse the denial of enforcement in United States v. Salkin, and we hold to be moot the appeal in United States v. Anderson.

* The facts of these cases fit a similar pattern. The Internal Revenue Service in the course of a taxpayer investigation issues a summons for production of records to a close corporation controlled by the taxpayer or to a bank wi~ which the taxpayer or the corporation has conducted business.The taxpayer, pursuant to statutory authority," instructs the recipient of the summons not to comply. The United States and the special agent • conducting the investigation then institute the enforcement proceedings that are contested here. Despite the similarities among these cases, we must relate the facts in each case to understand the particular issues involved.

United States v. Kis

3 In July 1978, the Criminal Investigation Division of the Internal Revenue Service in Milwaukee opened a formal investigation to determine the correct income tax liabilities of George A. Meyers, who had filed documents designated as "protest-type returns" for the years 1975, 1976, and 1977. Special Agent Glenn J. Kulas, who was assigned to the investigation, issued summonses to officers of several banks with whom Meyers had conducted business. Meyers, pursuant to section 7609 of the Internal Revenue Code of 1954, 26 U.S.c. § 7609 (1976), directed the officers, respondents in these cases, not to comply with the summonses, and the United States and Special Agent Kulas instituted enforcement proceedings in the Eastern District of Wisconsin on March 6, 1979.

4 In petitions seeking enforcement, the Government asserted that Kulas was conducting an investigation for the purpose of establishing Meyers's correct income tax liabilities for the years in question and that the testimony and information sought are necessary for that purpose; that the information sought is not in the possession of the Internal Revenue Service; and that all administrative steps required by the IRS for the issuance of summonses have been taken.' Following an order to show cause why the summonses should not be enforced, Meyers filed a responsive pleading that denied the assertions made in the Government's petition. He also alleged, among other things, that the investigation violated his Fifth Amendment rights and that its purpose was "to gain information so as to prosecute (him) criminally." Meyers also filed five pages of interrogatories, which the Government moved to quash.

5 A magistrate conducted a hearing on the petition on January II, 1980, at which the Government presented testimony that, among other things, the investigation was in its initial stages; there were no records on which to proceed without the information requested in the summons; and that no decision had yet been reached whether to prosecute Meyers criminally. The testimony also revealed that all "protest-type returns" are not prosecuted, and that a revenue agent was assisting Kulas in the investigation. Meyers was able to cross-examine all the Government witnesses at the hearing. The magistrate found that the Government had "made a sufficient showing under United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, \3 L.Ed.2d 112 (1964), and that the taxpayer (had) not met his burden under United States v. LaSalle National Bank, 437lJ.S. 2'18,98 S.Ct. 2357, 57 L.Ed. 2d 221 (1978)," since a valid civil purpose existed to the investigation and there was no institutional commitment by the IRS to prosecute Meyers as a "tax protester." The magistrate also quashed the interrogatories served by Meyers, since he had been able to ask many of the same questions at the hearing. The district court, on April 30, 1980, adopted the magistrate's findings of fact and conclusions ofJaw and ordered the respondent bank officers to comply with the summonses. Meyers appeals from this order.

United States v. Nelsen Steel & Wire Co.

7 This proceeding arises from an investigation begun in June, 1976, of the tax liabilities of Nelsen Steel & Wire Co., Daniel B. Nelsen, Sr., Daniel B. Nelsen, Jr., and Clifford D. Nelsen. Although the investigation originally concerned only the years 1974 and 1975, upon advice of the IRS agent in charge, the Government expanded its scope to include 1971 to 1973.' On May 13, 1977, the Government issued the contested summonses, which included the years 1971-1975. When the summonses were not complied with, the Government filed these enforcement actions in the Northern District of Illinois on November 30, 1977. The proceedings then followed the same course as the Kis case. Show cause orders were issued, and the individual taxpayers and their spouses were allowed to intervene. Instead of holding an immediate evidentiary hearing as in Kis and most other enforcement actions, the district court allowed the taxpayers and respondents discovery of certain documents and the ability to depose three IRS agents involved in the investigation. These depositions were completed by August, 1979. The taxpayers then requested further discovery, which the district court denied on February 28, 1980. Following briefmg by both parties, the district court ordered enforcement of the summonses on June II, 1980. Taxpayers appeal from this order.

United States v. Anderson

~ This investigation of the income tax liabilities of Donald L. and Harriet H. Anderson for the years 1973 to 1975 led to a recommendation in February, 1978 of a criminal prosecution, as well as the assertion of civil fraud penalties and adjustments to their tax liabilities. IRS Regional Counsel, however, rejected the recommendation and urged further investigation. The case then was reassigned to Special Agent Leonard H. Lupa, who in June,

1978, issued summonses to the :\ndl'rSn[lS to obtain handwriting and handprinting exemplars.· They were considered to be necessary in order to determine who had made certain entries in the taxpayers' business records for the years in question.

9 The :\ndersnns refused to comply with the summonses on July 7, 1978, and the Government petitioned for enforcement in the Southern District of Illinois on February I, 1979. After a hearing, the district court denied enforcement because, although the summonses were issued in good faith, the Government lacked the authority to compel the production of handwriting exemplars. While the Government's appeal from that order was pending, the United States Supreme Court held, in United States v. Euge, 444 FS. 707,100 S.Ct. 874, 63 L.Ed. 2d 141 (1980), that handwriting exemplars could be obtained under section 7602. Following a remand by this court, the district court ordered enforcement on June 2, 1980. The district court, this court, and the Supreme Court all denied stays of enforcement of the district court's order, so tbt' Aud"rsnus appeared before Special Agent Lupa on August 21, 1980, and complied with the summonses. The Government subsequently moved to dismiss this appeal as moot. The motion was argued along with it", Andersous' appeal on the merits.

United States v. Salkin

lOIn the course of an investigation into the income tax liabilities of Jack Salkin, summonses for various books and records were issued to him in his capacities as president of two close corporations and also to First State Bank of Chicago, with which he had conducted business. Salkin failed to comply with his summonses and intervened to prevent compliance by the bank, and the Government began enforcement proceedings in the Northern District of Illinois in December, 1978. Salkin denied the allegations in the Government's petitions, but he failed to allege any specific facts in rebuttal. He then filed notices of depositions of the special agents involved in the investigation, served a set of interrogatories on each agent, and requested production of certain documents in Government files. The district court quashed the interrogatories and the request for document production, but it permitted the depositions. On August 17, 1979, following the depositions, Salkin filed amended answers that included some facts developed through the discovery.

IlThe Government moved for summary judgment in September and October, 1979. The district court denied these motions on December 6, 1979. The court's decision noted that while the Government had made out its prima facie case for enforcement as required in Powell, supra, summary judgment was inappropriate because Salkin had raised a genuine issue of fact regarding the Government's purpose in pursuing the investigation at that time. Salkin had alleged that the IRS had abandoned the pursuit of a civil tax determination. The court therefore ordered an evidentiary hearing on the merits of the enforcement petitions.

12 At the opening of the hearing on April I, 1980, the Government announced that it did not intend to present any further evidence, since the court had already found that it had demonstrated a prima facie case. The court then granted Salkin's oral motion to dismiss the actions pursuant to Rule 41(b), Federal Rules of Civil Procedure. The court ruled that the affidavits of the agents involved in the investigation were not evidence and that the Government. had therefore not presented any evidence. The court dismissed the actions on the date of the hearing. The Government appeals.

II

13 Before we discuss the substantive issues raised in these appeals, we must first decide whether the appeal in United States v. Anderson has been mooted by the taxpayers' compliance with the summons to produce handwriting exemplars. The Andl'rsons contend that the appeal is not moot for several reasons. The investigation of their tax liabilities is still continuing, and therefore the controversy between the parties is still alive. They argue that the subject of the appeal the enforceability of the summons is thus "capable of repetition, yet evading review," " for other summonses may be issued on the basis of the same good faith representations made by the Government. The Andl'l"Sons point out that continued refusal to comply with the order of the district court would have subjected them to sanctions for ~ontempt of court, and litigants should not be required so to expose themselves to liability in order to avoid mootness.

14 Every court of appeals that has considered this question, however, has held that compliance with an IRS summons moots an appeal of the enforceability of the summons:" We agree with this line of decisions. While there may be an ongoing dispute between the IRS and the Andersons about their income tax liabilities, the particular controversy that is the subject matter of this appeal the enforceability of the summonses for handwriting exemplars no longer exists. The case or controversy to support the exercise of federal jurisdiction cannot be just any dispute between the parties but must concern the subject matter of the action. "Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, .JO.JlJ.S. 244, 246,92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971) (emphasis added).

15 When, as in this case, the court could not grant any relief that would affect the legal rights of either party, no case or controversy exists. See Def'unis v. Odegaard, 416 {1.S ••312, 317, 94 S.Ct. 1704, 1706,40 L.Ed.2d 164 (1974). TIHt And!..!}Q.~ contend that this court could grant them relief by declaring the summons to be invalid and by suppressing the handwriting exemplars and any evidence obtained as a result of their submission. Such a ruling, however, would ignore the well-established rule that questions of suppression should not be considered until the time when the Government seeks to use that evidence.")1 w;'u!J be hi~l;!ji ~:~~><;'!:::ii~v"~to ruic .n !hi~ -raac, (;'1 there (<. no gu;;r;;n!('(. !\!.It rue (j(,-'en#m("\i w! I ever eo .-k j((use ih,it c-f.Icnc.c It ::l3Ynever cvcu brint~ any "-c!ti~-:l(:ll ;h:tl'ni)~-lp,iH:;j .the :"~.nd(~l's(!.!!1t.As the First Circuit noted in a similar case,

16 The mere possibility of future criminal proceedings does not in itself justify present appellate consideration of the propriety of the summons. At this purely investigative stage, which may lead to civil proceedings or no proceedings at all, to quash the summons would be to prescribe amputation to forestall possible infection.

17 United States v. Lyons, 442 li.2d 1144,1145 (1st Cir. 1971). If the Government does decide to prosecute till' Andersons either in a civil or criminal proceeding, they may challenge the introduction of that evidence at that time, but there is no need, nor would it be proper, to decide that question now."

IS Similarly, this case does not fit under the "capable of repetition, yet evading review" exception to the mootness r'- doctrine. This exception is used only when it is certain that the same situation will recur. It is possible that the Government may issue additional summonses to the Andersolls based on the same representations made to support the issuance of these summonses, but we cannot assume that the Government will do so. To decide the issue now because of possible future summonses would be pure speculation on our part.

19 It is simply not correct, as till' Aud{'r5nus assert, that parties may not be compelled to choose between 1J compliance with a court order and risking a contempt citation. That is a choice that litigants are forced to make every day. Incurring a contempt citation may in many circumstances be the only means of gaining review when a question would otherwise become moot. The Supreme Court explicitly so recognized in United States v. Ryan, 402 U.S. 530,533,91 S.Ct. 1580, 1582,29 L.Ed.2d 85 (1971), in which it held that interlocutory review of the propriety of a grand jury subpoena would be unavailable when the respondent could "refuse compliance and ... obtain full review of his claims" as a defense to a contempt citation. The Court noted, "We have consistently held that the necessity for expedition in the administration of criminal law justifies putting one who seeks to resist the production

of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." Id.!5These principles are not limited to the criminal field. Interlocutory review of sub~enas issued for discovery under Fed.R.Civ.P. 45 may also be obtained only as a defense to a contempt citation.

20 Nothing in In re Special April 1977 Grand Jury, 581 F.*ld* 589 (7th Cir.), cert. denied, 439 U.S. 1046, 99 S.Ct. 721,58 L.Ed.2d 705 (1979), requires a holding to the contrary. That decision' permitted a post-compliance appeal of an order enforcing grand jury subpoenas, but it is distinguishable in one significant respect." In that case, the subpoenas were directed at members of the staff of appellant former Illinois Attorney General William Scott, not to Scott himself. It would have been unreasonable to require those staff members, who had no personal interest in resisting the subpoenas, to expose themselves to contempt by refusing to comply. That same logic compelled the Supreme Court in Perlman v. United States, 247 U.S, 7, 12-13, 38 S.Ct. 417, 419-20, 62 L.Ed. 950 (1918), to allow immediate review of an order directing a third party to produce exhibits, "for the custodian could hardly have been expected to risk a citation for contempt in order to secure (appellant) an opportunity for judicial review." In the present case, the Anclersons certainly had a strong personal interest in the summons. It was their decision to comply rather than risk a contempt citation, and they Cannot complain of the consequences now."

21 This court's recent decision in Marshall v. Milwaukee Boiler Mfg. Co., Inc., 626 F.2d B39 (7th Cir. 1980), is also distinguishable from the present case. The Milwaukee Boiler decision was based upon the particular nature of the Occupational Safety and Health Act, which was the focus of the controversy there. In that case, appellants sought suppression of the results of an inspection that they had permitted only after the district court had cited them for contempt. This court noted that under the penalty provisions of the Act, the penalties grew more substantial for each repeated violation. Any citation for a violation by OSHA that was based upon an illegitimate inspection would therefore have serious collateral consequences." In the present case, on the other hand, if the Andersons' summonses were improper, no collateral consequences exist that could not be remedied by a timely-filed suppression motion.

22 Because we find that the appeal in United States v. Anderson is moot, we remand that case to the district court with instructions that that court vacate its summons enforcement order.I'This procedure will permit the Anderwns to move to suppress the handwriting exemplars and any evidence derived therefrom if and when the Government seeks to use that evidence. That will be the proper time for a court to consider the issues raised in this appeal."

III

23 The taxpayers in these actions raise many same issues on appeal. They all challenge the sufficiency of the prima facie case presented by the Government and contend that the Government did not meet the standards established by the Supreme Court in United States v. Powell, .:rr2...L!l.:.3~,85 S.Ct. 248, 13 L.Ed.2d 112 (1964). They further argue that even if the Government did meet its burden, they have presented enough evidence, for example, of an institutional purpose to prosecute them criminally to rebut effectively the prima facie case under the tests enunciated in United States v. LaSalle National Bank, -137U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978). The taxpayers also challenge the varying limitations on discovery imposed by the district courts in each of the actions. Some of the cases present issues that appeared in their cases alone; for example, appellants in the Nelsen Steel case challenge the decision to reopen the previously audited tax years. We shall treat all of these issues in the order in which they will occur in an ordinary IRS summons enforcement case: first, the Government's responsibility to prove a prima facie case, and then the taxpayer's burden to rebut the Government's showing of good faith.

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In discussing the relative burdens of the parties in summons enforcement actions, we cannot stress too emphatically that these proceedings are intended to be summary in nature. They occur, after all, at only the investigative stage of any action against a taxpayer, and no guilt or liability on the part of the taxpayer is established. The sole reason for the proceedings and for permitting the taxpayer to intervene under section 7609 is to ensure that the IRS has issued the summons for proper investigatory purposes under section 7602 and not for some illegitimate purp<?~e(such as, for example, using a civil summons to gather evidence to be used solely in a criminal prosecution)."

25 For these reasons, the burden on the taxpayer to prove Government wrongdoing is significantly greater than that :'3 on the Government to show its legitimate purposes. The action should be concluded quickly, so that the investigation may advance toward the ultimate determination of civil or criminal liability, if any. The extreme length of the actions now on appeal none are less than two years old, and the Nelsen Steel case has dragged on nearly four years demonstrates that these purposes are not being met. Considering the extraordinarily heavy burden that the Supreme Court has placed on taxpayers resisting enforcement, there is no reason for cases like these to endure for so long. Indeed, section 7609(h)(2) requires that these actions be concluded as quickly as possible. That section provides,

26 Except as to cases of greater importance, a proceeding brought for the enforcement of any summons, ... and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date.

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26 U.S.C. § 7609(h)(2) (i 976). In order to meet this statutory prescription and to end the unnecessary delays that have burdened the enforcement powers of the IRS, it is clear that we must use our supervisory powers to mandate, in addition to the establishment of specific standards to be applied, a specific timetable for the resolution of these actions. ~4

A.

28

Summons enforcement proceedings begin when the Government files a petition for enforcement, pursuant to 26 U.S.C. § 7604. Along with the petition, the Government must submit evidence of a prima facie case that the conditions exist for the issuance of a summons. If the Government meets that burden, the district court should within fifteen days'; issue an order to the respondent to show cause why the summons should not be enforced.

29 United States v. Powell, supra, established the elements of the prima facie case that the Government must present. The burden is a slight one, for the statute must be read broadly in order to ensure that the enforcement . I. powers of the IRS are not unduly restricted. In order to gain the issuance ofa show cause order, the Service does not need to meet any standard of probable cause, even if the three-year statute. of limitations on ordinary tax liabilities has expired. It must show only

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(I) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, (3) that the information sought is not already within the Commissioner's possession, and (4) that

the administrative steps required by the Code have been followed in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

31 *n* Powell, supra, 379 U.S., pp. 57-58, 85 S.Ct. pp. 254-55. The Govenunent ordinarily proves these four clements by aftidavits of the agentsinvolved in the investigation. No more than that is necessary to make the prima hlc:ie :..:~t3";;.~"

B.

32 In United States v. Kis and United States v. Salkin, the Government met its burden of proof by providing affidavits attesting that the summoned materials were relevant to its investigations and not in its possession, that the administrative requirements had been satisfied, and that the investigations had a legitimate civil purpose of ascertaining the correct tax liabilities of the taxpayers for the years in dispute. Any contentions by the taxpayers to the contrary are without merit. As Powell made clear, the Service does not need to provide any more evidence at this initial stage of the proceedings. Both taxpayers, Meyers and Salkin, as well as those in United States v. Nelsen Steel, also raise questions concerning the institutional purpose of the IRS with respect to the commencement of criminal prosecutions. These questions must be considered by the court in the rebuttal stage of the proceedings, not in these initial stages, for the burden is on the taxpayer to disprove the Government's possession of a valid civil purpose. LaSalle National Bank, supra, 437 U.S. p. 316, 98 S.Ct. p. 2367. The assertions by affidavit ofa valid civil purpose are adequate to show a prima facie case that would support the issuance of a show cause order.

33 The taxpayers in Nelsen Steel contend that the Government did not demonstrate that the summoned material in that case was relevant to the IRS investigation. They argue that the tax records of their spouses are not relevant to their own tax liabilities, and they challenge the relevance of the corporate records ofD. Nelsen & Co., whose tax liabilities are not under investigation. While district courts must take "seriously their obligation to apply ... (the relevance) standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons," United States v. Bisceglia, 420 U.S. 141, 146,95 S.Ct. 915, 919, 43 L.Ed.2d 88 (1975), the threshold of relevance is a low one. Section 7602, which authorizes a summons for "any books, papers, records, or other data which may be relevant ... to snch inquiry" (emphasis added), gives the IRS broad summons power, similar to the inquisitorial power ofa grand jury." The Government therefore need show only that the inspection of the desired records "might throw light" upon the correctness of the taxpayer's return and liabilities. United States v. Turner, :!lJ51.. F.ld 272,279 (7th Cir. 1973). ''' The Government met that burden in Nelsen Steel through the affidavit of the special agent in charge, who attested that the requested materials were relevant:" Moreover, as the district court correctly found, the description of the items indicated their relevance.

34 Taxpayers in Nelsen Steel also challenged the adequacy of the Government's showing that the documents sought are not already in its possession. The Government admits that the affidavits of the agents submitted with the petitions for enforcement did not cover this point. As light as the burden is on the Government to prove its prima facie case in this regard, it must meet that burden. It has not done so in this case. An assertion by an agent during a deposition that he only has access to copies of some of the documents sought is not sufficient to make out a prima facie case.i'We therefore remand Nelsen Steel for the limited purpose of hearing evidence, by affidavit or otherwise, .13 concerning the Government's possession of the summoned materials. See United States v. Marine Midland Bank of New York, 585 F.2d 36, 38-39 (2d Cir. 1978).

35 The Nelsen Steel taxpayers further contend that the summons should not have been enforced with respect to retained copies of Forms 1099, which are filed with the IRS. These forms reflect various types of non-wage income paid to the taxpayer, such as interest income paid by a bank or investment dividends. They are filed with the IRS by the individual or institution that is the source of the payments, not by the taxpayer, and the IRS files them in the same manner. They are not cross-indexed by the taxpayer's name, so they are "as a practical matter, neither accessible to nor available to (the) IRS." United States v. First National Bank of New Jersey, {db Fold 6Ml, 674 (3d Cir.), cert. denied, sub nom. Levey v. United States, 447 U.S. 905,100 S.Ct. 2987, 64 L.Ed. 2d 854 (1980). We hold that the information contained therein is not therefore already within the Government's possession for purposes of a prima . _H facie case under Powell. As the Third Circuit stated in reaching the same result in that case, "The purpose of Powell ... is a desire to prevent abuse of the administrative summons process and harassment of the taxpayer." Id."When information is not otherwise available, as here, there is no such abuse or harassment in requiring the taxpayer to produce his own copies of the Forms 1099, which are more easily located than the Government's copies.

IV

36 The taxpayer will have thirty days to make his response after the district court has issued its show cause order. The burdens of production and of proof shift at that time to the taxpayer, and the Supreme Court established that the burden is "a heavy one." LaSalle National Bank, supra, 437 U.S. p. 316, 98 S.Ct. p. 2367. The taxpayer must "establish any defenses or ... prove that enforcement would constitute an abuse of the court's process." United States }·6 v. Genser, S82 F.ld 292, 302 (3d Cir. 1979) (Genser I). He must "prove a lack Gf geed faith, that the government ins l.ibandoncti in tlk institutional sense its pursuit nfpossibk i.iy~lpenahle~,.:<Cnjtui S1:<;.ltr'--v . "\-101L§_~!.1J:~0_q_t:~4, 138 (7th Cir. 1979). The taxpayer must do more than just produce evidence that would call into question the Government's prima facie case. The burden of proof in these contested areas rests squarely on the taxpayer. As the Third Circuit observed, "LaSalle may not have closed the door in the taxpayer's face, but neither did it leave much more than a very slight opening." United States v. Garden State National Bank, 607 F.ld 61, 70 (3d Cir. 1979).

A.

37 Two circuits have discussed in great detail the taxpayer's burden at this point. The Third Circuit, in a series of cases culminating in Garden State, id., has placed a very strict burden on the taxpayer. It requires that the taxpayer answer the Government's case through responsive pleadings, supported by affidavits, that allege specific facts,,in rebuttal. Those facts must permit at least an inference that some wrongful conduct by the Government exists .... is Mere allegations of bad faith will not suffice; nor will legal conclusions or memoranda of law. Any uncontested allegations of the Government's must be accepted as admitted. "Moreover, if at this stage the taxpayer cannot refute the government's prima facie Powell showing or cannot factually support a proper affrrmative defense, the district court should dispose of the proceeding on the papers before it and without an evidentiary hearing." Id., p. 71."

38 The Third Circuit permits a limited amount of preliminary discovery in order to assist the taxpayer in meeting this burden. He may discover:

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(1) the identities of the investigating agents,
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(2) the date the investigation began,
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(3) the dates the agent or agents filed reports recommending prosecution,
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(4) the date the district chief of the Intelligence Division or Criminal Investigation Division reviewed the recommendation,
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(5) the date the Office of Regional Counsel referred the matter for prosecution,
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(6) the dates of all summonses issued under 26 U.S.c. § 7602, (and)
45
(7) the nature of any contacts, relating to and during the investigation, between the investigating agents and officials of the Department of Justice.
46 Id., quoting United States *v.* Genser, 595 F.2d 146, 152 (3d Cir, 1979) (Genser II). Quoting Genser II further, the court goes on to say, "If the taxpayer's evidence reveals: '(I) that the IRS issued summonses after the investigating agents recommended prosecution, (2) that inordinate and unexplained delays in the investigation transpired, or (3) that the investigating agents were in contact with the Department of Justice,' the district court must then permit further investigation." Id.
47 The Fifth Circuit, in United States v. Harris, 628 F.2rl875 (5th Cir. 1980), adopts a slightly more lenient approach towards the taxpayer's burden. While it agrees that the taxpayer's right to an adversary hearing is not absolute, it permits the taxpayer to gain such a hearing through the mere allegation of bad faith on the part of the
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Government. Id., p. 879. Although it adds that it prefers the specific allegation of supporting facts, it does not require such specifics since the taxpayer is not always entitled to discovery before the hearing. The court reasons, "The taxpayer might be placed in the unfair dilemma of having to provide supporting facts, but having no way to obtain those facts." Id., p. 880, n.6.
48 We agree with the approach of the Third Circuit, for it more accurately reflects Congress's concern that summons enforcement proceedings be concluded rapidly, while at the same time the taxpayer is protected from summonses that may be an abuse of process." Although we agree with the Fifth Circuit that we do not want to put the taxpayer in the anomalous position of having to allege specific facts when he has no means to gather that information through discovery, the basic discovery that the Third Circuit allowed in Garden State solves that dilemma:' All the taxpayer needs to do is develop facts from which a court might infer a possibility of some wrongful conduct by the Government. He need not be able to prove that the wrongful conduct in fact

exists. This inference could be drawn from any of the factors cited in Garden State or by any other evidence that the taxpayer might have, such as an offer to settle a collateral dispute. If the taxpayer cannot develop even the evidence necessary to meet this standard, then an evidentiary hearing would be a waste of judicial time and
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resources.

B.

49 If the taxpayer can present enough specific facts to meet this standard, he is entitled to an adversarial hearing. This hearing should be held within sixty days after the filing ofhis response. At the hearing, the Government can make its prima facie case through the introduction into evidence of the affidavits submitted with the petition for enforcement that began the proceedings. The Government could also present other evidence, testimonial or otherwise, to counter the specific allegations made by the taxpayer that were sufficient to warrant the holding of the hearing. The taxpayer would then be able to present his case, which would include the specific allegations made in his responsive pleading. The taxpayer would also be able to examine under oath the agents responsible for the investigation and any other witnesses he may call. While we do not wish to circumscribe the discretion of the district court in conducting the hearing, the court should not permit the hearing to become a pure fishing expedition by the taxpayer. The testimony he seeks should be related to some possible abuse of process as could be inferred from previously presented evidence. The court may within its discretion limit testimony if the questioning moves too far afield.

50 As we noted at the beginning of this section, the taxpayer bears an extraordinarily heavy burden at the hearing. He can succeed only by proving by a preponderance of the evidence some improper use of the summons by the IRS. The most common ground for challenging an IRS summons and one that is raised in each of the cases presently on appeal is that the IRS seeks the information in the summoned documents for use solely in a criminal prosecution. As the Third Circuit noted in Garden State, however, when "the IRS has not recommended criminal prosecution to the Justice Department and the investigating agent has not recommended prosecution to his superiors within the Service, the taxpayer bears an almost impossible burden to resist enforcement of the summons." Id., pp. 66-67 (emphasis in original).

5] The Supreme Court created this heavy burden in Donaldson v. United States, .tOOU.S. 5'17,91 S.Ct. 534, 27 L.Ed.2d 580 (1971), and clarified it in LaSalle National Bank, supra. In Donaldson, the Court declared authoritatively, "Congress clearly authorized the use of the summons in investigating what may prove to be criminal conduct." Id., p. 535, 91 S.Ct. p. 544. The Court refused to make the appearance ofa special agent into the •• investigation a point of distinction between civil and criminal purposes of the investigation. "To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law," Id., pp. 535-36, 91 S.Ct. p. 545. The Court repeated this determination two years later in Couch v. United States, 409 U.S. 322, 326, 93 S.Ct. 611, 614-15, 34 L.Ed.2d 579 (1973), where it stated, "It is now undisputed that a special agent is authorized, pursuant to 26 U.S.c. § 7602, to issue an Internal Revenue summons in aid of a tax investigation with civil and possible criminal consequences." No other result is possible, for "Congress has created a law enforcement system in which criminal and civil elements are
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inherently intertwined." LaSalle National Bank, supra, 437 U.S. p. 309, 98 S.Ct. p. 2363.

52 LaSalle further undercut the taxpayer's ability to resist summons enforcement. It held, among other things, that the personal intent of the agent issuing the summons is also irrelevant to the enforceability of the summons. An agent's responsibilities are rarely wholly civil or wholly criminal, and an inquiry into the agent's personal motives would both frustrate the enforcement policy of the Service and would unreasonably delay the enforcement proceedings. The proper inquiry, LaSalle held, is into the institutional policy of the IRS. Id., p. 316, 98 S.Ct. p. 2367. The Court created a prophylactic rule that any summons issued after the IRS has made a formal

recommendation to the Justice Department to proceed with criminal prosecution shall be deemed to have been issued solely for criminal purposes, even if the Service intended to seek civil penalties as well. Id., pp. 311-12,98 S.Ct. pp. 2364-65.'" Short of such a formal recommendation," however, the taxpayer would bear the heavy burden "to disprove the actual existence of a valid civil tax determination or collection purpose by the Service." Id., p. 316, 98 S.Ct. p. 2367.

53 At the time of the summons enforcement hearing, therefore, if the IRS has not yet made a recommendation for criminal prosecution to the Justice Department, and ifthere is no reason to suspect that such a recommendation is being unduly delayed, "the party opposing the summons (must) establish that the inquiry has no civil purpose" whatsoever. United States v. Moll, supra, p. 139 (emphasis added).'"' The mere existence of a concurrent criminal purpose is irrelevant to the decision to be made at the hearing." If the taxpayer cannot prove at the hearing that the IRS has abandoned any institutional pursuit of a civil tax determination, the district court must order enforcement of the summons at that time. Id., p. 138.

C.

54 There may be a few cases in which the district court is unable to decide, on the basis of the evidence and testimony presented at the hearing, whether the summons should be enforced 01' denied. Only in thos~J>articular cases should the taxpayer be permitted any additional discovery beyond that ~~idout in Garden State. It is clear that the district court may limit discovery in a summons enforcement proceeding.' As we have discussed, some basic discovery should be permitted the taxpayer before he must make his initial response to the petition for enforcement. No discovery through depositions or interrogatories is necessary, however, between that response and the evidentiary hearing, if any, for any testimony that could be conducted then could be conducted just as easily in open court during the bearing." If the court cannot decide the merits of the enforcement petition at the hearing, then further discovery would clearly be helpful to the ultimate resolution of the case. The district court should therefore permit some discovery at this stage. The court can always limit this discovery, of course, if it is unduly burdensome.

55 Any discovery can be completed without a great burden on either party within sixty days after the initial evidentiary hearing. The district court should then hold a final evidentiary hearing on the petition to enforce the summons within thirty days after the completion of discovery. The burden at the final hearing would still, of course, rest upon the taxpayer, for LaSalle makes clear that it is his responsibility to prove that issuance of the summons would constitute an abuse of process.

V

56 Applying these standards to the cases before us, the summonses in the Kis and Salkin cases must be enforced. (The summonses in the Nelsen Steel case should also be enforced if the Government is able to prove on remand that it is not in possession of the information summoned.) As we discussed, supra, Part UIB, the Government made its prima facie case in each of these actions (except, again, with respect to the lack of possession in the Nelsen Steel case). The taxpayers failed to meet their burden of either disproving the prima facie case or proving a valid affirmative defense. They did not meet their burden because, while they argued that the IRS had an institutional commitment to prosecute them, they never made a showing that the Service had abandoned its civil purposes
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entirely. In all of them, the IRS still sought the information summoned in order to make proper civil tax determinations, and no recommendation had yet been made to the Department of Justice that the taxpayers be prosecuted criminally; nor did the taxpayers make any showing that such a recommendation was being unduly delayed in order to gather additional evidence for the prosecution. LaSalle requires no more.

57 AUof the taxpayers also contend that they were entitled to greater discovery than was allowed, but as we have seen, the district court may unquestionably limit discovery in summons enforcement proceedings. They were all given hearings at which they were able to ascertain virtually all of the information that they had sought to discover. This questioning included the basic prehearing discovery that we have permitted. See supra, Part IVA. The taxpayers in Salkin and in Nelsen Steel were also granted discovery in addition to the evidentiary hearing. The district courts thus gave the taxpayers more than ample opportunity to try to develop a defense that could meet the stringent standards of LaSalle. They were simply unable to do so.

5S As this opinion makes clear, the summary judgment procedure utilized by the district court in United States v. Salkin were entirely inappropriate to summons enforcement procedures. While these proceedings are intended to be summary in nature, the burden that must be met by a taxpayer resisting enforcement is significantly more stringent than that of a party opposing a motion for summary judgment. The district court therefore erred as a matter of law in dismissing the action under Rule 41(b). The Government had already made its prima facie case. The burden thus rested on the taxpayer to prove an improper use of the summons. Salkin never met that burden.

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In addition, the Government was not barred from reopening the investigation into the previously closed tax years in its inquiry in United States v. Nelsen Steel. Under 26 V.S.C. § 6501(e), the ordinary three-year statute of limitations period can be extended to six years when there is a substantial understatement of income. In United States v. Powell, supra, 379 U.S. p. 58, 85 S.Ct. p. 255, the Supreme Court specifically held that a taxpayer's burden of showing an abuse of process in a swnmons enforcement proceeding is not met by a mere showing that the statute of limitations for ordinary deficiencies has run. More importantly, taxpayers ought not be allowed to raise such issues in a summons enforcement proceeding. These extraneous issues tend only to delay the advancement of the action and to distract the court's attention from the primary issue that must be considered in these proceedings: whether the IRS has a legitimate purpose in issuing the summons. If the taxpayer has a claim regarding an allegedly improper reopening of an investigation, he may raise it in a separate acti.on.:".

VI

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In summary, tbe procedures and requirements for summons enforcement proceedings are:

I. The Government must first prove its prima facie case under Powell. It may do so by affidavit or by other evidence at the time it flies the petition for enforcement that begins these actions.

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2. Within thirty days, the taxpayer must respond by alleging specific facts in rebuttal of the Government's prima facie case or in support of an affirmative defense. The taxpayer will be assisted in meeting this burden by the gathering of certain basic information through discovery, as outlined in Garden State National Bank, supra.

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3. If the taxpayer has not alleged specific facts that permit an inference of some improper purpose on the part of the Government, the district court should promptly order enforcement of the summons. If the taxpayer has met

this initial burden, the district court must order a hearing on the petition within sixty days after the taxpayer's filing of his responsive pleadings. Only very limited discovery of documents and no testimonial discovery may be conducted during this time period. ~

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4. At the hearing, the burden still rests heavily on the taxpayer to prove that the summons is issued for an improper purpose or that the Government has abandoned any civil purposes to its investigation whatsoever. In most cases in which a hearing is held, the district court should be able either to order or to deny enforcement of the summons at that time.

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5. In the few cases in which resolution of the issues is still unclear after the hearing, the district court should permit the taxpayer additional discovery. This discovery, which can be limited by the district court in its discretion at any time, must be concluded within sixty days after the initial evidentiary hearing. A final evidentiary hearing, at which the taxpayer still bears the burden, must then be held within thirty days after the conclusion of discovery. The district court should reach its decision on the enforcement of the summons as promptly as possible following this hearing.

66 We affirm the enforcement of the summonses in United States v. Kis. We reverse the dismissal of the action in United States v. Salkin and remand that case with instructions to enter an order granting enforcement of the summonses there. We remand for a limited purpose United States v. Nelsen Steel for proceedings consistent !'6 with this opinion. Finally, we remand United States v. Anderson with instructions to vacate the order granting enforcement of the summons as being moot.

The Honorable Robert J. Kunzig, Judge, United States Court of Claims, is sitting by designation

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This opinion has been circulated pursuant to Circuit Rule 16(e) to all judges of this court in regular active service. No judge favored a rehearing en bane

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See section 7602 of the Internal Revenue Code, 26 U.S.c. § 7602 (1976)

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26 U.S.C. § 7609 (1976)

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26 U.S.C. § 7604(b) (1976) 2.. .

These same declarations of good faith were made in the petitions that commenced all of the actions under review here. See the discussion, infra, Part llIA, of the Government's prima facie case under United States v. Powell, :\79 U.s. -*8,85 S.C!. 248, J3 L.Ed.2d 112 (1964)

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Nelsen Steel had previously been audited for these tax years, had been assessed a deficiency which was paid, and the years had been closed. Reinspection letters were issued to the taxpayers involved in this case

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Lupa had not conducted the original investigation and was only marginally involved in the recommendation for

acr,iminal prosecution

Southern Pacific Terminal Co. v. lCC, 219 tJ.S. 498,31 S.Ct. 279,55 L.Ed. 310(1911); Sosnav. Iowa, 419 u.s. 393, 95 S.Ct. 553,42 L.Ed.2d 532 (1975) 2...

See In the Matter of the Special April 1977 Grand Jury, Sill F.2d 589, 591 (7th Cir.), cert. denied, sub nom. Scott v. United States, 439 U.S. 1046,99 S.C!. 721, 58 L.Ed.2d 705 (1978) u.

First Circuit: United States v. Arthur Andersen & Co., 623 F.2d no (1st Cir. 1980); United States v. Lyons, 442 E,.1d J 144 (l st Cir. 1971). Second Circuit: United States v. Deak-Perera Banking Corp., 610 F.2d 89 (2d Cir. 1979). Third Circuit: Vesco v. SEC, 462 F.2d 1350 (3d Cir. 1972) (analogous SEC subpoena case). Fourth Circuit: Kurshan v. Riley, 484 F.2d 952 (4th Cir. 1973). Fifth Circuit: Lawhon v. United States, 390 F.2d 663 (5th Cir. 1968); United States v. First State Bank of Clute, !i_7.§J::'.2.~U.227 (5th Cir. 1980). Sixth Circuit: United States v. Patmon, ii30 F)d 453 (6th Cir. 1980). Eighth Circuit: United States v. Olson, 604 F.2d 29, 31 (8th Cir. 1979); United States v. First National Bank of Sturgis, S. D., 587 F.ld 909, 910 (8th Cir. 1978); Barney v. United States, 568 F.ld J j(i (8th Cir. 1978). Ninth Circuit: SEC v. Laird, 598 F.2d 1162 (9th Cir. 1979) (analogousSEC subpoena case) United States v. Friedman, *5Y2* F.2d 928 (3d Cir. 1976), the only decision to hold otherwise, is distinguishable from this case and the others cited above, because it involved a number of consolidated appeals, and respondents had not complied with all of the summonses involved. A live controversy therefore still existed between the parties as to the propriety of the ltpmn°nses.

See, e. g., G. M. Leasing Corp. v. United States, 429 U.S. 338, 359, 97 S.Ct. 619, 632, 50 L.Ed.2d 530 (1977); Donaldson v. United States,:!!)O l!.2,.§17, 531, 91 S.Ct. 534, 542,27 L.Ed.2d 580 (1971); United States v. Blue, 384 US. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966)

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See Donaldson, supra, 400 U.S. p. 531, 91 S.Ct. p. 542 ("to the extent (he) may claim an abuse of process, (he) may always assert ... that claim in due course at its proper place in any subsequent trial. "). See also Duke, "Prosecutions for Attempts to Evade Income Tax," 76 Yale LJ. **1,62** (1966) u,

See, e. g., Sosna v. Iowa, supra (other persons will be adversely affected by one-year residence requirement in Iowa divorce statute); Gannett v. DePasquale, 443 tJ.S.l~, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (sufficient likelihood that newspaper will again be enjoined from publishing aspects of criminal proceeding)

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See United States v. Arthur Andersen & Co., supra, pp. 723-24

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See, e. g., Cobbledick v. United States, 309 U.S. _'1.', 60 S.Ct. 540, 84 L.Ed. 783 (1940); Alexander v. United States, 20l LS. 117,26 S.Ct. 356, 50 L.Ed. 686 (1906).!!.i...

Ryan v. Commissioner, 517 Fold 13,18-20 (7th Cir.), cert. denied, 423 U.S. 892,96 S.Ct. 190,46 L.Ed.2d 124 (1975); Grinnell Corp. v. Hackett, 519 F.2d .595, 596-98 (lstCir.), cert. denied sub nom Chamber of Commerce v. United Steel Workers of America, 423 U.S. 1033,96 S.Ct. 566,46 L.Ed.2d 407 (1975); Wright & Miller, Federal Practice & Procedure § 2463 (1971)

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Besides the difference in the nature of the personal interests involved in Grand Jury and in this case, as discussed in the text above, Grand Jury is also distinguishable because it was based upon two decisions that involved prior restraints on speech. Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791,49 L.Ed.2d 683 {I976); First National Bank of Boston v. Bellotti, 435 FSo 7(;5,98 S.Ct. 1407,55 L.Ed.2d 707 (1978). Courts are quite correctly more wary of forcing litigants to choose between compliance and contempt in a First Amendment context, for the chilling effect of any such dilemma is considerable
IlL
We note that, while no stays have been entered in any of the other three appeals on review here, none of the affected parties have complied with the summons enforcement orders. They have, apparently, been willing to risk the
Ucon,sequences of noncompliance
We note also that neither party in Milwaukee Boiler argued that the case was moot
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United States v. Munsingwear, Inc., 340 FS. 36, 39-40, 71 S.Ct. 104, 106-107,95 L.Ed. 36 (1950); County of Los Angeles v. Davis, .140 U.S. 625, 634, 99 S.Ct. 1379, 1384,59 L.Ed.2d 642 (1979). See also United States v. Olson, (,04 FoZd29 (8th Cir. 1979). Because of our resolution of United States v. Anderson, our subsequent discussion of the issues in summons enforcement proceedings will concern only the three other cases on appeal
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Cf. United States v. Friedman, .~B....ud928, 931 (3d Cir. 1976)
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United States v. LaSalle National Bank, 437 lJ.S. 298, 316, 98 S.Ct. 2357, 2367,57 L.Ed.2d 221 (1978) ("The purpose of the good faith inquiry is to determine whether the agency is honestly pursuing the goals of § 7602 by issuing the summons.")
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Id
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The Supreme Court has tried to expedite these proceedings as well. LaSalle National Bank, supra, p. 316, 98 S.Ct. p. 2367. See United States v. Harris, 628 Fo2d 875 (5th Cir. 1980)

This timetable, as all others in this opinion, is hereby established in accordance with our supervisory powers. This deadline should give the district court adequate time to consider the merits of the Government's petition, for it need not look any further than the face of the petition and of the supporting affidavits. Orders to show cause were issued in all four of the cases on appeal well within this time period
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United States v. Euge, 444lJ.S. 707, 711,100 S.Ct 874, 878, 63 L.Ed.2d 141 (1980); United States v. Kendrick, S18 t:.Jd 841, 849 (7th Cir.), cert. denied, 423 U.S. 1016,96 S.Ct. 449, 46 L.Ed.2d 387 (1975) .27
The last three of these elements relevance, possession, and satisfaction of the administrative process are self-explanatory and need no further enlightenment here. The existence and definition of a "legitimate purpose" is more complex; it is explained in our discussion of the taxpayer's burden of proof, infra, Part IVB
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Affidavits are often the only supporting evidence for the issuance of a search or arrest warrant, which, as noted above, requires a higher standard of proof. Affidavits alone should therefore certainly be sufficient to prove a prima facie case in summons enforcement proceedings
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United States v. Kendrick, supra; United States v. Tumer, <tsn F.2d 272,278-79 (7th Cir. 1973); United States v. Joyce, :\98 EJtlS92, 594 (7th Cir. 1974) _~O
See also United States v. City National Bank & Trust Co., (,42 F.2d 388 (lOth Cir. 1981) (summoned materials are relevant if a "realistic expectation" exists that the materials will illuminate the accuracy of a tax return); United States v. Noall, *S87* F.2d 12J, 125 (2d Cir. 1978), cert. denied, 441 U.S. 923, 99 S.Ct. 2031, 60 L.Ed.2d 396 (1979) ("Congress acted advisedly in using the verb 'may be' rather than 'is' since the Commissioner cannot be certain the
Udoc.uments are relevant or material until he sees them.")
See United States v. Moon, 616 F.2d 1043, 1046 (8th Cir. 1980); United States v. Garden State National Bank, 607 F.ld (i I, 68 (3d Cir. 1979) 32
The Government also seeks to prove it does not have possession of the documents through a "judicial admission" by taxpayers. In the taxpayers' memorandum in support of their motion for a stay pending appeal, they declared they would be irreparably injured if they were forced to turn over the summoned documents. The Government contends that there could be no irreparable injury if the IRS already had possession of them. While this argument is ingenious, it cannot make up for the Government's failure to prove its own prima facie case
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For the sake of judicial economy, we remand this case for that lirnited purpose only, and we will consider all the other issues raised in this appeal. If the district court finds the Government is not already in possession of the documents sought, the court should order enforcement of the summonses
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This court has never explicitly so held, but it required the same result in United States v. Tumer, supra, in which the court ordered enforcement of a summons for names of the persons for whom a particular preparer had prepared income tax returns, even though the returns were in the possession of the IRS and signed by the preparer. The court noted, id., p. 274, that the special agent involved had testified that retrieval of the returns based upon the preparer's signature would be all but impossible. See also Donaldson v. United States, supra, 400 U.S. p. 519, 91 S.Ct. p. 536, in which the Supreme Court ordered enforcement of a summons that included Forms 1099 that presumably suffered the same problems as exist here
3S
In United States v. Bank of Cali fomi a, 652 F.ld 780 (9th Cir. 1980), the Ninth Circuit affirmed a district court's holding that the IRS had not shown that Forms 1099 were not in the Commissioner's possession. This case is distinguishable on its facts from the present case, for it was based upon two factors that do not exist here: (I) The Government had not raised the contention in the district court; and (2) the affidavit of the IRS agent said the information was not in her possession, not that it was not in the possession of the IRS

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"Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." United States v. Powell, supra, 379 U.S. p. 58, 85 S.Ct. p. 255
E..
The court cites two hypothetical examples of such conduct: (I) "that a summons was issued at the request of the Justice Department," or (2) "that formal recommendations for prosecution were being delayed until a summons could be issued and enforced, solely to further a criminal prosecution." Garden State National Bank, supra, p. 71. See also LaSalle, supra, p. 317, and United States v. Genser, *S9:"* r.2tlI4(" 150 (3d Cir. 1979) (Genser II) .~8 United States v. National ':'tate Bank. 454 F.2d 1249, 1252 (7th Cir. 1972)
39 .
Set: also United States v. Mct.arthy, 5! 4 1'.2<1368.373 (311 Cir. 1975). Powell refers to "the adversary hearing [0 which the taxpayer is entitled before enforcement is ordered." Id., 379 US p. 58, 91 S.Cr. p, 255. See also Reisman v. Caplin, 375 lJ.S. 440,449,84 S.Ct. 508, 513, II L.Ed.2d 459 (1964). This hearing is not, however, automatic. While courts may have disagreed on the appropriate standard, they have agreed that the taxpayer must make some threshold showing to be entitled to the hearing :ill...
See also United States v. Wright Motor Co., Inc., 536 F.ld 1090, 1094 (5th Cir. 1976); United States v. Newman, 441 F.ld 165, 169 (5th Cir. 1971); United States v. Roundtree, 420 F.?!1Ji45, 852 (5th Cir. 1970) :!L
It also is more in keeping with the tenor of previous decisions in this circuit. See United States v. Moll, 602 F.ld 134 (7th Cir. 1979); United States v. Kendrick, supra; United States v. Joyce, supra; United States v. Turner, supra; United States v. Interstate Tool & Engineering Corp., 526 LId 59 (7th Cir. 1975); United States v. National State Bank, supra
-11
The taxpayer should be able to conduct the basic discovery we permit within the thirty days he has to file his responsive pleadings. If he is unable to do so because of delay by the Government, the district court may extend his time for filing the response. The district court should view with extreme caution any other excuse given by the taxpayer for failure to conduct the discovery
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While Powell contemplates an adversarial hearing, it certainly does not require one merely to permit a fishing expedition by the taxpayer
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A special agent is one who works in the CrirninalInvestigation Division of the IRS, as opposed to a revenue agent, whose responsibilities are principally civil. In many investigations, a special agent and a revenue agent work together
-15
See United States v. Moll, supra, p. 138 (7th Cir. 1979)
JiL
The Court recognized that even at the point of a referral the criminal and civil aspects of a tax fraud investigation do not diverge entirely, but it reasoned that such a prophylactic rule was necessary to prevent misuse of the summons process. LaSalle National Bank, supra, p. 312, 98 S.Ct. p. 2365
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The line is drawn at the time of a formal recommendation by the IRS to the Justice Department, not at the time of a recommendation for prosecution made by the special agent to his district office. The agent's recommendation could, after all, be rejected, as it was in United States v. Anderson here. LaSalle National Bank, supra, p. 313, n.l5, 98 S.Ct. p. 2365 n.15
1!i.
See also United States v. First National Bank of Atlanta, 628 F.2d 871, 874 (5th Cir. 1980) :!.2..
"It is not just an institutional commitment to recommend for prosecution that renders a summons issued under § 7602 invalid; rather, it is the absence ofa civil purpose for that summons that triggers the LaSalle rule." United States v. Genser, 602 F.ld 69, 71 (3d Cir.), cert. denied, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979) (Genser III) .
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Garden State National Bank, supra, p. 71, n.13; Genser I, supra, p. 302; United States v. McCarthy, supra, p. 376, n. 10
51
United States v. Harris, supra, p. 883; United States v. Turner, supra, p. 275; United States v.Interstate Tool & Engineering Corp., supra, p. 62; United States v. National State Bank, supra, p. 1252
52
See Moore's Federal Practice, P 81.06(1) (2d ed. 1979) ("Since the agent can be questioned on this subject (the improper purpose defense) the use of depositions and interrogatories prior to the hearing is quite unnecessary and serves the sole purpose of delaying the IRS examination. "). Some limited discovery of documents believed to be in the possession of the Service may be permitted before the hearing, but only if the taxpayer can make a positive showing that the particular documents are necessary to his defense and that they provide information that could not otherwise be obtained at the hearing. District courts must be wary before permitting such discovery that it is not l:1eing used as a dilatory tactic
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See n.49, supra
54
Because of our reversal of the denial of enforcement in United States v. Salkin, we need not consider taxpayer Salkin's claim for attorneys' fees in that case. Taxpayer Meyers's contention that enforcement of the summonses in

United States v. Kis would violate his Fifth Amendment rights has already been answered by this court in United States v. Turner, supra, pp. 276-78. We have considered aU other arguments raised by taxpayers in these cases, and we find them all to be without merit

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BAC Home Loans Servldng. LP ~
Attn: Customer Service CA6-919-01-41
P.O. Box 5170
Siml Valley, CA 93062-5170
AITN: ACCOUNT MANAGER RE: ACCOUNT NUMBER H 000aa065139020
FOR INDEPEDANT CONFIRMATION OF RECIBPT OF YO
ANY RESPONSE TO THE FOLLOWING ADDRESS,
Attn, Tammi Hanchett, Nota~ Acceptor ~
600 Grant Street Suite 500
DeDver, Colorado 80203
September 3. 200'
RESPA QUALIFIED WRmEN REQUEST, TILA REQUEST, COMPLAINT,
DISPUTE OF DEBT & VALIDATION OF DEBT

This Jetter Is a "ouallfted writteDrequest" ID compliance with, and Under, the R;j EJtate Settlement Procedures Act. 12 U S.C Section 260Sfc) and ReplaUoD X at 24 C f & 3500 and The Gramm Leach BUley Act

Dear Madam or SIr.

We are writing to you to complain about the accounting a~d servldng ofth\s mortgage. Further. we will request: dartHcation ofvartous sales, transfers. fundln. sources, legal and beneficial ownership, charges. credits. debits. transactions. reversals, actions, payments. analyses and records related 10 the servicing of this account from its origination to the present date.

It is our understanding that your company may have engaged in one or more predatory servldng or lending and servldnl practices. As consumers. we are extremely concerned- that predatory 5er.:'ldng and/or predatory -lender" practices. may have affected us, personally.

We are troubled that potential fraudulent and deceptive practice! by unscnIpulous morq.are brokers; that sales and transfers of mortgage servtdng rights; that deceptive and fraudulent servtcing practices to enhance balance shuts; that deceptive, abusive and fraudulent accounting

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Author: calisaacl961 Subject Sticky Note Date: 2/24/2014 1:40:33 AM
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Author: home Subject: Sticky Note Date: *2!9n014* 5:25:06 AM
Notary Acceptor
September 3. 2009