

**Rosenthal & Rosenthal, Inc. v Lederman**

2022 NY Slip Op 33550(U)

October 16, 2022

Supreme Court, New York County

Docket Number: Index No. 654122/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ROSENTHAL & ROSENTHAL, INC.,  Plaintiff,  - v -  WAYNE A. LEDERMAN,  Defendant.	INDEX NO. <u>654122/2018</u>  MOTION DATE <u>N/A</u>  MOTION SEQ. NO. <u>002</u>  <b>DECISION + ORDER ON                  MOTION</b>
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WAYNE LEDERMAN,  Plaintiff,  -against-  LR ACQUISITION, LLC, IAPPAREL, LLC, and SAMMY CATTON,  Defendants.	Third-Party Index No. 595891/2018
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In motion sequence number 002, plaintiff Rosenthal & Rosenthal, Inc. moves, pursuant to CPLR 3212(e), for partial summary judgment on its first and third<sup>1</sup> causes of action and to dismiss defendant Wayne A. Lederman’s defenses and counterclaims.

**Background**

Plaintiff brings this action to collect \$1,500,000 under a personal guaranty executed by defendant, who is the former owner and operator of nonparty Leg

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<sup>1</sup> Plaintiff’s summons and complaint mistakenly titles its third cause of action as “fourth cause of action.” (See NYSCEF Doc. No. [NYSCEF] 1, summons and compl. at 6.)  
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 Motion No. 002

Resources, Inc. (Company). (NYSCEF 42, aff of defendant ¶ 1.) The Company was in the business of wholesale marketing and selling of socks, tights, and other legwear to retail outlets who then sold these items to the public. (*Id.*)

In 2011, plaintiff entered into a factoring agreement with the Company, whereby the Company sold and assigned its accounts receivable to plaintiff in exchange for on demand cash advances and other financial accommodations (Factoring Agreement). (NYSCEF 31, Michael Callahan<sup>2</sup> aff ¶¶ 4-5.) Plaintiff was granted a security interest in and lien upon, and later perfected, all of the Company's "existing and after-acquired accounts receivable, general intangibles, credit balances, and books and records." (*Id.* ¶¶ 6-7; see NYSCEF 33, Uniform Commercial Code [UCC] Financing Statement [UCC-1].) In connection to and concurrently with the Factoring Agreement, defendant executed and delivered to plaintiff his "individual, personal absolute, and unconditional guarantee" of the Company's obligations under the Factoring Agreement in the amount of \$1.5 million including all costs, expenses, and reasonable attorneys' fees (Guaranty). (NYSCEF 31, Callahan aff ¶¶ 12, 14.) In relevant part, the Guaranty provides that defendant

"irrevocably, absolutely and unconditionally guarantees to [plaintiff] payment when due, whether by acceleration or otherwise, of any and all Obligations of the Obligor<sup>3</sup> to [plaintiff]. The term 'Obligations' shall mean all obligations, liabilities and indebtedness of the Obligor to [plaintiff] or an affiliate of [plaintiff], however evidenced, now or hereafter arising including (without limitation) under the Factoring Agreement, dated May 19, 2011, between [plaintiff] and Obligor . . . . In addition, the undersigned agrees to indemnify

<sup>2</sup> Callahan, who is familiar with the facts of this action, is the Senior Vice President and Senior Account Executive of plaintiff. (NYSCEF 31, Callahan aff ¶ 1; see *a/so* NYSCEF 34, Client Statement for Apr. 2019 [listing Callahan as the account executive].)

<sup>3</sup> The Guaranty defines "Obligor" as the Company. (NYSCEF 35, Guaranty at 2.)

[plaintiff] against any loss, damage or liability because of any knowing will full [sic] wrongful acts or fraud of the Obligor (the 'Fraud Indemnity')[ ].”

(NYSCEF 35, Guaranty at 2.<sup>4</sup>) The Guaranty also includes a broad waiver provision (Waiver Clause):

“No invalidity, irregularity or unenforceability of all or any part of the liabilities hereby guaranteed or of any security therefor or of any other guarantee of the Obligations shall affect, impair or be a defense to this guarantee. The liability of the undersigned hereunder is primary, absolute and unconditional and shall not be subject to any offset, defense or counterclaim of the Obligor.”

(*Id.* at 3.) Finally, defendant’s liability amount shall “in no event exceed the sum of \$1,500,000 plus all costs, expenses and fees (including, without limitation, reasonable attorneys [sic] fees for both in-house and outside attorneys) of collection incurred by [plaintiff] in enforcing collection hereof [ ].” (*Id.* at 5.) The Company faced financial hardship, had difficulty meeting its financial obligations, and sometime in April 2017, the Company shuttered its doors. (See NYSCEF 42, aff of defendant ¶¶ 9-10.) On March 30, 2017, plaintiff and defendant entered into a letter agreement titled “Consent to Peaceful Possession of Collateral” (Consent Agreement),<sup>5</sup> which provided in relevant part that

“All proceeds of the Collateral received and retained by [plaintiff] shall be directly applied by [plaintiff] to the Obligations as specifically set forth herein, however, for purposes of determining the [defendant’s] liability to [plaintiff] under the Limited Guarantee, the gross proceeds received by [plaintiff] for the sale of any or all of the Collateral shall only

<sup>4</sup> Pages refer to NYSCEF generated pagination.

<sup>5</sup> The Consent Agreement refers to the Factoring Agreement and capitalized terms used and not defined in the Consent Agreement have the meanings given in the Factoring Agreement. (NYSCEF 42, aff of defendant, exhibit 1 at 11 [preamble].)

and directly be applied against [defendant's] Obligation Cap to extinguish [defendant's] Limited Guarantee.”

(NYSCEF 42, aff of defendant, exhibit 1, Consent Agreement at 13 [§ 2 (d)].<sup>6</sup>) The Consent Agreement further provided that defendant's liability amount would be reduced

“by the total amount of [plaintiff's] factor commission factor fees, paid to [plaintiff] by the initial purchaser of the Collateral (referred to herein as the ‘Initial Purchaser’), provided that such reduction shall be applicable for only so long as [defendant] is employed by the Initial Purchaser and Initial Purchaser factors with [plaintiff], and until such time as the [defendant's] Obligation Cap is fully satisfied. [Plaintiff] further covenants and agrees that it will not sue or seek to collect upon any liability owed by the [defendant] or under the Limited Guarantee of the Obligations for so long as the [defendant] is employed by the Initial Purchaser.”

(*Id.*) Defendant explains that he “wanted to be employed by the same entity that would receive the Collateral so that [he] could oversee and ensure that the Collateral was sold in good faith and reasonable commercial manner so that [he] could make sure that [he] would receive the proper credit as to the Guarantee.” (NYSCEF 42, aff of defendant ¶ 17.) Nonparty LR Acquisitions, LLC (LRA) acquired the collateral and defendant entered into an employment agreement dated March 27, 2017 with LRA pursuant to the terms of the Consent Agreement. (See *id.* ¶¶ 19, 21, 25; *id.*, exhibit 2, Employment Agreement at 17.) However, defendant was terminated in September 2017; he alleges that LRA and plaintiff colluded to wrongfully terminate his employment to take advantage of his expertise and knowledge of the industry and gain exclusive possession of the collateral. (*Id.* ¶ 29.) Defendant's termination action, allegedly in

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<sup>6</sup> All of the exhibits appended to defendant's affidavit in opposition to plaintiff's summary judgment motion were improperly compiled into one 99-page document. Defendant's counsel is reminded to follow all Part 48 procedures. (See *specifically* Part 48 Procedures, Procedure 6 [B].)

contravention of the employment agreement, is also before this court, index No. 657163/2017 (Termination Action).

Plaintiff asserts that since April 2019, the outstanding balance is 6,024,353.76, plus interest,<sup>7</sup> owed by the Company to plaintiff. (NYSCEF 31, Callahan aff ¶ 10; see also NYSCEF 34, Client Statement for Apr. 2019 [“NET DUE CLIENT (FACTOR) AS OF 4/30/2019 [:] 6,024.353.76].) Defendant disputes the amount. (NYSCEF 45, response to plaintiff’s undisputed statement of facts ¶ 4.)

Plaintiff seeks \$1,500,000 from defendant, plus all costs, expenses and fees, pursuant to the Factoring Agreement and the Guaranty. (See NYSCEF 37, summons and compl. at 6 [first cause of action for breach of contract as to the Guaranty and third cause of action for recovery of fees and expenses].) Plaintiff also seeks an account stated from defendant (second cause of action). (*Id.* at 7.) Defendant filed an answer and asserted seven affirmative defenses: (i) plaintiff failed to act in good faith and fair dealing; (ii) an off-set of damages, (iii) promissory, equitable and/or judicial estoppel, (iv) unclean hands, acts and wrongful acts, (v) failure to mitigate, (vi) “doctrines of estoppel,” and (vii) economic duress. (See NYSCEF 38, answer, affirmative defenses and counterclaim [answer] at 6-7.) Defendant counterclaimed for fraudulent inducement requiring rescission (count one), violation of the UCC (count two), breach of duty of care (count three), breach of the implied covenant of good faith and fair dealing (count four),

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<sup>7</sup> Pursuant to the Factoring Agreement, “Upon the occurrence of a Default and for so long as such Default continues, the Obligations shall, at our option, bear interest at the Default Rate.” (NYSCEF 32, Factoring Agreement at 6.) The “Default Rate” is defined by the Factoring Agreement. (See *id.* at 12.)

and civil conspiracy as to violation of the UCC, breach of duty of care, and breach of good faith and fair dealing (count five). (See *id.* at 10-13.)

### **Discussion**

“On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” (*City of New York v Clarose Cinema Corp.*, 256 AD2d 39, 71 [1st Dept 1998] [citation omitted].) “[T]he burden then shifts to the non-moving party to establish the existence of a triable issue with respect to a bona fide defense.” (*Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485 [2015] [citation omitted].) “The court should not dismiss a defense where there remain questions of fact requiring a trial.” (*Granite State Ins. Co v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015].)

Here, summary judgment is warranted as plaintiff has sufficiently established its prima facie enforcement of the absolute and unconditional written Guaranty, the Company’s outstanding debt, and defendant’s nonpayment of his guarantee. (See generally NYSCEF 35, Guaranty; NYSCEF 32, Factoring Agreement; NYSCEF 34, Client Statement for Apr. 2019.)

Moreover, defendant failed to establish the existence of a triable issue of fact. Defendant does not dispute the enforceability of the unconditional and absolute Guaranty, that the Company owes plaintiff nearly \$6 million, and that defendant failed to perform under the Guaranty. Instead, defendant argues that plaintiff’s own “malicious” conduct, i.e., plaintiff’s purported collusion with LRA to terminate defendant’s employment so that plaintiff could sue defendant to recover under the Guaranty,

precludes summary judgment. In doing so, defendant relies on the covenant not to sue in the Consent Agreement: “[Plaintiff] further covenants and agrees that it will not sue or seek to collect upon any liability owed by the [defendant] or under the Limited Guarantee of the Obligations for so long as the [defendant] is employed by the Initial Purchaser.” (NYSCEF 42, aff of defendant, exhibit 1, Consent Agreement at 13.) Defendant relies on his allegedly wrongful termination and the covenant not to sue under the Consent Agreement, but it is unclear how the proprietary of this termination has any bearing on the Guaranty. The covenant prevents plaintiff from recovering against defendant under the Guaranty as long as the defendant is employed by the purchaser of the collateral. But the covenant does not except terminations and the court may not read a term into the agreement that is not there. (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [citations omitted].)

“Guaranties that contain language obligating the guarantor to payment without recourse to any defense or counterclaims, i.e., guaranties that are ‘absolute and unconditional,’ have been consistently upheld by New York courts.” (*Cooperatieve*, 25 NY3d at 493 [citations omitted].) Therefore, defendant has failed to raise a triable issue of fact that defendant’s absolute and unconditional guaranty is not valid or enforceable.

Moreover, defendant relies on *Cooperatieve* for the proposition that “an absolute and unconditional guaranty does not foreclose a guarantor’s challenge that the creditor’s wrongful post-execution conduct triggered the event that accelerates or causes the guarantor’s liability.” (*Cooperatieve*, 25 NY3d at 496, citing *Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102 [3d Dept 1988].) However, defendant’s argument misses the mark and misapplies the exception stated in

*Canterbury*. To illustrate, in *Canterbury*, the court determined that summary judgment was not warranted as there was an issue of fact as to whether the guarantee “unfairly brought upon the occurrence of the very condition precedent ([guarantor’s] suspension of business) upon which it relied to accelerate the loan against the guarantors.” (135 AD2d at 107.) The court opined that “[s]uch conduct may serve to discharge the guarantors’ obligation.” (*Id.*) On the other hand, here, defendant does not contend that plaintiff caused, expedited, or otherwise facilitated defendant’s liability under the Guaranty. In fact, defendant admits that the Company was financially distressed prior to and after entering into the Factoring Agreement. (NYSCEF 42, aff of defendant ¶¶ 5-7.) Defendant admits that the Company continued to suffer financially, and, in “trying to save his business from financial ruin, executed the Guarant[y].” (*Id.* ¶ 7.) The record amply shows that the Company’s financial problems were preexisting to the Factoring Agreement and Guaranty and continued to exist.

The case here is more akin to *Cooperatieve*, where the court held that the “broad, sweeping, and unequivocal language” of the guaranty “forecloses any challenge to the enforceability and validity of the documents which establish defendant’s liability for payments arising under the purchase agreement, as well as to any other possible defense to his liability for the obligations . . . .” (135 AD2d at 494.) The Court of Appeals affirmed and relying on *Plapinger*, expounded: “Were we to accept defendant’s argument, we would ignore this Court’s admonition in *Plapinger*, and ‘in effect condone defendant[’s] own fraud in deliberately misrepresenting [his] true intention’ . . . when putting [his] signature[ ] to [his] ‘absolute and unconditional’ guarantee.” (*Id.* at 494, citing *Plapinger*, 66 NY2d at 95 [brackets in original].) The Guaranty in this action

involves the same broad, sweeping, and unequivocal language. The same broad language also appears in the Waiver Clause. And, even if he could, defendant fails to explain how plaintiff's alleged involvement or collusion to wrongfully terminate defendant, an issue raised in the Termination Action, would not fall within the ambit of the Guaranty's Waiver Clause precluding defendant from bringing any counterclaim or defense against the Guaranty.

Additionally, defendant challenges the amount plaintiff received for the sale of the collateral. However, plaintiff's motion is for summary judgment as to liability only, not damages. Defendant also challenges the provision permitting attorneys' fees and expenses, but the basis for the challenge is unclear. Defendant asserts that plaintiff did not advise the court that it received proceeds from the collateral and thus plaintiff is acting in bad faith. However, damages at this stage are irrelevant; plaintiff need not prove damages in moving for summary judgment as to liability. (CPLR 3212 [c].)

Defendant's First, Third, Fourth, Fifth, and Seventh Affirmative Defenses Are Dismissed

At the outset, defendant's third and sixth affirmative defenses: (3) promissory, equitable and/or judicial estoppel and (6) estoppel are duplicative in form and substance. (NYSCEF 38, answer at 6.) Defendant fails to explain how these defenses differ. Moreover, defendant is silent on the sixth affirmative defense which constitutes abandonment of the defense. (See *Mehmet v Add2net, Inc.*, 66 AD3d 437, 438 [1st Dept 2009] [citation omitted].)

Plaintiff argues all defenses should be dismissed because they are conclusory, are pleaded without facts, and are in contravention of the Waiver Clause. With the exception of defendant's second affirmative defense for an off-set, defendant fails

explain why his first, third, fourth, fifth, and seventh defenses do not fall within the Waiver Clause, prohibiting defendant from bringing any defense or counterclaim. (NYSCEF 35, Guaranty at 3 [Waiver Clause].) “Absolute and unconditional guaranties have in fact been found to preclude guarantors from asserting a broad range of defenses.” (*Cooperatieve*, 25 NY3d at 493 [internal quotation marks and citation omitted].) Defendant therefore failed to raise an issue of fact requiring trial on these defenses.

Moreover, defendant’s first (failure to act in good faith and fair dealing), fourth (unclean hands), and fifth (mitigation) defenses, are all based upon defendant’s contention that plaintiff should have but failed to apply the proper amount of credits due from the sale of the collateral against defendant’ liability amount under the Guaranty. Defendant’s challenge to the amount of damages is not appropriate on a motion for summary judgment as to liability. (NYSCEF 57, tr at 2:25-3:3; CPLR 3212 [c].) Therefor, the first, third, fourth, fifth and seventh affirmative defenses are dismissed.

Plaintiff’s motion for summary judgment dismissing defendant’s off-set defense is denied because the Waiver Clause in the Guaranty was modified by the off-set provision under the Consent Agreement. At argument, defendant’s counsel contended that the Consent Agreement modified the terms of the Guaranty (NYSCEF 57, tr at 11:15-17), but admitted that the Guaranty was modified, in essence, to credit against defendant’s \$1.5 million personal guaranty. Plaintiff’s counsel argued the same and explained that the Consent Agreement was entered into to obtain the collateral without having to go through the UCC processes. (NYSCEF 57, tr at 13:6-12.) Therefore, neither party disputes that the Consent Agreement expressly provides for a reduction of

defendant's liability by the amount of proceeds generated by the sale of the collateral, among other credits. (NYSCEF 42, aff of defendant, exhibit 1, Consent Agreement at 13 [§ 2 (d)]). (See *infra* n 8.) Moreover, the Guaranty does not appear to explicitly bar modification to the Guaranty either, providing

“No waiver of any of its rights hereunder, and no modification or amendment of this guarantee, shall be deemed to be made by [plaintiff] unless the same shall be in writing, duly signed on behalf of [plaintiff], and each such waiver, if any, shall apply only with respect to the specific instance involved, and shall in no way impair the rights of [plaintiff] or the obligations of the [defendant] to [plaintiff] in any other respect or at any other time.”

(NYSCEF 35, Guaranty at 4.) Plaintiff's reliance on the Waiver Clause to dismiss defendant's off-set defense contradicts plaintiff's counsel's representation at argument and is rejected. Therefore, plaintiff has failed to meet its burden for dismissal of the off-set defense, the second affirmative defense. The court also rejects plaintiff's arguments that the defense is conclusory and without a factual basis.

#### Defendant's First, Third, Fourth, and Fifth Counterclaims Are Dismissed

A party moving for summary judgment dismissing counterclaims bears the initial burden of demonstrating its prima facie entitlement to the requested relief. (See *Scarpelli v Naderi*, 207 AD3d 769, 774 [2d Dept 2022].)

Plaintiff argues that defendant's counterclaims should be dismissed pursuant to the Waiver Clause. Defendant opposes the dismissal of his first counterclaim, for fraud in the inducement, and reiterates many of the same arguments he made in opposition to summary judgment on plaintiff's first and third causes of action. Fraud in the inducement is not a meritorious defense where the terms of a written guaranty expressly provided that it was “absolute and unconditional irrespective of any lack of

validity or enforceability of the guarantee, or any other circumstance which might otherwise constitute a defense available to a guarantor . . . .” (See *Citibank v Plapinger*, 66 NY2d 90, 92, 94 [1985].) Thus, for the same reasons, defendant’s first counterclaim is dismissed. (See *Citibank v Plapinger*, 66 NY2d 90, 92, 94 [1985].)

As to defendant’s third (breach of duty),<sup>8</sup> fourth (breach of the covenant of good faith and fair dealing), and fifth counterclaims (civil conspiracy), defendant fails to explain why they are excepted from the Waiver Clause (NYSCEF 35, Guaranty at 3), which prohibits defendant from bringing any defense or counterclaim and are therefore dismissed on this ground alone.<sup>9</sup> (See *Gannett Co., v Tesler*, 177 AD2d 353, 353 [1st Dept 1991] [affirming dismissal of defendant’s affirmative defenses and counterclaims based on the plain language of the guarantee which precluded defendant from raising any defenses or counterclaims].)

However, defendant’s second counterclaim for failure to conduct the sale of the collateral in a commercially reasonable manner, is sustained. Plaintiff relies on the Waiver Clause in support of dismissing the second counterclaim. However, defendant is correct in arguing that a guarantor may not waive the defense of commercial reasonableness pursuant to UCC § 9-501(3) and the court rejects plaintiff’s argument that the second counterclaim is precluded by the Waiver Clause. (*NatWest Bank N.A. v Grauberd*, 228 AD2d 337, 337-38 [1st Dept 1996].) Therefore, plaintiff failed to satisfy

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<sup>8</sup> Defendant’s third claim is also dismissed as duplicative of its claim for violation of the UCC. (NYSCEF 57, tr at 23: 8-11.)

<sup>9</sup> Defendant’s third counterclaim for breach of duty of care dismissed for this reason but is also duplicative of defendant’s counterclaim for violation of the UCC.

its burden to warrant summary judgment dismissing defendant's counterclaim for violation of the UCC, the first counterclaim.

Moreover, at argument, defendant raised an issue was raised about plaintiff having withheld documents in discovery concerning the commercial reasonableness of the sale contradicting plaintiff's certification in the note of issue that discovery was complete. The court permitted the parties to submit supplemental briefs to evidence what documents were produced to defendant concerning the commercial reasonableness of the sale of the collateral. (NYSCEF 56, tr at 23:12-20.) Plaintiff produced to the court documents concerning the commercial reasonableness of the sale of the collateral and stated in its letter brief that these documents were produced to defendant. (See NYSCEF 56, plaintiff's letter brief.) Defendant responded but failed to inform the court whether he received these documents in discovery. (See NYSCEF 58, defendant's letter brief.) Moreover, defendant states in a conclusory fashion that these documents and the documents submitted with plaintiff's motion do not reflect the commercial reasonableness of the sale of the collateral. Thus, because defendant's letter does not state in unequivocal terms whether or not he received these documents the court is left with only plaintiff's representation that it did provide the documents during discovery. Defendant is not seeking summary judgment on its second counterclaim. Plaintiff's motion to dismiss the second counterclaim remains denied for the reasons stated above.

Accordingly, it is

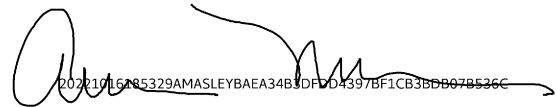
ORDERED that the branch of plaintiff’s motion that seeks summary judgment in plaintiff’s favor on the first and third causes of action on liability is granted; and it is further

ORDERED that the branch of plaintiff’s motion that seeks summary judgment dismissing the affirmative defenses is granted to the extent that the first, third, fourth, fifth, and sixth affirmative defenses are dismissed; and it is further

ORDERED that the branch of plaintiff’s motion that seeks summary judgment dismissing the counterclaims is granted to the extent that the first, third, fourth, and fifth counterclaims are dismissed; and it is further

ORDERED that motions in limine shall be filed within 30 days of the date of this decision and order; and it is further

ORDERED that the parties are to appear for a remote pretrial conference on November 18, 2022 at 2:30 pm, virtually.



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10/16/2022  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE