UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
IN ADMIRALTY

BRANCH BANKING AND TRUST COMPANY, a North Carolina Corporation,

Plaintiff,

Case No: 8:10-cv-00291-VMC-EAJ

v.

PAIR A DICE, Official No. 1195044, *in rem*, her owner, BRIAN MARSHALL, *in personam*,

Defendant.

_____/

PLAINTIFF'S RESPONSE TO MARSHALL'S MOTION FOR PROTECTIVE ORDER AND STAY AND MOTION TO SET ASIDE DEFAULT JUDGMENT

Plaintiff Branch Banking and Trust Company ("BB&T") hereby responds and opposes Defendant Marshall's Motion For Protective Order And Stay (Dkt. No. 47) and Motion To Set Aside Default Judgment (Dkt. No. 48).

SUMMARY OF ARGUMENT

Marshall should not be rewarded for ignoring pleadings, Court Orders, Defaults and Judgments entered by the Clerk of the Court. Marshall's Affidavit contends he "was shocked to learn that [BB&T] had obtained a $20 million+ default judgment against [him] in this action." Marshall Aff. (Dkt. No. 48-4) ¶ 4. After a review of the Court's Order and the Judgments entered by the Clerk of the Court, such "shock" cannot be believed. Marshall does not dispute that he was personally named in and served with the Verified Complaint (Dkt. No. 1), which sought a money judgment against him personally in both its allegations and its prayer for relief. He also does not dispute that when this Court ordered that the Final

Default Judgment be entered against him, the Court instructed that the Order be served on "All Parties" and "Counsel of Record," including Marshall. Order of September 1, 2010 (Dkt. No. 22) at 5. In addition, the Clerk of the Court served the Judgments on "Counsel of Record" and "Unrepresented Parties." Default Judgments (Dkt. Nos. 23 & 24). The Court and the Clerk of the Court made every effort to provide Marshall with notice of the proceedings in this case, and his choice to snub Court correspondence should not be rewarded.

Marshall also disingenuously claims that setting aside the default judgment will not prejudice BB&T. Virtually every action by Marshall in the past two years has prejudiced BB&T. For instance, after BB&T extended the Fourth Brian Marshall Loan (as defined in the Verified Complaint) in August of 2009, Marshall brazenly obtained duplicate titles on three collateralized vehicles and sold the vehicles without notice to BB&T and without remitting any of the proceeds to BB&T. That is only one example. Given who Marshall is, there are unquestionably others.

Now, after five (5) months of flouting the Court's entries of default and default judgment and likely concealing assets, Marshall has suddenly decided to defend this lawsuit because BB&T is pursuing postjudgment discovery through document productions and depositions of the people who know his finances. The ruse is up, and Marshall can no longer conceal assets and siphon off the collateral securing his debts in peace. BB&T would be highly prejudiced if Marshall is given the green light to renew his previous, prejudicial and duplicitous behavior.

Additionally, Marshall's legal arguments have no merit. As an initial matter, Marshall had no "good reason" to default in this litigation, because that was his own tactical decision—made, incidentally, while represented by counsel. Moreover, his supposedly "meritorious" defenses are not only incorrect, but are frivolous and designed solely to delay. In addition, setting aside the default judgment would cause extraordinary prejudice to BB&T, given that this issue arises in an admiralty case for which federal courts have exclusive jurisdiction, and it would be impossible to obtain a deficiency judgment in state court regarding the sale of PAIR A DICE. Furthermore, Marshall's argument that BB&T did not give proper credit for collateral is not a basis for setting aside a default judgment. Rather, at best, it is a basis for amending the judgment.

Marshall also makes the spectacular claim that the Court had no subject-matter jurisdiction to award a deficiency judgment against him personally. In doing so, he purposefully ignores the statute that allows a creditor in a maritime lien action to bring a civil action *in personam* in admiralty against the debtor. *See* 46 U.S.C. § 31325(b)(2)(A). Moreover, Marshall's argument that the Court had no jurisdiction to amend the judgment to reflect the deficiency pursuant to Rule 59(e) is simply wrong because the Court's Order amended that judgment pursuant to Rule 60(b)(6), which, unlike Rule 59(e), has no 28-day jurisdictional timeframe.

Finally, the Court should reject the Motion For Protective Order And Stay (Dkt. No. 47). Since September 2, 2010, BB&T has had two money judgments against Defendants. As such, BB&T could have sought postjudgment discovery at any time after the initial 14-day stay expired on September 16, 2010. The mere fact that the Court subsequently amended one

of the judgments to reflect the amount of the deficiency in December, 2010 did not entitle Marshall to a *second* 14-day stay. Furthermore, although Marshall implies that Rule 62(b)(4) entitles him to an automatic stay, such stays are discretionary and would require that he post a $20+ million supersedeas bond.

ARGUMENT

Litigants like Marshall can never obtain Rule 60(b)(1) relief from their tactical decisions to default from litigation. Whenever "a party willfully defaults by displaying either an intentional or reckless disregard for the judicial proceedings, the court need make no other findings in denying [Rule 60(b)(1)] relief." *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951-52 (11th Cir. 1996). Critically, Marshall himself admits that he made a tactical decision to default from this litigation. *See* Marshall Aff. (Dkt. No. 48-4) ¶ 6 ("I did not wish to oppose the Plaintiff's repossession and sale of the vessel"); Mot. Vacate (Dkt. No. 48) at 13 ("Marshall did not respond because he reasonably believed that this action concerned only the possession and sale of the vessel"). This alone is fatal to Marshall's entire argument.

Even if Marshall had not made the tactical decision to default—which he now belatedly regrets—Marshall still could not obtain Rule 60(b)(1) relief. "To establish mistake, inadvertence, or excusable neglect under Rule 60(b)(1), a defaulting party must show that: '(1) it had a *meritorious defense* that might have affected the outcome; (2) granting the motion *would not result in prejudice* to the non-defaulting party; and (3) a *good reason* existed for failing to reply to the complaint.'" *In re Worldwide Web Systems, Inc.*, 328 F.3d

1291, 1295 (11th Cir. 2003) (emphases added) (citation omitted). Marshall cannot satisfy a single one of these elements, never mind all three.

First, Marshall cannot show he had "any reason, let alone a 'good reason,'" for his *five-month delay* in responding to the default judgment served on him personally or his *eight-month delay* in responding to the entry of default that was served on his counsel. *Id.* at 1298. Second, Marshall cannot carry his heavy burden of showing *no* prejudice to BB&T. Even if the prejudice here were somehow "not particularly pronounced," the Court still should not set aside the default judgment because there is at least "some prejudice" to BB&T by the months-long delay. *Id.* at 1297. Third, Marshall has no meritorious defense, because he cannot "make an affirmative showing of a defense" that is so "likely to be successful" that it "would probably change the outcome" of this case. *Id.* at 1296-97. Marshall's "general denials" of liability "offered only at the highest order of abstraction" are not sufficient. *Id.* at 1296. Rather, because Marshall still cannot "explain what happened to the money that was transferred" and lent to him and his businesses, he cannot escape liability for his debts. *Id.*

Finally, Marshall's protective order and stay arguments fare no better. The subpoenas are valid, and Marshall is not entitled to any postjudgment discovery stay unless and until he posts a $20+ million supersedeas bond.

I. MARSHALL HAS NOT PROVIDED ANY "GOOD REASONS" WHY HE FAILED TO TIMELY RESPOND TO COURT ORDERS

A. Marshall Was Served With The Default Judgment

Marshall's claim that he was "shocked" to learn of the $20 million default judgment entered against him personally only when his live-in girlfriend, Christa Varwyk, was subpoenaed on December 14, 2010, is untenable. *See* Marshall Aff. (Dkt. No. 48-4) ¶ 4. As

an initial matter, the Clerk served all "Counsel of Record"—including Marshall's counsel—with the initial defaults on May 12, 2010. *See* Defaults (Dkt. Nos. 14 & 15). As such, there is no doubt that Marshall knew he had personally defaulted. More importantly, after the incomplete withdrawal of Marshall's counsel in August of 2010, the Court entered an Order on September 1, 2010 granting BB&T's Motion for Final Default Judgment, and that Order was served on "***All Parties***" and "***Counsel of Record***." Order (Dkt. No. 22) (emphases added). Following the Court's lead, the Clerk entered the default judgments, which were both served on "***Counsel of Record***" and "***Unrepresented Parties***" on September 2, 2010. Default Judgments (Dkt. Nos. 23 & 24) (emphases added). Thus, in both instances, Marshall was served personally by the Clerk of the Court.

Case law is clear that Marshall presumptively received those documents. *See Konst v. Fla. E. Coast R.R. Co.*, 71 F.3d 851, 855 (11th Cir. 1996) (noting "[t]he common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee," and "[t]here is a presumption that officers of the government perform their duties"); *Barnett v. Okeechobee Hosp.*, 283 F. 3d 1232, 1239-42 (11th Cir. 2002) (holding defendant presumptively received document mailed to it). In addition, the Court should take care to note that Marshall has not provided an affidavit from his prior counsel or otherwise averred that prior counsel stopped forwarding papers received through CM/ECF to Marshall.

Marshall has a history of ignoring court orders and now essentially asks to set aside a default judgment because he ignored *this* Court's Order. He should not be rewarded for doing so. As Marshall alluded to in the Motion to Vacate, he is involved in numerous other legal proceedings. *See* Mot. Vacate (Dkt. No. 48) at 5. One such proceeding was brought by

Marshall's former wife in the Circuit Court of Hillsborough County to enforce the payment of child support by Marshall, styled *In re The Former Marriage of Elizabeth Forrest Mann f/k/a Susan Elizabeth Marshall & Brian Marshall*, Case No. 02-DR-006524 (the "Child Support Case"). In the Child Support Case, Marshall failed to produce documents and the court entered an Order Granting Former Wife's Motion to Compel Former Husband's Discovery Responses. In a subsequent decision on January 6, 2011, the court found that Marshall "willfully and intentionally violated the Order Granting Former Wife's Motion to Compel Former Husband's Discovery Responses and Order the Confirming the Report of the General Magistrate dated October 28, 2010." Amended General Magistrate R & R and Amended Order Confirming Report at 3, attached hereto as Exhibit A. In addition, after Marshall himself testified, the court adjudged that Marshall was "in direct civil contempt for failure to pay his child support obligation as ordered by the Court." General Magistrate R & R and Order of Court on Report at 4, attached hereto as Exhibit B.

In another case, a law firm, Forizs & Dogali, P.A. ("Forizs"), had sued Marshall and one of his companies in the Circuit Court of Hillsborough County for failure to pay for legal services rendered. After obtaining a consent judgment against Marshall, Forizs attempted to obtain postjudgment discovery. After Marshall ignored a subpoena, Forizs moved the sanction Marshall for contempt for failing to appear for the deposition and produce requested documents. *See* Pl.'s Sanctions Mot., attached hereto as Exhibit C. The court issued the Order to Show Cause, but three (3) days prior to the hearing date, Marshall appeared for the deposition.

Consistent with his prior conduct, Marshall is banking on this Court looking the other way with respect to Marshall's blatant disrespect for this Court and the judicial process, and giving him another chance to further delay BB&T in the recovery of the money it is owed.

B. Marshall Is Not Entitled To Relief Pursuant To Rule 60(b)(1)

The primary theme animating Marshall's motions is that he and his counsel supposedly made an innocent mistake and honestly misunderstood BB&T's *in rem* action against PAIR A DICE and *in personam* action against Marshall as analogous to an action exclusively for foreclosure against collateral. Marshall's supposed mistake and misunderstanding is anything but innocent and honest, as even the most basic due diligence performed upon receipt of the Verified Complaint would have shown. As such, Marshall cannot establish any "good reason" for his tactical decision to default. *See, e.g.*, *Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987) ("The only excuse Air Canada offers for the failure [to respond] is that a mail clerk must have misplaced the complaint. This is not a sufficient excuse."); *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 934-36 (11th Cir. 2007) (lack of chronological detail in affidavits explaining "good reason" for defaulting was "fatal" to Rule 60(b) motion); *Fla. Physician's Ins. Co., Inc. v. Ehlers*, 8 F.3d 780, 784 (11th Cir. 1993) (defendant in multimillion dollar suit had no "good reason" to default when he breached his "duty to act with some diligence to ensure that his attorney was protecting his interests," so the fact that he "made himself impossible to contact cannot prevent the entry of default judgment"); *see also Compania Interamericana*, 88 F.3d at 951-52 (tactical defaulters are not entitled to Rule 60(b)(1) relief).

The very first paragraph of the Verified Complaint states "This is an action to foreclose Preferred Ship Mortgages and *to enforce a maritime lien for necessaries under 46 U.S.C. §§ 31301, et seq. and to recover damages for breach of contract*." Verified Compl. (Dkt. No. 1) ¶ 1 (emphasis added). Additionally, the Verified Complaint contains numerous allegations regarding Marshall's debts. *Id.* ¶¶ 7-22. Furthermore, the Verified Complaint alleges that "Demand has been made upon the Defendants for the payment of the sums owing to the Plaintiff, and the Defendants have failed to satisfy their obligations to make payment of the sums owing." *Id.* ¶ 26. Finally, the prayer for relief asks the Court to "enter judgment in Plaintiff's favor and against PAIR A DICE *and her owners* and operators foreclosing Plaintiff's maritime liens *in the amount due at the time of entry of judgment*." *Id.* ¶ 30(d) (emphases added). All of these allegations gave Marshall more than fair notice that BB&T was seeking to recover a debt from him personally.

Even if those allegations were somehow unclear, the statutory structure of a maritime lien action should have eliminated all doubt. Specifically, § 31325 provides in relevant part that upon "default of any term of the preferred mortgage [*i.e.*, maritime lien], the mortgagee [*i.e.*, BB&T] may" enforce the lien "in a civil action in rem for a documented vessel" and in "a civil action *in personam* in admiralty *against the mortgagor* [*i.e.*, Marshall] . . . for the amount of the outstanding indebtedness *or any deficiency* in full payment of that indebtedness." 46 U.S.C. § 31325(b) (emphases added). In other words, the statutory remedy BB&T pursued against Marshall and his boat *expressly provided* that BB&T could pursue a civil action both against Marshall's boat *in rem and* against Marshall *in personam* for a deficiency judgment against his personal assets.

It is also important to remember that at all times Marshall has been represented by counsel. Because it was always Marshall's "duty to act with some diligence to ensure that his attorney was protecting his interests," it must be presumed that Marshall made his tactical decision to default with the assistance of counsel. *Ehlers*, 8 F.3d at 784.

Together, the Verified Complaint's allegations, the statutory structure of a maritime lien action, and the fact that at all times Marshall has been and continues to be represented by counsel throw into sharp relief just how remarkable the averments in Marshall's affidavit truly are. *See* Marshall Aff. (Dkt. No. 48-4). For instance, it is incomprehensible how Marshall could have "never understood that the Plaintiff was seeking a money judgment against me personally." *Id.* ¶ 2. And as explained below, there is no merit to Marshall's supposed belief that the deficiency issue could be resolved only in the state court proceedings. *See id.* ¶ 3.

To that end, Marshall has not provided a precise timeline regarding when he supposedly first became aware of the default judgment. This "lack of [chronological] detail" is "fatal" to Marshall's Rule 60(b)(1) motion. *Eurisol*, 488 F.3d at 935 (rejecting Rule 60(b)(1) motion supported by an affidavit that provided "no dates," because "time matters when one seeks to set aside a default"). Indeed, the "longer a defendant—even a foreign defendant—delays in responding to a complaint, the more compelling the reason it must provide for its inaction when it seeks to set aside a default judgment." *Id.* Moreover, despite any issue with his prior attorney, at all times Marshall "had a duty to act with some diligence to ensure that his attorney was protecting his interests." *Ehlers*, 8 F.3d at 784. His failure to

do so—especially when BB&T "alleged millions of dollars of damages in its complaint"—prevents him from obtaining Rule 60(b)(1) relief. *Id.*

Simply put, Marshall's Affidavit is not to be believed, and his supposed misreading and misunderstanding of the claims is objectively unreasonable. In light of the notice personally provided to Marshall by the Court and the Clerk, his claim that he was not aware of the default judgments entered on September 2, 2010, until his girlfriend was subpoenaed on December 14, 2010, is nothing short of a lie. And even if it were true, it still would not justify his additional ***six-week delay*** in moving to set aside the default judgment.

II. SETTING ASIDE THE DEFAULT JUDGMENTS WOULD CAUSE BB&T SIGNIFICANT PREJUDICE

Numerous cases make clear that BB&T would suffer significant prejudice by vacating the default judgment due to the *eight-month delay* after entry of the defaults and the *five-month delay* after entry of the default judgments that elapsed before Marshall's belated decision to finally defend this litigation. *See, e.g., Sloss Indus. Corp.*, 488 F.3d at 935 (finding prejudice where defendant did not move to set aside default judgment until "over three and a half months after it was served with process, and over one month after the default judgment was entered").

Not only would BB&T be prejudiced by the vacating of the default judgment after such a long period of time, it would also be prejudiced because such a reversal would empower Marshall to continue to conceal assets and make it difficult for BB&T to realize on its collateral. Marshall has a history of defrauding BB&T of collateral provided for a loan. For instance, after BB&T extended the Fourth Brian Marshall Loan (as defined in the Verified Complaint) in August of 2009, Marshall obtained duplicate titles on three of the

vehicles that were provided as collateral for that loan. Marshall then proceeded to sell the three vehicles without BB&T's knowledge or permission, and without remitting any of the proceeds of those sales to BB&T. *See* Marshall Dep. Trans., attached hereto as Exhibit D.

Setting aside the Default Judgments would only provide Marshall with additional time to hide or sell assets or make it more difficult for BB&T to take possession of the collateral pledged under the various loans made to Marshall, thus further prejudicing BB&T.

III. MARSHALL'S PURPORTED "DEFENSES" ARE FRIVOLOUS

Marshall has not presented a single meritorious defense, because he made no "affirmative showing of a defense" that is so "*likely to be successful*" that it "would *probably change the outcome*" of this case. *In re Worldwide Web Systems, Inc.*, 328 F.3d 1291, 1296-97 (11th Cir. 2003) (emphases added). Indeed, such a meritorious defense could be established only "by a clear and definite recitation of facts," which Marshall has not undertaken. *Gibbs*, 810 F.2d at 1538 (*citing Moldwood Corp. v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969)). Instead, Marshall's purported defenses are legally frivolous because they still cannot "explain what happened to the money." *Id.*

A. Marshall's Abstention Argument Is The Exact And Polar Opposite Of How *Colorado River* Abstention Actually Works

Marshall contends the Court should abstain from deciding any "state law issues" regarding the deficiency, because the state court action was "first filed." Mot. Vacate (Dkt. No. 48) at 9. This specious argument is the exact opposite of how *Colorado River* abstention is applied.

In a series of decisions starting with *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976), the Supreme Court explained the exceedingly narrow

circumstances in which federal courts may abstain in favor of parallel state court litigation. This doctrine has come to be known as *Colorado River* abstention. *See* Erwin Chemersinsky, *Federal Jurisdiction* 813-36 (3d ed. 1999). Because "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," abstention in such cases is appropriate only in "exceptional circumstances." *Colorado River*, 424 U.S. at 813. To be sure, there is no constitutional requirement that federal courts shirk their "virtually unflagging obligation" to "exercise the jurisdiction given them" and thereby abstain merely because there is parallel state court litigation. *Id.* at 817. Rarely, however, there arise some prudential considerations that may permit abstention. *Id.* at 817-19. Nevertheless, "[o]nly the clearest of justifications will warrant dismissal." *Id.* at 819. Ultimately, the *Colorado River* Court permitted abstention from a water rights litigation in which there were parallel state court proceedings, because there were several exceptional circumstances: (1) the "avoidance of piecemeal litigation"; (2) the absence of federal proceedings; (3) the "extensive involvement of state water rights" in a case that named 1,000 defendants; (4) the "300-mile distance" between the federal and state courthouses; and (5) the federal government's "existing participation" in the state litigation. *Id.* at 820-21.

Subsequently, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the Supreme Court, in confirming *Colorado River*'s "exceptional circumstances" test, rejected the district court's abstention in favor of parallel state court proceedings, because there was "no showing of the requisite exceptional circumstances to justify" the stay. *Id.* at 19. Critically, the Supreme Court noted that there was no "danger of piecemeal litigation"—the principal concern animating the result in *Colorado River*. *Id.*

Moreover, also unlike *Colorado River*, in *Moses* "federal law provide[d] the rule of decision on the merits." *Id.* at 23.

Finally, in *Wilton v. Seven Falls Co.*, the Supreme Court clarified that federal courts may abstain from cases arising under the Declaratory Judgment Act in favor of parallel state court litigation without satisfying *Colorado River*'s "exceptional circumstances" test, because the exercise of jurisdiction over actions seeking declaratory judgments is always discretionary. 515 U.S. 277, 281-90 (1995).

The two cases on which Marshall relies—*Mt. Hawley Insurance Co. v. Sarasota Residences, LLC*, 714 F. Supp. 2d 1176 (M.D. Fla. 2010) (Covington, J.), and *Allstate Insurance Co. v. Clohessy*, 9 F. Supp. 2d 1314 (M.D. Fla. 1998)—are both readily distinguishable, because those cases correctly abstained from Declaratory Judgment Act claims in favor of parallel state court litigation. The present case involves no claims for declaratory relief, but involves numerous exclusively federal maritime issues. In other words, Marshall mistakenly points the Court to *Wilton* cases, when the present case involves a *Colorado River / Moses* situation. Moreover, Marshall ignores that this action arises in maritime law, so jurisdiction is exclusively federal. Therefore there literally is no state court action in favor of which the Court could even theoretically abstain.

B. Marshall's Collateral Credit Argument Is No Basis To Set Aside A Default Judgment, But Only To Amend It By Rule 60(b)(5)

Marshall mistakenly contends that the default judgment should be set aside because he was not given proper credit for some collateral. *See* Mot. Vacate (Dkt. No. 48) at 9-11. This is not a reason to *vacate* the judgment, but at best it may be a reason to *amend* the default judgment by Rule 60(b)(5). *See* Fed. R. Civ. P. 60(b)(5) (allowing any party to move

for relief when a judgment "has been satisfied, released, or discharged"). There is no evidence that the sold collateral *exceeded* the value of the deficiency judgment. In fact, two of the pieces of property that Marshall claims were sold by BB&T garnered much less than Marshall anticipated in his Plan of Reorganization. *See* Plan of Reorganization (Dkt. No. 48-2) at 2. Tellingly, Marshall cites no authority that it was BB&T's "affirmative duty" to inform the Court every time it sold a piece of his personal or real property in partial satisfaction of his debts. *See* Mot. Vacate (Dkt. No. 48) at 11. It is not BB&T's obligation to incur legal fees and costs to amend the judgment every time it sells collateral. Instead, if Marshall wishes, he may file a Rule 60(b)(5) motion to so apprise the court.

Moreover, Marshall does not come forward with any evidence that the $1,000 sale price was insufficient. Marshall claims that he presented BB&T with multiple offers for the vessel ranging between $400,000 and $500,000. Marshall Aff. (Dkt. No. 48-4) ¶ 7. Yet, Marshall failed to appear at the U.S. Marshall's public auction to bid on the vessel. Marshall cannot complain that the sale price of the vessel was inadequate when his fictitious potential offers failed to materialize at the public auction. *See Shing v. M/V Mardina Trader*, 564 F.2d 1183, 1188-89 (5th Cir. 1977).

C. Marshall Cannot Satisfy Any Element Of His Supposed Waiver And Estoppel Affirmative Defenses, Most Notably Reasonable Reliance

Marshall also contends that waiver and estoppel bar BB&T's claims. Specifically, because BB&T "took affirmative action against its collateral outside this proceeding," Marshall was somehow "lulled into not defending this action while [BB&T] obtained the default judgment." Mot. Vacate (Dkt. No. 48) at 11. There are a number of elementary problems with his argument.

Marshall's waiver arguments are frivolous because he cannot meet the "heavy burden" in a maritime action to prove that BB&T "waived [its] lien by looking to someone other than the vessel owner for payment." *Stevens Tech. Servs., Inc. v. U.S.*, 913 F.2d 1521, 1537 (11th Cir. 1990) (citation and punctuation omitted).[1] Indeed, "even under the best of circumstances, this position [would be] difficult to sustain," because due to the "strong presumptions in favor of a maritime lien," it is "necessary" to prove waiver by showing the creditor "deliberately intended to forego the valuable privilege of a maritime lien by looking solely to the personal credit" of someone other than the debtor. *Id.* (citation and punctuation omitted); *see also Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 750 (5th Cir. 1985) ("district court was fully justified in concluding that [defendant] failed to shoulder the heavy burden of proving a waiver through reliance on the personal credit of someone other than the vessel owner"). Marshall points to no such evidence.

To the extent Marshall asserts an equitable estoppel defense, he likewise fails to satisfy any of its elements. To successfully assert equitable estoppel under federal common law, Marshall would have to show that BB&T (1) misrepresented material facts; (2) was aware of the true facts, (3) intended that the misrepresentation be acted on or had reason to believe Marshall would rely on it; and he would also have to show that he (4) did not know, nor should have known, the true facts and (5) reasonably and detrimentally relied on the misrepresentation. *See Carneiro da Cunha v. Std. Fire Ins. Co. / Aetna Flood Ins. Program*, 129 F.3d 581, 587 (11th Cir. 1997). Marshall, however, does not (1) identify any

[1] As an initial matter, it is federal law—and not the decisions applying state law upon which Marshall relies—that would govern any such affirmative defenses in this maritime action. *See, e.g.*, *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, 330 F.3d 225, 238 (4th Cir. 2003).

representation of material fact made by BB&T or explain how such a hypothetical representation was intended to induce reliance, (2) show his own reasonable reliance, or (3) identify any detrimental change he undertook in reliance. Indeed, the sole representations to which Marshall alludes—which incidentally do not involve any "material facts"—occurred between late May and early August 2010, *after* Marshall had already defaulted from this litigation on May 12, 2010. *See* Mot. Vacate (Dkt. No. 48) at 8 (claiming parties "essentially agreed" to litigate the deficiency in state court); Marshall Aff. (Dkt. No. 48-4) ¶ 3 (same). These failures are all fatal to his purported defense.

D. Marshall's Subject-Matter Jurisdiction Argument Is Meritless

Neither of Marshall's jurisdictional arguments justifies vacating the default judgment. Indeed, Marshall's subject-matter jurisdiction argument is inscrutable. *See* Mot. Vacate (Dkt. No. 12) at 12-13. Apparently, because Marshall and his counsel misunderstood the statutory claim asserted in the Verified Complaint as "only seeking relief against the vessel Pair A Dice," the Court either "did not have jurisdiction to award a deficiency judgment" or "should not have exercised such jurisdiction." *Id.* at 12. Since Congress clearly provided that mortgagees like BB&T may pursue deficiency judgments against owners like Marshall via *in personam* actions, this argument has no merit. *See* 46 U.S.C. § 31325(b) ("mortgagee may enforce a claim for the outstanding indebtedness secured by the mortgaged vessel in a civil action in personam in admiralty against the mortgagor . . . for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness"); *see also* Verified Compl. (Dkt. No. 1) ¶ 1 (alleging maritime lien claim "under 46 U.S.C. §§ 31301, et seq.").

Relatedly, Marshall's argument that the Court had no jurisdiction under Rule 59(e) to amend the original default judgment to reflect the deficiency defies comprehension because the Court did not act pursuant to Rule 59(e). Rather, the Court amended the judgment through Rule 60(b)(6), which—unlike Rule 59(e)—has no 28-day jurisdictional timeframe. *See* Order of December 13, 2010 (Dkt. No. 33) at 2 ("Pursuant to *Federal Rule of Civil Procedure 60(b)(6)*, the Court grants the Motion." (emphasis added)).

IV. MARSHALL'S ATTEMPTS TO EVADE POSTJUDGMENT DISCOVERY ARE SPURIOUS

Marshall contends BB&T's subpoenas to his closest friends and associates are void because they issued fewer than fourteen days after the Court amended the *in personam* default judgment to reflect the deficiency. The sole purpose for Marshall's argument is to prevent BB&T from discovering the location of Marshall's assets and to assist his friends and associates in continuing to evade service of process. *See* Notice Of Service Of Subpoenas (Dkt. No. 46-1) at 2 (describing service of subpoena after many failed attempts: "I put the papers back into Defendant[']s vehicle, and I was returning to my vehicle when Defendant Christa Vawryk th[rew] the papers at my vehicle and said f___ you.").[2]

As an initial matter, BB&T has had the ability to seek postjudgment discovery in aid of execution since September 16, 2010. The fact that the Court subsequently amended one of those judgments pursuant to Rule 60(b)(6) did not thereby give Marshall a second bite at the stay apple. In support, Marshall cites an unpublished district court decision from another jurisdiction for the proposition that prevailing parties may not seek postjudgment discovery

[2] BB&T has already corrected its inadvertent procedural error in omitting written notice to all parties regarding its third-party subpoenas.

in aid of execution unless the judgment states a definite amount owed. *See* Mot. Protective Order (Dkt. No. 47) at 8. While there is no such requirement in the Eleventh Circuit, the initial judgment against Marshall was for a definite amount: $20,585,664.99, plus interest, less any credit for the sale of PAIR A DICE. *See* Default Judgments (Dkt. Nos. 23 & 24).

More strained is Marshall's argument that all postjudgment discovery should be stayed under Rule 62(b)(4) until the Court resolves his Motions. Mot. Protective Order (Dkt. No. 47) at 8-9. Marshall fails to mention that such stays are always discretionary, never automatic, s*ee* Fed. R. Civ. P. 62(b)(4) ("the court *may* stay" (emphasis added)), and, more importantly, judgment debtors are required to post a supersedeas bond before seeking such postjudgment discovery stays. *See Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). The burden is on Marshall to demonstrate why a bond should not be required under Rule 62(b). *See Continental Cas. Co. v. First Fin. Employee Leasing, Inc.*, No. 8:08-CV-2372-T-27GW, 2010 WL 5421337, at *1 (M.D. Fla. Dec. 27, 2010). Marshall has not even attempted to explain why he should not be required to post a supersedeas bond. As such, the Court should exercise its discretion to deny any prejudgment discovery stay.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(j), BB&T requests one hour of oral argument in open court. Although BB&T does not believe the legal or factual issues presented here are sufficiently complex to require oral argument, it nevertheless believes oral argument would be helpful to impress upon Marshall and his counsel their duties of candor and to avoid

vexatious litigation practices—and most importantly, their obligation to take this litigation seriously.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion For Protective Order And Stay (Dkt. No. 47) and Motion To Set Aside Default Judgment (Dkt. No. 48) and grant BB&T such further relief as the Court deems just and proper.

Dated: February 17, 2011

Respectfully submitted,

/s/ Gregory W. Kehoe

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2011, a true and correct copy of the foregoing Plaintiff's Response To Marshall's Motions For Protective Order And Stay And Motion To Set Aside Default Judgment was filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Gregory W. Kehoe
Attorney