

**Matter of White v New York State Teachers'  
Retirement Sys.**

2008 NY Slip Op 32210(U)

July 23, 2008

Supreme Court, Albany County

Docket Number: 0625107/2008

Judge: George B. Ceresia

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In this CPLR article 78 proceeding, petitioner Thomas M. White seeks review of a final determination by respondent New York State Teachers' Retirement System (TRS) which found petitioner's service for the school years commencing on July 1, 1999 and ending on June 30, 2006 (hereinafter the relevant time period) not creditable service in TRS. TRS opposes the petition, seeking its dismissal.

In From July 1, 1999 through June 30, 2000, petitioner served as the Director for Curriculum and Training and the Director of Technology for Project Lead the Way at the South Colonie Central School District (hereinafter South Colonie). That position was funded through Project Lead the Way, Inc. (hereinafter, when referring to the corporate entity, PLTW, Inc.) – a New York not-for-profit corporation. As noted in a memorandum from the South Colonie District Treasurer, “[PLTW, Inc.] . . . agreed to reimburse the district for all costs incurred for a ‘Project Lead the Way Coordinator’. Reimbursable costs will include \$60,000 yearly salary for Thomas White, the district share of FICA, medicare, TRS, & Health Insurance benefits, plus %5 indirect costs” (Grasek Memorandum [dated 9-13-99], Hewig Affirmation, Exhibit K). Project Lead the Way (hereinafter, when referring to the curriculum, PLTW) is a pre-engineering and technology curriculum for middle and high school students.

On December 17, 1999, petitioner and a representative of PLTW, Inc. entered into a “Contract for Services.” The agreement provided:

“The PLTW Associate for Training and Curriculum will be responsible to:

- Conduct ongoing training throughout the country in each of the PLTW courses.
- Participate, and at times lead, curriculum development projects.
- Assist in the development of the PLTW National Training Center at RIT and elsewhere as they are created.
- Participate in the development of appropriate distance learning models for PLTW.
- Serve as a master teacher at the PLTW summer institute.
- Attend, participate and deliver reports at PLTW meetings as requested by the National Director of Curriculum and Training.
- Maintain constant vigil for problems with PLTW states, schools and programs and forward suggestions to PLTW. This should include suggestions for improvements where there are no problems, which would result in revised practices that could produce better results or save resources. . . .
- Other duties consistent with this position as directed by the National Director of Curriculum and Training” (Contract for Services at ¶ 4 [dated 12-17-06], id., Exhibit J).

The contract further provided that petitioner’s “fee for services” would be “paid as a Grant to South Colonie Central Schools” (id. at ¶ 5). The agreement also provided for a set amount of vacation time (id. at ¶ 6). Further it provided that PLTW, Inc. would set up an expense budget for petitioner and reimburse him for necessary travel (id. at ¶¶ 9-10). Another term of the agreement stated:

“The Associate shall devote his full time, skill, labor and attention to the discharge of this duties as Associate for Training of Project Lead the Way during the term of this Agreement. He may, however, undertake speaking engagements, writing, learning or other professional duties, obligations and activities so long a such activities do not interfere or conflict with the mission of Project Lead the Way, or with the full and faithful discharge of the Associate for Training’s duties or written responsibilities as specified herein” (id. at ¶ 12).

From July 1, 2000 through June 30, 2006 petitioner served in the same position at Hudson Valley Community College (HVCC). For those years, PLTW, Inc. and HVCC entered into agreements, each for a one-year term, in which they agreed that HVCC would hire petitioner as the “Associate for Training of Project Lead the Way, Inc.” and that petitioner would serve at HVCC as a “12-month professional employee with a title and description of duties appropriate to the nature of the position at the College” (Agreement at ¶ 1 [dated 6-29-01], id., Exhibit P). Petitioner was not a party to those agreements. Those agreements further provided that PLTW, Inc. would provide a grant to pay for petitioner’s salary and overhead, with PLTW, Inc. also agreeing to pay a certain amount in overhead expenses (see id. at ¶ 2). The agreements also provided: “PLTW[, Inc.] will cover all other expenses associated with Project Lead the Way, Inc. directly” (id. at ¶ 3). The agreement noted that HVCC would not provide petitioner with office space since he would “work out of the PLTW[, Inc.] main office for the project” (id. at ¶ 5). In the agreement, PLTW, Inc. reserved the right to adjust petitioner’s salary (see id. at ¶ 7). It also provided: “Any and all termination and/or retirement benefits provided for in the NTP [Non-Teaching Professional] Administrative Code that are due [petitioner] at the time of his termination/retirement from HVCC shall be [the] full financial responsibility of PLTW” (id. at ¶ 8). Moreover, it provided that petitioner would “report to the Chief Executive Officer of Project Lead the Way, Inc.” and that he would “follow the rules and regulations of the NTP Administrative Code” (id. at ¶¶ 9-10).

In Spring 2006, TRS commenced an investigation of petitioner's membership in TRS with respect to his work with PLTW at South Colonie and HVCC.<sup>1</sup> On July 24, 2006, TRS notified petitioner of its preliminary determination regarding his retirement credit for school years 1999 – 2006, stating: “Specifically, [TRS] has preliminarily determined that you are not entitled to retirement credit for claimed teaching services at [South Colonie] for the 1999-2000 school year and for claimed teaching service at [HVCC] for the school years 2000-01 through 2005-06 because you did not render teaching service at [South Colonie] and HVCC during the respective years” (Schneider Letter [dated 7-24-06], White Affidavit, Exhibit A).

TRS further explained, in part:

“[W]e have obtained documents and information which appears to indicate that you had been improperly reported by [South Colonie] and HVCC as providing teaching service to them during the school years in question. The documents and information appear to indicate that, during the relevant time period, you were, in fact, working for a not-for-profit corporation named Project Lead the Way, Inc. . . .” (*id.*).

That letter further noted the afore-discussed contract between PLTW, Inc. and petitioner and, with regard to HVCC, the afore-discussed agreements between PLTW, Inc. and HVCC.

Thus, based on this, and other documentation, TRS concluded:

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<sup>1</sup> TRS also investigated six other TRS members. CPLR article 78 proceedings seeking review of TRS's determinations regarding those individuals were also before this Court and have been decided today. They are as follows: Matter of Handley v New York State Teachers' Retirement Sys., index No. 6239-07; Matter of Ford v New York State Teachers' Retirement Sys., index No. 6240-07; Matter of Phillips v New York State Teachers' Retirement Sys., index No. 6241-07; Matter of Jensen-Dooling v New York State Teachers' Retirement Sys., index No. 6241-07; Matter of Tebbano v New York State Teachers' Retirement Sys., index No. 6250-07; and Matter of Blais v New York State Teachers' Retirement Sys., index No. 6252-07.

“From all that appears to us, you were, during the time period in question, a full-time employee of PLTW[, Inc.]. Although PLTW[, Inc.] had apparently arranged with [South Colonie] and then HVCC for them to pay your salary and provide you with benefits as if you were an employee of [South Colonie] and then HVCC, you were, in fact, rendering services to PLTW[, Inc.] as a PLTW[, Inc.] employee” (id.).

Alternatively, TRS noted that “even assuming your service for PLTW[, Inc.] could also be considered service for either [South Colonie] or HVCC, that service does not appear to constitute teaching service creditable in the System” (id.).

In response, petitioner, through counsel, informed TRS, inter alia that its preliminary determination incorrect. Counsel further noted, inter alia:

“As you are aware, by letter dated July 31, 2000, [petitioner] was offered a full time administrative position at [HVCC] as Associate Director for Training for Project Lead the Way. . . . At that time, HVCC was responsible for training teachers with respect to the ‘Project Lead the Way’ technology curriculum. Mr. White’s appointment at HVCC was contingent on his submission of his academic transcripts to HVCC and his passing the required HVCC health examination.

“Furthermore, as you are already aware, [petitioner] submitted timesheets to HVCC on a regular basis. He was required to work set hours by HVCC pursuant to its administrative code. [Petitioner] reported to the Academic Vice President of Administrative Affairs at HVCC. He was required to abide by all HVCC rules and regulations. [Petitioner] was, clearly, an employee of HVCC. The fact that his position was funded by a grant does not make him an employee of the party making the grant to HVCC” (Latin Letter [dated 8-30-06], id., Exhibit C).

In a letter dated March 22, 2007, counsel for HVCC informed TRS, inter alia:

“PLTW was a collaboration to increase the demand for science and engineering education at the college level which involved the training of secondary school teachers, and the integration of new equipment and curricula into the secondary schools. It was definitely not a scheme to provide

[petitioner] with HVCC benefits. HVCC was the beneficiary of this program, and it was directly involved as well. It had an interest in the success of the PLTW program and in the quality of the curriculum and course delivery, since it was granting college credit for certain courses delivered at the secondary school level” (Wiley Letter [dated 3-22-07], id., Exhibit E).

On April 13, 2007, despite the above-quoted letter and material submitted by counsel, TRS finally “determined there is substantial evidence that [petitioner] rendered service to PLTW[, Inc.], not South Colonie . . . , during the July 1, 1999-June 30, 2000 school year and service to PLTW[, Inc.], not [HVCC] during the July 1, 2000 [- June 30, 2006] school years and that [petitioner] is, therefore, not entitled to any retirement credit in the System for purported teaching service as reported by [South Colonie] or HVCC during those school years” (Schneider Letter [dated 4-13-07], Hewig Affirmation, Exhibit P). Further, TRS noted that

“no evidence has been provided which might document that [petitioner] was performing any public service, let alone, teaching service, within the meaning of Education Law § 501 (19) for [South Colonie] and HVCC in the respective years in question. Vague descriptions of [petitioner’s] employment responsibilities during the school years in question will not suffice. The fact that HVCC allowed itself to be enlisted in PLTW[, Inc.’s] effort to have [petitioner] employed as a purported HVCC employee, placed on a public payroll while working for PLTW[, Inc.] at PLTW[, Inc.’s] expense and reported as rendering teaching service to a public employer participating in the System while working on the business of PLTW[, Inc.] does not establish a basis for providing [petitioner] with retirement credit for the time periods in question. Nor does the fact that [petitioner] was paid on the payroll of [South Colonie] and then HVCC at PLTW[, Inc.’s] expenses while working for PLTW[, Inc.] make [petitioner] a ‘teacher’ within the meaning of Education Law § 501 (4) during the school years in question” (id.).

The final determination provided that it would take effect on May 14, 2007, inviting petitioner to provide further information to TRS if desired. TRS attached its investigative

report to this determination (see “Report on the Investigation of System Members and Retirees Found Working for Charitable Venture Foundation and/or Project Lead the Way While Reported As Providing Teaching Service for Participated Employers in the System,” id., Exhibit X).

In response to further correspondence from petitioner’s counsel, TRS rejected, *inter alia*, petitioner’s argument that payment by either South Colonie or HVCC rendered those organizations petitioner’s employer, noting that evidence showed that PLTW, Inc. provided the funding for the salary. Furthermore, TRS maintained its position that petitioner was an employee of PLTW, Inc. and, alternatively, that he did not provide creditable service as a teacher, adjourning the effective date of its determination to June 29, 2007.

Petitioner then commenced this proceeding for review of TRS’s determination to deny him credit in TRS for his service during the relevant time period. In this proceeding, petitioner first argues that he was at all relevant times an employee of South Colonie and then HVCC, noting that his salary and benefits were paid by those organizations. Thus, petitioner maintains that TRS’ determination concluding otherwise is arbitrary and capricious and lacks a rational basis. Second, petitioner contends that TRS arbitrarily, capriciously and irrationally determined petitioner’s duties during the relevant time period did not constitute teaching service creditable in TRS. Finally, petitioner contends that the doctrine of estoppel is applicable here to protect his creditable retirement service.

First, the Court agrees with TRS that petitioner’s reliance on the doctrine of equitable estoppel is unavailing. As the Court of Appeals has held on several occasions, that doctrine

“is not available against a governmental agency in the exercise of its governmental function” (Matter of Daleview Nursing Home v Axelrod, 62 NY2d 30, 33 [1984]; see Collins v Manhattan & Bronx Surface Tr. Operating Auth., 62 NY2d 361, 372-373 [1984]). As that Court explained in Matter of Galanthay v New York State Teachers’ Retirement System: “Under section 525 of the Education Law the retirement board is mandated to correct any errors in the computation of benefit entitlement on the part of the members of the system” (50 NY2d 984, 986 [1980]). Therefore, the Court of Appeals concluded that, given this statutory responsibility coupled with public policy, “[t]he doctrine of estoppel will not reach so far as to hold an individual eligible for vested retirement where by statute, he clearly does not qualify for such eligibility” even where the benefit has already begun to be paid (id. at 986-987 [quoted case omitted]; see also Matter of Schwartz v McCall, 300 AD2d 887, 889 [3d Dept 2002]).

Although TRS has authority under the Education Law and associated case law to correct errors in computing benefits, it may neither exercise such authority in an arbitrary and capricious nor irrational manner (see generally Matter of Pell v Board of Education, 34 NY2d 222, 231 [1974]; Matter of Kirmayer v State of NY Civ. Serv. Commn., 42 AD3d 848, 850 [3d Dept 2007], lv dismissed 9 NY2d 955). Here, TRS has exercised its authority in both an arbitrary and capricious and irrational manner.

In this instance, TRS launched an investigation into petitioner’s service at South Colonie and HVCC after he had received credit for such service. While the investigation was proper, the Court takes issue with how TRS viewed the results of that investigation and its

ultimate determination in this matter. Essentially, TRS took a de novo approach in determining whether petitioner was South Colonie's or HVCC's employee without considering whether South Colonie or HVCC, in the first instance, had a good faith basis for concluding that petitioner was its employee when it reported his service to TRS. The Court holds today that, after conducting an investigation where service credit has been given, TRS should first consider whether an educational entity had a good faith basis for concluding that a teacher/professional is that entity's employee. If such a basis existed – whether or not a contrary conclusion could also be reached – TRS should accept that designation without substituting its judgment for that of the educational entity. If, however, such a basis does not exist, TRS is not bound by the educational entity's conclusion.<sup>2</sup> This is especially significant given that “[f]ull-time teachers are required to participate” in the retirement system (Matter of Scanlan v Buffalo Public School Sys., 90 NY2d 662, 667 [1997], citing Education Law § 503) and an educational entity must, therefore, make a contemporaneous determination as to a professional educator's employment status at the beginning of such service.

Here, arguably the record suggests that such a good-faith basis may have existed. As settled case law regarding what constitutes an employer-employee relationship holds: “Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results” (Matter of O'Brien v Spitzer, 7 NY3d 239, 242 [2006]; see Matter of Salamanca

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<sup>2</sup> As the parties acknowledge, in this given factual circumstances, no case law exists that is specifically on point to address the issues raised in this proceeding.

Nursing Home, Inc. [Roberts], 68 NY2d 901, 902-903 [1986]; Matter of Mydland [North Shore Equestrian Ctr. – Sweeney], 221 AD2d 747, 748 [3d Dept 1995]; Matter of Clorfeine [New York Open Ctr. – Hudacs], 187 AD2d 840, 840 [3d Dept 1992] [noting that, where a professional relationship exists, the issue is whether there is sufficient control over the services of the professional]; see also Santiago v Spinuzza, 48 AD3d 1257, 1258 [4<sup>th</sup> Dept 2008]). “Factors relevant to the determination [of whether such a relationship exists] include the right to control the alleged’s employee’s work, the method of payment, the right of discharge and the furnishing of equipment” (Matter of Wald v Avalon Partners, Inc., 23 AD3d 820, 820-821 [3d Dept 2005]). Further, “[n]o one factor is determinative, but control over means is the more important factor to be considered” (Matter of Charles A. Field Delivery Serv., Inc. [Roberts], 66 NY2d 516, 520 [1985]). Moreover, “[f]actors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer’s payroll and (5) was on a fixed schedule” (Bynog v Cipriani Group, Inc., 1 NY3d 193, 198-199 [2003]).

In applying these legal principles here, essential in considering whether South Colonie or HVCC had a good faith basis for concluding its relationship with petitioner as one of employer and employee is understanding the collaborative relationship between South Colonie or HVCC and PLTW, Inc. TRS has taken the view that the arrangement between South Colonie or HVCC and PLTW, Inc. was nothing “more than a gambit to funnel [petitioner’s] salary from a private entity through a school district [sic] so that [petitioner]

can receive retirement credit for his service to that private entity” (Hewig Affirmation at ¶ 67). This characterization, however, lacks a rational basis in the record.

The record before TRS and now this Court shows that HVCC and PLTW, Inc. entered into a series of one-year agreements (discussed above) to which petitioner was not a signature. Those agreements expressed HVCC’s and PLTW, Inc.’s “desire to work jointly and with others to support school districts through the program called Project Lead the Way®” (Agreement [dated 6-19-00], Hewig Affirmation, Exhibit V). Further, HVCC’s attorney in correspondence to TRS, also discussed above, explained to TRS the benefit of this collaborative relationship to HVCC. This explanation was echoed in an attached affidavit by an HVCC administrator. As demonstrated by the above-discussed evidence before TRS and the Court, HVCC and PLTW, Inc. worked in collaboration, in part, for the benefit of HVCC. To suggest otherwise, as TRS has in this proceeding, simply ignores the record in this matter.<sup>3</sup>

South Colonie or HVCC offered petitioner employment in the context of its collaborative relationship with PLTW, Inc. Accordingly, the issue in this proceeding is

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<sup>3</sup> Petitioner also submits the affidavit of Richard C. Liebich – the Chairman of the Board of Trustees of Charitable Ventures Foundation. This affidavit attempted to explain not only the historical background of PLTW but also to discuss the collaborative effort between PLTW, Inc. and HVCC and the concomitant funding given HVCC. The Court, however, cannot rely on this affidavit since it was not before the agency. As settled law holds, the scope of a court’s review is limited to what was before the agency (see Matter of Newark Val. Cent. School Dist. v Public Emp. Relations Bd., 83 NY2d 315, 321 n 4 [1994]; Matter of World Buddhist Ch’An Jing Ctr., Inc. v Schoeberl, 45 AD3d 947 [3d Dept 2007]).

whether South Colonie or HVCC had a good-faith basis to consider petitioner its employee in the context of the collaboration between South Colonie or HVCC and PLTW, Inc. For instance, both South Colonie and HVCC paid petitioner and provided him benefits (see Matter of Sicierski v New York State & Local Retirement Sys., 46 AD3d 1316, 1318 [3d Dept 2007], Education Law § 501 [3]). Further, the governing agreements for his HVCC employment noted that petitioner had to follow the rules and regulations outlined in the NTP Administrative Code (see Matter of Wald, 23 AD3d at 821). The record also indicates that TRS did not consider this good faith basis when it essentially determined based on its de novo review of the circumstances that petitioner was not an employee of South Colonie or HVCC. Accordingly, by failing to consider whether that good faith basis existed, TRS exercised its authority in both an arbitrary and capricious and irrational manner.

Furthermore, public policy supports this Court's holding that the educational entity's conclusion grounded in good faith must be considered by TRS. Here, the investigation into petitioner's service credit was launched after such credit had been given and well-after the school entity had previously determined petitioner to be its employee. In other words, the educational entity made a contemporaneous determination that petitioner was in its employment and TRS has conducted an after the fact investigation and, without taking into consideration the previous conclusion by the educational entity, essentially made a de novo finding. To tolerate this procedure places the educational professional in an untenable position of losing such benefits for which the educational entity had a good faith basis to offer that professional. Moreover, educational professionals would be less likely to work

within collaborative relationships such as PLTW where such educational professions would be in risk of losing either valuable pension benefits or creditable service. This potentially affects an educational entity's ability to staff such positions with the most qualified educational professional. Accordingly, for this reason and the others discussed above, the Court determines that, since, in reaching its determination, TRS failed to consider whether South Colonie or HVCC had a good faith basis for concluding that petitioner was its employee, that determination must be annulled and the matter remitted to TRS for such consideration.

In addition, TRS's alternative holding that petitioner failed to render creditable service as a teacher during the relevant period does not require a different result. Education Law § 501 (4) defines "teacher" as

"any regular teacher, special teacher, including any school librarian or physical training teacher, principal, vice-principal, supervisor, supervisory principal, director, superintendent, city superintendent, assistant city superintendent, district superintendent and other member of the teaching or professional staff of any class, public school, vocational school, truant reformatory school or parental school, and of any or all classes of schools within the state of New York . . . provided that no person shall be deemed a teacher within the meaning of this article who is not so employed for full time outside vacation periods. . . . In cases of doubt, the retirement board shall determine whether any person is a teacher as defined in this article" (Education Law § 501 [4]).

Further, subdivision 19 defines service, as pertinent here, as "actual teaching or supervision by the teacher during regular school hours of the day."

As a preliminary matter, TRS contends that its interpretation of provisions in article

11 of the Education Law as applied to petitioner in its determination should be given deference. The Court, however, disagrees. A Court need not give an agency's interpretation of a statute deference where, as in this instant matter, the "central statutory question . . . does not implicate 'knowledge and understanding of underlying operational practice or . . . evaluation of factual data,' which would limit the scope of . . . review" (Matter of Guido v New York State Teachers' Retirement Sys., 94 NY2d 64, 68 [1999], quoting Kurcsics v Merchant's Mut. Inc. Co., 49 NY2d 451, 459 [1980]; see Weingarten v Board of Trustees of the New York City Teachers' Retirement Sys., 98 NY2d 575, 580 [2002]). Further, "[w]here the terms of a statute are clear and unambiguous, 'the court should construe it so as to give effect to the plain meaning of the words used'" (Matter of Auerbach v Board of Educ., 86 NY2d 198, 204 [1995], quoting Patrolmen's Benevolent Assn. v City of New York, 41 NY2d 205, 208 [1976]).

Here, petitioner's duties fall under the definition of a teacher as applicable to TRS. A teacher, as defined in Education Law § 501 (4), includes a professional staff member, which is applicable to the petitioner's role at South Colonie and HVCC since he (cf Matter of Auerbach, 86 NY2d at 204). Further, contrary to TRS's determination and under the plain language of the statute, petitioner has provided service as a teacher to South Colonie and HVCC as defined in Education Law § 501 (19) by training staff to continue and further the work of PLTW at South Colonie or HVCC – especially where part of his duties was to teach staff. Thus, to accept TRS's interpretation of service under Education Law § 501 as applied in this proceeding would require the Court to limit the definition of a teacher to one who

strictly instructs students, which was clearly not the intent of the legislature since it defined teaching in a broader way (see Matter of Auerbach, 86 NY2d at 204).

Otherwise, the Court has considered the parties' remaining contentions and finds them either lacking in merit or unnecessary to consider given this Court's decision. Accordingly, it is

**ORDERED and ADJUDGED** that the petition is granted to the extent that the determination is annulled and the matter is remitted to respondent New York State Teachers' Retirement System for further proceedings not inconsistent with this Court's decision.

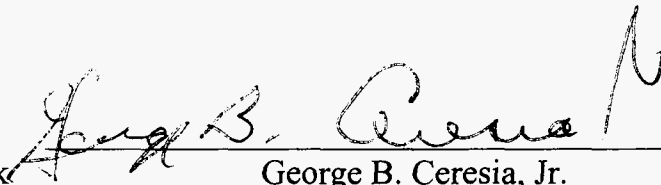
This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the petitioner who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

**ENTER**

Dated:

July 23, 2008

Troy, New York



George B. Ceresia, Jr.

Supreme Court Justice

## Papers Considered:

1. Notice of Petition dated August 10, 2007;
2. Petition verified August 10, 2007, with accompanying Exhibits A-F;
3. Affidavit of Thomas M. White sworn to August 8, 2007, with accompanying Exhibits A-F;
4. Richard C. Liebich sworn to August 7, 2007, with accompanying Exhibits A-J;
5. Answer verified January 16, 2008;
6. Affidavit of Walter Evans sworn to January 8, 2008;
7. Affirmation of Wayne Schneider, Esq., affirmed January 9, 2008, with accompanying Exhibits A-G;
8. Affirmation of Rosemarie C. Hewig, Esq., affirmed January 9, 2008, with accompanying Exhibits A-DD
9. Reply Affidavit of Thomas D. Latin, Esq., sworn to February 15, 2008, with accompanying Exhibit A.