
In the Matter of the Rehabilitation of
FRONTIER INSURANCE COMPANY

DECISION
AND
ORDER

RUSS HILL

Index No. 97-06
(RJI No. 01-06-084713)

(Judge Richard M. Platkin, Presiding)

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Hon. Richard M. Platkin, A.J.S.C.

Frontier Insurance Company in Rehabilitation (“Frontier” or “the Rehabilitator”) moves to confirm the Referee’s recommendation to deny the surety claim of Russ Hill (“the Claimant” or “Hill”) based upon his concealment of material information regarding the principal’s financial condition. Hill opposes the application and informally requests the entry of judgment in his favor.

BACKGROUND

In an agreement executed in November 1998, Hill sold the company he founded, Adcor Products (“Adcor”), to Moneysworth & Best Shoe Care, Inc. (“M&B Canada”). A portion of the purchase price was to be paid over time and was secured by a promissory note (“the Note”) and Hill’s retention of a security interest in the assets of Adcor. Hill also received common stock in M&B Canada, along with the promise of “stock shortfall payments” if the stock sold for less than its issuance price. Finally, Hill was to receive certain incentive compensation on a contingent basis. In connection with the foregoing transaction, M&B Canada, as principal, purchased a surety bond from Frontier to guarantee that Hill, as obligee, would receive the periodic payments called for under the Note.

Approximately one year later, in or about December 1999, M&B Canada sought to obtain an infusion of capital from Congress Financial Corp. (“Congress”). As a condition of providing M&B Canada with new financing, Congress insisted that Hill relinquish his security interest in the Adcor assets. Hill agreed on the condition that he receive substitute security. On January 19, 2000, Frontier issued two replacement surety bonds naming Hill as obligee. The new bonds more than tripled Frontier’s financial exposure.

Ultimately, M&B Canada was unsuccessful in obtaining new financing from Congress. Just five months after Frontier issued the two replacement bonds, the company defaulted on its obligations to Hill, who then sought payment of \$2,696,840 from Frontier under the new bonds. M&B Canada entered into bankruptcy shortly thereafter.

On November 1, 2006, the Rehabilitator issued a Notice of Determination denying Hill's surety claim in its entirety. Pursuant to the interim procedure order governing the rehabilitation of Frontier, Claimant sought review of the Rehabilitator's denial before the Hon. Robert C. Williams, the duly assigned Referee in the Frontier rehabilitation proceeding. By Order dated December 11, 2008, the Referee recommended denial of the Claimant's motion for summary judgment. Further, in a decision dated October 9, 2008, the Referee recommended denial of the Claimant's application for a protective order with respect to certain emails between Hill and his counsel, Paul Hegness that allegedly were protected by the attorney-client privilege.

In a Decision & Order dated April 16, 2009 ("the Prior Decision"), this Court confirmed both recommendations. With respect to the Claimant's motion for summary judgment, the Court first recognized that under New York law, "a creditor has no duty to keep the surety informed of the debtor's financial situation. Rather, the surety bears the burden of making inquiries and informing itself of the relevant state of affairs of the party for whose conduct it has assumed responsibility" (*State of New York v Peerless Ins. Co.*, 67 NY2d 845, 847 [1986]).

Nonetheless, the Court recognized that the defense of fraudulent concealment is available to a surety under the following limited circumstances: "1) the obligee must know facts that materially increase the surety's risk, and have reason to believe that surety would be unwilling to assume such a higher risk; 2) the obligee must have reason to believe that such facts are unknown to the surety; 3) the obligee must have the opportunity to communicate the

relevant information to the surety; and 4) the obligee must have the duty to disclose the information based upon its relationship to the surety, its responsibility for the surety's misimpression, or other circumstances" (*Rachman Bag Co. v Liberty Mut. Ins. Co.*, 46 F3d 230, 237 [2d Cir 1995]). "There is no definitive test for determining when a duty to disclose arises, but the Second Circuit has noted a variety of circumstances in which such a duty has been found to arise: for example, when the obligee deals directly with the surety in obtaining the bond, when silence would amount to an affirmative misrepresentation (that is, when the obligee has in some way created the misimpression), when the obligee colluded in the deception, when the obligee and surety are in a fiduciary relationship, or when the obligee has unique access to the information (for example, when it has sole control over the information)" (*WestRM-West Risk Mkts. v Lumbermens Mut. Cas. Co.*, 314 F Supp 2d 229, 237 [SDNY 2004]).

Viewing the limited factual record compiled on the summary judgment motion in the light most favorable to Frontier and giving it the benefit of all reasonable inferences, the Court concluded that a reasonable trier of fact could find that Frontier had satisfied the four-part test of *Rachman Bag* and that Hill, as obligee, was under a duty to disclose to Frontier the information in his possession regarding M&B Canada's finances.

Following an opportunity for pre-trial discovery, a four-day evidentiary hearing was held before the Referee commencing on October 6, 2009. The parties entered approximately 100 exhibits into evidence and presented the testimony of five live witnesses. At the hearing, the Rehabilitator objected to the Referee's receipt into evidence of certain portions of several deposition transcripts and submitted a motion in support of these objections. The Referee received the deposition testimony while reserving decision on the objections.

In a report dated April 7, 2010, the Referee adopted by reference the 43 separately numbered paragraphs of factual findings submitted by the Rehabilitator. On the basis of his wholesale adoption of the Rehabilitator's "statement of facts", the Referee recommended disallowance of Hill's claim, stating:

The evidence overwhelmingly demonstrates that just prior to issuance of the replacement bonds, Hill knew of facts that materially increased Frontier's risk and he knew that Frontier would be unwilling to assume such an increased risk. Hill knew that these facts were unknown to Frontier and he had the opportunity to disclose them to Frontier. Hill a duty to disclose those facts to Frontier. Based upon the foregoing, Frontier should be exonerated from liability under the replacement bonds

Oral argument was held before the Court on September 30, 2010. A copy of the transcript of the hearing before the Referee was provided to the Court on October 8, 2010. This Decision & Order follows.

DISCUSSION

The standard of review for this Court to apply is set forth in CPLR 4403. The Court "may confirm or reject, in whole or in part, the . . . report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing." "[T]he report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997]). While the findings of a referee to hear and report are entitled to great weight, particularly where matters of credibility are involved (*Schwartz v Meisner*, 198 AD2d 634, 634 [3d Dept 1993]), if those findings are not supported by the record, they must be rejected (*id.*).

The sole issue for determination before the Referee was whether Frontier was exonerated from liability to Hill under the surety bonds by reason of his fraudulent concealment of material

information. In reviewing the Referee’s report and recommendation, the Court is mindful that the burden of proof rests squarely upon the Rehabilitator to establish Hill’s wrongdoing by “clear and decisive evidence” (*Bostwick v Van Voorhis*, 91 NY 353, 361 [1883]). As the Court of Appeals explained more than 125 years ago:

Sureties are supposed to know the character of their principal, and to be willing to be bound for his fidelity. They must inquire and inform themselves of all the facts they desire to know, and if they omit to seek for or obtain the requisite information, they cannot easily avoid the bond upon inferential or unsatisfactory proof that they were drawn into signing it by bad faith on the part of the obligee. . . . [O]therwise bonds of this character will furnish a very precarious security to the parties who take them. (*Id.* at 360-361).

For the reasons that follow, the Court is not persuaded that the Rehabilitator has met its burden of establishing the second and fourth elements of the *Rachman Bag* test by clear and decisive evidence. Accordingly, its defense of fraudulent concealment must be rejected.

A. Hill’s Reasonable Belief Regarding Frontier’s Knowledge

Prior to considering the second element of *Rachman Bag*, it is necessary to briefly review the Referee’s finding that Hill was aware of the following undisclosed facts regarding M&B Canada’s financial condition that materially increased Frontier’s risk in writing additional surety bonds in January 2000: (1) M&B Canada’s default on interest payments due to Hill in October 1999; (2) the company’s severe delinquency in paying its vendors; (3) its lack of available credit or cash; (4) the failure of M&B Canada to satisfy an IRS tax lien associated with the Adcor transaction; (5) M&B Canada’s inability to make other payments to Hill, including stock shortfall payments, expense payments and an incentive bonus; and (6) the fact that there was no “Plan B” for M&B Canada if the restructuring deal with Congress fell through. While Hill raises a variety of objections to these findings, they are substantially

supported by the testimony and documentary evidence adduced at the evidentiary hearing and, therefore, should be confirmed.

Thus, to establish the second element of *Rachman Bag*, the Rehabilitator must demonstrate that Hill knew or had reason to believe that the foregoing information regarding M&B Canada's financial condition was unknown to Frontier (*see* 46 F3d at 237). The focus of this element is on the obligee and his reasonable perception of the surety's knowledge (*see id.*; *United States v Martinez*, 151 F3d 68, 73 [2d Cir 1998]; Restatement of Suretyship & Guaranty 3d, § 12 [3] [b] and cmt g). Put another way, an obligee's duty to disclose under *Rachman Bag* arises, if at all, only when the obligee knows or has reason to believe that the information in his possession is unknown to the surety.

The Court's starting point for this analysis is the undisputed fact that Hill had no direct dealings or communications with Frontier. In fact, no one from M&B Canada spoke directly to anyone at Frontier. Rather, all communications from M&B Canada regarding the surety bonds were directed to Frontier's bond broker, Stephen Kazmer of Scheer's Incorporated. And the only person from M&B Canada who spoke to Kazmer was Linda Millage, the company's chief financial officer ("CFO"). Moreover, neither Frontier nor Kazmer attempted to communicate directly with Hill. Accordingly, it is apparent that any information that Hill possessed regarding Frontier's knowledge of M&B Canada's financial condition necessarily was obtained or derived from others.

In that regard, a January 6, 2000 email exchange between Millage and Hill is revealing. In an email to Millage, Hill notes that he has already incurred more than \$5,000 in legal fees in connection with the proposed restructuring transaction and complains that "Congress wants a full disclosure to Frontier which means a total review of the document, which will cost a few

grand alone.” As a result, Hill sought assurances that the additional legal fees associated with “full disclosure” would be reimbursed by the company. Millage responded as follows:

Russ, I just spoke with Bill Moon [M&B Canada’s corporate attorney]. He believes that there is no requirement for full disclosure to Frontier. They have seen our most recent published financial statements, are aware of the new deal, and what prompted the new deal. The disclosure we have given thus far is identical to that given last time around.

Thus, while Hill was aware that M&B Canada had not provided “full disclosure” – a process that apparently connoted “full review of the document[s]” by counsel – the record demonstrates that Hill was advised by M&B Canada’s CFO (and the company’s sole point of contact with Frontier’s bond broker) of the following: (a) M&B Canada’s most recent published financial statements, including its 1998 annual report and its September 1999 quarterly report, had been provided to Frontier; (b) Frontier was aware of the terms of the contemplated financing with Congress and the financial circumstances that necessitated restructuring; and (c) the level of disclosure provided to Frontier in connection with the new bonds was identical to that provided by M&B Canada when the original bond was obtained.

Hill testified that based on what he was advised by Millage, he believed that the surety had received a fair and accurate depiction of M&B Canada’s finances. According to Hill, Millage’s alleged disclosures revealed, among other things, that: M&B Canada was in poor financial condition with no cash on hand; it had accounts payable that substantially exceeded accounts receivable; the company was in violation of loan covenants associated with its line of credit; M&B Canada owed at least \$142,000 to the IRS; M&B owed the Hills \$1.17 million as of January 2000, and the financial restructuring transaction was necessary due to M&B Canada’s inability to meet its financial obligations to Hill and others. Hill further testified that his attorney, Paul Hegness, had spoken with Bill Moon, M&B Canada’s corporate counsel,

subsequent to the Millage email and was assured “that a full disclosure was, in fact given to Frontier and [it] received all of the information that [it] requested.”¹

To be sure, Hill also acknowledged that he received an unaudited, internal bimonthly operating report for M&B Canada that he did not believe was disclosed to Frontier. However, Hill testified that he did not consider the information contained therein to be a reliable source of financial information for the publicly traded corporation, noting for the Referee specific inconsistencies and discrepancies apparent from the face of these reports.

In response to this proof, the Rehabilitator argues principally that Millage’s claim that Frontier was “aware of the new deal and what prompted the new deal” is directly rebutted by Kazmer’s testimony. According to Kazmer, Millage had assured him that the restructuring transaction was not “being done because of financial concerns”, and she offered rosy projections of M&B Canada’s future prospects. Kazmer also testified that Millage had not disclosed that M&B Canada already was in default on its prior bonded obligations to Hill. In addition, the Rehabilitator argues that the only proof that would substantiate the substance of Millage’s email to Hill – a few lines from her deposition transcript – is the inadmissible product of leading questions.

The Court concludes that the Rehabilitator’s arguments about the substance of the Millage/Kazmer communications miss the mark. Under the second prong of *Rachman Bag* the issue is not what Frontier actually knew about M&B Canada’s finances. Rather, as stated above, the focus must be on Hill’s reasonable perceptions of Frontier’s knowledge. For that reason, even if the Court were to fully credit Kazmer’s testimony, exclude or give no weight to

¹ While hearsay, this testimony goes to Hill’s state of mind, which, as explained previously, is the focus of the second element of *Rachman Bag*.

Millage's contrary deposition testimony, and find that Millage misled Kazmer, there simply is no record basis to conclude that Hill knew or should have known of Millage's misrepresentations.²

In considering Hill's reasonable perceptions of the surety's knowledge, the Court also attaches some significance to the fact that Frontier, a compensated surety, entered into an arm's length transaction with M&B Canada, a publicly traded company. The ability of the surety to obtain knowledge of the information concealed from it through means independent of the obligee is an "important" factor in determining the obligee's reasonable perceptions (Restatement of Suretyship & Guaranty 3d, § 12 cmt g).

The proof adduced before the Referee establishes that compensated sureties are known for making careful investigation of information material to their underwriting decisions before agreeing to be held liable for the obligations of another. This is in accord with the venerable common-law rule that places upon the surety the "burden of making inquiries and informing itself of the relevant state of affairs of the party for whose conduct it has assumed responsibility" (*Peerless*, 67 NY2d at 847; *see Rachman Bag*, 46 F3d at 235 ["Sureties must take the initiative to inquire about information they deem appropriate."]; *Cam-Ful Indus. v Fidelity & Deposit Co.*, 922 F2d 156, 162 [2d Cir 1991] [sureties are responsible for their own "laziness or poorly considered decisions"]).

Moreover, the evidentiary record compiled before the Referee demonstrates that the information that forms the basis of the Rehabilitator's concealment claim was readily

² While the Rehabilitator offered some proof that Hill was skeptical of the "pie in the sky" financing plans disclosed to him by Van Sant, there is no proof that Hill had reason to doubt what he was being told by CFO Millage regarding the disclosures made to Frontier. In fact, Hill testified without contradiction that he believed what he was told by Millage.

ascertainable by Frontier through the exercise of ordinary diligence. Information regarding M&B Canada's fourth quarter financial performance, the status of the company's existing bonded obligations, the current state of the company's delinquencies in satisfying existing contractual and tax obligations, and the consequences to M&B Canada if it failed to consummate the restructuring transaction with Congress all constitute information of a type that could easily have been obtained by Frontier had its underwriters made such a request to M&B Canada (or to Hill). Accordingly, Hill had no reason to believe that the information in his possession regarding M&B Canada's finances would not have been disclosed to Frontier had the surety's underwriters considered it material to the issuance of the new bonds.

Based on the foregoing, the Court concludes that the Referee's recommendation that "Hill knew that [adverse material] facts were unknown to Frontier" lacks adequate support in the record so as to allow the Rehabilitator to meet its burden of establishing the second element of *Rachman Bag* by clear and decisive evidence.

B. Hill's Duty to Disclose

The fourth element of the *Rachman Bag* test focuses on whether the obligee was under a legal duty to disclose the information in his possession to the surety under all of the particular facts and circumstances of the case. The Referee determined that Hill was under such a duty, but his report does not identify the particular circumstances that he relied upon in reaching that conclusion.³

As an initial matter, it is apparent that many of the factual circumstances described in *WestRM* and *Rachman Bag* as giving rise to a duty of disclosure on the part of a surety obligee

³ As noted in the Prior Decision, the existence of a legal duty under a given set of facts presents only a question of law for the Court. Accordingly, the Referee's conclusion regarding the existence of a duty is not entitled to deference in any event.

are not implicated here. There has been no showing that information concerning M&B Canada's finances was in the exclusive possession of Hill, there were no direct dealings between Frontier and Hill, there was no showing that Hill owed fiduciary duties to Frontier, and there is no claim that Hill was responsible for any misimpression on the part of the surety (*West RM*, 314 F Supp. 2d at 237).

Further, while the Rehabilitator argued in the prior motion practice that the undisclosed status of Hill as both surety obligee and as the president of M&B Canada gave rise to a duty of disclosure, it is now clear that this argument was predicated upon mistakes of fact. In making this argument, the Rehabilitator relied upon an affidavit from Kazmer averring that had Hill's "dual role" been disclosed, it would have triggered a heightened degree of scrutiny and investigation. However, the hearing record establishes that Hill was not an officer of the principal, M&B Canada, but rather headed up the company's United States subsidiary. And more fundamentally, Kazmer acknowledged that Hill's management role was, in fact, disclosed in M&B Canada's 1998 annual report, which was provided to Kazmer and Frontier.

In the Court's view, the most substantial argument in favor of the existence of a duty of disclosure is based on the Rehabilitator's claim that Hill participated in M&B Canada's decision not to provide Frontier with "full disclosure". In this regard, the Rehabilitator relies upon the January 6, 2000 email exchange between Millage and Hill, in which Hill appears to have conditioned his willingness to participate in "full disclosure" upon M&B Canada's agreement to reimburse his counsel fees. However, even accepting the Rehabilitator's position that the foregoing email exchange demonstrates that (a) Hill had the ability to control and/or influence M&B Canada's disclosure to Frontier and (b) Hill participated in M&B Canada's decision to provide the surety with something less than "full disclosure", the Court is not persuaded that

any resultant duty of disclosure extended to the financial information that forms the basis of the Rehabilitator's claim of fraudulent concealment.

In reaching this conclusion, the Court begins by considering what additional disclosures would have been provided to Frontier had Hill insisted upon "full disclosure" regardless of the advice of M&B Canada's corporate counsel or concern over legal fees. After all, insofar as Hill participated in M&B Canada's decision to provide the surety with something less than "full disclosure", there is considerable force to the Rehabilitator's argument that Hill thereby assumed responsibility to Frontier for the disclosure of the information that he caused to be withheld. On the other hand, such a duty would not extend to information that would not have been provided to Frontier had "full disclosure" been undertaken. In other words, the duty of disclosure that arises upon an obligee's participation in the principal's decision to withhold material information from the surety is limited to that which he participated in withholding.

In his testimony before the Referee, Hill explained that the term "full disclosure" used in his email exchange with Millage was a reference to a full review of the transaction and disclosure documents by counsel. This interpretation is supported by the context of the emails, which do not speak to whether or not specific types of information should be disclosed to Frontier, but rather is concerned with the attorney review process and the allocation of responsibility for the resulting counsel fees. Moreover, the term "full disclosure" must be read in the context of Millage's response, which assured Hill that Frontier had M&B Canada's most recent published and audited financial statements and was aware of the terms of contemplated financing with Congress and the financial circumstances that necessitated restructuring.

There simply is no non-speculative basis upon which to conclude that the process of attorney review attendant to "full disclosure" would have caused Frontier to receive any of the

information that forms the basis of the Rehabilitator's fraudulent concealment claim. The record is devoid of proof concerning the attorney review process undertaken in connection with the original bond,⁴ and no expert proof was offered to establish that legal review by competent transactional counsel would have caused additional disclosures to be made to Frontier. Moreover, the Court is mindful that such review would necessarily be informed by the legal precedents discussed above, which place upon the surety the "burden of making inquiries and informing itself of the relevant state of affairs of the party for whose conduct it has assumed responsibility" (*Peerless*, 67 NY2d at 847). Accordingly, while Hill's decision not to insist upon "full disclosure" certainly was improvident and raised legitimate questions on the part of Rehabilitator, the Court is not persuaded that it provides clear and decisive evidence of wrongdoing on Hill's part.

Finally, the Court concludes that Hill's intentional decision to refrain from notifying Frontier of M&B Canada's failure to make interest payments under the bonded Note in order to protect his broader financial interests (*e.g.* his stock holdings in M&B Canada) is not a circumstance that gives rise to a duty of disclosure. To hold otherwise would run counter to the clear teaching of *Peerless* and its progeny (*Peerless*, 67 NY2d at 847 ["the [obligee] was not obliged to notify [the surety] of [the principal's] persistent failure to meet its financial obligations so as to allow [the surety] . . . to forbear from increasing the bonds' face amounts"]); *State Bank of Albany v McDonnell*, 40 AD2d 905 [3d Dept 1972] ["It has been held that even

⁴ While the extent of attorney review associated with the original bond is unclear, Millage did observe to Hill that Frontier had received the same level of disclosure in connection with the new bonds as it had on the original bond. Hill further testified that Bill Moon served as M&B Canada's counsel in connection with the original bond.

when the creditor knows of prior defaults or irregularities by the debtor, it is not obligated to disclose this knowledge to the surety without an inquiry.”]).

Accordingly, the Rehabilitator has failed to demonstrate that Hill was under a duty to disclose the information that forms the basis of the subject fraudulent concealment claim.

CONCLUSION

In view of the Rehabilitator’s failure to establish all four elements of *Rachman Bag* by clear and decisive evidence, its defense of fraudulent concealment must be rejected. The Court has considered the remaining arguments and contentions put forward by the parties, including the evidentiary issues raised by the Rehabilitator, but finds them unavailing or unnecessary to disposition of this application.⁵

Accordingly, it is

⁵ In view of this conclusion, the Court need not delve into the issue of whether the Rehabilitator has also demonstrated reasonable reliance on the part of Frontier, a point that was not clearly addressed in the parties’ submissions. As the Second Circuit has explained, the traditional elements of fraudulent concealment – whether applying the four-part test of *Rachman Bag* or the three-part test of the Restatement (Third) – are “not, in themselves, grounds for voiding a suretyship contract” (*Martinez*, 151 F3d at 73). If the surety demonstrates the traditional elements of fraudulent concealment, “the obligee’s actions constitute only a material misrepresentation, which is not an independent ground for voiding the contract. . . . [A] surety’s obligations are voidable only if it was justified in relying on the material misrepresentation” (*id.*; accord *Peerless*, 67 NY2d at 848). Here, Kazmer testified that while he collected and provided Frontier with certain financial information regarding M&B Canada, he was specifically directed by Frontier not to engage in underwriting. And no one who actually was engaged in underwriting the surety bonds for Frontier testified before the Referee. Moreover, the expert witness put forward by the Rehabilitator was a business valuation professional, not a surety underwriter. On the other hand, the surety expert who appeared for Hill credibly testified that any reliance by Frontier was unreasonable due to the surety’s failure to make basic inquiries into important issues going to the principal’s ability to meet its ongoing financial obligations, particularly since “red flags” were apparent from the face of the company’s financial reports. Finally, as explained above, the record demonstrates that the financial information withheld from Frontier could easily have been obtained by the surety through the exercise of reasonable diligence.

ORDERED that the motion by Frontier Insurance Company to confirm the April 7, 2010 report of the Referee is denied; and it is further

ORDERED that the Rehabilitator's Notice of Determination is vacated and annulled; and it is further

ADJUDGED that the Rehabilitator has failed to demonstrate any valid defenses to the surety claim of Russ Hill, and the subject surety claims shall be deemed allowed; and it is finally

ORDERED that this matter is remanded to the Rehabilitator for further proceedings not inconsistent herewith.

This constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned Claimant's New York counsel. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York
November 22, 2010

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

Notice of Motion, dated May 5, 2010;
Affirmation of Daniel Adams, Esq., dated May 5, 2010, with attached exhibits 1-4;
Affirmation of Thomas G. Foley, Jr., Esq., dated June 2, 2010;
Claimant's Memorandum in Opposition, dated June 3, 2010, with attached exhibit A;
Claimant's Response to Evidentiary Objections, dated June 3, 2010, with attached exhibit A;
Reply Affirmation of Daniel Adams, Esq., dated June 25, 2010; and
Testimony and Exhibits from Hearing Before Referee.