UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

R. WAYNE KLEIN, the Court-Appointed Receiver of Trigon Group, Inc., and for the assets of Daren L. Palmer,

Plaintiff,

v.

CAPITAL ONE FINANCIAL CORPORATION, a Delaware Corporation, CAPITAL ONE, NATIONAL ASSOCIATION, a National Banking Association, and CAPITAL ONE BANK (USA), NATIONAL ASSOCIATION, a National Banking Association,

Defendants.

Case No. 4:10-cv-00629-EJL

MEMORANDUM ORDER

INTRODUCTION

Pending before the Court in the above-entitled matter are the cross Motions for Summary Judgment filed by both sides. The matters are ripe for the Court's consideration. Having fully reviewed the record herein, the Court finds that the facts and legal arguments are adequately represented in the briefs and record. Accordingly, and in the interest of avoiding further delay, and because the Court conclusively finds that the

decisional process would not be significantly aided by oral argument, the Motions shall be decided on the record before this Court without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2009, Plaintiff, R. Wayne Klein, was appointed Receiver of Trigon Group, Inc. and for the assets of Daren L. Palmer in two related enforcement actions filed by the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC"). *See* Case 4:09-cv-00075-EJL and Case 4:09-cv-00076-EJL. In those cases, Trigon and Mr. Palmer were alleged to have engaged in a large-scale Ponzi scheme.

The Complaint here details the Ponzi scheme undertaken by Trigon and Mr. Palmer. (Dkt. 1.) The Receiver has brought this action against Defendants Capital One Financial Corporation, Capital One, National Association, and Capital One Bank (USA), National Association to recover funds invested in Trigon that were diverted to Defendants during the Ponzi scheme. (Dkt. 1.) The Receiver alleges the Defendants, between November 15, 2006 and August 29, 2008, received payments from Trigon in the sum of $44,259.75; specifically listing several of these payments. (Dkt. 1, pp. 7-9.) The Complaint raises claims for 1) Avoidance and Recovery of Fraudulent Transfers and 2) Constructive Trust and Other Provisional Remedies. (Dkt. 1.) The fraudulent transfer claim is brought under the Idaho Uniform Fraudulent Conveyance Act (UFTA), Idaho Code §§ 55-913, 55-914, and 55-916. The Constructive Trust claim seeks remedies provided for under Idaho Code § 55-916(b) and (c) (Dkt. 1.) The Defendants filed a

Motion to Dismiss which the Court granted in part and denied in part. (Dkt. 8, 16.) The parties then filed the instant cross Motions for Summary Judgment which the Court now takes up.

STANDARD OF LAW

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides, in pertinent part, that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

The party moving for summary judgment has the initial burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). Once the moving party has met this initial burden, the nonmoving party has the subsequent burden of presenting evidence to show that a genuine issue of fact remains. The party opposing the

motion for summary judgment may not rest upon the mere allegations or denials of her pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Id*. at 248. If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" then summary judgment is proper as "there can be no 'genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)[1]

Moreover, under Rule 56, it is clear that in order to preclude entry of summary judgment an issue must be both "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Hahn v. Sargent*, 523 F.3d 461, 464 (1st Cir. 1975) (quoting *First Nat'l Bank v. Cities Serv. Co. Inc.*, 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See, e.g., British*

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[1] *See also,* Rule 56(e) which provides:

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or
- (4) issue any other appropriate order.

Motor Car Distrib. V. San Francisco Automotive Indus. Welfare Fund, 883 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted). Of course, when applying the above standard, the court must view all of the evidence in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Hughes v. United States*, 953 F.2d 531, 541 (9th Cir. 1992).

DISCUSSION

The Receiver argues summary judgment is appropriate here because the transfers constitute both actual and constructive fraud under the UFTA for which the Defendants have no defense.[2] The Receiver's Motion also requests that the Court award prejudgment

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[2] The complete language of Idaho Code § 55-913 that makes up the Receiver's claims here is as follows:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
  (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
  (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
    1. was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
    2. intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

interest on its claims. Finally, the Receiver asserts the Court should grant it summary judgment on the Defendants' counterclaim. On the other hand, the Defendants' Motion argues they are entitled to summary judgment on all of the Receiver's claims and on their own counterclaim. (Dkt. 35.) The Court finds as follows.

1. Non-Capital One Bank Defendants

As an initial matter, the parties agree that Defendants' Motion for Summary Judgment should be granted, and the Plaintiff's Motion be denied, as to the named Defendants other than Capital One Bank (USA), National Association. (Dkt. 38 at 3) (Dkt. 42 at 10.) The Court agrees and will order that summary judgment be granted in favor of Defendants Capital One, National Association and Capital One Financial Corporation.[3]

2. Actual Fraudulent Transfer Claim

Under Idaho Code § 55–913(1)(a) an actual fraudulent transfer is a transfer made with "intent to hinder, delay or defraud any creditor of the debtor." To prevail on this claim, it is the Receiver's burden in the first instance to show that a transfer of monies was made with the actual intent to hinder, delay, or defraud. *See* Idaho Code §§ 55-913(1). Upon the Receiver making such a showing, the burden then shifts to Capital One to prove any affirmative defenses they may raise under Idaho Code § 55-917(1). One such defense is the good faith defense which requires proof that Capital One 1) acted in

[3] Because the only remaining Defendant is Capital One Bank (USA), National Association, hereafter in this Order the Court will refer to the Defendant in the singular or as "Capital One."

good faith and 2) gave reasonably equivalent value in exchange for the transfer. *See* Idaho Code § 55-917(1) ("[a] transfer ... is not voidable under Idaho Code § 55–913(1)(a), against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or oblige.").

To make his case, the Receiver relies on the presumption that payments made from Ponzi scheme funds are presumed to be made with the "actual intent to defraud." *Donnell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008). Because there is no dispute here that Trigon, the payer of the money to Capital One, was operating a Ponzi scheme at the time of the transfers in question, the Receiver maintains he has established that the transfers were actual fraudulent transfers under Idaho Code § 55-913(a)(1). Capital One counters that the "Ponzi-schme presumption" should not apply here and, therefore, there is no evidence of actual fraudulent intent. (Dkt. 37 at 3.)

The cases upholding the ponzi-scheme presumption, Capital One argues, are distinguishable to this case because they all involved transfers to investors or transfers that were integral to perpetrating the ponzi scheme. (Dkt. 37 at 3.) Here, Capital One contends, it was not an investor and did not profit from the transfers. (Dkt. 37 at 4-5.) The Receiver maintains that the presumption is applicable here under the relevant case law because the transfers were made from monies belonging to Trigon's creditors (its investors) to pay the debts of Mr. Palmer. (Dkt. 42 at 3.)

There is no factual dispute in this case that Trigon was operating a ponzi scheme during the time in question. Thus, the only question on this point is whether, as a matter

of law, the "ponzi presumption" applies here. Having reviewed the arguments of the parties and the applicable case law, the Court finds the presumption does apply in this case.

Capital One points to *In re Image Masters, Inc*, 421 B.R. 164, 186 (Bankr. E.D.Pa. 2009) in support of its argument that courts do not automatically apply the presumption in all ponzi scheme cases. In that case, the court was discussing the requirements for pleading fraud found in Federal Rule of Civil Procedure 9(b) in the context of a motion to dismiss. There the court examined cases concluding that the general fraudulent intent underlying a ponzi scheme was insufficient to establish the fraudulent transfer cause of action. *Id.* at 186. This context is much different from the case here. Further, the decision was recently vacated and remanded, in part, on this particular point. *See Image Masters, Inc. v. Chase Home Finance*, 489 B.R. 375 (E.D.Pa. Mar. 11, 2013) (finding the presumption does not only apply in cases involving investors, brokers, or other insiders for purposes of satisfying Rule 9(b)). This case as well as the other cases cited by Capital One fail to support its position.

Instead, the Court finds the case law supports applying the presumption here. The Ninth Circuit has stated "the mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud." *Donnell*, 533 F.3d at 770 (quoting *In re AFI Holding*, 525 F.3d at 704) (internal quotation marks omitted); *see also In re Agricultural Research and Technology Group, Inc.*, 916 F.2d 528, 535-36 (9th Cir. 1990) (The "mere existence of a

ponzi scheme, which can be established by circumstantial evidence, has been found to fulfill the requirement of actual intent on the part of the debtor.").[4]

Again, there is no dispute that Trigon was operating a Ponzi scheme at the time it made the transfers to Capital One. Applying the ponzi-scheme presumption here, the Court agrees that the Receiver has shown an actual fraudulent transfer was made here with "intent to hinder, delay or defraud any creditor of the debtor." Idaho Code § 55–913(1)(a). The next inquiry then is whether or not Capital One has proven the good faith defense found in Idaho Code § 55-917(1). On this issue, the parties do not appear to dispute that Capital One accepted the transferred funds in good faith. The main source of contention lies in the question of whether or not Capital One gave reasonably equivalent value in exchange for the transfer.

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The Court finds instructive the reasoning in the recently decided case of *In re National Consumer Mortg., LLC*, No. 2:10-CV-00930-PMP-PAL, 2013 WL 164247, at *11 (D. Nev. Jan. 14, 2013) (This discussion was as it related to the constructive fraudulent transfer claim in that case.).

> A Ponzi scheme is "a financial fraud that induces investment by promising extremely high, risk-free returns, usually in a short time period, from an allegedly legitimate business venture." *Donell v. Kowell*, 533 F.3d 762, 767 n. 2 (9th Cir. 2008) (quotation omitted). "The fraud consists of funnelling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment." Id. (quotation omitted); *see also In re Slatkin*, 525 F.3d 805, 809 n. 1 (9th Cir. 2008). The "mere existence of a Ponzi scheme is sufficient to establish actual intent under § 548(a)(1) or a state's equivalent to that section." *In re AFI Holding, Inc.*, 525 F.3d 700, 704 (9th Cir. 2008) (quotation omitted). Courts presume actual intent in relation to a Ponzi scheme because the debtor knows at the time of the transfer that the scheme ultimately must collapse. *In re Indep. Clearing House Co.*, 77 B.R. 843, 860 (D.Utah 1987). Proof that transfers were made pursuant to a Ponzi scheme likewise establishes insolvency for constructive fraudulent transfers. *Donell*, 533 F.3d at 770–71; *Warfield v. Byron*, 436 F.3d 551, 558–59 (5th Cir. 2006) (stating a Ponzi scheme "is, as a matter of law, insolvent from its inception").

Capital One claims it provided reasonably equivalent value to Trigon because 1) Trigon and Mr. Palmer are alter egos and 2) Trigon and Mr. Palmer have been consolidated in the receivership proceeding. (Dkt. 37 at 6-7.) Because the two are one, Capital One asserts the benefit it conferred upon Mr. Palmer was also given to Trigon. At a minimum, Capital One argues, there is a genuine issue of material fact as to the issue of whether or not Trigon and Mr. Palmer should be treated as consolidated or independently. The Receiver maintains Trigon received no value for the transfers and disputes Capital One's arguments that Trigon and Mr. Palmer were alter egos and/or have been consolidated.

The Court finds the only value that is relevant is the value that was received by Trigon who provided the funds paid to Capital One in the transfers, not the value to any third party - i.e. Mr. Palmer. *See In re Fox Bean Co., Inc.*, 287 B.R. 270, 281 (Bankr.D. Idaho 2002) ("a debtor's payment of the debt of another does not constitute a reasonably equivalent value when the debtor is not obligated on the debt."). Here, Trigon funds were used to make the payments to Capital One to repay the monies owed to Capital One by Mr. Palmer. The beneficiary of these transfers then was Mr. Palmer who's debts were extinguished by the transfers. Thus, this issue turns on whether or not Capital One is correct in its argument that the two entities should be treated as one consolidated entity.

The Court finds the determination of whether or not Trigon and Mr. Palmer should be considered alter egos and/or consolidated is a question of law; not a question of fact.[5]

Capital One argues the Court's orders in the SEC's action, Case No. 4:09-cv-75-EJL, that approved the Receiver's various motions for distributions and applications for fees and expenses show that "the Receivership Entities are being treated as one consolidated entity – the Receivership Estate" and the Court has not distinguished between Mr. Palmer and Trigon. (Dkt. 35-4 at ¶ 3.) The Court finds otherwise. The Orders from the SEC action did not consolidate Trigon and Mr. Palmer in the actions brought by the SEC and CFTC. Those Orders concerned the distributions and payment of fees and expenses, they did not consolidate Trigon and Mr. Palmer. The Court has not, contrary to Capital One's assertion, already determined and/or treated Trigon and Mr. Palmer as one. There is no order substantively consolidating Trigon and Mr. Palmer and the record here does not support any such consolidation. The Receiver in these matters was appointed for the purpose of recovering funds belonging to Trigon's investors. The Receiver has no duty or obligation to Mr. Palmer.

In support of its consolidation arguments, Capital One points mainly to *In re Leneve*, 341 B.R. 53 (Bankr. S.D. Fla. 2006) and *In re Pearlman*, 450 B.R. 219 (Bankr. M.D. Fla. 2011). (Dkt. 41 at 5) (Dkt. 35 at 4.) The Receiver counters that these cases are distinguishable. (Dkt. 42 at 4-6.)

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[5] Capital One argues both that the question of consolidation in this case raises genuine issues of material fact and also that "as a matter of law" Trigon and Mr. Palmer have been consolidated. (Dkt. 37 at 7) (Dkt. 41 at 9.)

In *Leneve*, the bankruptcy court was confronted with a "tangled web" of entities which the debtor used to engage in a fraudulent pattern of conduct regarding transfers of assets. The bankruptcy trustee in that case filed an adversary proceeding to avoid certain fraudulent transfers under the United States Bankruptcy Code and Florida's UFTA. The court determined that in the "rather unique situation" presented in that case that the debtor "operated these businesses as mere instrumentalities and alter egos of himself" such that the assets and creditors of the entities were essentially LeNeve's own assets. *Id.* at 64. Thus, the court went on to hold, that transfers made to repay a preexisting debt on behalf of an obligor could not be avoided because the debtor and obligor were treated as one entity.

The Court finds the facts in this case are different from *Leneve*. Mr. Palmer's involvement in Trigon has not been shown to be as interwoven as was the case in *Leneve* such that they are one in the same. Notably, the undisputed facts regarding the particular transfers at issue in this case show Mr. Palmer to have been separate from Trigon. The credit card in question in this case was issued by Capital One to Mr. Palmer and Blackrock Ltd., LLC, not Trigon. (Dkt. 35-4 at ¶ 4.) The credit card was extended based on Mr. Palmer's personal credit history, not Trigon's credit. Moreover, Capital One has represented that it had no knowledge of any relationship between Trigon and Mr. Palmer at the time it issued the credit card or when it received the payments; which is the relevant time period for the determination of whether reasonably equivalent value was given. (Dkt.

35-4 at ¶ 4.) Thus, the Court here finds it cannot be said that the assets of Trigon were essentially the assets of Mr. Palmer.

In re Pearlman involved substantive consolidation of the debtor's assets and liabilities with those of the fraudulent entities he used in carrying out classic Ponzi schemes. *Pearlman*, 460 B.R. at 309. The bankruptcy trustee sought to avoid the transfers made by the debtors to repay preexisting loan obligations to the creditor. The court held that summary judgment as to the constructive fraudulent transfer counts was barred because the trustee could not establish the joint debtors received less than reasonably equivalent value in exchange for the transfers. The reasoning was that because the entities had been substantively consolidated with the debtor's estate, the trustee could not show that the entities did not receive reasonably equivalent value in exchange for the transfers repaying the loan. *Id.* at 317.

At best this case would be relevant here as to the constructive fraudulent transfer claim below. Regardless, the facts leading to the decision in *Pearlman* are different from those found here. In *Pearlman*, the court had entered an order completely and substantively consolidating the joint debtors' estates, combining their assets and liabilities into one consolidated estate. *Pearlman*, 460 B.R. at 316-17. No such order has been entered in this case. Furthermore, as discussed above, the record here reflects that Mr. Palmer and Trigon have been treated separately and have not been consolidated. For those reasons, the Court finds the facts in this case do not, as a matter of law, support the conclusion that Trigon and Mr. Palmer are substantively consolidated.

Instead and for the reasons stated above, the Court concludes that, as a matter of law, the Receiver has met its burden to show an actual fraudulent transfer occurred. It is undisputed that Trigon was engaged in an Ponzi scheme at the time of the transfers. Again, "the mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud." *Donnell*, 533 F.3d at 770. Thus, the Receiver met his burden. On the affirmative defense, Capital One has failed to establish that it gave reasonably equivalent value to the transferee - Trigon. As the Receiver points out, "[i]t is a fundamental principle of fraudulent transfer cases that one cannot normally pay another's debts and contend to have received 'reasonably equivalent value' in exchange." *Leneve*, 341 B.R. at 63. Here, Trigon transferred funds from the Ponzi scheme to Capital One to repay the debts of Mr. Palmer. Trigon and Mr. Palmer have not been consolidated so as to be treated as a single entity. As such, Trigon did not receive reasonably equivalent value in exchange for those transfers. Accordingly, the Court will grant the Receiver's Motion for Summary Judgment as to this claim.

2. Constructive Fraudulent Transfer Claim

Alternatively, the Receiver claims the transfers were constructive fraudulent transfers under Idaho Code § 913(1)(b). To prevail on this claim, the Receiver must show that:

1) Trigon was insolvent at the time of the transfer of monies to Capital One, and

2) Trigon received no reasonably equivalent value in return for the monies paid to Capital One.

Idaho Code § 913(1)(b). There is no good faith defense to a constructive fraudulent transfer. The Court finds the Receiver has made the necessary showing to prevail on this claim as well.

Again, it is undisputed that Trigon was engaged in a Ponzi scheme at the time of the transfers to Capital One. The transfers to Capital One were made by Trigon during the Ponzi scheme when Trigon was insolvent. For the reasons stated above, the Court finds that Capital One did not give any reasonably equivalent value to Trigon in exchange for the monies transferred. As such, the Court finds summary judgment on this claim is also appropriate.[6]

C. Statutory Prejudgment Interest

The Receiver also seeks the statutory prejudgment interest at a rate of 12% per annum as provided for in Idaho Code § 28-22-104 from September 9, 2008. The Court agrees that prejudgment interest is appropriate here and will grant the same. The amounts involved in the transactions here are readily ascertainable by mere mathematical process.

D. Defendant's Counterclaims

Capital One has raised a counterclaim and affirmative defenses of offset and recoupment. (Dkt. 35 at 9-10.) These claims argue that if the transfers are avoided, then Capital One will have a claim for the amount lost against the "Receivership Entities" because it will then be a creditor of Mr. Palmer for repayment of the loans it advanced to

[6] In light of the Court's rulings on the fraudulent transfer claims, it need not rule upon the Receiver's claim for unjust enrichment.

him. Because the Receiver "stands in the shoes of [Mr.] Palmer," Capital one argues, the Receiver will be liable to Capital One for repayment of the same loans for which it obtained avoidance. (Dkt. 35 at 10.) In response, the Receiver argues the counterclaim seeks an impermissible triangular setoff. (Dkt. 38 at 8.)

"The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398 (9th Cir. 1996) (quoting *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995)). "The defining characteristic of setoff is that 'the mutual debt and claim ... are generally those arising from different transactions.'" *Id.* (quoting 4 Collier on Bankruptcy ¶ 553.03, at 553-14 (15th ed. 1995)). "In contrast to setoff, recoupment 'is the setting up of a demand arising from the same transaction as the plaintiff's claim or cause of action, strictly for the purpose of abatement or reduction of such claim.'" *Newbery*, 95 F.3d at 1399 (quoting Collier ¶ 553.03, at 553-15). "Under recoupment, a defendant is able to meet a plaintiff's claim with a countervailing claim that arose out of the same transaction." *Id.* (citations and quotations omitted).

Here again, Capital One argues Trigon has been consolidated with Mr. Palmer in these proceedings and, therefore, in the event of an avoidance of the transfers would result in the debt of Mr. Palmer also being the debt of the Receiver and Trigon. (Dkt. 41 at 9.) For the reasons previously stated, the Court finds Trigon and Mr. Palmer have not been consolidated in this matter. As such, there is no mutual indebtedness between Trigon

and Mr. Palmer. For the same reasons, triangular setoff is not available to Capital One here.[7] Accordingly, the Court grants the Receiver's Motion for Summary Judgment, and denies Capital One's Motion, as to the counterclaim.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED as follows:

1) The Defendant's Motion for Summary Judgment (Dkt. 35) is **GRANTED in part and DENIED in part** as stated herein. The Motion is granted as to the claims against the Defendants Capital One, National Association and Capital One Financial Corporation. The remainder of the Motion is denied.

2) The Plaintiff's Motion for Summary Judgment (Dkt. 36) is **GRANTED in part and DENIED in part** as stated herein. Plaintiff is directed to submit a proposed judgment to the Court's email box: EJL_Orders@id.uscourts.gov.

3) The trial is vacated.

DATED: **May 28, 2013**

Honorable Edward J. Lodge
U. S. District Judge

[7] A "triangular setoff" occurs "where A offsets an obligation owed to B against B's debt to C [and] is generally not allowed under nonbankruptcy law." *In re EBW Laser, Inc.*, Adversary No. 07–2004, 2009 WL 116995, at *3 (Bkrtcy. M.D.N.C. Jan. 15, 2009) (quoting 5 Collier on Bankruptcy ¶ 553.03[3][b], p. 553–31 (15th ed. rev. 2008)). Triangular setoff is impermissible absent a formal agreement by all parties to treat the separate entities as one. *In re Garden Ridge Corp.*, 399 B.R. 135, 140 n. 9 (D. Del. 2008) (citation omitted). There is no such agreement in this case.