

In the Matter of the Rehabilitation of
FRONTIER INSURANCE COMPANY

DECISION
AND
ORDER

Claimants: Kentucky Coal Employer Self-Insurance
Guaranty Fund and the Department of Workers' Claims
of the Commonwealth of Kentucky

Claims BO7396, BO7397 and BO7398

Index No. 97-06

(Judge Richard M. Platkin, Presiding)

APPEARANCES: STITES & HARBISON PLLC
Attorneys for Rehabilitator
(W. Blaine Early, III, of counsel)
250 W. Main Street - Suite 2300
Lexington, KY 40507-1758

WALTHER, ROARK & GAY, PLC
Attorneys for Claimants
(Jonathan L. Gay, of counsel)
163 East Main Street - Suite 200
P.O. Box 1598
Lexington, KY 40588-1598

HARGRAVES McCONNELL & COSTIGAN, P.C.
Attorneys for Claimants
(John McConnell, of counsel)
420 Lexington Avenue, Suite 2101
New York, NY 10170

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

Claimants Kentucky Coal Employers Self-Insurance Guaranty Fund (“the Fund”) and the Department of Workers’ Claims of the Commonwealth of Kentucky move for an order rejecting the Referee’s report and recommendation of October 7, 2008, as amended on November 3, 2008 (“the Referee’s Report”). Frontier Insurance Company in Rehabilitation (“Frontier” or “the Rehabilitator”, as applicable) cross-moves for an order confirming the Referee’s Report.

BACKGROUND

The Kentucky Department of Worker Claims (“DWC”) is an agency of the Commonwealth of Kentucky charged with the responsibility of, among other things, reviewing the adequacy of surety posted by employers in Kentucky who self-insure their workers’ compensation liability. The Fund was established by the Kentucky Legislature on March 1, 1997 as a non-profit legal entity for the purpose of assuring continued payments to injured workers in the event that self-insured coal employers become unable to fulfill their financial obligations.

Horizon Natural Resources Company (“Horizon”) owned and operated several coal companies in Kentucky and participated in the Commonwealth’s self-insured workers’ compensation program.¹ In order to secure its liability for workers’ compensation payments, Horizon provided DWC with three surety bonds from Frontier (“Frontier Horizon Bonds” or “the Bonds”) in or about 1998, in a total penal sum of \$23,358,330: (a) \$2,711,591 from Self-

¹ References herein to Horizon shall be deemed to include its predecessor entities.

Insurers' Past Liability Bond No. 133381;² (b) \$12,485,127 from Continuous Bond No. 133334; and (c) \$8,161,612 from Continuous Bond No. 133382.

Following a downgrade in the rating of the Frontier Bonds, DWC requested that Horizon replace the Bonds with more reliable surety. Thus, by letter dated March 27, 2000, Steve Taluskie, a branch manager with the DWC, notified Horizon that "once [DWC] is provided adequate replacement surety . . . , [the Bonds] will effectively be released." According to Mr. Taluskie, Horizon and DWC thereafter entered into several months of protracted negotiations regarding replacement security.

In a letter dated June 15, 2000, the Commissioner of DWC wrote to Frontier in response to notices of cancellation issued by Frontier with respect to surety bonds used to secure the liabilities of certain other self-insured employers in Kentucky.³ The Commissioner's letter stated that "[a]n exoneration of liability will only be granted in those instances where the principal has furnished to [DWC] satisfactory substitute security for all of those liabilities previously secured by the Frontier surety bonds." The letter further noted that applicable Kentucky law requires an employer such as Horizon to "maintain in full force and effect security satisfactory to the Commissioner." The record does not disclose whether this letter was received by Horizon. Subsequently, DWC did formally release certain of the non-Horizon surety bonds at Frontier's request.

On June 16, 2000, the Commissioner issued a Show Cause Order and Notice of Hearing ("Show Cause Order"), which required Horizon to appear and show cause why a certificate of

² This Bond is limited to liabilities arising from injuries that occurred from August 22, 1973 to November 15, 1992.

³ The position of commissioner of DWC was subsequently changed to executive director. These terms will be used interchangeably herein.

default should not issue and a demand be made upon Frontier, as surety, for payment of the Bonds.⁴ The Show Cause Order recited Horizon's failure to furnish adequate substitute security in accordance with Mr. Taluskie's letter of March 27, 2000. The record does not disclose what, if any, formal action was taken by DWC pursuant to the Show Cause Order.

In October and November 2001, Horizon obtained two letters of credit from Kentucky Bank & Trust ("KBT") totaling \$8 million. In December 2001, after receiving two new letters of credit from First National Bank of Grayson ("Grayson") in the same penal amount, DWC released the KBT letters of credit. In early 2002, Horizon then obtained four bonds from Greenwich Insurance Company ("GIC") totaling \$5,985,711. On March 1, 2002, Deutsche Bank issued a letter of credit on behalf of Horizon in the amount of \$8 million, which was then increased to \$11 million in May 2002. Shortly thereafter, DWC released the Grayson letters of credit.

Thus, following DWC's March 27, 2000 demand for adequate replacement surety, Horizon produced new security in the total net amount of \$16,984,711. As the Rehabilitator notes, however, the aggregate amount of new security produced by Horizon totaled \$32,984,711, inclusive of the \$16 million in letters of credit from KBT and Grayson, which were released by DWC. It is undisputed that Frontier Horizon Bonds were not formally released by DWC or returned to Horizon or Frontier.

On August 6, 2002, Horizon wrote to DWC requesting release of the Frontier Horizon Bonds. The letter stated that the Bonds were replaced with the Deutsche Bank and GIC letters of credits and/or bonds, totaling almost \$17 million. The record does not contain a formal

⁴ An amended Show Cause Order was issued on June 27, 2000.

response from DWC to this request, though Mr. Taluskie avers that Horizon's request was denied.⁵

In November 2002, Horizon filed for bankruptcy. In Fall 2004, Horizon informed DWC that it would no longer honor its self-insured workers' compensation obligations. The DWC immediately issued a certificate of default and ordered the Fund to assume Horizon's obligations. The DWC also called all Horizon security, including the Frontier Bonds.

DWC successfully collected the full amount of security posted by GIC and Deutsche Bank, totaling \$16,984,711.⁶ However, the Rehabilitator declined to honor the Frontier Horizon Bonds, determining that the Bonds were "effectively released" when DWC obtained approximately \$33 million in replacement security and collected about \$17 million in cash therefrom. According to the Rehabilitator, the new security was "adequate" because: (a) it exceeded the penal sum of the Frontier Horizon Bonds by about \$10 millions; (b) the Claimants failed to come forward with evidence demonstrating a lack of adequacy; (c) Claimants failed to exhaust the replacement surety; and (d) and all actual and incurred obligations of Horizon to its injured workers are being met. Thus, the Rehabilitator determined that "by operation of law and equity, Frontier's obligations under the [Bonds were] effectively discharged and released when replacement security was obtained."

Claimants challenged the Rehabilitator's determination before Referee Robert C. Williams, pursuant to the interim procedure order entered in the Frontier rehabilitation

⁵ Given the absence of proof demonstrating that DWC issued a formal denial of Horizon's request, the Court questions Claimants' contention that Horizon could have sought and obtained judicial review of DWC's alleged denial and, relatedly, that Horizon failed to exhaust its administrative remedies.

⁶ Throughout this Decision & Order, references to the approximately \$17 million in new security produced by Horizon shall be deemed to refer to foregoing sum.

proceeding. Following paper discovery but without the benefit of depositions, each side cross-moved before the Referee for summary judgment.

Claimants sought judgment as a matter of law that the Frontier Horizon Bonds had not been discharged in accordance with the Kentucky law or the provisions of the relevant Bond contracts. And even if the Bonds could be “effectively discharged”, Claimants argued that the determination of whether “adequate” replacement surety had been provided is the exclusive province of the DWC, which had determined that the \$17 million in new security tendered by Horizon was insufficient to release \$23 million in existing surety bonds.

The Rehabilitator’s motion before the Referee sought judgment as a matter of law on the basis of an alleged “effective discharge” of the Frontier Horizon Bonds. This argument was grounded principally upon the language of the March 27, 2000 Taluskie letters, the Rehabilitator’s assertion that the security subsequently provided by Horizon was “adequate” to discharge the outstanding Bonds, and principles of equitable estoppel and unjust enrichment.

By Report dated October 7, 2008, as amended on November 3, 2008, the Referee accepted the Rehabilitator’s position that the Frontier’s liabilities and obligations under the Bonds were effectively discharged by Horizon providing almost \$17 million in “replacement surety”, which was determined to be “adequate” to cover the obligations incurred by Horizon. Further, the Referee found that Claimants’ “conduct of releasing all other sureties for [Horizon] upon receipt of replacement surety dictates release of the Bonds. [DWC] is bound by its prior position, representations and past customs because Frontier reasonably relied upon [the DWC] assertions and reasonably expected to be relinquished of its surety responsibility under the Bonds.” “To find otherwise,” the Referee determined, “would create an unjust inequity for

Frontier and provide an unintended windfall for Claimants. Accordingly, the Claimants are estopped from denying release of the Bonds.”

Claimants now move for an order rejecting the Referee’s Report, and the Rehabilitator cross-moves for an order confirming such Report. Oral argument was held on September 29, 2009. This Decision & Order follows.

ANALYSIS

Summary judgment is a drastic remedy and should only be granted if there are no material issues of disputed fact (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). In evaluating a motion for summary judgment, a court should simply determine whether material issues of disputed fact preclude the grant of judgment as a matter of law (*S. J. Capelin Assoc. v. Globe Mfg Corp.*, 34 NY2d 338 [1974]). The party moving for summary judgment has the initial burden of coming forward with admissible evidence to support the motion, so as to warrant the Court directing judgment in movant’s favor; the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of any factual issue requiring a trial (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The standard of review for this Court to apply in reviewing the Referee’s recommendations 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.” Since the Referee’s determinations were formulated on the basis of the parties’ cross-motions for summary judgment, which present only questions of law, the Referee’s Report therefore is subject to *de novo* review.

It is undisputed that the Frontier Horizon Bonds were never formally released by DWC in accordance with the applicable provisions of Kentucky law, the terms of the Bonds and the

past practice of the DWC in providing formal releases and returning the cancelled bonds to the principal or surety. Further, the record demonstrates that Horizon, Frontier's principal, defaulted on the payment obligations secured by the Bonds and that Frontier has not paid Claimants the proceeds of the Bonds. Based on these undisputed facts, Claimants have demonstrated a prima facie entitlement to judgment as a matter of law.

As noted above, the Rehabilitator relies on three separate but related arguments in opposition to Claimants' motion and in support of its cross-motion. First, it contends that the Frontier Horizon Bonds were effectively released in accordance with DWC's letter of March 27, 2000, which states that "once [DWC] is provided adequate replacement surety . . . , [the Frontier Horizon Bonds] will effectively be released." In arguing that DWC was in fact provided adequate replacement surety, the Rehabilitator points to the almost \$33 million in new security produced by Horizon following the March 27, 2000 demand letter and the almost \$17 million collected from the new security issued by Deutsche Bank and GIC. Second, the Rehabilitator contends that in light of the March 27, 2000 letter, Claimants are equitably estopped from denying release of the Bonds. Finally, the Rehabilitator argues that to allow Claimants to recover the full penal sum of the Frontier Horizon Bonds *and* the almost \$17 million in new security would constitute unjust enrichment.

While the Rehabilitator styles its first two defenses as separate and distinct arguments, it is apparent that they share considerable analytical overlap. In the Court's view, the Rehabilitator's first defense – the claim that the Frontier Horizon Bonds were effectively discharged once Horizon provided DWC with adequate replacement security – is grounded in equitable estoppel. After all, there is no assertion that Mr. Taluskie, a branch manager for DWC, had authority to modify the provisions of Kentucky law vesting decisions regarding the

adequacy of security for self-insured employers in the hands of the in the executive director of DWC (*see* Kentucky Revised Statutes [“KRS”] § 342.340 [1], 342.345). Nor is there anything in the record to suggest that Mr. Taluskie was authorized to modify the provisions of the Bond and/or DWC practices and procedures governing the release of surety. Rather, the gravamen of the Rehabilitator’s first defense is that DWC should be held to the terms of the March 27, 2000 letter following Horizon’s detrimental reliance thereupon. At oral argument, the Rehabilitator’s counsel did not dispute this characterization of its first defense.

Thus, a careful review of the Rehabilitator’s submissions reveal at least three distinct theories of equitable estoppel. As explained previously, the Rehabilitator contends, first and foremost, that DWC should be estopped from denying that the Bonds were effectively released upon Horizon producing adequate replacement security, in accordance with the letter of March 27, 2000. Relatedly, the Rehabilitator contends that the DWC should be estopped from denying that the new security produced by Horizon in response to DWC’s demand was approximately \$33 million, rather than the net amount of about \$17 million that remained following DWC’s release of \$16 million in letters of credit from KBT and Grayson. Finally, the Rehabilitator contends that, at a minimum, Claimants should be estopped from seeking a duplicative recovery from the new security *and* the Frontier Horizon Bonds.

The Supreme Court of Kentucky recently summarized the principles governing a claim of equitable estoppel in a case such as this:

While it is true that equitable estoppel can be invoked against a governmental entity in unique circumstances, a court must find that exceptional and extraordinary equities are involved to invoke that doctrine. Estoppel is a question of fact to be determined by the circumstances of each case. The essential elements of equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and

inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

(*Sebastian-Voor Props., LLC v. Lexington-Fayette Urban County Gov't*, 265 SW3d 190, 194-195 [Ky 2008] [internal citations and quotations omitted]).

The Court begins its analysis with the Rehabilitator's contention that DWC should be estopped from denying that Horizon produced \$33 million in new replacement security in response to the March 27, 2000 letter of Mr. Taluskie, which demanded adequate replacement surety for the \$23 million in Frontier Horizon Bonds, at which point the Bonds would "effectively be released." As Claimants note, this correspondence was directed to Horizon, not Frontier, and the record does not establish that Frontier ever received or was advised of Mr. Taluskie's correspondence. However, the Court is satisfied that under Kentucky law, Frontier, as surety, is entitled to assert the defenses of Horizon, as principal, with which it is in privity.

Nonetheless, the Rehabilitator has failed to come forward with proof demonstrating that Horizon was misled and relied to its detriment upon the March 27, 2000 letter or any other words or conduct of DWC in relation to the agency cancelling the KBT and Grayson letters of credit while declining to take any formal action with respect to Frontier Horizon Bonds.⁷ In fact, the only proof on this point in the record demonstrates that DWC's decision to release the

⁷ And as explained *supra*, the Rehabilitator has failed to show that Frontier was even aware of the March 27, 2000 communication giving rise to the claim of estoppel, much less demonstrate that the surety was misled to its detriment.

KBT and Grayson bonds was made at the request of Horizon. As set forth in the affidavit of Christopher L. Clarke, the Director of Risk Management and Workers' Compensation for Horizon at pertinent times, Horizon viewed the letters of credit issued by KBT and Grayson, small Kentucky banks with limited financial resources, as stop-gap measures while Horizon continued its efforts to find a long-term form of replacement security.

In this connection, the Court rejects the Rehabilitator's contention that the Clarke affidavit is devoid of probative value because it is "incorrect and unreliable." To the extent that the Rehabilitator discerns inconsistencies or errors in the affidavit of Mr. Clarke – an employee of Horizon at pertinent times who claims personal knowledge of relevant events – these contentions go to the weight to be given his testimony by the trier of fact, not to its admissibility or sufficiency. And the Court's task on summary judgment is simply to identify disputed issues of fact, not to resolve factual disputes. The same conclusions follow with respect to the two affidavits of Mr. Taluskie put forward by Claimants.

Having rejected the Rehabilitator's contention that DWC is estopped from denying that Horizon produced \$33 million in new replacement security, the issue then becomes whether the Rehabilitator has demonstrated, prima facie, that DWC should be estopped from denying the "effective release" of \$23 million in Frontier Horizon Bonds on the basis of Horizon producing about \$17 million in replacement security. For the reasons that follow, the Court concludes that the Rehabilitator has not met its initial burden in this regard.

Pursuant to the March 27, 2000 letter that lies at the heart of the Rehabilitator's estoppel claim, a representative of DWC requested that Frontier's principal, Horizon, replace the Frontier Bonds with more reliable surety, advising that "once [DWC] is provided adequate replacement surety . . . , [the Bonds] will effectively be released." Nothing in this letter states or implies that

the determination concerning the replacement security tendered by Horizon would be made by anyone other than the executive director of the DWC, in accordance the pertinent provisions of Kentucky law, the language of the applicable Bonds, and the past practice of the agency with respect to the release of security. Further, even if the letter could be understood in the manner advocated for by the Rehabilitator, intervening events prior to Horizon securing the \$17 million in new security – including the June 15, 2000 letter to Frontier, the Show Cause Order, the continued negotiations between Horizon and DWC regarding replacement security, and the formal release of other Frontier bonds – would have rendered such an interpretation unreasonable as a matter of law.

Despite the apparent efforts of Horizon, the company only could obtain a net total of just under \$17 million in new security in response to DWC’s demand for replacement of the Bonds. The Rehabilitator has not come forward with proof sufficient to establish that Horizon was misled in any way regarding DWC’s willingness to accept \$17 million in new security in exchange for relinquishing \$23 million in existing security. In fact, the only proof on this point contradicts the Rehabilitator’s theory. Claimants offer the affidavit of Mr. Clarke, who avers that Horizon, despite its good faith efforts, was unable to marshal sufficient new security to secure the release of the Frontier Horizon Bonds. To similar effect is the affidavit of Mr. Taluskie, who avers that DWC denied a request to release the Frontier Bonds on the basis of the new security tendered by Horizon.

While the Court cannot accept the Rehabilitator’s contention that DWC should be estopped from denying the “effective release” of \$23 million in surety Bonds on the basis of Horizon producing about \$17 million in new security, the Court does see merit to a narrower

estoppel defense arising out of Claimants' treatment of Horizon's tendered substitute security as additional security.

The Taluskie letter, which plainly was directed at obtaining substitute security, could reasonably have created the impression on the part of Horizon that the penal sum of the Frontier Bonds would be effectively reduced by any new security provided in response to DWC's demand. Claimants do not contend that DWC was exercising its statutory prerogative to require Horizon to produce security in excess of the \$23 million available to the Commonwealth on March 27, 2000 and, in any event, there is nothing in the record to support such a contention. Rather, the clear import of the Taluskie letter is that DWC was dissatisfied with the Bonds issued by Frontier due to the insurer's financial difficulties, and the agency sought to have Horizon substitute an equivalent sum of new security issued by a more reliable entity. Further, by its terms, the Taluskie letter establishes an intention, or at least an expectation, that Horizon would attempt to secure replacement security in response to DWC's demand. And to the extent that DWC now claims that the true state of affairs is that it had the discretion to accept and draw against the substitute security tendered by Horizon while declining to release any portion of the Frontier Horizon Bonds for which the new security was tendered as a substitute, a reasonable trier of fact could conclude that DWC had actual or constructive knowledge of the real facts and that Horizon lacked such knowledge.

By procuring substantial new security for the benefit of its injured employees in response to DWC's demand for replacement of the Frontier Horizon Bonds, the Rehabilitator also has demonstrated, *prima facie*, that Horizon relied in good faith upon the words and conduct of DWC. As explained above, Horizon was under no obligation by the Commonwealth to increase the amount of security for its self-insurance program; the issue raised by DWC

concerned the adequacy of the particular Bonds issued by Frontier, not their amount. And the expenses incurred by Horizon in purchasing the new security it tendered to DWC as a replacement to the Frontier Horizon Bonds is sufficient to constitute detrimental reliance.

Moreover, the evidence relied upon by Claimants, including the Taluskie and Clarke affidavits and other key documents, does not directly contradict this narrower theory of estoppel. Neither Mr. Taluskie's averment that DWC denied Horizon's request to formally release the Bonds nor Mr. Clarke's averment that Horizon was unsuccessful in obtaining a formal release of the Bonds speak directly to the narrower issue of whether Horizon could reasonably have been believed that the substitute security it tendered to DWC in response to its demand for replacement of the Frontier Bonds would entitle to a reduction in the penal sum of such Bonds.

Moreover, Claimants do not (and cannot) contend that the \$17 million in substitute security tendered by Horizon was inadequate in way other than its penal sum. In fact, in his affidavit, Mr. Taluskie confirms that DWC rejected Horizon's request for release of the Frontier Bonds on the basis that the \$17 million in new security was insufficient, in view of DCS, to justify relinquishment of \$23 million in existing security.⁸

Under this narrower theory of estoppel, other facts relied upon Claimants in opposition to the Rehabilitator's motion also are of diminished significance. Thus, the fact that Horizon continued paying premiums on the Frontier Horizon Bonds after their alleged "effective release" – conduct apparently inconsistent with a belief on the part of Horizon that the Bonds had been released *in toto* – is not fundamentally inconsistent with the notion that some portions of the

⁸ And, of course, the record reflects that Claimants have in fact recovered the full penal sum of the new security provided by Horizon.

Bonds remained in place. For the same reason, Horizon's conduct in asking for formal release of the Bonds in August 2002 is of far less significance.

Finally, in seeking to invoke equitable estoppel against DWC, a governmental entity, there must be a finding that exceptional and extraordinary equities are implicated under the facts and circumstances of this particular case. The Court is satisfied that the Rehabilitator has succeeded in at least raising a triable issue of fact on this point. In this connection, the Court rejects Claimants' contention that equitable estoppel against the government is available only in cases involving deliberate deception. The case relied upon by Claimants in support of this proposition actually states that equitable estoppel against the government is available "only in extraordinary circumstances *such as* where the agency deliberately misleads a party" (*Vance v. Kentucky Office of Ins.*, 240 SW3d 675, 678 [Ky App 2007] [emphasis added]; see *Sebastian-Voor*, supra ["unique circumstances" involving "exceptional and extraordinary equities"]). And while Claimants contend that invocation of an estoppel would work a hardship on Horizon's injured workers, the facts remains that a finding of estoppel on the narrow issue identified by this Court would result in the conclusion that DWC effectively relinquished \$17 million in downgraded Frontier surety in exchange for an equal amount of good and collectible security.

Based on the foregoing and recognizing that under Kentucky law, equitable estoppel is a question of fact to be determined on a case-specific basis, the Court concludes that the Rehabilitator has come forward with sufficient proof from which a reasonable trier of fact could find that DWC is estopped from seeking to recover \$16,984,711, representing the amount of substitute security tendered by Horizon at DWC's request, which Claimants successfully have drawn against. Determination of the merits of this defense is left to a full evidentiary hearing before the Referee, following a reasonable opportunity for the parties to obtain depositions and

other appropriate pre-trial discovery. However, for the reasons stated above, the Court further concludes that the claim of equitable estoppel does not extend to the Rehabilitator's claim that the Frontier Horizon Bonds were effectively discharged in their entirety.

The Court also finds that the Rehabilitator has stated a viable affirmative defense sounding in unjust enrichment, though not the full extent urged by the Rehabilitator. To succeed on a claim of unjust enrichment under Kentucky law, the Rehabilitator must show that Horizon conferred a benefit upon Claimants at its expense, a resulting appreciation of the benefit by Claimants, and an inequitable retention of the benefit by Claimants without payment for its value (*Tractor & Farm Supply v. Ford New Holland*, 898 F Supp. 1198 [WDKY 1995]). For substantially the same reasons stated above, the Court concludes that Frontier may pursue a defense of unjust enrichment to the extent that Claimants seek to recover the entire penal sum of the Frontier Horizon Bonds while enjoying the benefit of the substitute security tendered by Horizon in response to DWC's March 27, 2000 demand.⁹ However, the Court rejects the Rehabilitator's contention that its unjust enrichment defense extends beyond the \$16,984,711 recovered from the new sources of security procured by Horizon in response to DWC's demand for replacement security.

The Court has considered the parties' remaining arguments and contentions and finds unavailing or unnecessary to disposition of the instant applications.

Accordingly, it is

ORDERED that the Claimants' motion to reject the Referee's report is granted in part and denied in part, in accordance with the foregoing; and it is further

⁹ Insofar as Claimants contend that Frontier has been unjustly enriched by receiving the full premium amounts for the Bonds while arguing that its obligations thereunder were substantially reduced, Claimants lack standing to pursue such a claim on behalf of Horizon.

ORDERED that the Rehabilitator's motion to confirm the Referee's report is rejected in part and granted in part, in accordance with the foregoing; and it is further

ORDERED that this matter is remanded to the Referee for further proceedings not inconsistent with this Decision & Order.

This constitutes the Decision and Order of the Court. The original of this Decision & Order is being returned to counsel for Claimants; all papers are being transmitted to the County Clerk. 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 16, 2009

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

Papers Considered:

Claimants' Notice of Motion, dated October 27, 2008;

Memorandum of Law in Support of Claimant's Motion to Reject Referee's Order and Enter the Claimants' Proposed Findings and Conclusions of Law, which incorporates by reference Claimants' submissions to the Referee, as well as transcripts of the oral arguments held on August 12, 2008, and the Referee's October 7, 2008 Order;

Affirmation John McConnell, Esq., dated October 27, 2008, with attached exhibits A-F;

Submission of Referee's Corrected Order and Proposed Schedule Regarding Court's Consideration of Referee's Order, served November 11, 2008, with attachment;

Frontier's Notice of Motion, served November 24, 2008;

Frontier's Combined Response to Claimant's Motion to Reject and Motion to Confirm Referee's Report Regarding Claim Nos. B07396, B07397 and B07398 Relating to Horizon Natural Resources, served November 24, 2008;

Frontier's Memorandum in Support of Response to Claimant's Motion to Reject and Motion to Confirm Referee's Report Regarding Claim Nos. B07396, B07397 and B07398 Relating to Horizon Natural Resources, which incorporates by reference Frontier's submissions to the Referee, along with the transcript of the Summary Judgment Hearing, the Timeline used at the Hearing, and the Referee's Report as clarified on November 3, 2008, regarding Claim Nos. B07396, B07397 and B07398, served November 24, 2008;

Claimants' Response to Frontier's Motion to Confirm and Reply to Frontier's Response to the Claimant's Motion to Reject Confirmation of Findings and Conclusions of Law, dated January 9, 2009, with attached exhibits;

Frontier's Reply to Claimant's Response to Frontier's Motion to Confirm and Memorandum in Support Relating to Horizon Natural Resources, served January 23, 2009;

Claimants' Sur-Reply to Frontier's Reply to the Claimants' Motion to Reject Confirmation of Findings and Conclusions of Law, dated February 6, 2009, with attached exhibit;

Frontier's Memorandum Regarding One Aspect of Novation, dated October 13, 2009, with attached exhibits;

Claimants' Supplemental Memorandum of Law Regarding Novation, dated October 13, 2009, with attached exhibit.