

# EXHIBIT S

(SEAL)

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
LAND COURT DEPARTMENT

ESSEX, ss.

10 MISC. 425681 (JCC)

RUSSELL & ASSOCIATES, LLC  
a Massachusetts Limited Liability Company,

Plaintiff,

v.

ROBERT V. WALLACE, JR., as Trustee of the  
BD LENDING TRUST,  
DESERT PINE, LLC, a Massachusetts Limited Liability  
Company a/k/a Desert Palm, LLC, and/or, alternatively,  
DESERT PALM, LLC, a Limited Liability Company of  
Currently Unknown Origin,  
RFF FAMILY PARTNERSHIP LIMITED PARTNERSHIP,  
a California Limited Partnership,  
THE TOWN OF SAUGUS, a Municipal Corporation, and  
PITT PIPELINE COMPANY, INC.,  
a Massachusetts Corporation,  
GEORGE BENJAMIN CONLEY, as Executor of the Will of  
Elizabeth Conley, deceased,

Defendants,

*and*

LINK DEVELOPMENT, LLC, a Massachusetts Limited Liability  
Company, and  
PETER F. RUSSELL, ESQ., individually,  
SHOPS AT SAUGUS,  
a Delaware Limited Liability Company,  
CARUSO MUSIC COMPANY, a Massachusetts Corporation,

Interested Parties

**ORDER ON DEFENDANT RFF FAMILY PARTNERSHIP LIMITED PARTNERSHIP'S  
SPECIAL MOTION TO DISMISS**

The Plaintiff law firm, Russell & Associates, LLC ("Russell"), filed this action on March 25, 2010, seeking declarations as to the priority of certain liens which it claims to hold on the

real property known as 1040 Broadway (Route 1 North) in Saugus, Massachusetts (the "Property"). The Property is about twenty-two (22) acres in size, and is comprised of one (1) registered parcel and three (3) unregistered parcels. The registered parcel is shown on Plan No. 15302-A, filed with Original Certificate of Title No. 10353 in the Southern Registry District for Essex County. The three (3) unregistered parcels are described in deeds recorded in the Essex South District Registry of Deeds, respectively, in Book 17407, Page 462, in Book 17843, Page 194, and in Book 17407, Page 471.<sup>1</sup>

In its Verified Complaint, Russell seeks a declaration that it has a first priority lien on the Property by virtue of an attorney's lien pursuant to G. L. c. 221, § 50, and seeks an order requiring the recorder of this court to accept for filing, in connection with the registered parcel, a document entitled "Certificate of Attorney's Lien." Russell also seeks a determination of the priority of its claimed attorney's lien on the three unregistered parcels. Finally, Russell seeks a declaration that it holds a first (or second) priority position lien on the Property as the result of a 2009 assignment of a mortgage originally granted by Link Development, LLC ("Link") to Desert Pine, LLC ("Desert Pine").

On March 26, 2010, the Plaintiff's Motion for Lis Pendens was endorsed, ex parte.<sup>2</sup> On June 1, 2010, Defendant RFF Family Partnership Limited Partnership ("RFF") filed a Special Motion to Dismiss, pursuant to G. L. c. 184, § 15, seeking dismissal of the claims against it with an award of attorney's fees and costs, as well as dissolution of the lis pendens. The hearing on RFF's Special Motion, originally marked for June 21, 2010, was rescheduled by the court

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<sup>1</sup> The Property is described in more detail in the Plaintiff's Verified Complaint.

<sup>2</sup> The Plaintiff filed its Motion for Lis Pendens immediately after its ex parte Motion for a Temporary Restraining Order was denied. Defendant RFF Family Partnership Limited Partnership was represented at the Temporary Restraining Order proceeding and was aware of the subsequently submitted Motion for Lis Pendens. The other Defendants had not yet been served with the Plaintiff's Complaint or its ex parte Motions, and had not yet made an appearance in the case.

(Cutler, J.) after Russell failed to file a timely opposition (relying on RFF's assent, but without obtaining leave of court). The rescheduled hearing was conducted on July 20, 2010. The Plaintiff again failed to timely file its opposition, but was permitted an extension to July 30, 2010 for good cause shown. Defendant RFF filed a response to the Plaintiff's Opposition on August 30, 2010.

In its Special Motion to Dismiss, RFF asserts that the Plaintiff's claim to hold a priority lien on the Property under the attorney's lien statute should be dismissed as a matter of law, and that the attorney's lien claimed by the Plaintiff does not constitute a proper basis for the *lis pendens* because it does not involve an interest in real property. RFF argues that Russell has not perfected its claimed attorney's lien in the manner provided by statute and that, at best, there is an inchoate lien. RFF further argues that, once choate, an attorney's lien under G. L. c. 221, § 50 attaches only to the *proceeds* derived from a resolved claim or litigation and, therefore, cannot attach to the Property. Additionally, RFF contends that the Plaintiff cannot have a first priority lien on the Property by virtue of the mortgage assigned to Russell in 2009, because the assignor's interest in that mortgage had previously been subordinated to a mortgage held by RFF.

In the Plaintiff's Opposition, Russell contends that, notwithstanding the provisions of G. L. c. 221, § 50, a statutory attorney's lien already attaches to the Property by virtue of a voluntary agreement executed by Russell's corporate client, Link, on December 28, 2009,<sup>3</sup> entitled "Certificate of Attorney's Lien." Russell alternatively argues that the "Certificate of Attorney's Lien" should be treated as an existing lien on the Property *independent* of the attorney's lien statute and, therefore, said Certificate must be accepted for registration as notice of an encumbrance on the registered parcel. Russell also contends that its assignment was not

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<sup>3</sup> Link is the plaintiff in the pending Superior Court action and was record owner of the Property at the time the instant action was commenced in Land Court.

affected by the 2007 Mortgage Subordination Agreement because (1) the party executing the agreement lacked authority to do so, and (2) the Subordination Agreement was not recorded or registered prior to the 2009 assignment to Russell being put on record.

Section 15 of Chapter 184 provides, in relevant part, that if a memorandum of lis pendens is approved ex parte,<sup>4</sup> “any party aggrieved thereby may move at any time for dissolution of the memorandum...” and that “[a] party may also file a special motion to dismiss the claimant’s action if that party believes that the action or claim supporting the memorandum of lis pendens is frivolous.” Said Section 15 further provides that the court “shall grant” a special motion to dismiss if it finds “that the action or claim is frivolous because (1) it is devoid of any reasonable factual support; or (2) it is devoid of any arguable basis in law; or (3) the action or claim is subject to dismissal based on a valid legal defense such as the statute of frauds.” If the court allows the special motion to dismiss, “it shall award the moving party costs and reasonable attorneys [sic] fees ....” Section 15 also provides that “[i]n the event there are un-adjudicated claims remaining after the dismissal of any claim pursuant to which the memorandum of lis pendens was recorded, the court shall order the entry of partial judgment with respect to the claim dismissed pursuant to this section.” G. L. c. 184, §15 (emphasis added).

For the reasons set forth below, RFF’s Special Motion to Dismiss is **ALLOWED IN PART and DENIED IN PART.**

#### Attorney’s Lien

With respect to the Plaintiff’s request for a declaratory judgment that it holds an attorney’s lien on the Property pursuant to G. L. c. 221, § 50, I find that the claim is unsupported by either law or fact and is, therefore, frivolous. More specifically, I find that this claim *does not*

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<sup>4</sup> RFF was present at the hearing when the lis pendens was argued, although the other named Defendants were not.

constitute the type of claim “affect[ing] the title to real property”<sup>5</sup> on which to base a memorandum of lis pendens under G. L. c. 184, § 15, and is also not within this court’s jurisdiction.

Pursuant to G. L. c. 221, § 50, an attorney’s lien attaches to the “proceeds derived” from the “cause of action, counterclaim or claim” and the “judgment, decree or other order in his client’s favor entered or made” in the litigation or other claim where the subject legal representation occurred. Here, the litigation on which Russell bases its attorney’s lien claim is not yet resolved, but *remains pending* in Suffolk Superior Court,<sup>6</sup> and Russell has not requested “the [superior] court in which the proceeding is pending” to “determine and enforce the lien.” G. L. c. 221, § 50. As the subject of *that* litigation was never before the Land Court, this Court has no role with respect to determination or enforcement of the claimed attorney’s lien.

Moreover, under G. L. c. 221, § 50 an attorney’s lien would not, in any event, attach directly to the Property, but rather would attach only to the monetary proceeds (if any) from the proceedings in which Russell has represented the Property owner. *See In re Leading Edge Products, Inc.*, U.S. Dist. LEXIS 7597 (D. Mass. May 28, 1991) at \*3 (“the use in § 50 of the word ‘proceeds’ (as opposed to a broader term, such as ‘benefits’) indicates that the section’s drafters contemplated [a cash] fund.”); *cf. Ropes & Gray, LLP v. Jalbert*, 454 Mass. 407 (2009) (an attorney’s lien which attached to the client’s claim — a patent application and patent — is inchoate until proceeds are derived from the sale of the patent or patent application). Therefore, Russell’s attorney’s lien claim is not one affecting title to real property.<sup>7</sup>

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<sup>5</sup> “[O]f the use and occupation thereof or the buildings thereon.”

<sup>6</sup> Suffolk Superior Court Docket No. 06-5242.

<sup>7</sup> A claim affects title if it involves a plaintiff’s interest in real estate, including a lien or similar encumbrance on such real estate. *Wolfe v. Gormally*, 440 Mass. 699, 706 (2004).

I find, therefore, that Russell's claim asserting a statutory attorney's lien on the Property in a first priority encumbrance position is both devoid of reasonable factual support and lacking any arguable basis in law.<sup>8</sup> RFF's Special Motion to Dismiss the Plaintiff's attorney's lien claim is **ALLOWED**.

Allowance of RFF's Special Motion to Dismiss with respect to Russell's attorney's lien claim does not, however, require the dissolution of the memorandum of lis pendens, since I find that Russell's other claim against RFF — its claim for a declaratory judgment regarding the priority of Plaintiff's assigned mortgage on the Property — is *not* subject to dismissal under the standards set forth in G. L. c. 184, § 15.

#### Priority of the Plaintiff's Assignment of Mortgage

According to the documentation submitted with Russell's Complaint and with RFF's Special Motion to Dismiss, Link granted a first mortgage on the Property to Desert Palm, LLC, in 2005, as security for a 2 million dollar loan (the "Desert Palm Mortgage"). In 2006, Link granted a mortgage on the Property to Defendant BD Lending Trust, as security for a \$600,000 loan (the "BD Mortgage"). On October 10, 2006, the Desert Palm Mortgage and the BD Mortgage were both put on record in the Essex Registry District as encumbrances on the registered parcel, together with an instrument purporting to subordinate the Desert Palm

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<sup>8</sup> I have considered, but also reject, the alternative argument presented in Russell's Opposition to the Special Motion to Dismiss, that it holds a priority lien on the Property *independent* of the Attorney's Lien statute, by virtue of a voluntary grant of lien memorialized in the document entitled "Certificate of Attorney's Lien," dated December 28, 2009. The argument that the Certificate creates a lien independent of the statute is fully undercut by the language used in the Certificate itself. Indeed, the Certificate expressly recognizes and purports to grant a lien "pursuant to G. L. c. 221, § 50" to secure a debt owed to Russell for legal services. The Certificate also states that the lien is "enforceable under G. L. c. 221, § 50." However, even if the Certificate were read (as the Plaintiff would have it) as a separate, voluntary lien granted as security for a debt owed to Russell in connection with the Property, there is no reasonable basis for Russell's claim that such a lien would have priority over encumbrances of record prior to the execution of the Certificate.

Mortgage to the BD Mortgage.<sup>9</sup> No information has been submitted to this court documenting whether these three instruments were also recorded to encumber the unregistered parcels.

In 2007, Link granted a mortgage on the Property to RFF as security for a loan in the amount of 1.4 million dollars (the "RFF Mortgage"). The RFF Mortgage, which was signed on October 15, 2007 by Jeffrey B. Karll as Manager of Link, was put on record in the Essex Registry District on October 16, 2007. Submitted as an exhibit to RFF's Special Motion to Dismiss was a copy of a "Subordination Agreement" purporting to subordinate the Desert Palm Mortgage to the RFF Mortgage. The Subordination Agreement was signed on October 17, 2007 by Jeffrey Karll, as Manager of "Desert Pine, LLC f/k/a Desert Palm, LLC." According to the affidavit of Jeffrey B. Karll, he, as "manager of Desert Pine LLC a/k/a Desert Palm LLC," assigned the Desert Palm Mortgage to Russell. The Assignment to Russell was put on record in the Essex Registry District on February 26, 2009. RFF has presented no evidence that the Subrogation Agreement was ever put on record. There has also been no evidence produced that the RFF Mortgage or the Assignment to Russell was ever recorded on the unregistered parcels of the Property.

The limited documentation presented in the proceedings demonstrates that fuller inquiry into the facts will be required before any determinations can be made regarding the validity and priority of the various mortgages, assignments, and subordination documents. Indeed, some of the salient facts are presently being litigated in the Superior Court action. I find that the Plaintiff's claim for declaratory judgment concerning the priority of its 2009 assignment is not so lacking in factual or legal support as to be deemed frivolous at this stage of the proceedings. Therefore, RFF's is not entitled to dismissal of said declaratory judgment claim. Further,

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<sup>9</sup> The circumstances surrounding the BD Mortgage are the subject of the pending Superior Court action in which Russell has been representing Link.



because that declaratory judgment claim does involve a question of title to an interest in real property, dissolution of the lis pendens is not appropriate at this time.

Accordingly, it is hereby

**ORDERED** that Defendant RFF's Special Motion to Dismiss is **ALLOWED** with respect to Plaintiff's claim that it holds a priority lien on the Property in the form of an attorney's lien under G. L. c. 221, § 50; and it is further

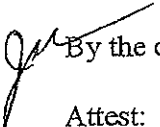
**ORDERED** that Defendant RFF's Special Motion to Dismiss is **ALLOWED** with respect to the Plaintiff's claim that it holds a priority lien on the Property independent of provisions of the attorney's lien statute, G. L. c. 221, § 50; and it is further

**ORDERED** that an award of Defendant RFF's costs and reasonable attorney's fees, pursuant to G. L. c. 184, § 15, shall be made after said Defendant has submitted appropriate documentation of the costs and fees it incurred in connection with its Special Motion to Dismiss the attorney's lien claim; and it is further

**ORDERED** that Defendant RFF's Special Motion to Dismiss is **DENIED** as to the Plaintiff's claim for declaratory judgment that it holds an assignment of mortgage with first or second priority over the RFF Mortgage; and it is further

**ORDERED** that RFF's request to dissolve the lis pendens is **DENIED**.

**SO ORDERED.**

 By the court (Cutler, J.)

Attest:

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Deborah J. Patterson, Recorder

Dated: 3 December 2010

A TRUE COPY  
ATTEST:

  
RECORDER