

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
3

4 BEDROCK FINANCIAL, INC., a  
California Corporation,

5 Plaintiff,

6 v.

7 THE UNITED STATES OF AMERICA,

8 Defendant.  
9

1:10-cv-2326 OWW MJS

MEMORANDUM DECISION AND ORDER  
RE PLAINTIFF'S MOTION TO  
STRIKE AND DEFENDANT'S MOTION  
TO STRIKE

(DOCS. 12, 14)

10 I. INTRODUCTION

11 Plaintiff Bedrock Financial, Inc. ("Bedrock") proceeds with  
12 this action for equitable subrogation, declaratory relief, and  
13 judicial foreclosure of equitable lien against the United States  
14 of America ("United States"). Before the court are Bedrock's  
15 motion to strike answer and counterclaim (Doc. 12) and the United  
16 State's motion to strike (Doc. 13). The United States filed an  
17 opposition to Bedrock's motion (Doc. 13), to which Bedrock  
18 replied (Doc. 14). Bedrock did not file an opposition to the  
19 United States' motion to strike. The motions were heard June 13,  
20 2011.  
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23 II. BACKGROUND

24 In August 2006, Jose M. Fuentes and his wife, Irma Fuentes  
25 (together, "Debtors"), borrowed \$150,000.00 from R.K. Lowe,  
26 Trustee of the RK Lowe Revocable Trust ("Lowe Mortgage"), and  
27 secured repayment with a first deed of trust ("Lowe Deed of  
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1 Trust") against a vacant lot with commercial zoning in Atwater,  
2 Merced County, California ("Property"). The Lowe Deed of Trust  
3 was recorded on August 25, 2006 in Merced County.

4 On October 24, 2007, the Internal Revenue Service ("IRS")  
5 recorded a \$42,458.12 tax lien against the Debtors in the Merced  
6 County records ("Tax Lien").  
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8 The Debtors became delinquent on their payments under the  
9 Lowe Deed of Trust in 2007. On February 5, 2008, the Debtors  
10 refinanced the Property with a \$243,000.00 loan from Bedrock  
11 Financial ("Bedrock Refinancing"), securing repayment with a deed  
12 of trust encumbering the Property in favor of Bedrock Financial  
13 ("Bedrock Deed of Trust"). The Bedrock Financial Deed of Trust  
14 was recorded on February 5, 2008 in Merced County. The Debtors  
15 defaulted on the Bedrock Deed of Trust, and Bedrock foreclosed on  
16 the Property in October 2009.  
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18 Bedrock alleges that the Tax Lien was not discovered until  
19 long after the Debtors went into default under the Bedrock Deed  
20 of Trust. Bedrock alleges that based on the date of recordation  
21 of the Tax Lien, the Bedrock Refinancing unintentionally put the  
22 United States in a senior lien position on the Property. On May  
23 3, 2010, Bedrock filed a state court action against the United  
24 States seeking equitable subrogation and foreclosure of Bedrock's  
25 equitable lien. The United States removed the action to federal  
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1 court and added First American ("FirstAm") as a third-party on a  
2 counterclaim of conversion of federal funds.

3 The California Secretary of State suspended Bedrock as a  
4 California corporation effective December 24, 2009. Due to  
5 Bedrock's lack of standing to pursue or defend a lawsuit, on  
6 October 12, 2010 the Complaint and the United States'  
7 counterclaim against Bedrock were voluntarily dismissed without  
8 prejudice; the third-party complaint against FirstAm remains  
9 pending.  
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11 After Bedrock's corporate status was reinstated, it re-filed  
12 a complaint for equitable subrogation and judicial foreclosure on  
13 December 14, 2010. (Doc. 1). On March 17, 2011, the United States  
14 filed an answer and counterclaim for declaratory relief and  
15 judicial foreclosure. (Doc. 10). Bedrock filed a motion to strike  
16 portions of the United States' answer and counterclaim (Doc. 12),  
17 and the United States filed a motion to strike Bedrock's jury  
18 demand (Doc. 13).  
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### 20 III. LEGAL STANDARD

21 Rule 12(f) provides that the court "may order stricken from  
22 any pleading any insufficient defense or any redundant,  
23 immaterial, impertinent, or scandalous matter." Fed. R. Civ. P.  
24 12(f). The function of a Rule 12(f) motion to strike is to avoid  
25 the expenditure of time and money that might arise from  
26 litigating spurious issues by dispensing with those issues prior  
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1 to trial. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.  
2 1993), *rev'd on other grounds, Fogerty v. Fantasy, Inc.*, 510 U.S.  
3 517, 114 S.Ct. 1023 (1994). Motions to strike are disfavored and  
4 infrequently granted. *E.g., Natural Res. Def. Counsel v.*  
5 *Kemphorne*, 539 F.Supp.2d 1155, 1162 (E.D. Cal. 2008). "A motion  
6 to strike under Rule 12(f) should be denied unless it can be  
7 shown that no evidence in support of the allegation would be  
8 admissible, or those issues could have no possible bearing on the  
9 issues in the litigation." *Gay-Straight Alliance Network v.*  
10 *Visalia Unified School Dist.*, 262 F.Supp.2d 1088, 1099 (E.D. Cal.  
11 2001). "[E]ven when technically appropriate and well-founded,  
12 Rule 12(f) motions often are not granted in the absence of a  
13 showing of prejudice to the moving party." 5C CHARLES A. WRIGHT,  
14 ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND  
15 PROCEDURE § 1381, (3d ed. 2011).

18 "Although motions to strike a defense are generally  
19 disfavored, a Rule 12(f) motion to dismiss a defense is proper  
20 when the defense is insufficient as a matter of law." *Kaiser*  
21 *Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677  
22 F.2d 1045, 1057 (5<sup>th</sup> Cir. 1982). "A defense that might confuse the  
23 issues in the case and would not, under the facts alleged,  
24 constitute a valid defense to the action can and should be  
25 deleted." 5C CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD  
26 L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1381, (3d ed. 2011). A  
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1 partial defense is not insufficient. *Id.*

2        " 'Immaterial' matter is that which has no essential or  
3 important relationship to the claim for relief or the defenses  
4 being pleaded." *Fantasy*, 984 F.2d at 1527. " 'Impertinent' matter  
5 consists of statements that do not pertain, and are not  
6 necessary, to the issues in question." *Id.* Scandalous matters are  
7 allegations "that unnecessarily reflect [] on the moral character  
8 of an individual or state [] anything in repulsive language that  
9 detracts from the dignity of the court." *Consumer Solutions REO,*  
10 *LLC v. Hillery*, 658 F.Supp.2d 1002, 1020 (N.D. Cal. 2009)  
11 (quoting *Cobell v. Norton*, 224 F.Rd.D. 1, 5 (D.D.C. 2004)).  
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#### 14                                   IV. DISCUSSION

##### 15           A. Bedrock's Motion to Strike

##### 16                   1. Second Affirmative Defense

17        Bedrock moves to strike the United States' second  
18 affirmative defense as an insufficient defense:

19                   (2) Plaintiff has waived by its conduct any contention that  
20 the property's fair market value in February 2008 was less  
21 than \$243,000.

22        Doc. 10, 4. Bedrock contends that the United States' second  
23 affirmative defense, based on the doctrine of waiver, is legally  
24 insufficient to bar recovery under Bedrock's claims for equitable  
25 subrogation and judicial foreclosure. Bedrock argues that its  
26 Complaint seeks an equitable lien on the security itself-  
27 regardless of its value in 2008 or any time, and the property's  
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1 fair market value in 2008 has no bearing on any claim.

2 The United States rejoins that the second affirmative  
3 defense is not insufficient because equities are material to this  
4 lawsuit, and that valuation, i.e., "windfall" "unjust  
5 enrichment," or "prejudice," is material to the balancing of  
6 equities.  
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8 Weighing of equities is part of the test for equitable  
9 subrogation. *See Caito v. United Cal. Bank*, 20 Cal.3d 694, 704  
10 (1978) ("Subrogation must not work any injustice to the rights of  
11 others."). In addition, the doctrine of superior equities is  
12 followed in subrogation litigation. *Rokeby-Johnson v. Aquatronics*  
13 *Int'l, Inc.*, 159 Cal.App.3d 1076, 1084, 206 Cal.Rptr. 232 (1984).  
14 Unjust enrichment is among the equities relevant to equitable  
15 subrogation. *See In re Johnson*, 240 Cal.App.2d 742, 746 (1966).  
16 Subrogation is applied liberally to prevent unjust enrichment.  
17 *Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co.*, 78  
18 Cal.App.3d 371, 377, 144 Cal.Rptr. 189 (1978). The United States'  
19 second affirmative defense is not insufficient as a matter of  
20 law.  
21

22 The United States further argues that the Property's 2008  
23 valuation is a partial defense. The United States asserts that  
24 the valuation was adequate in 2008 to fully pay the Tax Lien,  
25 and, together with later interest accrual and other facts,  
26 reduces Bedrock's equities to zero. Motions to strike are denied  
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1 if there is a mixed question of law and fact that cannot be  
2 resolved. 5C CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD  
3 L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1381 (3d ed. 2011).

4 Finally, the United States correctly asserts that Bedrock  
5 has not shown any prejudice from the second affirmative defense.  
6 "Motions to strike are rarely granted in the absence of a showing  
7 of prejudice to the moving party." *Ollier v. Sweetwater Union*  
8 *High School Dist.*, 735 F.Supp.2d 1222, 1224 (S.D. Cal. 2010).

9  
10 Bedrock's motion to strike the United States' second  
11 affirmative defense is DENIED.

12 2. Fifth and Seventh Affirmative Defenses

13 Bedrock also moves to strike the United States' fifth and  
14 seventh affirmative defenses as insufficient defenses:

15 (5) Plaintiff's acquisition of the fee interest in the  
16 property in October 2009 extinguished plaintiff's lien  
17 interest.

18 . . .

19 (7) Having foreclosed on its mortgage once in its October  
20 2009 nonjudicial foreclosure, plaintiff cannot now foreclose  
21 on the same interest a second time.

22 Doc. 10, 4. Bedrock contends that the United States' fifth and  
23 seventh affirmative defenses, based on the doctrine of merger,  
24 are insufficient because the merger doctrine does not bar the  
25 establishment or foreclosure of any equitable estate. Bedrock  
26 argues that in order to assert such theories, the United States  
27 must plead that Bedrock intended a merger. Bedrock contends that  
28 because the allegation of intent does not appear in the United

1 States' answer and it "cannot be made under the facts of the case  
2 at bar," the fifth and seventh affirmative defenses are legally  
3 insufficient.

4 The United States rejoins that a motion to strike cannot  
5 rely on extrinsic evidence, such as "the facts of the case at  
6 bar." *Fantasy*, 984 F.2d at 1528 ("a motion to strike must rely  
7 only on the fact of the pleading and on judicially noticed  
8 facts."). Whether Bedrock intended the merger is a question of  
9 fact. *Sheldon v. La Brea Materials Co.*, 216 Cal. 686, 692, 15  
10 P.2d 1098 (1932) ("[I]ntention is a question of fact."). The  
11 United States further argues that the equities are important in  
12 merger questions, and that the application of the merger doctrine  
13 depends on further factual development. A motion to strike an  
14 affirmative defense can only be granted if there are no questions  
15 of fact. *Levin-Richmond Terminal Corp. v. Int'l Longshoremen's &*  
16 *Warehousemen's Union, Local 10*, 751 F.Supp. 1373, 1375 (N.D. Cal.  
17 1990).

20 In its reply, Bedrock argues that the doctrine of merger has  
21 no application and is immaterial. Bedrock asserts that it seeks  
22 to impose and foreclose on an equitable lien, not on the original  
23 trust deed, and whether Bedrock's original trust deed merged into  
24 its subsequent fee interest is of no consequence. Bedrock,  
25 however, does not provide legal support for this argument.  
26 "[W]hen there is no showing of prejudicial harm to the moving  
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1 party, the courts generally are not willing to determine disputed  
2 and substantial questions of law upon a motion to strike."

3 *Augustus v. Bd. of Pub. Instruction of Escambia Cnty., Fla.*, 306  
4 F.2d 862, 868 (5<sup>th</sup> Cir. 1962). "[T]hese questions quite properly  
5 are viewed as best determined only after further development by  
6 way of discovery and a hearing on the merits, either on a summary  
7 judgment motion or at trial." 5C CHARLES A. WRIGHT, ARTHUR R. MILLER,  
8 MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1381 (3d  
9 ed. 2011).

11 Bedrock's motion to strike the United States' fifth and  
12 seventh affirmative defenses is DENIED.

13 3. "Immaterial" and "Impertinent" References to Title  
14 Insurance in Counterclaim

15 Bedrock contends that the following references to title  
16 insurance and purported indemnification of Bedrock in the United  
17 States' counterclaims are immaterial and impertinent:

18 19. One or more of Dual Arch International, Bedrock and the  
19 Tax Debtors selected FirstAm, and all engaged FirstAm, to be  
20 their escrow agent and to provide title insurance.

21 20. At the direction of Dual Arch International, Bedrock and  
22 the Tax Debtors, with their approval and for their benefit,  
23 FirstAm set up and carried out an escrow for a loan by  
24 Bedrock and provided lender's title insurance to Bedrock.

25 . . .

26 33. Bedrock made a title insurance claim against FirstAm,  
27 complaining of the insured against federal tax lien. Upon  
28 receipt of the insurance claim, FirstAm did not pay the  
federal tax lien and did not pay Bedrock.

1 34. FirstAm instead, under a term of the title insurance  
2 policy, defended Bedrock's interest in the Parcel by  
3 promoting a court action by Bedrock against the federal  
government.

4 35. If the first-in-time federal tax lien is first in right,  
5 FirstAm will indemnify Bedrock under the terms of its title  
insurance policy for any loss suffered by Bedrock.

6 37. Should the first-in-time federal tax lien not be first  
7 in right, FirstAm would escape paying on Bedrock's insurance  
claim.

8 Doc. 10, 7-9. Bedrock contends that the acts or omissions of  
9 First American Title Company and First American Title Insurance  
10 Company ("FirstAm") are irrelevant to this lawsuit and are likely  
11 to prejudice the fact-finder against Bedrock and jeopardize  
12 Bedrock's right to a fair trial.

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14 The United States rejoins that: (1) FirstAm had knowledge of  
15 the Tax Lien, and the court, sitting in equity, should consider  
16 FirstAm's knowledge in weighing the equities; (2) FirstAm is the  
17 alleged tort feisor in the first lawsuit's claim for conversion  
18 of federal funds, and FirstAm's culpability in the related  
19 lawsuit should be considered in balancing the equities; and (3)  
20 as between Bedrock and FirstAm, FirstAm has the primary interest  
21 in the litigation, and, regardless of whether Bedrock prevails in  
22 this action, FirstAm will make Bedrock financially whole.  
23 Therefore, the United States argues that FirstAm's rights,  
24 obligations and behavior before, during, and after the litigation  
25 impact the equities as between the parties.

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28 Bedrock rejoins that: (1) whether FirstAm had knowledge of

1 the Tax Lien is irrelevant, and any knowledge that FirstAm had of  
2 the Tax Lien during escrow cannot be imputed to Bedrock; (2)  
3 FirstAm is not Bedrock's agent; and (3) evidence of Bedrock's  
4 insurance coverage would not be admissible under Federal Rule of  
5 Evidence 411.

6  
7 The court has issued an order to show cause why the first  
8 lawsuit, including the United States' third-party complaint for  
9 conversion against FirstAm, should not be consolidated with this  
10 lawsuit. Consolidation of the lawsuits would moot Bedrock's  
11 claims of immateriality and impertinence.

12 Even if the two lawsuits are not consolidated, an inquiry  
13 into the admissibility of evidence of Bedrock's insurance  
14 coverage is premature at the pleading stage. In addition, the  
15 disputed allegations provide a better understanding of the United  
16 States' counterclaim. 5C CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY KAY  
17 KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 1382 (3d ed.  
18 2011). ("The Rule 12(f) motion to strike allegedly offensive  
19 matter also will be denied if the allegations might serve to  
20 achieve a better understanding of the plaintiff's claim for  
21 relief.").

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23  
24 Bedrock's motion to strike paragraphs 19-20 and 33-37 of the  
25 United States' counterclaim is DENIED.

26 4. "Scandalous" References to Title Insurance in  
27 Counterclaim

28 Bedrock also moves to strike the following paragraphs as

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scandalous:

38. Should title insurers be allowed to escape payment of valid insurance claims by the device of actions against taxing authorities with recorded tax lien notices, title companies and escrow agents would have incentives to ignore and pass clouds on title to their customers.

39. Should title insurers be allowed to escape payment of valid insurance claims by actions against taxing authorities with recorded tax lien notices, the insurers would have incentives to insure clear title, at nominal risk to themselves, when the insured interests actually are clouded by valid tax liens.

Doc. 10, 9. Bedrock contends that no lender or title insurer would ever want to risk the expense, hassle, and difficulty of litigating lien priority disputes with the federal government. Rather, Bedrock argues that these allegations cast it in a "cruel and derogatory light" and do not state any facts whatsoever. Doc. 12-1, 10.

The United States correctly argues that these allegations fall far short of the Rule 12(f) standard for scandalous matters. The allegations do not reflect on the moral character of Bedrock or anyone else, state anything in repulsive language, or detract from the dignity of the court or parties.

Bedrock's motion to strike paragraphs 38 and 39 of the United States' counterclaim is DENIED.

5. References to Title Insurance in Body of Answer

Based on its arguments supporting the motion to strike references to title insurance in the Counterclaim, Bedrock moves to strike references to title insurance in the body of the United

1 States' answer. For the same reasons, Bedrock's motion to strike  
2 references to title insurance in the United States' answer is  
3 DENIED.

4 B. United States' Motion to Strike

5 The United States moves to strike the jury demand in the  
6 Complaint (1) due to lack of subject matter jurisdiction because  
7 of sovereign immunity, and (2) because the parties' claims sound  
8 in equity. Bedrock did not file an opposition to the motion to  
9 strike or address it in its reply. The United States' motion  
10 cannot be addressed until the parties' claims are developed in  
11 discovery. The motion to strike the jury demand can be renewed.  
12

13 The United States' motion to strike is DENIED, without  
14 prejudice.  
15

16 V. CONCLUSION

17 For the reasons stated:

- 18 1. Bedrock's Motion to Strike is DENIED, without prejudice.
- 19 2. The United States' Motion to Strike is DENIED, without  
20 prejudice.
- 21 3. Bedrock shall submit a proposed form of order consistent  
22 with this memorandum decision within five (5) days of  
23 electronic service of this memorandum decision.  
24

25 SO ORDERED.

26 DATED: June 17, 2011

27 /s/ Oliver W. Wanger  
28 Oliver W. Wanger  
United States District Judge