

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 6:18-cv-1366-RBD-LHP

BRUCE A. KWITNY; and U.S. BANK  
TRUST NATIONAL ASSOCIATION,

Defendants.

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**ORDER**

The Government brought this suit to enforce tax liens against property owned by Defendant Bruce A. Kwitny; Defendant U.S. Bank Trust N.A. has a mortgage lien on the property. (Doc. 80 (“Motion”), p. 1.) The parties now move to order the property to be foreclosed and sold. (*Id.* at 12.) On referral, U.S. Magistrate Judge Leslie Hoffman Price entered a Report and Recommendation submitting that the Court should grant the Motion. (Doc. 84 (“R&R”).) The time has passed and there were no objections, so the Court examines the R&R for clear error only. *See Macort v. Prem, Inc.*, 208 F. App’x 781, 784 (11th Cir. 2006). Finding none, the R&R is due to be adopted in its entirety.

Accordingly, it is **ORDERED AND ADJUDGED:**

1. The R&R (Doc. 84) is **ADOPTED AND CONFIRMED** and made a

part of this Order in its entirety.

2. The parties' Motion (Doc. 80) is **GRANTED**.
3. The Court **FINDS** that a forced foreclosure sale of the Subject Property is appropriate and **HONORS** the parties' Stipulation of Priority. (Doc. 75.)
4. The Court **ORDERS** the sale of the Subject Property at a judicial sale pursuant to 26 U.S.C. §§ 7402 and 7403 and in accordance with the terms and conditions set forth in the parties' proposed order. (Doc. 83.)

**DONE AND ORDERED** in Chambers in Orlando, Florida, on September 15, 2022.



  
ROY B. DALTON JR.  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. )  
)  
BRUCE A. KWITNY, )  
U.S. BANK TRUST NATIONAL )  
ASSOCIATION, NOT IN ITS )  
INDIVIDUAL CAPACITY BUT )  
SOLEY AS OWNER TRUSTEE FOR )  
RCF 2 ACQUISITION TRUST C/O )  
U.S. BANK TRUST NATIONAL )  
ASSOCIATION, )  
)  
Defendants. )  
\_\_\_\_\_ )

Case No. 6:18-cv-1366-RBD-LRH

**JOINT MOTION FOR ENTRY OF ORDER ENFORCING TAX LIENS  
AND ORDER OF SALE**

Plaintiff, the United States of America, and Defendant U.S. Bank Trust National Association, not in its individual capacity, but solely as owner trustee for RCF 2 Acquisition Trust c/o U.S. Bank Trust National Association (“U.S. Bank Trust N.A.”), jointly move this Court to enter the attached proposed Order Enforcing Tax Liens and Order of Sale. The United States filed this lawsuit, in part, to enforce its federal tax liens attached to real property owned by delinquent taxpayer Bruce Kwitny. The United States named U.S. Bank Trust N.A. as a defendant by virtue of its mortgage lien on

the property. Because the Court has entered default judgment against Kwitny for his unpaid federal income tax liabilities, and all other issues raised by this proceeding have been resolved, including providing for full payment of U.S. Bank Trust N.A.'s interest in the Subject Property, it is appropriate for the Court to order that the federal tax liens upon the Subject Property be enforced and the property sold. The parties have prepared a proposed order, attached to this motion, for sale of the Property by the Internal Revenue Service Property Appraisal and Liquidation Specialists ("PALS") under such terms the Court deems necessary.

For the following reasons, the Court has the authority to enter the Order of Sale, and it should do so.

### **BACKGROUND**

The United States initiated the above-captioned civil action to collect Kwitny's unpaid federal income tax liabilities for the 2006 through 2014 tax years and to enforce its federal tax liens that attached to real property located at 1551 Rock Springs Drive, Melbourne, Florida 32940. ECF No. 1.

The legal description of the Subject Property is as follows:

Lot 43, MAGNOLIA SPRINGS PHASE ONE,  
according to the plat thereof, as recorded in Plat 43,  
Page 63, 64, and 65, Public Records of Brevard  
County, Florida.

The United States also named U.S. Bank Trust N.A. as a defendant pursuant to § 7403(b) by virtue of its mortgage lien on the Subject Property.<sup>1</sup> ECF No. 74. The United States and U.S. Bank Trust N.A. entered into a stipulation of priority whereby the parties agreed that if the Court orders the sale of the Subject Property, the net sales proceeds (after costs of sale and ad valorem taxes) shall be paid first to U.S. Bank Trust N.A. by virtue of its mortgage lien. ECF No. 75. The mortgage loan on the Subject Property is current through October 1, 2022, and that the total unpaid balance is \$50,238.49 as of July 15, 2022. *See* Exhibit A (copy of mortgage loan correspondence).

Bruce A. Kwitny did not answer or otherwise respond to the United States' Complaint, and the Clerk entered default against him. ECF No. 15. Upon motion by the United States (ECF No. 19), the Court entered default judgment against him determining (1) that Kwitny owes \$572,671.80 as of February 11, 2019, plus interest and statutory additions that continue to accrue, in unpaid federal income tax liabilities for the 2006 through 2014 tax years and (2) that federal tax liens arose and attached the Subject Property. ECF No. 25, 26. There are no remaining disputes over priority. *See* ECF No.

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<sup>1</sup> As the Court is aware, the mortgage lien on the Subject Property has changed hands several times since the Complaint was originally filed. The Court substituted Ditech Financial, LLC for NewRez, LLC formerly known as New Penn Financial, LLC dba Shellpoint Mortgage Servicing. Shortly thereafter, the mortgage lien was transferred to U.S. Bank Trust N.A.

75). Nor is there any dispute as to the status of the mortgage loan on the Subject Property. It now is appropriate for the Court to enter the attached order of lien enforcement and order of sale.

### **ARGUMENT**

The Court has jurisdiction to enforce a federal tax lien and sell property to pay delinquent tax debts under 26 U.S.C. § 7403(a) and (c). As noted above, the Court has determined that federal tax liens attach to the Subject Property and that the liabilities underlying those liens remain unpaid. (ECF No. 25). *See also* 26 U.S.C. §§ 6321; 6322. Section 7403(c) of the Internal Revenue Code allows this court to finally determine all claims to or liens upon the subject property, to decree a sale of the property, and to determine the distribution of the proceeds of such sale.

The United States and U.S. Bank Trust N.A. agree that the bank's interest in the Subject Property is superior to the United States' federal tax lien. The parties also agree that the sale proceeds from the forced sale of the Subject Property will be distributed to U.S. Bank Trust N.A. for full payment of the mortgage loan balance, second only to payment of the costs of sale itself. *See* ECF No. 75.

Selling the Subject Property will result in a substantial payment against Kwitny's delinquent taxes. Although the United States does not know the future sale price for the Subject Property, it is certain that a sale will yield

proceeds sufficient to pay the costs of sale, fully pay U.S. Bank Trust N.A.'s mortgage loan, and have a surplus left over to apply towards Kwitny's unpaid tax liabilities. The fair market value of the Subject Property is approximately \$325,000. Because the balance on the mortgage is only about \$50,000, the United States can set a minimum bid for the property that is certain to yield a payment.

The surplus above U.S. Bank Trust N.A.'s lien distinguishes this case from, for example, *United States v. Boyd*, 246 F.2d 477, 481 (5th Cir. 1957), cited in ECF No. 25 at 6. In *Boyd*, the Fifth Circuit declined to order foreclosure where the senior lien would soak up the entire value of the property, making the foreclosure pointless from the government's perspective. That isn't the case here. The Court can enter a sale order. And as explained below, doing so is an appropriate exercise of the Court's discretion.

**I. Section 7403 Contemplates Multiple Interest Holders in a Subject Property and Does Not Require that a Mortgage be in Default Prior to Entering an Order of Sale**

First, the Court can enter an order of sale regardless of whether the senior mortgage is in default.<sup>2</sup> 26 U.S.C. § 7403 gives the United States broad

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<sup>2</sup> The district court's order adopting in part and denying in part the magistrate judge's recommendation acknowledges that the mortgage holder's "superior interest in the property does not necessarily preclude foreclosure" but declined to enter an order of sale because "the claims of another interest-holder in the Subject Property have yet to be resolved." (ECF No. 25 at 6-7). U.S. Bank Trust, N.A.'s claim to the Subject Property has now been resolved through a Stipulation of Priority. Now that all of the claims on the Subject Property have (continued...)

power to seek to enforce its federal tax liens. And it contemplates that the United States will seek to enforce tax liens on properties that have multiple lienholders. First, § 7403(a) permits the United States to “seek to ‘subject *any property*, [of] whatever nature, of the delinquent, or *in which he has any right, title, or interest*, to the payment of such tax or liability.’” *United States v. Rodgers*, 461 U.S. 677, 692 (1983) (quoting § 7403(a); emphasis in *Rodgers*). That is, as *Rodgers* explained, the United States may seek to sell any property in which the delinquent taxpayer has any interest. The statute is not limited to property the taxpayer owns free and clear or where the tax lien is in the most senior position. *See id.* at 692-94. Next, § 7403(b) requires the United States to name as parties *all* potential claimants to the property. Finally, § 7403(c) says that the court “shall . . . finally determine the merits of *all* claims to and liens upon the property.” (Emphasis added). The plain language of the statute sweeps in lienholders both junior and senior to the federal tax lien. And after a court decides a sale is appropriate—a decision discussed below—the proceeds are distributed “according to the findings of the court in respect to the interests of the parties and of the United States.” § 7403(c).

In short, the statute “contemplate[s], not merely the sale of the delinquent taxpayer's own interest, but the sale of the entire property (as long

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been adjudicated, it is appropriate for the Court to enter the proposed Order Enforcing Tax Liens and Order of Sale.



as the United States has any ‘claim or interest’ in it), and the recognition of third-party interests through the mechanism of judicial valuation and distribution.” *Rodgers*, 461 U.S. at 694. *See generally id.* at 690-94 (resolving circuit split on whether United States could sell entire property or just taxpayer’s interest in it).

In writing § 7403(c) to encompass senior lienholders as well as junior ones, Congress derogated from the common rule that a junior lienholder’s sale is made subject to and without disturbing a senior lien. Under Florida law, a junior lienholder can initiate a foreclosure action notwithstanding the senior lienholder’s interest in the same property, but the junior lienholder’s sale is subject to and without disturbing the senior lien. *See, e.g., Garcia v. Stewart*, 906 So. 2d 1117 (Fla. Dist. Ct. App. May 25, 2005). That is the opposite of § 7403’s requirement that the United States name as a defendant every person possessing an interest in the subject property. *Cf.* 26 U.S.C. § 7403(b) (“All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.”). The Supreme Court has explained that § 7403 allows the government to sell the entire property, even if the taxpayer holds only a partial interest in it, and even if the sale would result in the liquidation of the interest of an innocent third party. *See Rodgers*, 461 U.S. at 692-94, 697-98. Thus, it makes no difference whether a senior mortgage is

in default or not, as long as the Court determines the senior mortgagee's interest in and claim to the property.<sup>3</sup>

The rule Congress created makes sense. For many delinquent taxpayers, real property is a valuable asset, and one they may pay for with the money they should have used to pay their taxes. It cannot be the case that the taxpayer could avoid a forced sale of property by simply remaining current on the mortgage loan. If that were the case, it would frustrate “the Government's paramount interest in prompt and certain collection of delinquent taxes,” *Rodgers*, 461 U.S. at 711.

Here, the United States named the senior mortgage holder, now U.S. Bank Trust N.A., as a defendant, knowing that its interest was superior to that of the United States and that the mortgage loan was to be fully paid before any sale proceeds were applied toward Kwitny's unpaid tax debts. The parties filed a Stipulation of Priority to that effect, and the attached proposed order provides that the sale proceeds from the foreclosure sale of the Subject

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<sup>3</sup> The Court cited *United States v. White*, No. 5:09-cv-363-Oc-10GRJ, 2010 WL 11623548 (M.D. Fla. Nov. 23, 2010), on page 3 of its order denying the previous motion without prejudice. *White* did not finally decide that foreclosure was inappropriate without the senior mortgage being in default; it merely required the United States to submit a more fulsome explanation. *See id.* To the extent the *White* court believed that a rule like the Florida state-law rule in *Garcia* controlled, *see* Order, *White*, No. No. 5:09-cv-363-Oc-10GRJ (ECF No. 48) (entered Dec. 17, 2010), the United States respectfully submits that it was in error. Furthermore, the *White* court eventually ordered foreclosure, so its belief was dicta that was never subject to the United States' appeal.

Property (after payment of the costs of sale) will be paid first to U.S. Bank Trust N.A. on account of its mortgage lien.

## **II. The Court Should Order the Sale of the Entire Subject Property**

As explained above, the Court can order the foreclosure sale of the Subject Property despite U.S. Bank Trust N.A.'s interest in that same property. And it should.

In *Rodgers*, the Supreme Court explained that a district court has limited discretion to decide not to sell a delinquent taxpayer's property when the government requests it. And that "limited discretion . . . should be exercised rigorously and sparingly, keeping in mind the Government's paramount interest in prompt and certain collection of delinquent taxes." 461 U.S. at 711.

In situations where a third party's interest will be extinguished, *Rodgers* outlines the following four factors that courts consider: (1) the extent to which the Government's financial interests will be prejudiced if it only sold the taxpayer's partial interest; (2) whether the third party has a legally recognized expectation that the property would not be subject to a forced sale; (3) the prejudice to the third party from the sale; and (4) the relative character and value of the taxpayer's and the third party's interests in the property. *Id.* at 710-11. *See also United States v. Dase*, No. 4:18-cv-501-ACA, 2020 WL 950536, at \*2 (N.D. Ala. Feb. 27, 2020).

First, the United States would be prejudiced if it were required to sell only Kwitny's partial interest in the Subject Property, as opposed to the entire property. Kwitny owes approximately \$572,000 in unpaid federal income tax liabilities. The Subject Property is a valid source of collection. Although a forced sale of the Subject Property would not result in the total satisfaction of Kwitny's unpaid tax liabilities, the proceeds from the forced sale of the Subject Property (after payment to U.S. Bank Trust N.A. on account of its mortgage lien) would pay down a significant portion of Kwitny's tax debts. *See also Dase*, 2020 WL950536, at \*3 (agreeing with the "common sense proposition that attempting to sell [the delinquent taxpayer's] one-half interest while allowing [co-tenant] to retain her one-half interest would result in a lower price," and finding government would be prejudiced as a result).

If the United States were to sell the property subject to and without disturbing U.S. Bank Trust's senior lien—which is relief that the bank has not asked for—it might tend to depress the overall sale price of the property, and therefore the United States' recovery. It would certainly make the sale more complicated, because a prudent bidder would have to review the U.S. Bank Trust mortgage. The first factor favors the United States.

The second factor arguably favors the bank's ability to resist the sale of the entire property—which, again, it is not doing. Under *Garcia* and similar

cases, a lender in Florida could have a reasonable expectation that a junior mortgagee's sale would not disturb its lien.

The third factor, the likelihood of prejudice to the non-liable interest holder, favors the United States. U.S. Bank Trust, a corporation—unlike a non-liable individual—does not reside at the Subject Property and thus would not incur the expense of moving and securing a new residence. Further, should the Court order a foreclosure sale, U.S. Bank Trust will receive proceeds equal to the amount of the unpaid balance on the mortgage loan. Because U.S. Bank Trust will be adequately compensated for its interest in the Subject Property and will not be forced to incur the costs of relocation, it is not prejudiced by the foreclosure sale of the Subject Property. *Cf. Rodgers*, 461 U.S. at 677-78. *See also Dase*, 2020 WL 950536, at \*4.

And finally, the fourth factor, the relative character and value of the liable and non-liable interests, favors the United States. Kwitny, unlike U.S. Bank Trust N.A., has a current possessory interest in the Subject Property. He is the sole beneficial owner of the Subject Property. U.S. Bank Trust N.A. does not reside at the Subject Property nor maintain possession of it. The bank only holds a lien. As such, this factor weighs in the government's favor, as U.S. Bank Trust N.A. does not maintain a current possessory interest in the Subject Property. *Cf. United States v. Persaud*, 420 F.Supp.2d 1263, 1296 (M.D. Fla. 2006) (determining the final *Rodgers* factor weighed in favor of the non-liable

spouse who maintained “actual possession” of the property at issue). On balance, the *Rodgers* factors weigh in favor of a forced sale of the entire Subject Property, notwithstanding U.S. Bank Trust, N.A.’s mortgage lien.

### **CONCLUSION**

For the reasons stated, the parties respectfully request that the Court grant the motion for entry a decree of foreclosure and order of sale and order that the Subject Property be sold a judicial sale, pursuant to 26 U.S.C. §§ 7402 and 7403, to collect Defendant Bruce A. Kwitny’s unpaid federal tax liabilities for the 2006 through 2014 tax years.

### **LOCAL RULE 3.01(g) CERTIFICATION**

The undersigned hereby certifies that on July 20, 2022 she conferred via e-mail with counsel for U.S. Bank Trust National Association, not in its individual capacity, solely as owner trustee for RCF 2 Acquisition Trust c/o U.S. Bank Trust National Association, and that she does not oppose the relief requested in this Motion. The United States did not confer with Bruce Kwitny because default judgment has been entered against him.

Dated: July 25, 2022

**For Plaintiff the United States**

Respectfully submitted,

DAVID A. HUBBERT  
Deputy Assistant Attorney General

/s/ Elizabeth N. Duncan  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25th day of July, 2022, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record. I also HEREBY CERTIFY that a copy of the foregoing was mailed via Federal Express to the following non-CM/ECF participant:

Bruce A. Kwitny  
1511 Rock Springs Drive  
Melbourne, Florida 32940

*/s/ Elizabeth N. Duncan*  
ELIZABETH N. DUNCAN  
Trial Attorney, Tax Division  
U.S. Department of Justice



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
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UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

BRUCE A. KWITNY, )

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ASSOCIATION, )

Defendants. )

Case No. 6:18-cv-1366-RBD-LRH

**DECLARATION OF ELIZABETH N. DUNCAN IN SUPPORT OF  
JOINT MOTION FOR ENTRY OF ORDER ENFORCING TAX LIENS  
AND ORDER OF SALE**

I, Elizabeth N. Duncan, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am employed by the United States Department of Justice, Tax Division as a Trial Attorney. I am lead counsel for the United States of America in the above-captioned proceeding. I have prepared this declaration in support of the Joint Motion for Entry of Order Enforcing Tax Liens and Order of Sale.

2. A true and correct copy of correspondence from the mortgage loan servicer dated July 15, 2022, which the undersigned received from counsel for U.S. Bank Trust N.A. via email on July 15, 2022, is attached to this Declaration as Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 25<sup>th</sup> day of July, 2022.

*Elizabeth N. Duncan*  
ELIZABETH N. DUNCAN  
Trial Attorney, Tax Division  
U.S. Department of Justice