IN THE SUPERIOR COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOSE C. MAFNAS, Plaintiff, and Counter-Defendant, v. ALFRED LAURETA, E. EVELYN LAURETA, HEDWIG V. HOFSCHNEIDER, DANIEL T. VILLAGOMEZ, KENNETH W. COWARD, and CONCEPTION B. COWARD, Defendants and Counter-Claimants.	CIVIL ACTION NO. 88-696 ORDER PARTIALLY GRANTING MOTIONS TO STRIKE AFFIRMATIVE DEFENSES, AND TO DISMISS COUNTERCLAIMS, AND THIRD-PARTY CLAIMS; ORDER GRANTING MOTION TO DISQUALIFY
ALFRED LAURETA and HEDWIG V. HOFSCHNEIDER, Third-party Plaintiffs, v. JESUS S. SANTOS, Third-party Defendant.	

This matter arises out of a quiet title action implicating Article XII of the Commonwealth Constitution. On December 7, 1994, the parties argued several motions, including the following: a motion to disqualify; a motion to dismiss Defendants' third-party complaint; a motion to strike

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Defendants' affirmative defenses; and a motion to dismiss counterclaims.[1] The Court now renders its decision.

I. FACTS

On September 28, 1988, Jose C. Mafnas initiated a quiet title action based upon Article XII of the Commonwealth Constitution. The complaint concerns real property known as Lot 031 E 09 ("the property"), and names Alfred Laureta, E. Evelyn Laureta, Hedwig V. Hofschneider, Daniel T. Villagomez, Kenneth W. Coward and Conception B. Coward as defendants. Defendants Hofschneider, Villagomez, and Third-Party Defendant Jesus C. Santos are persons of Northern Marianas descent ("NMD"). The remaining Defendants are non-NMDs.[2]

Involved in this case are several putative conveyances of the subject property, beginning with a January 22, 1986, sale via warranty deed by Santos to Hofschneider. complaint, *Exh. A.* Hofschneider, an NMD, purchased the property with money supplied by Laureta, a non-NMD, in order to lease it to him. Complaint. The lease that they entered into contained a provision whereby Hofschneider would grant title to Laureta in the event of a change in law removing the restriction against ownership of property by non-NMDs. Id. Approximately a year and a half later, Laureta canceled the lease and Hofschneider sold the property to Villagomez. Complaint, *Exh. C.* Thereafter, the Cowards leased the property from Villagomez. Id. at 177. Finally, on September 27, 1988, Santos again sold the property, this time to Mafnas. Complaint, *Exh.* B. On the following day, Mafnas initiated this suit, claiming that the Santos-Hofschneider sale and the Hofschneider-Laureta lease violate Article XII because Laureta, a non-NMD, bought the property

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[1] On the same date, the Court heard Mafnas's motion for summary judgment and rendered its decision on May 2, 1994. The Court found that the change of law provision in the lease violated Article XII. Notwithstanding, the Court opined that the lease would be validated if it was determined that the violative provision was not integral to the lease and was therefore severable.

[2] With certain exceptions, Article XII of the CNMI Constitution prohibits nonONMDs from holding interests in land in excess of 55 years.

through Hofschneider. *Plaintiff's Consolidated Motions* at 5, 20-36. The Cowards and Villagomez are not accused of having entered into an agreement in violation of Article XII. Instead, Villagomez' title is challenged based upon the fact that it was conveyed by Hofschneider, who, Mafnas claims, had no title to give. The Cowards' right to possession under their lease with Villagomez is being challenged upon the same grounds.

In response to the complaint, Defendants profess that they have been in conformance with Article XII. Alternatively, Defendants argue that the purpose of this suit is not to provide Mafnas with possession or title over the property, but to discredit former Judge Laureta to cause his recusal from Article XII cases. Defendants maintain that Plaintiff's counsel Theodore R. Mitchell encouraged Mafnas to solicit clients with this aim. *Id.* at 4. Allegedly, Mafnas made an unsuccessful attempt to persuade Santos to retain Mitchell in order to bring this action against Defendants. *Id.* After Santos refused, Defendants claim that Mafnas bought the property from Santos with the intent of bringing this action himself; Defendants note that Mafnas filed this suit the following day. *Id.* Further, Defendants assert in their third-party complaint that Santos is liable as he knew of Mafnas' intent at the time of the conveyance. *Dejendants' First Amended Third-party Complaint, 5, 6.* Thus, Defendants aver that Mafnas and Santos were co-conspirators.

II. ISSUES

A. Whether a defendant may assert affirmative defenses to avoid an Article XII claim.

B. If so, whether the following affirmative defenses should be stricken: champerty; equal protection and due process; standing; waiver; laches; failure to state a claim; bona fide purchaser; illegality; fraud; and, statute of frauds.

C. Whether a defendant may counterclaim against an Article XII plaintiff.

D. If so, whether the following counterclaims should be dismissed: abuse of process; interference with contract; champerty; breach of contract; and, restitution.

E. Whether the third-party complaint should be dismissed.

F. Whether ABA Model Rules permit an attorney to serve as both advocate and witness.

m. ANALYSIS

A. Whether affirmative defenses may be used to avoid an Article XII claim

A threshold argument which Plaintiff advances is that Article XII sets up an absolute right, permitting no exceptions, and therefore, no affirmative defenses. An affirmative defense presupposes a legitimate claim but sets out additional facts which avoid recovery on the claim. BLACK'S DICTIONARY OF LAW, 5th Ed. (1979). Thus, Mafnas fears that a successful affirmative defense would result in the enforcement of land transactions judged to violate Article XII.

Additionally, Mafnas argues that affirmative defenses can not be asserted against an Article XII claim because affirmative defenses presuppose a valid claim, which in the Article XII context, means that a transaction is void ab initio. Void ab initio "means that if a person sells land to a person who is not of Northern Marianas descent, that transaction never has any effect and never has any effect with respect to the title of the land." The Analysis *to the Constitution* p. 178. In short, Mafnas concludes that it is impossible to assert a defense against something that never happened.

The Framers to the Constitution did not intend Article XII to establish an unqualified right to prevent non-NMDs from owning land in the Commonwealth. This is evidenced by the express exceptions to Art. XII, § 1's decree that "[t]he acquisition of permanent and long-term interests of real property in the Commonwealth shall be restricted to persons of Northern Marianas descent." Comm. Const. Art. XII, § 1. For instance, Art. XII, § 3 exempts land above the first floor of a condominium building from the definition of "permanent and long-term interests in real property." Furthermore, Art. XII, § 2 exempts from the definition of "acquisition" transfers to spouses by inheritance, as well as transfers to banks and others who acquire property through mortgages.

Likewise, the Court rejects Mafnas's second theory, based as it is upon the erroneous assumption that a transaction violating Article XII will invariably be found void ab initio. To the contrary, both Commonwealth Supreme Court pronouncements and the Constitution negate this idea.

In *Diamond Hotel Co., Ltd., v. Matsunaga,* Appeal No. 93-023, *slip op.* at 6,7, (N.M.I. Jan. 19, 1995), the Supreme Court enforced a lease even though it contained a renewal provision found to violate Article XII. Rather than declaring the entire transaction void ab initio, as Mafnas would urge here, the Court simply excised the violative provision and effectuated the balance, after finding that the violative provision was not an integral part of the lease. *c.f.*, *Manglona* v. *Kaipat,* 3 N.M.I. 322 (1992); *Laureta* v. *Mafnas,* Civil Action No. 88-696 (Super. Ct. May 2, 1995) (transaction violating Article XII enforceable contingent upon a finding that violative portion is severable). Thus, the Court finds that Article XII is susceptible to avoidance by affirmative defenses.

1. Rules Governing Affirmative Defenses

Rule 12(f), Com.R.Civ.P. provides in pertinent part that "upon motion by a party . . . the court may order stricken from the pleadings any insufficient defense . . .". A defense is insufficient as a matter of law if it can not succeed under any circumstances. *Resolution Trust Corp. v. Fleischer,* 835 F.Supp. 1318 (D.Kan. 1993). The rule is designed to avoid expending time and money litigating issues that will not affect the outcome of the case. U.S. *v. Smugglers-Durant Min. Corp., 823* F.Supp. 873 (D.Colo. 1993); 835 F.Supp. 1318 ("Purpose of the rule is to minimize delay, confusion and prejudice by narrowing the issues for discovery and trial"). Yet, motions to strike are generally disfavored because of their dilatory character. *Manglona* v. *Tenorio,* Civil Action No.: 93-1061 (Super. Ct. April 5, 1994); WRIGHT & MILLER, § 1381, p. 672. To combat this, some cases demand that the moving party demonstrate that it would be prejudiced by denial of the motion. WRIGHT & MILLER, 1381, p. 672; In *Re Chambers Development Securities Litigation,* 848 F.Supp. 602 (W.D.Pa. 1994). Nonetheless, it is within the sound discretion of the trial court to grant such motions in the absence of prejudice where the insufficiency of the defense is apparent, no new questions of law are presented, and the material facts are uncontroverted. WRIGHT & MILLER, *supra* atp. 672-678; 835 F.Supp. 1318; 823 F.Supp. at 875.

2. Factual Assumptions

An affirmative defense accepts the allegations in the pleading, but states additional facts which avoid recovery under the complaint. *Centronics Financial Corp. V. El Conquistador Hotel Corp.,*

573 F.2d 779, 782 (2d Cir. 1978); BLACK'S DICTIONARY OF LAW, 5th Ed. (1979). Thus, for purposes of a motion to strike affirmative defenses under Com.R.Civ.Proc. 12(f), both the facts alleged in the complaint and the additional facts alleged in the affirmative defenses are accepted as true. *Id.* The later set of facts do not contradict the complaint, they build upon it.

B. Defendants' Affirmative Defenses

1. Equal Protection and Due Process

Defendants contend that Mafnas's claim deprives Defendants Hofschneider and Villagomez of their rights to equal protection and to due process. A viable equal protection claim under Art. I, § 6 of the Commonwealth Constitution and the Fourteenth Amendment of the United States Constitution requires that the party seeking to invoke the protection either belong to a suspect classification, or have suffered an infringement of a fundamental right. *In re Blankenship,* 3 N.M.I. 209, 219 (1992); *Mafnas v. Laureta,* Civil Action No. 88-696 (Super Ct. May 2, 1995). Equal protection analysis under the U.S. Constitution has found that the rights of certain "suspect classes" are more susceptible to infringement based upon their race, sex or ethnicity. *In re Blankenship,* 3 N.M.I. 209, 219 (1992). In the case at bar, Defendants Hofschneider and Villagomez, both NMDs, are far from belonging to a "suspect class". Instead, they are members of the class which Article XII explicitly seeks to promote. Comm.Const. Art. XII, §1. Likewise, Hofschneider and Villagomez are not at risk of deprivation of a fundamental right. They would be at risk of divestiture only if the Court determines that their interest violated Article XII; and the Ninth Circuit has pronounced that such divestitures conform with equal protection guarantees. *Wabol* v. *Villacrusis,* 958 F.2d 1450 (9th Cir. 1990). Hence, this component of Defendants' affirmative defense is defective.

Similarly, the due process component of Defendants' claim is unfounded. Due process requires that "'the parties whose rights are to be affected are entitled to be heard: and in order that they may enjoy that right, they must first be notified.'" *Fuentes* v. *Shevin, 92* S.Ct. 1983, 1994 (1972) (citations omitted). In the instant case, Defendants do not claim to have been inadequately provided with either notice or an opportunity to be heard. Thus, Defendants' claim is deficient as

a matter of law as to the due process component as well as the equal protection component. Mafnas's motion to strike Defendants' equal protection affirmative defense is GRANTED.

2. Standing

Defendants maintain that standing under an Article XII claim requires privity of contract between the opposing parties, which is lacking here. Answer at 8. Generally, standing is "a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court". *Borja* v. *Rangamar*, 1 N.M.I. 347, 359 (1990) (citations omitted); see Sierra Club v. Morton, 92 S. Ct. 1361, 1364 (1972); *Flast* v. Cohen, 88 S.Ct. 1942 (1968). More specifically, Article XII claims are a derivative of quiet title actions and impose the same procedural requirements for standing. A claimant bringing a quiet title action must allege title and entitlement to possession aaverse or hostile to the interest claimed by others. *State, etc. v. Santiago*, 590 P.2d 335, 337 -338 (1979). Here, Mafnas claims title and the right to possession of the property based upon his warranty deed of sale from Santos. Clearly, then, Mafnas has satisfied these requirements. Mafnas's motion to strike Defendants' affirmative defense of lack of standing is GRANTED.

3. Waiver

A waiver is defined as an intentional relinquishment of a known right. Johnson. V. *Zerbert*, 58 S.Ct. 1019 (1938). In the instant case, Defendants invoke the defense of waiver in a conclusory manner, unaccompanied by any theory as to its applicability to the facts at hand. Defendants' sole argument for preservation of this defense is the claim that it presents an issue of fact. While true that a motion to strike is inappropriate where there are disputed issues of fact, In Re All Maine Asbestos *Litigation*, 575 F.Supp. 1375 (1983), here, Defendants have not identified a single fact relevant to issue of waiver which is in dispute. Therefore, based on the facts, or lack thereof, before it, the Court finds that the defense of waiver is insupportable as a matter of law. Mafnas's motion to strike Defendants' affirmative defense of waiver is GRANTED.

4. Laches

Laches attaches to bar a claim in equity based on a failure to seasonably assert a right, thereby prejudicing the opposing party. Wooded Shores Property Owners Ass'n, *Inc.* v. *Mathews*, 345 N.E.2d

186, 189 (Ill. App.Ct. 1976). Defendants present this defense in a stark manner, mirroring their conclusory assertion of waiver. It is understandable why Defendants conserved their energy: the defense of laches is unsupportable, given that Mafnas instituted this suit one day after purchasing the subject property and acquiring a cause of action. Not understandable, however, is why Defendants did not seek to conserve the energy of the Court by withdrawing this frivolous defense. Mafnas's motion to strike Defendants' affirmative defense of laches is GRANTED.

5. Failure to State a Claim

Defendants allege that Mafnas has not set out facts to support a claim for relief based upon Article XII. Indeed, Mafnas has stated such a claim, as this Court's decision partially granting Mafnas's summary judgment reflects. *Laureta v. Mafnas*, Civil Action No. 88-696 (Super. Ct. May 2, 1995). Furthermore, failure to state a claim is not an affirmative defense. Mafnas's motion to strike Defendants' affirmative defense based on a failure to state a claim is GRANTED.

6. *Bona Fide Purchaser*

A bona fide purchaser is one who acquires title for value paid without notice of another's prior claim of right to, or equity in, the property. *Schoolhouse Educational Aids, Inc. v. Haag*, 733 P.2d 313 (Ariz. App. 1987); *Snuffin v. Mayo*, 494 P.2d 497 (Wash.App. 1972). The significance of the classification is that it establishes priority with the bona fide purchaser over claims by *prior* purchasers. *Grand Investment Co. v. Savage*, 742 P.2d 1262 (1987). Here, Defendants seek to invoke the status of bona fide purchaser to protect against a claim by a *subsequent* purchaser. Thus. irrespective of whether Defendants are bona fide purchasers, the doctrine can not shield them against Mafnas's claim. It is therefore inconceivable that this defense could succeed. Mafnas's motion to strike Deferidants' bona fide purchaser affirmative defense is GRANTED.

7. Illegality

Defendants advocate the finding that this action is barred on the basis that it was illegal for Mafnas to purchase property from one whom he knew had already conveyed title and whom he knew did not intend to repurchase title. This presents a new question of law, and therefore should not be stricken. *Phillips Machinery Company v. Le Blond, Inc.*, 494 F.Supp. 318, 321 (N.D. Okla.

1989). Mafnas's motion to strike Defendants' affirmative defense of illegality is DENIED.

8. Fraud

Defendants baldly state that Mafnas fraudulently acquired the property at issue. Fraud involves misrepresentation or deceit, causing detrimental reliance. BLACK'S LAW DICTIONARY, 5th Edition (1979) ("An intentional perversion of the truth for the purpose of inducing another for reliance upon it to part with some [value] or a legal right"). Here, Defendants do not claim that Mafnas made misrepresentations to them. Thus, the Court has no opportunity to visit the issue of detrimental reliance. Further, Defendants do not even claim that Mafnas made misrepresentations to Santos in order to induce Santos to sell the property to him. Conversely, Defendants claim that Mafnas and Santos worked in concert with Mitchell to institute this suit by the sale of the property. In any case, Defendants lack standing to claim injury predicated on a fraud perpetrated upon Santos. Moreover, Defendants' allegations lack the specificity required of fraud. Com.R.Civ.Proc. 9 (b). Mafnas's motion to strike Defendants' affirmative defense of fraud is GRANTED.

9. Statute of Frauds

Defendants assert that the present case is barred by the statute of frauds, requiring that certain land transactions be memorialized. The statute of frauds renders unenforceable oral executory agreements for the creation or transfer of interests in land, including leases in excess of one year. 2 CMC $4912.

Defendants give the Court no insight into how they seek to invoke the statute of frauds. The Court is unable to ascertain its applicability, since all of the germane transactions were memorialized. Moreover, any imaginable statute of frauds defense is foreclosed by the Court's earlier decision that the Laureta-Hofschneider lease evidences a land interest in violation of Article XII. Laureta v. *Mafnas*, Civil Action No. 88-696 (Super. Ct. May 2, 1995) (transaction containing provision violating Article XII enforceable if such provision is deemed severable from larger transaction). Thus, here, a statute of frauds defense is insufficient as a matter of law. Mafnas's motion to strike Defendants' statute of frauds affirmative defense is GRANTED.

C. Whether Counterclaims May Be Asserted In Article XII Actions

Defendants have filed counter-claims as well as affirmative defenses. Mafnas attacks both upon the ground that allowing them would impermissibly dilute Article XII rights. This position is illogical. Counterclaims do not seek to avoid a legitimate claim. Counterclaims only qualify or limit the right to *money* judgements, by acting as a set off. WRIGHT, MILLER & KANE, FEDERAL PRACTICE and PROCEDURE: Civil 2d § 1404; 20 Am Jur Counterclaim $1 (emphasis added). Counterclaims do not affect or limit a right. A counterclaim is a cause of action on which the defendant might have obtained affirmative relief had he sued the plaintiff in an independent action. Id. at § 3 (citations omitted). The philosophy behind Com.R.Civ.Proc. 13, governing counterclaims, is to expedite the resolution of all controversies between the parties in one suit. WRIGHT, MILLER & KANE, FEDERAL PRACTICE and PROCEDURE: Civil 2d § 1403. Permitting counterclaims fosters the conservation of time and money; benefitting the parties, the court, and, ultimately, the public. The counterclaims put forth by Defendants in the present case are compulsory counterclaims, meaning counterclaims arising out of the same transaction or occurrence as plaintiff's claim. Id. Compulsory counterclaims are waived if not asserted in a responsive pleading. Res judicata then bars all future suits based upon that cause of action. Id. Thus, prohibiting compulsory counterclaims in Article XII actions would not only be inefficient but grossly unjust.

Further, the Analysis to the Constitution demonstrates that the Framers of the Constitution sanctioned the assertion of counterclaims against Article XII claims. For example, the Analysis explains that Art. XII, § 6, the enforcement section, "affects only the title in land. [Section 6] does not affect the cause of action that the buyer may have if the seller takes his money and then does not part with title because the buyer is not a person of Northern Marianas descent." *Analysis to the Constitution* 178, *179.* Obviously, such a cause of action would be in the form of a compulsory counterclaim, as it would necessarily involve the same facts and circumstances as the plaintiff's Article XII claim. Thus, the Framers expressly permit non-NMDs, facing possible loss of title under an Article XII action, to counterclaim to recover the purchase price. Moreover, the Framers did not indicate that they intended this to be the single viable counterclaim against an Article XII plaintiff.

Thus, the Court concludes that Article XII contemplates no limitations on the scope of counterclaims. For the foregoing reasons, Mafnas's argument is meritless.

1. Factual Assumptions

The standard for reviewing a motion to dismiss a counterclaim under Com.R.Civ.P. 12 (b)(6) is identical to that of a motion to dismiss for failure to state a claim upon which relief may be granted. WRIGHT, MILLER & KANE, FEDERAL PRACTICE and PROCEDURE: Civil 2d § 1407. The allegations contained in the pleading under attack are taken as true. Id. Thus, in a motion to dismiss, as opposed to a motion to strike, the Court must accept only the non-moving party's version of the facts. However, inapposite to the apparent belief of both parties here, this assumption pertains solely to factual allegations, not to legal conclusions.

2. Standard for Motion to Dismiss a Claim/Counterclaim

Our Commonwealth Supreme Court instructs that motions to dismiss be granted where a claim clearly does not contain either direct allegations on every material point necessary to sustain recovery on any legal theory, or indicate that evidence on material points will be introduced at trial. *In re Adoption of Manglona,* 1 *N.M.I.* 449 (1990). Obviously, though, courts do not accept "sweeping legal conclusions" or "footless conclusions of law". WRIGHT, MILLER & KANE, FEDERAL PRACTICE and PROCEDURE: Civil 2d § 1407.

D. Defendants' Counterclaims

1. Abuse of Process

A prima facie case for abuse of process[2/] requires proof of an intentional misuse of judicially issued legal process in an attempt to accomplish a result not intended by such process. *White Lightening Company v. Wolfson,* 438 P.2d 345 (Cal. 1968). Unlike an action for malicious prosecution, lack of probable cause is not an essential element, for the wrong lies in the misuse of the process, and not in the validity of its issuance. *Id.* Consequently, an action for abuse of process does not have to await disposition of the underlying case. ***Harvey*** *v. Pincus,* 549 F.Supp. 332

[3/] This action is also referred to as malicious abuse of process, especially in older cases.

(E.D.Pa. 1982), *affd without op* (3d Cir. 1983), 716 F.2d 890, *cert. den.* 104 S.Ct. 284 (1983).

a) Counterclaim against Mafnas. Defendants' claim that Mafnas's action was initiated to achieve an aberrant end: to discredit Former Judge Laureta and to disqualify him from Article XII cases. Furthermore, Defendants claim resulting damages. *First Amended Answer* p.14, *15.* Thus, Defendants have plead facts which, when taken as true, meet each requisite element of the cause of action: improper motives; issuance of process; and damages.

Mafnas incorrectly states that Defendants base their entire claim upon Mafnas's refusal to accept a settlement offer. Mafhas apparently arrived at this conclusion by rejecting Defendants' allegations regarding Mafhas's improper motive in initiating this suit. In so doing, Mafnas negligently or intentionally misapplies the standard for reviewing a motion to dismiss which requires acceptance of the uon-moving party's construction or the facts. *Id* Mafnas's motion to dismiss Defendants' counterclaim of abuse of process is DENIED.

b) Claim against Santos. Defendants/Third-party Plaintiffs maintain that Santos joined Mafnas's and his attorney's conspiracy to discredit former Judge Laureta at the time that he executed the warranty deed to Mafnas. Civil conspiracy entails a combination of two or more persons acting in concert to accomplish either an unlawful purpose by lawful means or a lawful purpose by unlawful means. *Connor* v. *Bruce,* 170 *N.Y.S.* 94, 95 (N.Y. 1918). Defendants/Third-party Plaintiffs' theory that Santos wished to disparage former Judge Laureta is dubious considering Santos's refusal to initiate this suit himself. However, according to Defendants/Third-party Plaintiffs' version of the facts which the Court is obligated to adopt, it is conceivable that Santos collaborated with Mafnas to accomplish acts constituting abuse of process. In light of this, and the policy against dismissal, this claim is preserved. Santos's motion to dismiss Defendants/Third-party Plaintiffs' claim of abuse of process is DENIED.

2. Interference with Contract

A cause of action lies for interference with contract where one intentionally and improperly interferes with the performance of a contract between another and a third person by preventing the other from preforming the contract or by causing his performance to be more expensive or

burdensome. RESTATEMENT (SECOND) TORTS § 766A (1982).

Defendants contend that Mafnas and Santos were cognizant of the contracts for sale of the subject property from Mafnas to Hofschneider and from Hofschneider to Villagomez, as well as of the Hofschneider-Laureta lease and the Villagomez-Coward lease. In addition, Defendants allege that Mafnas and Santos kew or should have known that these contracts were still in effect and that they, by entering into their own contract of sale, would wrongfully interfere with them. Defendants state that Mafnas and Santos nevertheless intentionally interfered with these contracts inwanton disregard for the damage this caused Defendants.

Defendants state that they will demonstrate their damages at trial. However, the only pertinent damage under an interference with contract claim is that which flows from non-performance of the contract. Here, however, Defendants' contracts were fully performed. Thus, the contention that Defendants/Third-party Plaintiffs were damaged is insupportable.

Mafnas's and Santos's motions to dismiss Defendants/Third-party Plaintiff's interference with contract counterclaim are GRANTED.

3. Champerty

Defendants assert that Mafnas and Mitchell conspired to enter into a property transaction for the purpose of bringing a lawsuit, thereby committing the common law tort of champerty. Defendants state that there are two components to the champertous scheme alleged: an agreement between Mitchell and Mafnas to institute suits to discredit Laureta, and an agreement between Mafnas and Santos to sell the property to enable Mafnas to bring suit. In opposition, Mafnas contends that the doctrine of champerty is not recognized in the Commonwealth.

Champerty involves an agreement under which a disinterested third-party extends financial assistance to the litigation of another in exchange for compensation in the event of a successful resolution. *Charles* v. *Phillips*, 252 S.W.2d 920 (Ky. Ct.App. 1952). In addition, to maintain a case of champerty, it must be shown that the agreement was improperly motivated. Id. The defense of champerty may only be raised to avoid the compensation agreement. Id.; *Burnes v. Scott, 6* S.CT. 865, 869; 14 C.J.S., Champerty , 38, 47, pages 382-383, 387. However, only the parties

to the champertous agreement have standing to challenge it. *Burnes* v. *Scott,* 6 S.Ct. 865, 869 (1886).

The Defendants were not parties to the allegedly champertous agreements; therefore, they have no standing to raise this defense. Consequently, the questions of whether champerty is recognized in the Commonwealth, and if so whether Defendants' claim satisfies the elements of champerty are moot.

Mafnas's and Santos's motions to dismiss Defendants/Third-party Plaintiff's champerty counterclaim are GRANTED. [4/]

4. Breach of Contract

Defendants assert that Santos is liable for refusing to honor Hofschneider's demand that Santos defend him pursuant to Santos's obligations under the warranty deed used to convey the property in dispute to Hofschneider. *First Amended Third-party Complaint,* at *4*. The deed states that Santos held good title at the time of the conveyance and warranted that Santos would defend Hofschneider against adverse claims asserted by persons claiming to have paramount title. Specifically, the deed provides that:

> . . . Grantor, for himself, and his heirs and assigns, hereby covenants with Grantee and his heirs and assigns, that Grantor is lawfully seised in fee simple of the above described premises; that he has good right to convey same; that the premises are free and clear of all encumbrances, except those in favor of the government, and that Grantor and his heirs and assigns shall and will WARRANT AND DEFEND the properties herein conveyed to Grantee and his heirs and assigns against any person lawfully claiming the same or any part thereof . . .

Complaint, Exh. A.

A general warranty deed, such as that issued by Santos to Hofschneider, obligates the grantor, upon demand, to defend the grantee against all rightful claims asserted under superior title to that conveyed. *Walter* v. *Robinson, 174* S.W. 503 (KY 1915). The covenants of warranty and of further assurances embodied in a warranty deed run with the land. *St. Paul Title Ins. Corp.* v.

[4/] Likewise, Defendants have no standing to raise champerty as an affirmative defense. Hence, the Court also GRANTS Mafnas's motion to strike Defendants' champerty affirmative defense.

Owen, 452 S.2d 482 (Al. 1984). Thus, the original covenantor or his heirs and assigns are answerable to future title holders. *Id.*

a) Counterclaim against Mafnas. The covenants of warranty and of further assurances made by Santos to Hofschneider run with the land. Thus, assuming that the Santos-Mafnas conveyance is valid, Santos transferred to Mafnas these obligations as well as title; Mafnas's obligations under the warranty deed are a derivative of Santos's. Defendants' claim against Mafnas is deficient for the same reasons, explained below, why their counterclaim against Santos is deficient. Mafnas's motion to dismiss Defendants' breach of contract counterclaim is GRANTED.

b) Claim against Santos. Defendants are not claiming that Santos conveyed defective title. Rather, Defendants are claiming that Santos is obligated to defend against defects which arose *after* Santos had conveyed title. This is clearly beyond even the broad scope of a general warranty deed. The seller should not be held accountable for defects due to the incapacity of the buyer to own land. Moreover, the transaction subject to Article XII scrutiny here is the Hofschneider-Laureta lease not the Santos-Hofschneider sale. [5/] It would be absurd to hold Santos liable, under the warranty deed that he issued to Hofschneider, for the invalidity of the lease entered into by Hofschneider and Laureta. Mafnas's motion to dismiss Defendants/Third-party Plaintiffs' breach of contract cause of action is GRANTED.

5. Restitution1 Equitable Adjustment

Defendants argue that they will be entitled to restitution if Mafnas prevails in this action. Restitution requires a showing that a person obtained something of value to which he was not entitled. *Bill v. Gattavar*, 209 P.2d 457 (Wash. 1949). The object is the prevention of unjust enrichment. 77 C.J.S. RESTITUTION p.323; *see, Repeki v. MAC Homes (Saipan) Co.*, 2 N.M.I. 33 (1991). In determining whether enrichment is "unjust", the party seeking restitution need not always be innocent

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[5/] Examination of the Santos-Hofschneider sale beyond the four corners of the deed was rendered virtually ineffectual by recent Ninth Circuit and Supreme Court cases obviating the agency resulting trust theory. *Diamond Hotel Co., Ltd., v. Matsunaga*, Appeal No. 93-023, *slip* op. at 6,7, (N.M.I. Jan. 19, 1995); *Ferreira* v. *Mafnas*, I F.3d 960 (9th Cir. 1993), *remanded, Ferreira v. Mafnas Borja*, Appeal No.90-047, *slip op.* (N.M.I. Jan. 3, 1995).

or have "clean hands". Thus, "[w]here a contract is invalidated due to illegality, a performing party may recover in quasi-contract under certain circumstances." *Taimanao* v. Young, 2 CR 285 (D.N.M.I. App. 1985). Substantial compliance with the clean hands doctrine in lieu of strict compliance is especially appropriate in the Article XII arena where violations are often inadvertent. Further, even intentional violations do not carry the taint of moral turpitude. Therefore, restitution is proper following an Article XII nullification of title. This interpretation is codified in 2 CMC § 1451 (a), mandating the award of restitution or an "equitable adjustment" to any party directly and adversely affected by an adjudication that a transaction is void ab initio under Article XII, § 6.

Here, Defendants assert that Mafnas and Santos will be unjustly enriched if Mafnas prevails in this action. The Court agrees, noting that Mafnas will gain property valued in 1988 at $21,000.00 for which he paid Santos $10.00. Similarly, Santos received a windfall equaling $16,000.00. In retrospect, Santos received this sum for no consideration, since Hofschneider paid him for exclusive title to the property and yet Santos went ahead and resold the property. On the other hand, Mafnas's and Santos's largesse will be at the expense of defendants. For instance. Villagomez will be divested of property costing $21,000.00. It appears that his only source of reparation at law would be against Hofschneider for breach of the warranty deed, leaving Hofschneider as the injured party. Hence, the facts indicate that Mafnas and Santos would benefit at the expense of Defendants if the Court voids the transactions at issue pursuant to Article XII, § 6. Moreover, although not strictly required, the Court finds that Defendants qualify as having clean hands. Hofschneider and Laureta are accused of violating Article XII; yet, their good intent is evidenced by the severability provision in the Laureta-Hofschneider lease, demonstrating a desire to comply with the applicable law. [6/] Thus, Defendants' factual allegations support a claim for restitution.

Mafnas's and Santos's motions to dismiss Defendant's restitution counterclaim are DENIED.

[6/] There does not appear to be an issue of clean hands with regard to the Cowards and Villagomez. The Cowards and Villagomez are not accused of having entered into an agreement in violation of Article XII. Instead, Villagomez' title is challenged based upon the fact that it was conveyed by Hofschneider, who, Mafnas claims, had no title to give. The Cowards' right to possession under their lease with Villagomez is being challenged upon the same grounds.

E. Attorney-witness

Defendants have moved to disqualify Mafnas's attorney, Theodore Mitchell, based on ABA Model Rule of Professional Conduct 3.7 ("Rule 3.7").[7/] Model Rule 3.7 largely prevents an attorney from acting as trial counsel where he or she is likely to be called as a witness.

Defendants argue that Mitchell falls within the Rule's prohibition, because his testimony is necessary in connection with the abuse of process counterclaim. Mafnas disputes this on several grounds: first, that Defendants lack standing to bring this motion; second, that disqualification would unfairly burden Mafnas; and, third, that by waiting almost six years, Defendants waived the right to bring this motion.[8/]

Model Rule 3.7 provides in pertinent part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> . . .
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

American Bar Association Model Rules of Professional Conduct Rule 3.7. The official comment clarifies the rationale behind Rule 3.7, observing that blending the roles of advocate and witness can easily prejudice the opposing party. *Model Rule* 3.7 *(comment); Security General Life Ins. v. Superior Court, 718 P.2d 985 (Ariz. 1986).* Prejudice may arise because a witness is supposed to testify on the basis of personal knowledge, while an advocate is supposed to explain and comment on testimony given by others. Id. Thus, it may be uncertain whether testimony by an advocate-witness should be taken as proof or as analysis of the proof. Id. The court in *General Mill Supply* Co. *v.*

7/ Rule 3.7 is applicable in the Commonwealth pursuant to CNMI Disciplinary Rules and Procedures. Com.D.R.P. 2.

8/ Mafnas also claims that disqualification is inappropriate as Mitchell's representation does not present a conflict of interest. However, the Court did not address this, as Defendants to not base their motion on a conflict of interest.

SCA Services, Inc., 696 F.2d 704 (1982), summarizes this dilemma:

> The experience of the Bar and its collective voice in the ABA canons demands a separation of roles of advocate and witness. Experience shows that one who combines both roles is not likely to be, as an officer of the court, helpful to the court. There is always danger that when he speaks, he will forget whether he speaks as an advocate or [witness], to the likely confusion of the proceedings, as well as their embitterment. . . Experience teaches that embitterment is likely to occur when one counsel undertakes to impeach the credibility of opposing counsel in his capacity as witness.

In determining whether disqualification is called for, courts balance three factors: whether the attorney's testimony will cause prejudice to the opposing party; whether the testimony is necessary; and, the hardship disqualification will cause the attorney's client. Whether an opposing party is apt to be prejudiced depends on the nature of the case, the importance and anticipated tenor of the testimony, and the likelihood that the attorney's testimony will contradict that of other witnesses. In the case at bar Mitchell's testimony will be central to the abuse of process claim. Consequently, allowing him to act as both advocate and witness may easily prejudice Defendants.

The requirement that the attorney be a "necessary" witness reflects the effort to avoid misuse of the rule as a tactical ploy. *Security General Life Ins. v. Superior Court, 718 P.2d 985 (Ariz.* 1986. Case law defines a necessary witness as one whose testimony is both material and unavailable elsewhere. 718 P.2d 985 (Ariz. 1986); *Cottonwood Estates* v. *Paradise Builders, 624* P.2d. 296, 299 (Ariz. 1981). The Court finds that Mitchell is a necessary witness. Mitchell, Mafnas and Santos are seemingly the persons best equipped to testify on this issue. Each will have something critical and unique to add. In particular. it is anticipated that Mitchell's testimony will be pivotal, and, therefore both material and otherwise unavailable.

Disqualification will not be ordered if it would cause undue hardship to the attorney's client. *Model Rule 3.7*(3). The paramount concern is to preserve to the extent possible a client's right to counsel of his own choosing. *Central Milk Producers Co-op v. Sentry Food Stores, 573* F.2d 988 (1978). Also of concern is the delay and added expense caused by substitution. Id. These burdens become more onerous with the passage of time. Thus, courts are disinclined to favor a motion made long after the pertinent facts were known. Id.

Fortunately, Rule 3.7 is narrowly tailored to employ the least disruptive means of addressing

the attorney-witness problem. Illustratively, the language of the rule does not demand total disqualification. An attorney may continue to work on the case, he or she simply may not serve as counsel during trial or related evidentiary hearings. This greatly diminishes the degree of added time and expense associated with substituting counsel. In addition, disqualification of an attorney does not disqualify other members from the same firm. *Model Rule 3.7*(b). Subsection (b) of the rule explicitly states that the principal of imputed disqualification does not apply.

The Court rejects Mafnas's unsubstantiated argument that he will be unable to find another attorney to take on an Article XII case. The Court does not find this possibility to be great and assumes that the other attorneys in Mitchell's firm would be willing to take on this case. Hence, only the fact that Defendants were dilatory in making this motion militates against disqualification. While the court dislikes awarding such delay, it has not been shown how doing so will harm Mafnas. In contrast, the potential for harm to Defendants has been made evident. Thus, the Court finds that disqualification is warranted.[2/]

IV. CONCLUSION

A. Affirmative defenses may be asserted to avoid an Article XII claim.

B. Mafnas's motion to strike affirmative defenses is GRANTED with regard to standing, champerty, equal protection and due process, laches, waiver, failure to state a claim, bona fide purchaser, statute of frauds, and fraud; and, DENIED with regard to illegality.

C. Mafnas's motion to dismiss counterclaims is GRANTED with regard to interference with contract, breach of contract, and champerty; and, DENIED with regard to abuse of process and restitution.

[2/] Mafnas's argument that Defendants lack standing is unfounded. The official comment makes it certain that, the opposing party, because he is at risk, has standing to object under Model Rule 3.7. Model Rule 3.7 (comment); *c.f. Security General Life Ins. v. Superior Court, 718 P.2d 985 (Ariz. 1986)*.

D. Santos's motion to dismiss is GRANTED with regard to interference with contract, breach of contract, and champerty; and, DENIED with regard to abuse of process and restitution.

E. Defendants' motion to disqualify Mitchell, Mafnas's attorney, pursuant to Model Rule 3.7 is GRANTED.

So ORDERED this 11 day of July, 1995.

ALEXANDRO C. CASTRO, Presiding Judge