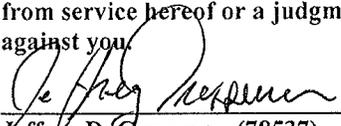


STRADLEY RONON STEVENS & YOUNG LLP  
BY: Steven B. Davis, Esquire (73204)  
Jeffrey D. Grossman, Esquire (78537)  
Nancy L. Margolis, Esquire (66425)  
2600 One Commerce Square  
Philadelphia, PA 19103  
(215) 564-8000  
Fax: (215) 564-8120

Attorneys for Plaintiff, Michael F. Consedine,  
Insurance Commissioner of the Commonwealth of  
Pennsylvania in his Official Capacity as Statutory  
Liquidator of First Sealord Surety, Inc.

TO TENCO EXCAVATING, INC.

You are hereby notified to file a written response to the  
enclosed Answer and New Matter within twenty (20) days  
from service hereof or a judgment may be entered  
against you.

  
Jeffrey D. Grossman (78537)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

*IN RE:*  
First Sealord Surety, Inc.,  
In Liquidation

v.

NO. 1 FSS 2012

RECEIVED  
COMMONWEALTH COURT  
OF PENNSYLVANIA  
17 SEP 2012 11 46

**ANSWER OF MICHAEL F. CONSEDINE,  
INSURANCE COMMISSIONER OF THE COMMONWEALTH OF  
PENNSYLVANIA, IN HIS OFFICIAL CAPACITY AS LIQUIDATOR OF  
FIRST SEALORD SURETY, INC., WITH NEW MATTER, IN RESPONSE TO  
THE APPLICATION TO INTERVENE TO LIFT STAY AND FILE COMPLAINT  
FOR DECLARATORY JUDGMENT OF TENCO EXCAVATING, INC.**

Plaintiff, Michael F. Consedine, Insurance Commissioner of the Commonwealth  
of Pennsylvania, in his official capacity as Statutory Liquidator of First Sealord Surety, Inc. (the  
“Liquidator”), pursuant to Pa. R.A.P. 123 and 3776, answers and asserts new matter in response  
to the Application to Intervene to Lift Stay and File Complaint for Declaratory Judgment  
 (“Application to Intervene”) of Tenco Excavating, Inc. (“Tenco”), as follows:

1. Admitted that the proposed Complaint is attached as Exhibit "A" to Tenco's Application to Intervene. Further Answering, the Liquidator incorporates its answer and New Matter set for below, as if fully set forth herein.

2. After reasonable investigation, the Liquidator is without knowledge or information sufficient to form a belief as to the truth of the averments within this paragraph.

3. Admitted in part; denied in part. The Liquidator denies that FSSI always required the deposit of collateral.

4. Admitted.

5. After reasonable investigation, the Liquidator is without knowledge or information sufficient to form a belief as the truth of an averments relating to Tenco's averred completion of all projects. The remaining averments of this paragraph are expressly denied.

6. Denied. Further answering, this Court entered an Order for Liquidation of First Sealord Surety, Inc. ("FSSI") on February 8, 2012. At no time has the FSSI estate had assets that could arguably be identified as Tenco's and, moreover, Tenco is a creditor of FSSI in Liquidation. Like all creditors of the FSSI estate, Tenco must file a proof of claim to advocate the positions it sets forth in this improper Application to Intervene and proposed Complaint for Declaratory Judgment, and to avail itself of a recovery against the FSSI estate.

7. Denied.

8. The Liquidator admits that Tenco seeks relief by its proposed Complaint for Declaratory Judgment, but denies any entitlement to such relief.

9. The Liquidator admits that Tenco intends to advocate in support of the relief it seeks, but denies the merits of Tenco's arguments.

10. Denied.

11. Denied. Further answering, the Proof of Claim process is the appropriate forum and opportunity for Tenco to advocate in support of the relief it seeks.

12. Admitted, except that the Proof of Claim process is the appropriate forum and opportunity for Tenco to advocate in support of the relief it seeks.

13. The Liquidator admits that if this Court granted Tenco's Application to Intervene, Tenco would be permitted to proceed as averred in this paragraph. However, further answering, the proof of claim process is the appropriate forum and opportunity for Tenco to advocate in support of the relief it seeks.

14. Denied.

15. Denied. Further answering, the proof of claim process is the appropriate forum and opportunity for Tenco to advocate in support of the relief it seeks.

16. Denied to the extent that the averments state or otherwise imply that the proof of claim process is not the appropriate opportunity for Tenco to adequately represent and advance its interests.

#### NEW MATTER

17. A surety may hold cash belonging to bonded contractors or depositors on their behalf, as collateral to secure those bonded contractors' obligations owed to the surety.

18. Like other sureties, FSSI held cash collateral for many of its bonded contractors, including Tenco.

19. In April, 2009, Kevin Nugent, an owner of Tenco, deposited \$500,000 with FSSI as collateral to secure obligations of Tenco owed to FSSI, pursuant to a collateral agreement he and Tenco entered into with FSSI (the "Collateral Agreement").

20. In or around August of 2010, another \$500,000 was wired to an FSSI account as additional collateral deposited with FSSI under Tenco's Collateral Agreement. With this second deposit, FSSI held a total \$1 million of collateral intended to secure obligations of Tenco owed to FSSI.

21. Beginning in February of 2011, FSSI's Treasurer transferred to and commingled in FSSI's operating accounts cash collateral from segregated accounts in FSSI's name, each of which was associated with and held a sole contractor's posted collateral, including the \$1 million deposited with FSSI under Tenco's Collateral Agreement.

22. The cash collateral transfers and subsequent expenditures through FSSI's operating accounts occurred prior to liquidation and, as is thus far identified by the Liquidator, total \$3,545,954.95.

23. Including \$1 million collateral associated with Tenco, FSSI improperly transferred and spent the collateral funds associated with more than twenty contractors.

24. Before this Court entered the Order of Liquidation of FSSI on February 8, 2012, FSSI wrongly spent all or almost all of \$3,545,954.95, comprising the aggregate collateral funds that FSSI transferred between February and June of 2011, from segregated accounts to the FSSI's operating accounts .

25. On February 8, 2012, the FSSI Operating Account held a balance of \$297,953.66; an account balance well below the aggregate \$1 million collateral provided to FSSI under

Tenco's Collateral Agreement, which \$1 million FSSI had more than six months earlier transferred into an FSSI operating account, comingled with other monies and spent in total before February 8, 2012.

26. On March 20, 2012, the Liquidator wrote to Tenco's counsel and advised of the pre-liquidation transfers and expenditure of \$1 million collateral deposited under Tenco's Collateral Agreement. *See* Exhibit "A."

27. The Liquidator similarly advised other identified collateral victims in writing.

28. On July 20, 2012, counsel for the Liquidator advised Tenco's counsel that collateral held under Tenco's Collateral Agreement was dissipated pre-liquidation and that, accordingly, the Liquidator was unable to elevate Tenco's claim for the return of \$1 million over the claims of other creditors. *See* Exhibit "B."

29. As of September 13, 2012, seventeen parties have filed proofs of claim relating to FSSI's pre-liquidation expenditure of cash collateral, and hundreds more from other creditors, relating to other subject matter, have also been received.

30. Tenco is a creditor of the FSSI estate, pursuant to 40 P.S. §221.3 (defining "Creditor" as ". . . a person having any claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent").

31. On September 4, 2012, after Tenco filed its Application to Intervene, the Liquidator's counsel spoke with Tenco's counsel and reminded him that pre-liquidation, FSSI depleted the \$1 million collateral. The Liquidator's counsel also suggested that Tenco withdraw the pending Application to Intervene and, as a creditor of the FSSI estate, file a proof of claim. If filed, the Liquidator offered to review Tenco's proof of claim on an expedited basis so that

Tenco, if it disagreed with the Liquidator's determinations, could promptly object and trigger the appeal process. As of the filing of the Liquidator's Answer with New Matter, Tenco's Application to Intervene remains pending and Tenco has not filed a proof of claim.

32. Tenco's application should be denied for its failure to exercise or exhaust a statutory and court ordered remedy.

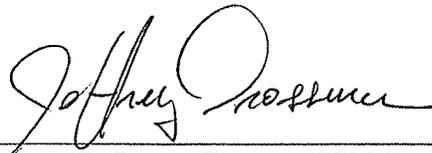
33. Tenco's application fails to satisfy Pa.R.A.P. 3775(c) because the proof of claim process adequately protects Tenco's interests along with all other creditors.

34. Tenco's application fails to satisfy Pa.R.A.P. 3775(c) because its intervention, if allowed, will unduly prejudice the rights of FSSI In Liquidation and the creditors of the FSSI estate.

35. Tenco, the proposed intervenor, lacks standing to the extent that others have sustained the damages Tenco now asserts.

36. The Liquidator reserves the right to plead additional new matter or file another appropriate response to Tenco's proposed Complaint for Declaratory Judgment.

WHEREFORE, Michael F. Consedine, Insurance Commissioner of the Commonwealth of Pennsylvania in his Official Capacity as Statutory Liquidator of First Sealord Surety, Inc., respectfully requests this Court to deny the Application to Intervene to Lift Stay and File Complaint for Declaratory Judgment of Tenco Excavating, Inc., without prejudice to Tenco's right to pursue its claim in accordance with 40 P.S. § 221.37 *et seq.*



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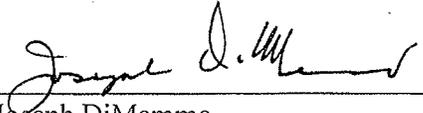
Steven B. Davis, Esquire (73204)  
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Nancy L. Margolis, Esquire (66425)  
STRADLEY RONON STEVENS & YOUNG, LLP  
2600 One Commerce Square  
Philadelphia, PA 19103-7098  
(215) 564-8000

Attorneys for Plaintiff, Michael F. Consedine,  
Insurance Commissioner of the Commonwealth of  
Pennsylvania in his Official Capacity as Statutory  
Liquidator of First Sealord Surety, Inc.

Dated: September 14, 2012

VERIFICATION

I, Joseph DiMemmo, Deputy Insurance Commissioner of the Pennsylvania Insurance Department, Office of Liquidations, Rehabilitations and Special Funds, am authorized by Michael F. Consedine, Insurance Commissioner of the Commonwealth of Pennsylvania, pursuant to 40 P.S. § 221.23, to act on his behalf in his capacity as Liquidator of First Sealord Surety, Inc. I hereby verify that the facts set forth in the foregoing Answer with New Matter in response to the Application to Intervene to Lift Stay and File Complaint for Declaratory Judgment of Tenco Excavating, Inc., are true and correct to the best of my knowledge, information or belief. This statement is made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

  
\_\_\_\_\_  
Joseph DiMemmo  
Deputy Insurance Commissioner of the  
Pennsylvania Insurance Department

Dated: September 13, 2012



---

FIRST SEALORD SURETY, INC.  
(In LIQUIDATION)

March 20, 2012

Deborah Metzger Mulvey, Esq.  
Segal McCambridge  
1818 Market Street  
Suite 2600  
Philadelphia, PA 19103

Re: Principal/Your Client: Tenco Excavating, Inc.  
Cash Collateral: \$1,000,000

Dear Ms. Metzger:

The Liquidator's has generally confirmed that a substantial portion of the cash collateral given to First Sealord Surety, Incorporated ("FSSI") was, at various dates, withdrawn and deposited into the operating account of FSSI. The Liquidator is in the process of examining the accounting records of FSSI to determine which accounts were withdrawn from, the Principal related to the collateral account affected, whether such withdrawal related to loss or expense incurred by FSSI, the dates and amounts of these transactions and any other related information that can be drawn from the examination.

Currently, from information reviewed this far, it appears that an account for the cash collateral provided by Tenco Excavating Inc., was opened by FSSI at Bancorp under number 131021906. As of May 16, 2011, a balance of \$1,000,000.00 appears to have been present in the account. On May 16, 2011, FSSI directed Bancorp to move the \$600,000.00 from account 131021906 to an operating account of FSSI held at Bancorp. On May 16, 2011 FSSI directed a transfer in the amount of \$600,000.00 from the FSSI operating account at Bancorp to FSSI's operating account at Wells Fargo Bank.

On June 14, 2011, FSSI directed Bancorp to move the \$400,000.00 from account 131021906 to the operating account of FSSI held at Bancorp. This transfer was combined with transfers from other accounts which equaled an additional \$100,000.00. On June 14, 2011 FSSI directed a transfer in the amount of \$500,000.00 from the FSSI operating account at Bancorp to FSSI's operating account at Wells Fargo Bank

Although we continue to seek additional information, the cash collateral Tenco provided to FSSI appears to have been used for operations of the company and has been dissipated. The Liquidator is continuing to investigate to develop a definitive understanding of these transactions.

The Liquidator's staff is currently planning and administering the transfer of the records and operations of the estate to offices in Harrisburg, Pennsylvania. This should be completed by the

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789 E. Lancaster Ave., Suite 200 ~ PO Box 900 ~ Villanova, PA 19085 ~ (610) 664-2324 ~ FAX (610) 664-2297

end of March. At that time specific staff assignments including the handling of collateral should be finalized. In the meantime, the Liquidator requests that any response to this letter or general questions continue to be directed to:

Liquidation Claims  
Pennsylvania Insurance Department  
Office of Liquidations, Rehabilitations and Special Funds  
Capitol Associates Building  
901 N. 7<sup>th</sup> Street  
Harrisburg, PA 17102  
(717) 787-7823  
[Ra-in-claims@pa.gov](mailto:Ra-in-claims@pa.gov)

Sincerely,



Kenneth Shaffer, Administrative Officer  
Pennsylvania Insurance Department – Bureau of Liquidations and Rehabilitations

ANY DELIVERY INFORMATION MUST BE PRINTED ON THE FRONT OF THIS LABEL. NO INFORMATION SHOULD BE PRINTED ON THE BACK.

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Deborah Metzger Mulvey, Esq.  
Segal McCambridge  
1818 Market Street  
Suite 2600  
Philadelphia, PA 19103  
Tenco Coll

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
**X**  Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 17  Yes  
if YES, enter delivery address below:  No

3. Service Type  Certified Mail  Express Mail  
 Registered  Return Receipt for Merchandise  
 Insured Mail  C.O.D.

4. Restricted Delivery? (Extra Fee)  Yes

2. Article Number  
(Transfer from service label)

91 7108 2133 3939 1998 9249

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

First Seaford Surety, Inc.  
789 East Lancaster Avenue - Suite 200  
P.O. Box 900  
Villanova, PA 19085



91 7108 2133 3939 1998 9249

Deborah Metzger Mulvey, Esq.  
Segal McCambridge  
1818 Market Street  
Suite 2600  
Philadelphia, PA 19103





Stradley Ronon Stevens & Young, LLP  
Suite 2600  
2005 Market Street  
Philadelphia, PA 19103-7018  
Telephone 215.564.8000  
Fax 215.564.8120  
www.stradley.com

Jeffrey D. Grossman  
[jgrossman@stradley.com](mailto:jgrossman@stradley.com)  
215-564-8061

July 20, 2012

**VIA E-MAIL**

Douglas Y. Christian, Esq.  
Ballard Spahr LLP  
1745 Market Street, 51<sup>st</sup> Floor  
Philadelphia, PA 19103-7599

Re: **Tenco Excavating, Inc. – First Sealord Surety, Inc. in Liquidation**

Dear Doug:

This will respond to your letter of July 6, 2012 directed to First Sealord Surety, Inc. in Liquidation (the "Liquidator"). As we recently discussed, the Liquidator understands that the collateral deposited pre-liquidation with First Sealord Surety, Inc., in connection with Tenco Excavation, Inc. ("Tenco"), was entirely dissipated pre-liquidation. Accordingly, the Liquidator is unable to return any collateral funds to Tenco. At present, we are simply unaware of any legal basis to elevate Tenco's claim above other creditors under the facts as we know them. We, of course, remain willing to review any information you or Tenco may have with respect to this matter, as well as any support you may have with respect to legal positions you may advance on Tenco's behalf. Please contact me if you would like to discuss this further. In the interim, the Liquidator continues to reserve all rights and defenses with respect to Tenco's claims.

Yours truly,

A handwritten signature in cursive script that reads "Jeffrey Grossman".

Jeffrey Grossman

JDG/jnl

# Ballard Spahr LLP

1735 Market Street, 51st Floor  
Philadelphia, PA 19103-7599  
TEL 215.665.8500  
FAX 215.864.8999  
www.ballardspahr.com

Douglas Y. Christian  
Direct: 215.864.8404  
Fax: 215.864.9206  
christiand@ballardspahr.com

July 6, 2012

*Via Email (JGrossman@stradley.com)*

Jeffrey D. Grossman, Esquire  
STRADLEY RONON  
2005 Market Street, Suite 2600  
Philadelphia, PA 19103

Re: Tenco Excavating, Inc. – First Sealord Surety, Inc.

Dear Jeff:

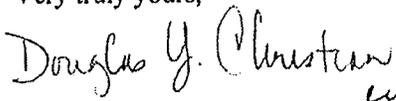
As you know, I represent Tenco Excavating, Inc. (“Tenco”). Tenco hereby makes demand for return of its cash collateral provided to First Sealord Surety, Inc. (“FSSI”) in the principal amount of \$1 million. The March 12, 2012 letter from Tenco’s former lawyer, attached hereto, itemizes the dates on which the collateral was provided.

As you know, collateral such as this is not an asset of the FSSI estate, and FSSI must return the funds to their rightful owner without further delay.

Please let me have your client’s response to this demand on or before July 20, 2012. If a favorable response is not received from your client by that date, Tenco reserves the right to petition the Commonwealth Court for intervention, relief from the stay (to the extent your client does not consent thereto), and substantive relief by way of return of principal and interest.

Please give me a call upon your receipt of this letter to discuss the matter. Thank you.

Very truly yours,



Douglas Y. Christian

DYC/lc  
Enclosure

DMEAST #15314560 v2

March 12, 2012

**VIA FEDERAL EXPRESS**

Liquidation Claims  
Pennsylvania Insurance Department  
Office of Liquidations, Rehabilitations, and Special Funds  
Capital Associates Building  
901 N. 7<sup>th</sup> Street  
Harrisburg, PA 17102

Attn: Mr. Craig Wilson and Office of Statutory Liquidator of FSSI

Re: In Re: First Sealord Surety, Inc. in Liquidation  
In the Commonwealth Court of Pennsylvania  
Docket No.: 1 FSS 2012  
Our File No.: 950.101

Dear Mr. Wilson:

We represent Tenco Excavating, Inc. ("Tenco") in respect to its claim for return of collateral associated with indemnity, surety, and/or bond agreements placed with First Sealord Surety, Inc. ("First Sealord" or "FSSI").

We herewith submit the below-listed documents in response to the published Notice requesting information and documentation to assist the Liquidator in assessing the status of cash collateral deposits. Based upon the Order of Liquidation, and upon extinguishment of the underlying General Indemnity Agreement pursuant thereto, Tenco seeks return of \$1 million cash collateral, collectively paid on (i) April 6, 2009 by two Official Checks each in the amount of \$250,000 made payable to First Sealord Surety and (ii) August 31, 2010 by wire transfer to

Craig Wilson  
Statutory Liquidator of FSSI  
March 12, 1012  
Page 2

Bancorp Bank, receipt of which was acknowledged by Nancy Mucchetti of First Sealord on the said dates.

In Regard to the April 6, 2009 Collateral Deposit:

- Copy of Check No. 100063905 in the amount of \$250,000 payable to First Sealord Surety dated April 6, 2009
- Copy of Check No. 100063906 in the amount of \$250,000 payable to First Sealord Surety dated April 6, 2009
- Letter of Transmittal dated April 6, 2009
- Receipt for Collateral of \$500,000 in the form of checks dated April 6, 2009
- Collateral Agreement dated April 6, 2009
- Instructions for Return of Collateral dated April 6, 2010

In Regard to the August 31, 2010 Collateral Deposit:

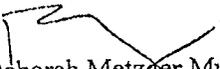
- Receipt for Collateral of \$500,000 in the form of wire transfer dated August 31, 2010
- Collateral Agreement, undated

Underlying Agreement Pertaining to all Tenco Collateral Deposits:

- General Indemnity Agreement dated April 3, 2009

I look forward to learning the present status of the afore-mentioned collateral deposits, and thank you for your consideration.

Very truly yours,

  
Deborah Metzger Mulvey

DMM/

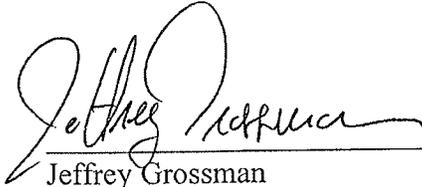
cc: Laura Lyon Slaymaker, Esquire, Project Director, PID (via hand delivery, w/attachments)  
Christian Ryba, Esquire (via email)

CERTIFICATE OF SERVICE

I, Jeffrey Grossman, hereby certify that I have caused to be served today, September 14, 2012, via first-class mail, postage pre-paid, a copy of the (1) Answer with New Matter of Michael F. Consedine, Insurance Commissioner of the Commonwealth of Pennsylvania, in his official capacity as Statutory Liquidator of First Sealord Surety, Inc., in Response to the Application to Intervene to Lift Stay and File Complaint for Declaratory Judgment of Tenco Excavating, Inc., and (2) the accompanying Memorandum of Law, on:

Douglas Y. Christian  
Benjamin M. Schmidt  
Ballard Spahr LLP  
1735 Market Street, 51<sup>st</sup> Floor  
Philadelphia, PA 19103

*Attorneys for Petitioner,  
Tenco Excavating, Inc.*

  
\_\_\_\_\_  
Jeffrey Grossman

STRADLEY RONON STEVENS & YOUNG LLP  
 BY: Steven B. Davis, Esquire (73204)  
 Jeffrey D. Grossman, Esquire (78537)  
 Nancy L. Margolis, Esquire (66425)  
 2600 One Commerce Square  
 Philadelphia, PA 19103  
 (215) 564-8000  
 Fax: (215) 564-8120

Attorneys for Plaintiff, Michael F. Consedine,  
 Insurance Commissioner of the Commonwealth of  
 Pennsylvania in his Official Capacity as Statutory  
 Liquidator of First Sealord Surety, Inc.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<i>IN RE:</i>	:	
First Sealord Surety, Inc.,	:	
In Liquidation	:	
	:	
	:	NO. 1 FSS 2012
v.	:	
	:	
	:	
	:	
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	:	

**MEMORANDUM OF LAW  
 OF MICHAEL F. CONSEDINE, INSURANCE COMMISSIONER OF THE  
 COMMONWEALTH OF PENNSYLVANIA, IN HIS OFFICIAL CAPACITY AS  
 LIQUIDATOR OF FIRST SEALORD SURETY, INC., IN OPPOSITION TO  
 THE APPLICATION TO INTERVENE TO LIFT STAY AND FILE COMPLAINT  
 FOR DECLARATORY JUDGMENT OF TENCO EXCAVATING, INC.**

Plaintiff, Michael F. Consedine, Insurance Commissioner of the Commonwealth of Pennsylvania, in his official capacity as Statutory Liquidator of First Sealord Surety, Inc. (the “Liquidator”), pursuant to Pa. R.A.P. 123, 3775 and 3776, files this Memorandum of Law in Opposition to the Application to Intervene to Lift Stay and File Complaint for Declaratory Judgment (the “Application to Intervene”) of Tenco Excavating, Inc. (“Tenco”).

**I. INTRODUCTION**

On February 8, 2012, this Court placed First Sealord Surety, Inc. (“FSSI”) into liquidation. *See* Order of Liquidation (“Liquidation Order”), at Exhibit “A.” Tenco is a creditor

of the FSSI estate, pursuant to 40 P.S. §221.3 (defining “Creditor” as “. . . a person having any claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent”). As a creditor, Tenco’s exclusive remedy lies with the proof of claim process.

Instead of filing a proof of claim as required by law, Tenco filed its Application to Intervene, to recover \$1 million from the FSSI estate as damages for the wrongful, pre-liquidation depletion by FSSI of an equivalent amount of cash collateral deposited on Tenco’s behalf. Tenco’s Application to Intervene is an improper attempt to leap frog over all other creditors of the FSSI estate, including identically situated creditors whose collateral was also wrongly depleted, pre-liquidation, by FSSI. Accordingly, the Application to Intervene should be denied.

## **II. FACTUAL BACKGROUND**

Pursuant to a collateral agreement among Kevin Nugent (a Tenco owner), Tenco and FSSI (the “Collateral Agreement”), by the end of August of 2010, FSSI had received a total of \$1 million of collateral, which it held in a segregated account. Under the Collateral Agreement, the \$1 million was intended to secure Tenco’s obligations owed to FSSI. *See* Liquidator’s Answer to Application to Intervene with New Matter at ¶¶ 18-20.

Beginning in February of 2011, FSSI’s Treasurer began transferring cash collateral from segregated accounts to FSSI’s operating accounts. Each of these segregated accounts was associated with and held a sole contractor’s posted collateral. The cash collateral transfers and subsequent expenditures through FSSI’s operating accounts, thus far identified by the Liquidator, total \$3,545,954.95, which is comprised of improper transfers from the collateral

accounts associated with more than twenty FSSI bonded contractors, one of which is Tenco. *Id.* at ¶¶ 21-23.

Indeed, as to Tenco, no later than June 14, 2011, the entirety of Tenco's \$1 million cash collateral had been transferred from a segregated FSSI account into one of FSSI's operating accounts and comingled with other funds. Moreover, between June 14, 2011 and this Court's entry of the Liquidation Order on February 8, 2012, FSSI spent the entire \$1 million of collateral funds deposited under Tenco's Collateral Agreement. *Id.* at ¶¶ 21-24. Accordingly, the FSSI estate has not held any assets that could arguably be identified as Tenco's and, as such, Tenco must be considered a creditor of FSSI with a claim against the estate for the wrongful, pre-liquidation depletion of collateral. *See* 40 P.S. §221.3, *supra*.

Tenco cannot be permitted to jump ahead of other creditors of FSSI's estate, including other identically situated collateral depositors, in its effort to claim dollar-for-dollar compensatory damages out of the FSSI estate for collateral funds that no longer exist.<sup>1</sup> Tenco is similarly situated to other creditors of FSSI's estate and its claim must be identically advanced, starting with the filing of a proof of claim. This is true not only because Tenco's funds are gone, but also because the proof of claim process is the exclusive creditor remedy applicable here and should be upheld to assure the equitable and efficient administration of the FSSI estate.

### III. ARGUMENT

Article V of the Insurance Department Act of 1921, as amended, § 40 P.S. 221.1 *et seq.* (the "Insolvency Act"), governs the liquidation of insurers and sureties domiciled within

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<sup>1</sup> As of September 13, 2012, seventeen other identically situated contractors and depositors have filed proofs of claim with the FSSI estate for the pre-liquidation, improper depletion of their respective collateral funds. *See* Liquidator's Answer with New Matter, at ¶29.

the Commonwealth of Pennsylvania. A primary objective of the Insolvency Act, relevant here, is to preserve and fairly distribute FSSI's remaining assets to creditors according to the statutorily prescribed process. *See* 40 P.S. §221.1(c) (stating purpose of Insolvency Act). Under Article V, the Liquidator is vested with the authority to take possession of all assets of FSSI and to assure the proper distribution of those assets among FSSI's creditors, like Tenco.

In order to ensure proper distribution, the procedures detailed within 40 P.S. §§ 221.37 - 221.44 collectively provide for the filing and classification of claims in a liquidation. In addition, pursuant to these and other relevant provisions, on February 8, 2012, this Court issued the Liquidation Order and related Case Management Order to establish the claim filing procedures for claims against FSSI. *See In Re: FSSI in Liquidation*, (Pa. Cmwlth., 1 FSSI 2012, February 8, 2012). Thus, the Legislature and this Court have set out a process whereby the Liquidator must first evaluate the validity and priority of all claims against the estate. If this Court allowed Tenco to bypass the established proof of claim process, an efficient and equitable administration of this estate would not be possible and the purpose of Article V, as stated above, would be frustrated. Indeed, the need to adhere to the established proof of claim process is most clear here, because other identically situated contractors and depositors whose cash collateral was improperly dissipated by FSSI, have already filed proofs of claim against the estate for the return of their cash collateral. No justifiable reason exists for Tenco to move ahead of those identically situated creditors when Tenco's claims, other than perhaps the amount of collateral, are identical.

Undoubtedly, Tenco may only assert claims as a creditor of the FSSI estate. In *Commercial Risk Re-Insurance Co. v. Superintendent of Insurance of the State of New York*, 2

A.D.3d 264, 769 N.Y.S.2d 530 (N.Y. App. Div. 2003), the court adjudicated similar facts involving the rehabilitation of Frontier Insurance Company (“Frontier”). Before the New York Superintendent of Insurance placed Frontier into rehabilitation, the insurer had wrongly appropriated over \$1.65 million belonging to Commercial Risk Re-Insurance Co. (“Commercial Risk”) from a trust account. From these funds, Frontier deposited \$542,674.39 into its checking account and spent that amount in payments to third-parties. The remainder was traced to Frontier’s money market account, which account had subsequently increased by more than \$11 million. The court concluded that Commercial Risk’s entitlement to the turnover of funds depended upon the extent to which the converted monies remained in the Rehabilitator’s possession. Applying this rule of law, the court held that Commercial Risk was a common creditor with respect to the \$542,674.39 wrongly paid to third parties (but was entitled to turnover of the remaining trust funds which Frontier had moved to a money market fund and not depleted). *Id.* at 265-266. Like Commercial Risk, Tenco is a creditor of the FSSI estate with respect to the \$1 million collateral fund wrongly depleted before entry of the Liquidation Order. Therefore, Tenco can only avail itself of the proof of claim process to seek a recovery.<sup>2</sup>

Notably, this Court has upheld the exclusivity of the proof of claims process for creditors, even where the Liquidator sought to file a declaratory judgment complaint. In *Reliance Insurance Co. in Liquidation v. Aramark Corp., et al.*, 35 A.3d 958 (Pa. Cmwlth. 2011), the Liquidator filed a complaint seeking, *inter alia*, a declaratory judgment as to the proper priority to be assigned to three hundred claims asserted by Aramark against Reliance.

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<sup>2</sup> To the extent Tenco argues that fact issues exist as to tracing the \$1 million deposited with FSSI under its Collateral Agreement, such fact issues must be raised and resolved in the proof of claim context.

Aramark opposed and argued that the Liquidator failed to exhaust the administrative remedy of the proof of claim process before seeking declaratory relief. This Court agreed.

Declaratory judgment is not appropriate where the Legislature has enacted a legislative framework within which the substance of the declaratory judgment claim is to be resolved. In *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1977), our Supreme Court explained:

[w]hen the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, at least initially, by the administrative agency. Full utilization of the expertise derived from the development of various administrative bodies would be frustrated by indiscriminate judicial intrusions into matters within the various agencies' respective domains.

*Id.* at 965-66 (quoting *Feingold*, 383 A.2d at 793.) The Court noted that allowing the Liquidator to “short circuit” the administrative process would allow the law to be determined without the benefit of the administrative agency first reviewing the matter. Importantly, the Court also recognized that allowing the complaint for declaratory judgment to proceed would set a “dangerous precedent for creditors in other liquidation proceedings to attempt to bypass the proof of claim process in the same manner.” *Id.* at 966 (emphasis added). Tenco, by its application, attempts this impermissible bypass here.

The Insolvency Act provides the exclusive remedy for creditors with claims against FSSI. This includes claims by principals, obligees, subcontractors, suppliers and any other creditors with a claim against FSSI. All such claims must be made through the filing of a

“proof of claim.” 40 P.S. §§ 221.37, 221.38. Consistent with these provisions, the Liquidation Order requires:

[a]ll claims against the estate of First Sealord, together with proper proof thereof, shall be filed on or before October 5, 2012. No person shall participate in any distribution of any assets of First Sealord unless his, her, or its claim has been filed with the Liquidator in accordance with the time limit established by the Liquidator . . . .

See Liquidation Order at ¶15, Exhibit “A.” The statutory claims procedure is mandatory and exclusive, and is designed to promote the fair, orderly and efficient adjudication of claims.

It is well settled in Pennsylvania that when a statute provides for an exclusive remedy or procedure, litigants may not seek the aid of the courts in departing from the requirements of the statute. *See Hargrove v. Ehinger*, 638 A.2d 282, 285-86 (Pa. Cmwlth. 1994) (Department of Banking Code provides comprehensive system for liquidation of banking institutions); *see also Foster v. Colonial Assurance Co.*, 668 A.2d 174, 176 n.2 (Pa Commw. 1995) (noting procedure under Article V for claimants to appeal from proof of claim adjudication); *see also State ex rel. Long v. Interstate Cas. Ins. Co.*, 417 S.E. 2d 296 (N.C. Ct. App. 1992). (“[T]he proper mechanism for asserting a claim against an insurer in liquidation is by means of filing a Proof of Claim and the purpose of this procedure is in part to enhance ‘efficiency and economy of liquidation’”) (citation omitted). Where, as here, the Pennsylvania legislature has promulgated a specific statutory mechanism for parties to bring claims, Pennsylvania courts do not hesitate to preclude parties from asserting claims for failure to comply with the specified procedure. That result should be no different here. Tenco, or other depositors on its behalf, have monetary claims against the FSSI estate for FSSI’s pre-liquidation, wrongful dissipation of \$1 million collateral. Tenco cannot be permitted to “short-circuit” the

administrative process and bypass the proof of claim filing requirement, which is exactly what it attempts by its Application to Intervene.

In addition, under Pa.R.A.P. 3775(c), an intervention is not permitted if it will “unduly delay or prejudice the adjudication of the rights of the parties.” Here, the contemplated intervention by Tenco would undoubtedly and unduly prejudice the rights of the Liquidator and other creditors. The Liquidator would be required to expend the resources of the FSSI estate to defend against Tenco’s Complaint for Declaratory Judgment and to protect FSSI’s estate assets from any judgment entered on Tenco’s claim to the extent Tenco sought to be treated other than as a creditor of the FSSI estate under Article V. These defense expenditures would prejudice the Liquidator as well as other creditors of the estate by depleting estate assets.

Moreover, as to the other creditors of FSSI’s estate, including those contractors and depositors identically situated to Tenco, intervention would prejudice their rights by unjustifiably elevating the interests of Tenco over theirs and by creating additional administrative expenses by allowing Tenco special treatment.<sup>3</sup> One hallmark of the Insolvency Act is to treat similarly situated creditors alike, and Tenco has no ground in law or fact to gain any advantage over other creditors. Intervention would provide a procedural advantage and, therefore, unduly prejudice the rights of these other creditors. The official comment to Pa.R.A.P. 3775 recognized this, when setting out several examples of claims properly advanced through an intervention, *e.g.* to “assert any rights or interest afforded to the person by Article V and for which neither Article

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<sup>3</sup> On March 20, 2012, July 20, 2012 and September 4, 2012, the Liquidator provided Tenco with its determination that the \$1 million collateral posted on Tenco’s behalf was wrongly depleted by FSSI before liquidation. The Liquidator also advised Tenco’s counsel to file a proof of claim, which the Liquidator would review on an expedited basis so that, if Tenco disagreed with the Liquidator’s determination, Tenco could file objections and begin the appeal process. The Liquidator also asked Tenco to withdraw the Application to Intervene. *See* Liquidator’s Answer with New Matter, at ¶¶ 26, 28 and 31.

V nor prior orders of the Court provide an avenue for redress.” Because both Article V and this Court’s orders provide Tenco with the proof of claim “avenue for redress,” intervention is not proper and not permitted here.

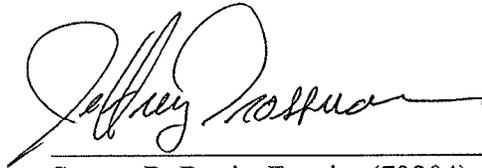
Further, if asserted in the proper form, Tenco could adequately represent its interests in the FSSI estate. Under the statutory claims procedure, the Liquidator is required to review all proofs of claim filed and to issue notices of determination thereon. *See* 40 P.S. §§ 221.45(a) and 221.41(a). If Tenco is dissatisfied with the Liquidator’s determination as to its claim, Tenco may appeal the Liquidator’s notice of determination by filing an objection. All such disputed claims are ultimately resolved by the Court or by a Court appointed referee. 40 P.S. § 221.41(b). Tenco may not assert any proper basis to depart from this established practice. All of Tenco’s interests could be adequately represented through its participation in the proof of claims process. Tenco should not be permitted to circumvent these established procedures and jump ahead of other identically situated creditors. Doing so would violate the fundamental principle of the Insolvency Act, which is to assure for equitable distribution among claimants in an efficient and orderly manner.

The relief Tenco seeks is prohibited by Pennsylvania law, as contrary to the exclusive and mandatory statutory claims procedure in a liquidation proceeding. Moreover, Tenco has not shown that its interests will not be properly represented and protected if it is required, like all other creditors with claims for the dissipation of collateral, to adhere to the proof of claims process.

IV. CONCLUSION

For the reasons set forth above, and as set forth in the Liquidator's Answer and New Matter to Tenco's Application to Intervene, the Liquidator requests that this Court deny Tenco's application, without prejudice to Tenco's right to pursue its claim pursuant to 40 P.S. §221.37 *et seq.*

Respectfully,



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Steven B. Davis, Esquire (73204)  
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Attorneys for Plaintiff, Michael F. Consedine,  
Insurance Commissioner of the Commonwealth of  
Pennsylvania in his Official Capacity as Statutory  
Liquidator of First Sealord Surety, Inc.

Dated: September 14, 2012

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: First Sealord Surety, Inc. :  
in Liquidation : No. 1 FSS 2012

ORDER OF LIQUIDATION

AND NOW, this 8th day of February, 2012, upon consideration of the Petition for Liquidation of First Sealord Surety, Inc. ("First Sealord") filed by Michael F. Consedine, Insurance Commissioner of the Commonwealth of Pennsylvania, and upon the unanimous consent of the Board of Directors of First Sealord and of the Board of Directors of Sealord Holdings, Inc., the sole shareholder of First Sealord, the Petition is GRANTED.

It is hereby **ORDERED** that:

1. First Sealord shall be liquidated pursuant to Article V of The Insurance Department Act of 1921, Act of May 17, 1921 (Act), P.L. 789, *as amended*, added by the Act of December 14, 1977, P.L. 280, 40 P.S. §§ 221.1 – 221.63.

2. Insurance Commissioner Michael F. Consedine and his successors in office are hereby appointed Statutory Liquidator of First Sealord and directed to take possession of First Sealord's property, business and affairs in accordance with Article V of the Act.

3. The Liquidator is hereby vested with all the powers, rights and duties authorized under Article V and other applicable statutes and regulations.

## ASSETS OF THE ESTATE

4. The Liquidator is vested with title to all property, assets, contracts and rights of actions (collectively "assets") of First Sealord of whatever nature and wherever located, as of the date of filing of the Petition for Liquidation. All assets of First Sealord are hereby found to be *in custodia legis* of this Court and this Court asserts jurisdiction as follows: (a) *in rem* jurisdiction over all assets of First Sealord wherever they may be located and regardless of whether they are held in the name of First Sealord or in any other name; (b) exclusive jurisdiction over all determinations as to whether assets belong to First Sealord or to another party; ~~(c) exclusive jurisdiction over all determinations of the validity and amounts of~~ claims against First Sealord; and (d) exclusive jurisdiction over the determination of the priority of all claims against First Sealord.

5. The filing or recording of this Order with the Clerk of the Commonwealth Court or with the Recorder of Deeds of the county in which First Sealord's principal office or place of business is located (Delaware County), shall impart the same notice as is imparted by any deed, bill of sale or other evidence of title duly filed or recorded with that Recorder of Deeds.

6. The Liquidator is directed to take possession of all assets that are the property of First Sealord.

7. The Liquidator is directed to continue telephone, data-processing, water, electric, sewage, garbage, delivery, trash removal and utility services needed by the estate of First Sealord by establishing a new account for the Liquidator as of the date of this Order.

8. First Sealord's directors, officers and employees shall: (a) surrender peaceably to the Liquidator the premises where First Sealord conducts its business; (b) deliver all keys or access codes thereto and to any safe deposit boxes;

(c) advise the Liquidator of the combinations and access codes of any safe or safekeeping devices of First Sealord or any password or authorization code or access code required for access to data processing equipment; and (d) deliver and surrender peaceably to the Liquidator all the assets, books, records, files, credit cards, and other property of First Sealord in their possession or control, wherever located, and otherwise advise and cooperate with the Liquidator in identifying and locating any of the foregoing.

9. First Sealord's directors, officers and employees are enjoined from taking any action, without approval of the Liquidator, to transact further business on behalf of First Sealord. They are further enjoined from taking any action that would waste the assets of First Sealord or would interfere with the Liquidator's efforts to wind up the affairs of First Sealord.

10. Except as otherwise provided in this Order, executory contracts to which First Sealord is a party as of the date of this Order may be affirmed or disavowed by the Liquidator.

11. All banks, investment bankers, companies, other entities or other persons having in their possession assets which are, or may be, the property of First Sealord, shall, unless otherwise instructed by the Liquidator, deliver the possession of the same immediately to the Liquidator, and shall not disburse, convey, transfer, pledge, assign, hypothecate, encumber or in any manner dispose of the same without the prior written consent of, or unless directed in writing by, the Liquidator.

12. All persons and entities are enjoined from disposing of or destroying any records pertaining to any transactions between First Sealord and any party.

13. The amount recoverable by the Liquidator from any reinsurer shall not be reduced as a result of this Order of Liquidation, regardless of any provision in a reinsurance contract or other agreement. Payment made directly by the reinsurer to an insured or other creditor of First Sealord shall not diminish the reinsurer's obligation to First Sealord, except to the extent provided by law.

#### **TERMINATION OF POLICIES**

14. Any First Sealord surety bond, surety undertaking or policy still in force at the time of the Liquidation will continue only until the earlier of the following: (1) thirty (30) days after the entry of this order; (2) the expiration of the bond, undertaking or policy by its own terms; or (3) the date when the obligee or insured replaces the surety bond, surety undertaking or policy with equivalent coverage in another reinsurer or surety, or otherwise terminates the policy.

#### **PROOF OF CLAIM FILING**

15. All claims against the estate of First Sealord, together with proper proof thereof, shall be filed on or before October 5, 2012. No person shall participate in any distribution of the assets of First Sealord unless his, her or its claim has been filed with the Liquidator in accordance with the time limit established by the Liquidator, subject to the provisions for the late filing of claims pursuant to Section 537 of the Act, 40 P.S. §221.37.

16. No judgment or order against First Sealord or its insureds entered after the date of filing of the Petition for Liquidation, and no judgment or order against First Sealord or its insureds entered at any time by default or by collusion, will be considered as evidence of liability or quantum of damages by the Liquidator in evaluating a claim against the estate of First Sealord.

17. In addition to the notice requirements of Section 524 of the Act, 40 P.S. §221.24, the Liquidator shall publish notice in newspapers of general circulation, where First Sealord has its principal places of business, and in the national edition of a national publication such as USA Today that: (a) specifies the last day for the filing of claims; (b) explains the procedure by which claims may be submitted to the Liquidator; (c) provides the address of the Liquidator's office for the submission of claims; and (d) notifies the public of the right to present a claim, or claims, to the Liquidator.

18. Within thirty (30) days of giving notice of the order of liquidation, as set forth in Section 524 of the Act, 40 P.S. §221.24, and of the procedures for filing claims against the estate of First Sealord, the Liquidator shall file a compliance report with the Court noting, in reasonable detail, the date that and manner by which these notices were given.

#### **ADMINISTRATIVE EXPENSES**

19. The Liquidator shall pay as costs and expenses of administration pursuant to Section 544 of the Act, 40 P.S. §221.44, the actual, reasonable and necessary costs of preserving or recovering the assets of First Sealord.

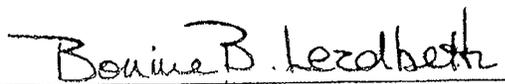
20. Distribution of the assets of First Sealord in payment of the costs and expenses of estate administration including, but not limited to, compensation for services of employees and professional consultants, such as attorneys, actuaries and accountants, shall be made under the direction and approval of the Court. This includes reimbursement to the Pennsylvania Insurance Department for expenses it has incurred in compensating professional consultants,

attorneys and other persons it has engaged on behalf of First Sealord for the preservation of its assets.

**STAY OF LITIGATION**

21. Unless the Liquidator consents thereto in writing, no action at law or in equity, including, but not limited to, an arbitration or mediation, the filing of any judgment, attachment, garnishment, lien or levy of execution process against First Sealord or its assets, shall be brought against First Sealord or the Liquidator, whether in this Commonwealth or elsewhere, nor shall any such existing action be maintained or further prosecuted after the effective date of this Order. All above-enumerated actions currently pending against First Sealord in the courts of the Commonwealth of Pennsylvania or elsewhere are hereby stayed; relief sought in these actions shall be pursued, as is appropriate, either by filing a proof of claim against the estate of First Sealord pursuant to Section 538 of the Act, 40 P.S. §221.38, or by applying to intervene.

22. All secured creditors or parties, pledges, lienholders, collateral holders or other person claiming secured, priority or preferred interests in any property or assets of First Sealord are hereby enjoined from taking any steps whatsoever to transfer, sell, assign, encumber, attach, dispose of, or exercise, purported rights in or against any property or assets of First Sealord except as provided in Section 543 of the Act, 40 P.S. §221.43.

  
BONNIE BRIGANCE LEADBETTER,  
Judge

Certified from the Record

FEB 08 2012

And Order Exit