7-29-2011

Estate of Holland v. Metropolitan Property and Cas. Ins. Co. Clerk's Record v. 2 Dckt. 38157

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IN THE

SUPREME COURT

OF THE 2.4.

STATE OF IDAHO

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND

Plaintiff /Appellants,

vs.

METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME,

Defendant /Respondents.

Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

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VOLUME 2

38157

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-0677 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiffs, by and through their attorney of record and hereby move this Court, pursuant to I.R.C.P. 56(a) for summary judgment as to the entitlement of attorney's fees and the amount thereof ($60,000), or at least partial summary judgment on the issue of entitlement of attorney's fees.

The basis of this motion is that Defendants have answered Plaintiffs' complaint and have failed, pursuant to I.R.C.P. 8(d), to deny specific allegations made in Plaintiffs' complaint thereby admitting the truth of the matter contained therein. Specifically, Defendants have failed

to affirmatively deny paragraphs 9, 10, 13, 16, 17, and 18 of Plaintiffs' Complaint. Thus, by failing to deny the allegations made in these paragraphs, Defendants have admitted their truth. By admitting the truth of the foregoing paragraphs, Defendants have no factual basis to defend against Plaintiffs' entitlement to attorney's fees pursuant to Idaho law.

This motion is supported by affidavit of counsel as well as memorandum filed contemporaneously herewith and incorporated herein. This motion is also supported by the pleadings filed in this case.

ORAL ARGUMENT IS WAIVED.

DATED this 17th day of May, 2010.

Kinzo H. Mihara
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2010, I caused a true, accurate, and correct copy of the foregoing document to be served on the Defendants attorney via the method indicated below:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-0677 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiffs, by and through their attorney of record and hereby offer this memorandum of law in support of their motion for summary judgment. This memorandum is supported by the affidavit of counsel filed contemporaneously herewith, along with counsel's previous affidavit, which are both incorporated herein by reference.

I. UNDISPUTED FACTS AND PROCEDURAL HISTORY

Benjamin Charles Holland (Ben) passed away on October 25, 2009. *See* Complaint; *see also* Aff. K. Paukert, ¶ 3. Shortly after Ben passed, his parents, Gregory and Kathleen Holland,

Plaintiffs herein, contacted their attorney for assistance with legal matters related to their son's death. *See* Aff. K. Mihara in Support of Plaintiffs' Motion for Summary Judgment (Aff. K. Mihara (May)), Ex. "1." Their attorney offered to represent them *pro bono publico*. *Id.* The Estate of Benjamin C. Holland and Ben Holland's parents, Gregory and Kathleen (Plaintiffs), combined, held three (3) policies of insurance with Defendants. *See* Complaint, ¶¶¶ 3, 4, and 5; *see also* Aff. K. Mihara (May), Ex. "19" (Defendants' response to RFA no. 16). Claims relating to Ben's death were made under all three policies. *See* Complaint; *see also* Aff. K. Mihara (May), Ex. "19" (Defendants' response to RFA no. 16).

Plaintiffs' attorney provided proofs of loss to Defendants as provided for in Plaintiffs' policies of insurance on November 10, and provided information in response to inquiry on November 17, and December 1, 2009, January 27 and 28, 2010. *See* Complaint, ¶¶ 9 and 10; *see also* Aff. K. Mihara (May), Exs. "3," "4," "5," and "19" (Defendants' response to RFA nos. 2 and 6).

Plaintiffs' attorney constantly engaged both Defendants' adjustor and coverage counsel in an attempt to obtain a coverage decision from November, 2009 to February 2, 2010. *See* Aff. K. Mihara (Feb.), ¶ 6; *see also* Aff. K. Paukert, ¶¶ 4-17. Indeed, it should be noted that in mid-January, 2010, despite being well over thirty (30) days since formal proof of loss had been given, Plaintiffs had not filed a complaint against Defendants as Defendants' coverage counsel had requested, and Plaintiffs had agreed not to take any formal legal action against Defendants until January 22, 2010. *See* Aff. K. Mihara (Feb.), Ex. "B;" *see also* Aff. K. Mihara (May), Exs. "6" and "7." Defendants failed to give Plaintiffs an answer regarding coverage under the applicable policies of insurance on or before January 22, 2010, Plaintiffs and their attorney came to a new

understanding regarding fees, and this lawsuit was filed on January 26, 2010. *See* Complaint; *see also* Aff. K. Paukert, ¶¶ 4-14; *see also* Aff. K. Mihara (May), Ex. "2."

On February 2, 2010, Defendants made their first tender to settle this matter. *See* Answer, Exs. "A" and "B;" *see also* Aff. K. Paukert, ¶ 10; *see also* Aff. K. Mihara (May), Ex. "19" (Defendants' response to RFA No. 9). The tender was for $200,000.00 – applicable limits under the motorcycle insurance policy identified in the complaint. *See* Complaint, ¶ 5; *see also* Answer, Ex. "B," *see also* Aff. K. Paukert ¶ 10 and Ex. "1." On February 9, 2010, Plaintiffs filed their Motion for Attorney's Fees Pursuant to I.C. § 41-1839. *See* Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839. Plaintiffs' motion was supported by memorandum and affidavit filed contemporaneously therewith. *Id.* On February 9, 2010, Defendants were served with the Complaint, Summons, Motion for Attorney's Fees, Affidavit, and Memorandum in Support. *See* Aff. K. Mihara (May), ¶ 19, Ex. "13;" *see also* Aff. K. Paukert, ¶ 14. Defendants' counsel, William B. Schroeder, was also provided these documents on or about February 12, 2010. *See* Aff. K. Mihara (May), ¶ 22, Ex. "16." Plaintiffs' demanded $60,000.00, in addition to the $200,000.00 tendered under the applicable policies, as compensation as a reasonable attorney's fee due and owing pursuant to the statute allowing for the award of attorney's fees. *Id.*

In late February, 2010, subsequent to the filing of Plaintiffs' motion for attorney's fees, Counsel for both Plaintiffs and Defendants jointly negotiated and drafted the settlement release document in this matter, attached to Defendants' answer and entitled "Release of All Claims." *See* Aff. K. Mihara (May), ¶ 23, Ex. "19" (Defendants' response to RFA nos. 21 and 22); *see also* Answer, Ex. "A." Such negotiated settlement agreement expressly reserved the issue of attorney's fees, and the amount thereof, to be decided by this Court. *See* Joint Motion and

Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney's Fees; *see also* Answer, Ex. "A;" *see also* Aff. K. Mihara (May), ¶¶ 22, 23, and Ex. "19" (Defendants' response to RFA No. 22).

On February 26, 2010, pursuant to the terms of the settlement, counsel for both Plaintiffs and Defendants jointly executed a motion to dismiss all claims, with prejudice, except for the pending motion for attorney's fees. *See* Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees. Defendants' attorney authorized payment of the full settlement amount once Plaintiffs executed the jointly drafted release. *See* Aff. K. Mihara (May), Ex. "17.") All parties stipulated to the form of the order dismissing the underlying claims in this case. *See* Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees. Pursuant to the stipulation and joint motion this Court entered the requested order on March 3, 2010. *Id.*

Defendants have just recently answered Plaintiffs' complaint. *See* Answer. Attorney Katherine Paukert has just recently executed affidavits in support of Defendants' opposition to Plaintiffs' motion for attorney's fees. *See* Aff. K. Paukert; *see also* Supp. Aff. K. Paukert. Adjustor Daneice Davis has also just submitted affidavits. *See* Aff. D. Davis; *see also* Supp. Aff. D. Davis. Further, Defendants have recently served responses to Plaintiffs' first discovery requests and the time for Defendants to amend their answer as a matter of right has passed. *See* Aff. K. Mihara (May), Ex. "19;" *see also* I.R.C.P. 8(d) and I.R.C.P. 15.

Those are the facts, and those facts are undisputed.

II. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991); see also *Sewell v. Neilson, Monroe, Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Standards applicable to summary judgment require the district court to liberally construe facts in the existing record in favor of the party opposing the motion, and to draw all reasonable inferences in favor of the non-moving party. *Loomis*, 119 Idaho at 436. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* The moving party is entitled to judgment when the nonmoving party fails to establish existence of an element essential to that party's case on which that party will bear the burden of poof at trial. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.26 126 (1988). A mere scintilla of evidence of only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2002).

III. ARGUMENT

Defendants have admitted all necessary facts for final adjudication of this matter by failing to affirmatively deny such facts in their answer, by submitting the affidavits of Katherine Paukert and Daneice Davis, and by serving their responses to Plainitffs' discovery requests.

Also, Defendants' estopple claim contained in their answer fails for lack of proof of the necessary elements.

And finally, the factual assertions in Ms. Paukert's affidavits, along with the affidavit filed by Daneice Davis, support the award of attorney's fees sought by Plaintiffs, and in the amount – if not in a greater amount – than that sought by Plaintiffs.

It is for the foregoing reasons why summary judgment should be entered in favor of Plaintiffs. Each reason is discussed in detail below.

a. **Defendants have admitted all facts necessary for this Court to enter judgment in favor of Plaintiffs.**

The Idaho Rules of Civil Procedure provide that if a party fails to deny an allegation in a responsive pleading, then such an allegation is deemed admitted. *See* I.R.C.P. 8(d). The rule provides:

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading, except those necessary to sustain an action for divorce. . .

Id. (emphasis added). The applicable rule provides, "[t]here shall be a complaint and an answer..." *See* I.R.C.P. 7(a). Thus, an answer is the responsive pleading to the complaint and any averments in the complaint not denied by the answer are deemed admitted.

In this case, Plaintiffs made specific averments in their complaint. *See* Complaint, ¶¶ 9, 10, 13, 16, 17, and 18. The gist of these averments were that Plaintiffs had properly noticed their claim pursuant to the policies' terms, and Defendants had failed for a period of over thirty (30) days to tender an amount justly due under those policies contrary to I.C. § 41-1839, thus entitling Plaintiffs to award of their attorney's fees under the statute. *Id.*

Upon review of the Answer in this case it is apparent that Defendants fail to deny paragraphs 9, 10, 13, 16, 17, and 18 in their answer. *See* Answer, ¶ 2. Defendants state:

> . . . no Answer is required as to Paragraphs 1 through 33, as all claims, except the claim for I.C. § 41-1839 attorney's fees, alleged in paragraph 34 of the Complaint, have been dismissed with prejudice. . .

See Answer, pp. 2. Thus, Defendants' answer fails to deny the factual allegations contained in paragraphs 9, 10, 13, 16, 17, and 18 of Plaintiffs' complaint.

The reason that Plaintiffs had set an evidentiary hearing for this matter was to introduce evidence to support paragraphs 9, 10, 13, 16, 17, and 18 of Plaintiffs' complaint, availing themselves to the entitlement of attorney's fees in this matter. In short, by failing to deny paragraphs 9, 10, 13, 16, 17, and 18 of Plaintiffs' complaint, Defendants have admitted the facts necessary for adjudication of this matter and have negated any need for an evidentiary hearing.

It is because Defendants have admitted all necessary allegations by failing to deny the allegations contained in Plaintiffs complaint pursuant to I.R.C.P. 8(d) that Plaintiffs are entitled to summary judgment on the remaining issue in this case.

b. **Defendants' estopple argument is without merit as Defendants fail to provide evidence to satisfy the elements of estopple.**

Defendants' third affirmative defense is an equitable claim that Plaintiffs are estopped from claiming attorney's fees. Defendants' argument is fatally flawed as Defendants fail to marshal any evidence in support of their argument.

Under Idaho law, in order to obtain the benefit of equitable estoppel, a party must show:

> (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.

See *Weitz v. Green*, April 2, 2010, docket no. 33696 (Idaho Supreme Court).

In this case, the only evidence Defendants offer is the affidavits of Katherine Paukert and Daneice Davis. *See* Aff. K. Paukert. Ms. Paukert and Ms. Davis make several conclusory statements; however, Defendants never parse out how such statements represent either a 'false representation' or a 'concealment of a material fact' by Plaintiffs. In addition, under the second element, Defendants fail to show how their adjustor and/or counsel 'did not and could not have discovered the truth.' In fact, it is undisputed that Defendants have retained not one, but two law

firms to represent them in this matter. *See* Aff. K. Mihara (May), Exs. "16" to "18." Defendants further fail to prove or even allege how it was the intent of counsel to have Defendants rely upon his statement(s).

It is for the reason that Defendants fail to prove the necessary elements of equitable estopple that Defendants third affirmative defense and/or argument is fatally flawed and must be disregarded.

c. **The factual assertions in Ms. Davis' and Ms. Paukert's affidavits support the award of attorney's fees sought by Plaintiffs, and in the amount sought by Plaintiffs.**

Idaho law sets forth the criteria that this Court must weigh when dealing with requests for statutory attorney's fees in cases such as this. I.R.C.P. 54(e)(3); See *Martin*, 138 Idaho 244 (2002); see also *Halliday*, 89 Idaho 293 (1965); see also *Walton*, 120 Idaho 616 (1991).

The rule of civil procedure states:

> In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:
>
> (A) The time and labor required.
> (B) The novelty and difficulty of the questions.
> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
> (D) The prevailing charges for like work.
> (E) Whether the fee is fixed or contingent.
> (F) The time limitations imposed by the client or the circumstances of the case.
> (G) The amount involved and the results obtained.
> (H) The undesirability of the case.
> (I) The nature and length of the professional relationship with the client.
> (J) Awards in similar cases.
> (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
> (L) Any other factor which the court deems appropriate in the particular case.

See I.R.C.P. 54(e)(3).

In this case, Ms. Paukert affirms that she knew that counsel for Plaintiffs had agreed to represent Plaintiffs *pro bono publico*. *See* Aff. K. Paukert, ¶ 4; *see also* Supp. Aff. K. Paukert. Ms. Paukert further acknowledges that counsel for Plaintiffs was making every possible argument on behalf of his clients. *Id.*, ¶¶ 5-28. Indeed, in the face of adversarial posturing, Plaintiffs' counsel provided Idaho case law supporting Plaintiffs' legal and equitable positions. *Id.*, ¶ 6-28. Also, it is undisputed that Ms. Paukert acknowledges that Defendants did not provide Plaintiffs a coverage answer on January 22, 2010, the mutually-agreed upon date to do so. *Id.*, ¶¶¶ 7, 8, and 9. The most important fact that can be gleaned from Ms. Paukert's affidavit is – that liability and damages were still at issue between the parties on the day the Complaint was filed. *Id.* ¶¶ 9 and 10. Plaintiffs filed their complaint only after being told by Defendants' coverage counsel that, "[i]t was my final opinion that the majority of states would not find coverage." *Id.*, ¶ 8. It was apparent that Defendants were disputing both coverage and liability.

Despite the conclusory statements contained in Ms. Paukert's affidavit regarding the fact that Plaintiffs' counsel's theories regarding coverage in that more than one insurance policy applied to the covered loss, it is telling that Defendants issued two checks – one check referencing a claim number under one policy, and another check referencing a claim number under another policy. *See* Aff. K. Mihara (May), Ex. "15;" *see also* Ex. "19" (Defendants' response to RFA nos. 18 and 19). Plaintiffs would submit that perhaps Plaintiffs' counsel's theories were not as 'off the wall' as Defendants attempt to portray them as payment was issued under two policies.

Ms. Paukert states that "MetLife is a good company." *See* Aff. K. Paukert, ¶ 8. Plaintiffs would assert just the opposite. MetLife was such a good company that Plaintiffs had not received a coverage answer despite waiting over two months! *See* Aff. K. Paukert, ¶¶ 3-12. MetLife was such a good company in that their adjustor was seeking additional proof of loss (motorcycle title)

after being advised that the lawsuit had been filed. *See* Aff. K. Paukert, ¶ 8; *see also* Aff. K. Mihara (Feb.), Ex. "C." Would MetLife have this Court believe that it was seeking the additional information to perhaps pay more than they would have contractually had to pay under the policies?

The above facts show that MetLife would have denied coverage for Plaintiffs' claims under the higher policy limits if they could have. They were looking for every opportunity to do so. Their coverage counsel was posturing against Plaintiffs' attorney theories by trying to argue non-coverage under the policies. As Ms. Paukert states in her affidavit, "I explained to him that I thought he had significant problems with his stacking and household residency requirements," and "I interpreted Idaho law not to allow the stacking of insurance policies," "in my opinion, Benjamin Holland was not a household resident, " "it was my final opinion that the majority of states would not find coverage," and "[i]t is definitely not a clear-cut case that there would be coverage under the motorcycle policy" – but despite all of this "MetLife offered the limits."

Both Ms. Davis' and Ms. Paukert's affidavits are proof that there was significant time and labor required of Plaintiffs' attorney. Further, their affidavits show that the questions of law were particularly novel and difficult. Despite facing such adversity, Plaintiffs' counsel showed the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law. Ms. Paukert's affidavits do not appear to speak to the prevailing charges for like work. Ms. Paukert's affidavits confirm that the fees were *pro-bono*, and then contingent immediately prior to filing the lawsuit. Time limitations imposed by the circumstances of this case were that Plaintiffs had waited for over two months for a coverage answer before filing suit, Defendants had denied liability and/or coverage, and perhaps a declaratory action against Plaintiffs was imminent. Two hundred thousand dollars ($200,000.00),

the policy limits under one of the greater policies at issue, obtained without Plaintiffs having to go through an arduous litigation path, was the amount involved and the results obtained. Ms. Paukert's affidavits show that there was significant legal research conducted by both parties.

As this Court is well aware, one of the factors not enumerated in the rule, but covered by case law, is that an attorney's attempt to settle the case without litigation should be taken into account by the trial court when awarding statutory attorney's fees. See *Walton v. Hartford Ins. Co.*, 120 Idaho 616 (1991). In *Walton*, the plaintiffs' attorney had attempted to orchestrate settlement prior to filing a lawsuit.[1] *Id.* at 618.

In *Walton*, like in this case, counsel for the plaintiffs waited until he had obtained the best result he believed he could for his clients until he advised the insurance company that he would be seeking statutory attorney's fees.[2] *Id.* at 619. In its ruling, the Supreme Court of Idaho stated:

> It should be kept in mind that in representing the Waltons, their counsel initially tried to orchestrate a settlement without litigation or arbitration, and certainly without delay, in which event the costs of counsel to the Waltons would have been only 25 percent of the recovery. However, it is abundantly clear that Hartford may very well have procrastinated as long as possible in order to avoid paying under the underinsured provisions of its policy sold to the Waltons, who had willingly had paid the premium with the reasonable expectation that the Hartford umbrella covered them up to the amount of $300,000. As it was, Hartford was quite willing to hold back from settling, and has cost the Waltons considerably more in attorney fees. Hartford's delay caused the ultimate result, not consistent with the statute, of substantially diminishing the Walton's recovery.

Id. at 621. Upon review of the District Court file, it appears that the Waltons' attorney was paid his contingency fee by The Hartford.

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[1] "Not mentioned in the district court's otherwise well-narrated sequence of events is the reluctance of counsel for the Waltons to embroil them in a trial... counsel retained by the Waltons entered into a written fee agreement, contingent upon recovery, which provided for only 25 percent if counsel did not have to litigate, but 33 1/3 percent if such became necessary."

[2] "Within 48 hours of the [arbitration] award, The Hartford's draft in the amount of $166,000.00 was tendered to Mr. and Mrs. Walton. Shortly thereafter, The Hartford was advised that the Walton's counsel intended to petition for his one-third contingent attorney's fees pursuant to I.C. § 41-1839."

In this case, it is undisputed by all parties that counsel for Plaintiffs would have performed his services on this case for free had there been a coverage answer forthcoming on January 22, 2010. In this case, it was MetLife that caused considerably more work for Plaintiffs and has resulted in considerably more in attorney's fees and time and energy. From the facts of this case, like *Walton*, it is abundantly apparent that MetLife may very well have procrastinated as long as possible in order to avoid paying under the underinsured provisions of its policies - policies sold to Plaintiffs who had willingly paid their premiums with the reasonable expectation that their insurance company would cover them up to their limits. This case was not filed before January 22, 2010. This case was only filed after MetLife's coverage counsel stated that her "final opinion" was that "there was no coverage."

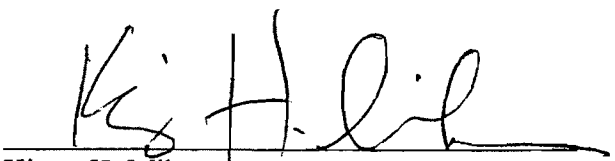
It is counsel's hope that Defendants do not have the audacity to try to persuade this Court to believe that MetLife would have tendered the limits of any of the larger of the policies had Plaintiffs not had an attorney to advocate on their behalf.

MetLife should pay the requested attorney's fees and MetLife has only itself to blame as it failed to tender the amount justly due to Plaintiffs within thirty days after receiving proof of loss.

IV. CLOSING

It is for the foregoing reasons why attorney's fees should be awarded to Plaintiffs in the amount requested in their memorandum, if not in greater amount depending on this Court's discretion, for having to bring and prosecute this matter to its current status. At the minimum, Plaintiffs ask for this Court to decide the issue of entitlement of attorney's fees.

DATED this 17th day of May, 2010.



Kinzo H. Mihara
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2010, I caused a true, accurate, and correct copy of the foregoing document to be served on the Defendants attorney via the method indicated below:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-0677 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL PERFORMANCE OR DISMISS PLAINTIFFS' MOTION FOR ATTORNEY'S FEES**

COMES NOW Plaintiffs, by and through their attorney of record and hereby respond to Defendants' pending motion to compel and/or dismiss. Plaintiffs would ask the Court to deny Defendants' motion for the following reasons: [1]

I. BACKGROUND AND UNDISPUTED FACTS

[1] Also for the reasons set forth in Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees and Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment.

Plaintiffs point this Court to the factual allegations in their complaint, which facts Defendants do not deny in their Answer. Further, Plaintiffs would point this Court to the filings in the Court's record.

II. **STANDARD OF REVIEW**

As Defendants fail to cite law or authority as the basis for their motion, and as Defendants fail to include a standard of review section in their memorandum of authorities in support of their motion, and hence the standard of review section of this response will not be included.

III. **ARGUMENT**

a. **Defendants fail to cite law or authority for the basis of their motion and as such it must be dismissed.**

One of the basic tenets of Idaho jurisprudence is that a motion for affirmative relief must state the rule or law upon which motion is based. *See* I.R.C.P. 7(b)(1).

The applicable rule states:

> An application to the Court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing, shall state with particularity the grounds therefore including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief sought.

Id. Hence, there are three requirements of every motion. *Id.* (emphasis added).

In this instance, Defendants' motion cites neither statute, case law, nor an applicable civil rule as a basis for relief. *See* Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees. The motion states that it is based upon an affidavit of Kathleen Paukert and Defendants' memorandum filed contemporaneously with their motion. Neither Ms. Paukert's affidavit, nor Defendants' memorandum carry the force of law and are, therefore, improper bases for the foundation of a motion.

Because the application of I.R.C.P. 7(b)(1) is mandatory to all motions filed with the Court seeking affirmative relief, and because Defendants fail to cite any applicable law upon which said motion is based, Defendants' motion is fatally flawed and must be denied.

b. **Defendants are judicially estopped from arguing that Plaintiffs' execution of the settlement document precludes their recovery of attorney's fees.**

An issue before this Court is whether Defendants can jointly appear before this Court and file a document entitled, "Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees" based upon "settlement of this matter" and then turn around and claim that such settlement precludes the Court from awarding statutory attorney's fees.

It is a well entrenched principle of Idaho law that a party cannot take inconsistent positions before the court, or otherwise speak out of both sides of one's mouth. See *Loomis v. Church*, 76 Idaho 87, 93-94, 277 P.2d 561, 565 (1954) (a litigant is estopped from adopting inconsistent and contrary positions arising out of the same transaction or subject matter); *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997).[2]

In this case, "in derogation of the settlement terms," it is undisputed that Katherine Paukert, Esq. transmitted a draft settlement release that contained an explicit indemnification provisions for both herself and her law firm.[3] *See* Aff. K. Mihara in Support of Plaintiffs' Motion for Summary Judgment (Aff. K. Mihara, (May)), Exs. "15" and "19" (Defendants' response to RFA no. 23). Unsurprisingly, Plaintiffs' counsel advised that his clients would not execute such a settlement draft.

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[2] the policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estopple is intended to protect against a litigant playing fast and loose with the courts. *Loomis*, at 93-94.

[3] This fact, in and of itself, constitutes a breach of the agreement between the parties and therefore any agreement reached prior had already been breached and was therefore by operation of law, terminated, and any further performance by Plaintiffs was excused. In the alternative, the facts support the finding of either modification or novation.

It is further undisputed that counsel for both Plaintiffs and Defendants jointly negotiated and drafted the settlement document attached to Defendants' answer. *See* Joint Motion and Stipulated Order; *see also* Aff. K. Mihara (May), Ex. "19" (Defs' answer to RFA no. 23). In regards to the issue of attorney's fees, Plaintiffs' attorney had sent Defendants' attorney a letter which stated in part:

> . . . Please let this letter memorialize that you have requested, and I have agreed, that I will not disburse the checks in my possession (check nos. 002599482 ($50,000) and 002599483 ($150,000)) at least until you and I have had a chance to attempt to find some mutually-agreeable release language that is acceptable to both of our clients. . .

See Aff. K. Mihara, Ex. "20" (emphasis added). Now it appears that despite the release being jointly drafted by Defendants' attorney, Defendants argue that such release language was not mutually-agreeable nor acceptable. *See* Defendants' Motion to Compel or Dismiss.

Indeed, it is undisputed that it was Defendants' attorney that filed the joint motion and stipulated order based upon the fact that "the parties have fully resolved all claims in this matter except for the pending motion for attorney fees." *See* Aff. K. Mihara (May), Ex. "18;" *see also* Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees; *see also* Answer, Ex "A.". To be sure, it was Defendants' attorney who gave Plaintiffs' attorney authority to disburse the settlement checks once the aforementioned release was signed.[4] *See* Aff. K. Mihara (May), Ex. "17." Surprisingly, in light of the foregoing facts, it is Defendants who now seek dismissal of the remaining claim in this case based upon the very same language that was before them when the settlement release was negotiated, drafted, and executed.

Equity refuses to bend to allow Defendants, who had full knowledge of the claims of the case, negotiate specific terms of a settlement release, authorize full payment of the settlement

amount once said settlement document has been executed, and then claim that the release their attorney jointly drafted is not the release envisioned by the settlement. The time to file a successful motion to compel settlement terms expired at the time Defendants, through their attorney, negotiated the specific terms of release and authorized full payment upon execution of the jointly negotiated settlement draft.[5]

It is for the foregoing reason why Defendants' motion fails.

c. **Plaintiffs' and Defendants' agreement of February 3, 2010 was not an enforceable contract as material terms of the agreement had yet to be negotiated.**

Another issue becomes whether Plaintiffs' and Defendants' entered into a binding settlement agreement on February 3, 2010.

As Defendants correctly note, Idaho law sets forth the fact that stipulations for the settlement of litigation are regarded with favor by the courts and will be enforced unless good cause to the contrary is shown. See *Lawrence v. Hutchinson*, 146 Idaho 892, 204 P.3d 532, 538-39 (Ct. App. 2009) (citing *Kohring v. Robertson*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002); *Conley v. Whittlesey*, 126 Idaho 630, 633, 888 P.2d 804, 807 (Ct. App. 1995)). Whether the parties to an agreement or stipulation become bound prior to the drafting and execution of a contemplated formal writing is largely a question of intent. See *Lawrence*, at 538 (citing *Kohring*, 137 Idaho at 99). The intent of the parties is to be determined by the surrounding facts and circumstances of each particular case. *Id.* (citing *Conley*, 126 Idaho at 634). The stipulations are best evaluated by looking to the very words of counsel and their clients. *Id.* Circumstances which have been suggested as being helpful in determining the intention of the parties are: whether the contract is one usually put in writing; whether there are few or many details; whether

[4] Any further demand from Defendants for performance from Plaintiffs fails for lack of consideration.

the amount involved is large or small; whether it requires a formal writing for a full expression of the covenants and promises; and whether the negotiations themselves indicate that a written draft is contemplated at the final conclusion of the negotiations. *Id.* (citing *Elliot v. Pope*, 42 Idaho 505, 511 (1926)).

In *Lawrence*, cited above, it was noted that a formal writing was expected to be executed by the parties. *Id.* at 539. Specific release language had not previously been discussed. *Id.* The parties confirmed that written releases were regularly used in the settlement of similar cases. *Id.* The district court, pursuant to its own experiences, also indicated that a written release would normally follow the type of agreement in the case. *Id.*

Releases are usually contemplated in the settlement of insurance cases such as the one at bar. In this case, it is undisputed that the parties had discussed the execution of a formal document (a release) in their attorneys' February 3, 2010 emails. *See* Answer, Ex. "B." It is also undisputed that subsequent to the February 3, 2010 emails, the parties' attorneys negotiated the specific terms of the release in this case. *See* Aff. K. Mihara (May), Exs. "16," "17," "19" (Defs' responses to RFAs nos. 21 and 22), and "20." There is no dispute that the settlement release in this case, negotiated and drafted by counsel for both parties, contains express language that excludes Plaintiffs' entitlement to attorney's fees from its terms. *See* Answer, Ex. "A." There is also no dispute of fact that Defendants' authorized full payment once Plaintiffs executed the mutually-negotiated and drafted release attached to Defendants' Answer as Exhibit "A." *See* Aff. K. Mihara (May), Ex. "17." In addition, consistent with their understanding with Defendants, it is undisputed that Plaintiffs' executed the mutually-negotiated and drafted release. *See* Answer,

[5] If not before when their other counsel sent a draft settlement release with terms not envisioned by the February 3, 2010 agreement.

Ex. "A." In short, Plaintiffs have fully complied with their obligations under any agreement reached on February 3, 2010.

It is for the foregoing reasons that Defendants' motion should be denied as Plaintiffs have fully performed under the terms of the agreement that was negotiated between the parties.

d. **Plaintiffs lack authority to waive entitlement to their attorney's fees.**

For almost sixty (60) years Idaho law has recognized that insurers who fail to pay amounts justly due under policies of insurance for a period of thirty days must pay statutory attorney's fees to Plaintiffs. *See* Chapter 289, page 621, 1951 Session Laws (approved March 22, 1951); see also *Penrose v. Commercial Travelers Ins. Co.*, 75 Idaho 524, 529, 275 P.2d 969 (1954).

The Court noted back in 1954, "the enactment of such statutes constitutes a valid exercise of the police power. . ." *Penrose*, at 537. Indeed, the Supreme Court went on to observe that:

> . . . the parties entered into the insurance contract charged with the knowledge of the reserved police power of the state which may at any time be invoked in the promotion of the general welfare by enlarging from time to time the remedies and procedures in connection with insurance contracts; the statute. . . does not affect the substantive matter of the contract; it only enlarges the remedies and procedures available to an insured whose claim is not paid who is obligated to litigate and does successfully litigate his claim under the insurance contract. . .

Penrose, at 539 (emphasis added). Hence, it is the reserved police power of the state of Idaho that imposes the attorney's fees liability upon Defendant.

The very issue of whether parties have the authority to release another who owes them a statutory duty has come before the Supreme Court of Idaho in a case involving a horse rider who was injured due to the negligence of the outfitter. See *Lee v. Sun Valley Co.*, 107 Idaho 976 (1984). The Court recognized the general rule of law that statutory rights and duties may not be waived or exempted by contract. *Id.* at 979. The Court held:

> . . . that where the legislature has addressed the rights and duties pertaining to . . . injuries arising out of the relationship between two groups, i.e., employers/employees, outfitters and guides/participants, and has granted limited liability to one group in exchange for adherence to specific duties, then such duties become a "public duty" within the exception to the general rule validating exculpatory contracts. . .

Id.

There is no dispute of fact that I.C. § 41-1839 is the code provision that applies to the statutory award of attorney's fees in cases such as this. *See* Aff. K. Mihara (May), Ex. "19" (Defendants' response to RFA no. 15). It is further undeniable that said code provision allows for limited liability for attorney's fees if the insurer simply tenders the amount due to the insured to the insured within thirty days. *See* I.C. § 41-1839(1). Further, liability for attorney's fees can be avoided if the insurer simply deposits such amount with a court. *See* I.C. § 41-1839(2).

In this case, despite having received proof of loss in early November of 2009, Defendants never tendered anything prior to February 2, 2010. *See* Aff. K. Mihara (May), Ex. "19" (Defendants' response to RFA no. 9); *see also* Supp. Aff. K. Paukert, ¶ 18. Indeed, in the face of dispositive case law, Defendants do not admit that the amount settled upon was "the amount justly due."[6] *Id.* (Defendants' response to RFA no. 12).

Arguing by analogy, Plaintiffs would ask the Court to note that there is civil liability and there is criminal liability. Indeed, when criminal liability is imposed via the police power of the state, the victim may not "release" the perpetrator from liability, only the state may. Plaintiffs would ask this Court to reflect, likewise, that when civil liability is imposed by the police power of the state – only the state may "release" a defendant from liability. Idaho has not released

[6] *Martin v. State Farm Mut. Ins. Co.*, 138 Idaho 244, 248 (2002) ("If the amount tendered by the insurer is unconditionally accepted by the insured, the it will represent the "amount justly due". . .); see also *In re Jones*, 401 B.R. 456 (2009) (Bkrtcy D. Idaho) (interpreting Idaho law) ("the amount that is "justly due" is determined either presently, when an insured accepts the amount offered by the insurance company, or retrospectively after a jury or an arbitrator determines the amount.")

Defendants herein. Plaintiffs' could not have released Defendants from their liability if they had wanted to.

Again, it is for the foregoing reason why Defendants' first affirmative defense fails and why summary judgment should be awarded in favor of Plaintiffs.

IV. **CONCLUSION**

It is for the foregoing reasons why this Court should deny Defendants' motion to compel, or in the alternative to dismiss.

Respectfully submitted this 17th day of May, 2010.

Kinzo H. Mihara
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2010, I caused a true, accurate, and correct copy of the foregoing document to be served on the Defendants attorney via the method indicated below:

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Kinzo H. Mihara

STATE OF IDAHO)
COUNTY OF KOOTENAI) ss
FILED:

2010 MAY 17 AM 11:29

CLERK DISTRICT COURT
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-0677 PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES PURSUANT TO I.C. § 41-1839

COMES NOW Plaintiffs, by and through their attorney of record, and hereby submit this reply to Defendants' response to Plaintiffs' motion for attorney's fees. As Defendants do not provide an alternative standard of review in their response, Plaintiffs will submit that the standard of review set forth in their motion is undisputed.

I. UNDISPUTED FACTS

In this case it is undisputed that Plaintiffs submitted their initial claim against a MetLife insurance policy on or about November 10, 2009. *See* Defs' Response, p. 2. It is undisputed that Defendants' adjustor did not send out a confirmatory letter clarifying her understanding of Defendants' alleged extension with Plaintiffs' attorney. *See* Aff. D. Davis, ¶ 3. p.2. It is undisputed that Plaintiffs' attorney sent a letter to Defendants' adjustor clarifying his understanding of the matter on or about January 6, 2010. *See* Aff. D. Davis, ¶ 4, *see also* Aff. K. Mihara in Support of Plaintiffs' Motion for Summary Judgment (Aff. K. Mihara, (May)), Ex. 21. It is further undisputed that Plaintiffs' attorney sent a letter to both Defendants' attorney, and Defendants' adjustor, stating that Plaintiffs' counsel would not take any action against Defendants until after January 22, 2010 and also transmitting a seventeen page coverage memorandum.[1] *See* Defs' Response, p. 16, FN 6; *see also* Supp. Aff. K. Paukert, ¶ 20, p. 2; *see also* Aff. K. Mihara (May), ¶ 10, Exs. "6" and "7." The January 14, 2010 letter reads, in pertinent part:

> . . . Should MetLife contest a portion of coverage, please forward the amounts uncontested to my care at the address above with the checks made payable to: The Estate of Benjamin Holland. Please let this letter also memorialize our agreement that I will not take any further action in this case against MetLife until after Friday, January 22, 2010. . .

See Aff. K. Mihara (May), Exs. "6" and "7" (emphasis added). It is further undisputed that the subject line of the email which transmitted said letter to Katherine Paukert read, "Holland v.

[1] Despite Defendants' claim that ". . . these letters, inexplicably, were not communicated or addressed to Ms. Paukert . . ." (*See* Defs' Response, FN 6, p. 16), Ms. Paukert references receipt of that very same letter in her supplemental affidavit. (*See* Supp. Aff. K. Paukert, ¶ 20). In addition, cursory review of the subject letter's address block shows that Ms. Paukert was emailed that letter on or about January 14, 2010 and the affidavit of counsel shows documentation of receipt by both K. Paukert and D. Davis. (*See* Aff. K. Mihara (May), Exs. "6" and "7").

MetLife (Unfiled); Demand and Statement of Legal Position." *See* Aff. K. Mihara (May), Ex. "7" (emphasis added).

It is undisputed that Ms. Davis had requested and received a motorcycle title from Plaintiffs' attorney on January 27, 2010. *See* Aff. D. Davis, ¶ 8; *see also* Aff. K. Paukert, ¶ 8; *see also* Aff. K. Mihara (May), Exs. "9" and "10." It is further undisputed that Ms. Davis requested another copy of said title as she claimed that the original copy was illegible and sent confirmatory memoranda to that effect. *Id.* Another undisputed fact is that Defendants' agent, Joe Foredyce, had noticed Daneice Davis regarding the lawsuit on January 29, 2010 and Daneice Davis had noticed Katherine Paukert that same day. *See* Aff. D. Davis, ¶ 8. p. 3; *see also* Supp. Aff. K. Paukert, ¶ 25, p. 4.

In fact, it is undisputed that counsel for plaintiffs, despite being on a *pro-bono publico* arrangement with his clients, fought vigorously to obtain a favorable recovery for his clients prior to filing suit in this matter. *See* Defs' response, *see also* Aff. K. Paukert; *see also* Supp. Aff. K. Paukert, *see also* Aff. D. Davis; *see also* Aff. K. Mihara (Feb.); *see also* Aff. K. Mihara (May); *see also* Complaint.

Those are the undisputed facts and those facts are supported by the evidence forwarded by both parties.

II. ARGUMENT

It is Plaintiffs' understanding that Defendants argue that Plaintiffs should be foreclosed from obtaining an award of their attorney's fees because (1) Plaintiffs' and Defendants' settlement agreement allegedly provided against an award of attorney's fees, (2) Plaintiffs were not the prevailing party, (3) Defendants came to a timely decision under the

statute, (4) Plaintiffs are estopped from arguing for attorney's fees, (4) that Defendants' are entitled to a trial on the subject of attorney's fees, and finally, (5) if attorney's fees are awarded, such amount requested is unreasonable. Defendants' arguments are all without merit as discussed in detail below.

A. **Defendants' argument that Plaintiffs' and Defendants' settlement agreement provides a basis for the preclusion of attorney's fees is barred by the doctrine of Judicial Estopple.**

For the reasons and law set forth in Plaintiffs' response to Defendants' motion to compel or motion to dismiss, such reasons and law are hereby incorporated herein for brevity, Defendants' first argument (set forth in section II.A. of Defs' Response) is without merit and must be denied.

B. **Defendants attempt to tangle facts and dicta from several cases in an attempt to argue a conflict in Idaho law as a subterfuge and smokescreen to oppose Plaintiffs' motion for the award of attorney's fees.**

Defendants' would have this Court believe that 'the amount justly due' must be either be decided by the Court, or awarded pursuant to arbitration. *See* Defs' Response, § II.B., p. 11.[2] Defendants' very argument has been sternly rejected by the Federal bankruptcy court in Idaho (applying Idaho law). See *In re Jones*, 401 B.R. 456 (2009). In holding that settlement within the context of litigation of a contested claim results in a finding of the 'amount justly due," Federal Bankruptcy Judge Jim Pappas wrote:

> **Defendants further contends that, absent an agreement, a jury or arbitrator necessarily must determine what amount is 'justly due."** . . . Therefore, Defendant contends, a jury or arbitrator's determination was necessary to arrive at the amount justly due.

[2] Defendants cite *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 70 (1999); *Manduca Datsun Inc. v. Universal Underwriters Ins.*, 106 Idaho 163 (Ct. App. 1984); and *Halliday v. Farmers Ins. Exch.* 89 Idaho 293 (1965).

Defendant's position is surely untenable. For the purposes of the statute, the amount that is 'justly due' is determined either presently, when an insured accepts the amount offered by the insurance company, or retrospectively, after a jury or arbitrator determines the amount. See, *Martin*, 61 P. 3d at 605; *Walton v. Hartford Ins. Co.*, 120 Idaho 616, 818 P.2d 320(1991); *Brinkman*, 766 P.2d at 1231. The Idaho Supreme Court has stated that the question or "what amount is 'just' only arises when the Plaintiff and the insurance company cannot agree." *Brinkman*, 766 P.2d at 1231. On the other hand, if "the insurance company tenders an amount that is agreeable to the plaintiff, the plaintiff will accept and that will be the end of it." *Id.* Put another way,

> If the amount tendered by the insurer is unconditionally accepted by the insured, the it will represent the "amount justly due" and the case ends. . . But if the insurance company makes no tender within thirty days, or makes a tender that is substantially less than the aribtrators' eventual award, the insurance company is liable for a reasonable amount of the insured's attorney's fees, as compensation to make the insured whole.

Martin, 61 P. 3d at 605.

See *In re Jones*, 401 B.R. at 466-467. (*emphasis in original*) (**emphasis added**). Hence it is interesting that at least one judge sitting on the federal bench (in Idaho) has cited the very cases cited by Defendants to hold squarely the opposite conclusion that Defendants have come to and would urge this Court to adopt.

Despite the case law cited by Judge Pappas, and while Defendants admit that $200,000.00 was the amount tendered by Defendants, and accepted by Plaintiffs – and that Defendants were ready to tender $50,000.00 to settle Plaintiffs claims prior to Plaintiffs' lawsuit – Defendants have the audacity to claim that Plaintiffs were not the prevailing party in this case.[3]

Indeed, Defendants further concede: "Were the Defendants here seeking to settle with the Plaintiffs in response to the lawsuit, there might be an argument attorney's fees are applicable"

[3] Defendants claim that Plaintiffs are not the prevailing parties in this case despite citing the very language of *Slaathaug v. Allstate Ins. Co.*, 132 Idaho 705, 711 (1999) ("The court explained that in order to "prevail," the insured need not obtain a verdict for the full amount requested. The insured need only be awarded an amount greater than that tendered by the insurer.")

See Defs' response, § II.B., p. 13. Plaintiffs' would offer that Plaintiffs' attorney sent an email to Defendants' attorney K. Paukert and left a message with her on January 26, 2010 as well as sending a formal letter to Defendant's adjustor on January 27, 2010. *See* Aff. K. Mihara (May), Exs. "7," "10," and "21." Despite Plaintiffs' contention, Plaintiffs would point this Court to the undisputed fact that the settlement release in this matter that specifically references this lawsuit. *See* Answer, Ex. "A." Plaintiffs would also point this Court to the undisputed fact that the offer was made on February 2, 2010, and the acceptance came on February 3, 2010. *See* Answer. It is further admitted by Defendants' that Defendants' agent had noticed Daneice Davis regarding the lawsuit on January 29, 2010 and Daneice Davis had noticed Katherine Paukert that same day. *See* Aff. D. Davis, ¶ 8. p. 3; *see also* Supp. Aff. K. Paukert, ¶ 25, p. 4. Ms. Paukert stated that she took action upon learning of the lawsuit. ("I had an assistant check with the Court and was advised that there was not a record of such a filing"). *Id.*

It is not Plaintiffs' responsibility and/or duty to meet and confer with Defendants prior to taking action in this case. Indeed, Plaintiffs' are unaware of the statutory language or developed case law that disallows recovery of attorney's fees dependent on Defendants' motivation to settle. But, in any case, referencing Defendants' own words above, perhaps if Defendants were seeking to settle with the Plaintiffs in response to the lawsuit, there might be an argument attorney's fees are applicable.

Also, in any event, if, *arguendo*, Defendants did not know about the lawsuit on or before February 2, 2010, it is plain as day that they should have known due to the admitted fact that they were told of the lawsuit by their agent on January 29, 2010.

Plaintiffs would also point out the fact that the argument raised in this section was not raised by Defendants' answer, and therefore, should not be argued before this Court in their response.

Plaintiffs would suggest that consistent with *In re Jones*, cited above, the federal bench's view of the matter is the correct view of the law. Plaintiffs would also demand that Defendants keep their arguments to those contained within their answer. It is for the foregoing reasons why Defendants' second theory fails.

C. **Defendants' argument that they were timely under the statute fails because Defendants had well over thirty days to process these claims when their adjustor was not on vacation.**

Idaho law sets forth when the clock begins to run on the thirty (30) day requirement of the statute. The Idaho bankruptcy court has noted that:

> [i]f the information provided [by the insured to the insurer] is insufficient to give the insurer an opportunity to investigate its liability, the insurer may deny coverage. *Otherwise, the insurer must investigate and/or determine its rights and liabilities.*

See *In re Jones*, 401 B.R. at 465 (citing *Brinkman*, 766 P.2d at 1231) (*emphasis in orginal*).

In this case, there is no dispute of material fact that Plaintiffs, through their counsel, submitted their initial proof of loss and noticed claims to Defendants on or about November 10, 2010. *See* Defs' Response, § A.1, p. 2 ("Plaintiffs submitted their initial claim against a MetLife insurance policy on or around November 10, 2009"); *see also* Aff. D. Davis, ¶ 3, p.2 ("Notice of this claim was submitted on or around November 10, 2009"). Plaintiffs sent Defendants a letter along with the police report documenting the fatal accident and noting the responsible party's insurance information. *See* Aff. K. Mihara (May), Ex. "3." It is also undisputed that in reaction to that initial claim, Defendants began to investigate and requested additional information. *Id.*

Defendants also fail to mention to this Court that Plaintiffs' attorney sent every piece of information asked for by Defendants on November 17, 2009.[4] *See* Aff. K. Mihara (Feb.), Ex. "A;" *see also* Aff. K. Mihara (May), Ex. "4." It is undisputed that the next time Plaintiffs were asked for proof of loss is after they filed their lawsuit. *See* Aff. D. Davis, ¶ 8; *see also* Aff. K. Mihara (May), Exs. "6" and "7."

In addition, it is undisputed that despite the fact that Plaintiffs had just made a claim for hundreds of thousands of dollars in coverage under their policies issued by Defendants, and the fact that an attorney was involved, Defendants' adjustor, despite her usual practice, did not send out confirming memorandum of her understanding of the matter. *See* Aff. D. Davis, ¶ 3, p. 2. Ms. Davis states, "I usually send out a confirmation letter for such extensions, but with the press of getting ready for a lengthy vacation, I did not." *Id.* Now, Defendants wish to hang their defense on their understanding of the facts with a letter that was never sent to confirm the terms and understanding of an extension. It is also interesting to note the time between when the claim was initially made (Nov. 10, 2010) and when Defendants' allegedly made an offer to settle (Dec. 7, 2010) – just within thirty (30) days.[5]

Plaintiffs dispute that Ms. Davis' understanding set forth in her affidavit were the terms of the offer not to take any formal action against Defendants. *See* Aff. K. Mihara (May), Ex. "21." It is Plaintiffs' understanding that Ms. Davis would be away due to an exigent family matter. *Id.* In fact, it was Plaintiffs' understanding that despite Ms. Davis' vacation, other MetLife personnel would, indeed, be working on the claim and it was just the coverage answer

[4] The initial proof of loss contained reference to the police report outlining the details of the accident as well as a copy of the death certificate verifying that Mr. Holland was deceased. The November 17, 2009 included but not limited to proof of loss included a death certificate, tax returns, funeral bills, wage statements by Mr. Holland's employer, a resume, as well as a letter from the negligent party's insurance carrier.

that would be forthcoming after Ms. Davis would be returning from vacation. *Id.* Plaintiffs' understanding of the matter can be verified through confirming memoranda dated January 6, 2010 and January 14, 2010, respectively. *Id.*

In any event, such purported extension is irrelevant as it is undisputed that Defendants had the time from November 10, 2010 to December 7, 2010; and then from January 7, 2010 to January 26, 2010 to work on and process Plaintiffs' claims; claims that all arise from the same set of facts and proof – those timeframes are, again, well over thirty days.[6]

Further, it is undisputed that despite Defendants' claims that they were unaware of the lawsuit filed against them on February 2, 2010 when they made the offer to settle to Plaintiffs, both Ms. Davis and Ms. Paukert admit that they were advised by Defendants' agent, Joe Foredyce, on January 29, 2010, that a lawsuit had been filed and notice was published in the Coeur d'Alene Press. *See* Aff. D. Davis, ¶ 8, p.3; *see also* Supp. Aff. K. Paukert, ¶ 25, p. 4. Despite the foregoing undisputed fact, Defendants hang their hats on the defense that an offer was made without Defendants' knowledge that a lawsuit had been filed against Defendants. *See* Aff. D. Davis ¶ 8, p. 3, c.f. Aff. D. Davis ¶ 10, p. 4; *see also* Supp. Aff. K. Paukert, ¶ 25, p. 4, *c.f.*, Supp. Aff. K. Paukert, ¶ 26, p. 4. Defendants' contention that they did not know about the lawsuit prior to settlement is contradicted by their own evidence.

D. Defendants' estopple claims fail for the reasons set forth in Plaintiffs' response to Defendants' motion to compel and/or dismiss.

For the reasons and law set forth in Defendants' motion to compel and/or dismiss, such

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[5] Plaintiffs dispute that a formal offer to settle was ever made prior to the Feb. 2, 2010 offer.

[6] It should be noted that I.C. § 41-1839 does not require a 'proof of claim' – the statute in question only requires 'proof of loss.' Plaintiffs would argue that their original proof of loss submitted to Defenants constituted sufficient notice to begin the time running on the other claims as well. The statute does not contain language that is policy specific.

reasons and law are hereby incorporated herein for brevity, Defendants' fourth argument (set forth in section II.D. of Defs' Response) is without merit and must be denied.

E. **Defendants' argument that any dispute as to a material fact results in a trial is misplaced due to the fact that the vast majority of all facts in this case, material and non-material, are undisputed leaving only a question of law to be determined by the Court.**

Defendants suggest that a full-blown trial is necessary to adjudicate the merits of the final claim between the parties. *See* Answer; *see also* Defs' Response, § 2.E., p. 20. Plaintiffs would suggest the opposite.

It is a well established rule of Idaho law that disputes over material fact result in trials. See *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589 (2006). However, "if the evidence reveals no disputed issues of material fact, what remains is a question of law. . ." See *Cordova v. Bonneville County Joint School District No. 93*, 144 Idaho 637 (2007).

In this case, Defendants' response fails to parse out what 'genuine issues of material fact' exist. *See* Defs' Response, § 2.E., p. 20. In fact, Defendants concede that this Court may find that there are no genuine issues of material fact ("If, after reviewing the affidavits and other evidence, the Court concludes that genuine issues of material fact exist . . ."). *Id.* (emphasis added).

Plaintiffs and this Court should not be forced to guess at which facts Defendants take issue with or find are material.

It is for the foregoing reason why Defendants' request for a trial is not meritorious and why there is no genuine issues of material fact.

F. **Defendants fail to parse out how handling a civil case *pro bono*, or that the attorney fee agreement was redacted (for privilege) should be a reasons to depart downward from a requested attorney's fee.**

In reading Defendants' response, Plaintiffs are at a loss as to why their attorney's

previous willingness to take a case *pro bono publico* should be a reason to depart downward from the amount claimed as an attoney's fee. In fact, Defendants never parse out how going from a *pro bono publico* arrangement in a matter where liability and damages should be relatively simple (wrongful death case with no comparative negligence to be attributed to the deceased), to a contingency fee agreement where liability and damages are at issue, should be a reason to depart downward under I.R.C.P. 54(e)(3).

Defendants also state that counsel for Plainitffs, "rejected payment for the initial claim . . ." however, Defendants fail to note or to advise this Court that Idaho law is explicit in the requirement that such an offer be in writing. *See* I.C. § 9-1501. The statute reads:

> An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender or the money, instrument or property.

Id. Thus, an offer not in writing is not equivalent to the actual production or tender. *Id.*

In this case, Defendants admit that they simply never conveyed a written tender of the amount justly due prior to February 2, 2010. *See* Aff. K. Mihara (May), Ex. "19" (Defs' response to RFA no. 9). Indeed, Defendants' would have this Court believe that counsel for Plaintiffs rejected payment, however, admit that no such offer was ever forthcoming. *Id.* In their response, Defendants state:

> Ms. Paukert had no discussions about sending him the policy limits for the Initial Claim, because Mr. Mihara was waiting for MetLife's decision on coverage under the policies with the higher limits.

See Defs' Response, p. 5. Ms. Paukert reinforces that statement in her supplemental affidavit:

> Mr. Mihara was clear he did not want the policy limits under Benjamin Holland's policy. He wanted coverage under one or both of the parents' policies because of the higher limits. Therefore, we had no discussions about sending him Benjamin Holland's policy limits.

See Supp. Aff. K. Paukert, ¶ 18. Plaintiffs' counsel got exactly what he demanded for his clients. *See* Aff. K. Paukert; *see also* Answer, Exs. "A" and "B." Again, Defendants' purported evidence is contradictory to their stated legal position and arguments.

Defendants argue that if an award of attorney's fees is granted by this Court, such fees should be limited to the time spent preparing the complaint. Such argument fails to take into account that despite being on a *pro-bono* arrangement, counsel for Plaintiffs bent over backwards to come to an equitable settlement prior to filing a lawsuit. *See* Aff. K. Paukert, ¶¶ 3-17; *see also* Supp. Aff. K. Paukert, ¶¶ 18-28; *see also* Aff. D. Davis, ¶¶ 3-11; *see also* Aff. K. Mihara (Feb.); *see also* Aff. K. Mihara (May).

Defendants' evidence shows that Plaintiffs' attorney would not take 'no' for an answer and relentlessly lobbied both the adjustor and coverage counsel for - and obtained - a coverage decision which tendered higher limits for his clients. *See* Aff. K. Paukert; *see also* Aff. D. Davis, *see also* Supp. Aff. K. Paukert; *see also* Complaint. At the time the fee agreement was entered into, and at the time of filing of the Complaint, it is undisputed that Defendants had not yet tendered a dime to satisfy Plaintiffs' claims and that liability and damages were all still at issue. *Id.* There is no dispute as to the fact that the Complaint was filed on January 26, 2010. *See* Complaint.

Plaintiffs will counter Defendants' contention that the amount sought is unreasonable by quoting the Supreme Court of Idaho:

> A contingent fee agreement that was reasonable when entered into does not become unreasonable simply because in the end the attorney recovers more than he or she would have under an hourly fee contract.

See *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 152 P.3d 614, 619 (2007).

It is for the foregoing reasons that Defendants' argument that the amount sought is unreasonable fails.

G. **Defendants have waived any and all objection to Plaintiffs' entitlement to attorney's fees along with the amount claimed by failing to timely object.**

It is well established that a failure to timely object to a claimed entitlement to attorney's fees waives any objection to the requested entitlement as well as the amount sought. See *Conner v. Dake*, 103 Idaho 761 (1982); see also *Fearless Farris Wholesale, Inc. v. Howell*, 105 Idaho 699 (Ct. App. 1983); see also *Farber v. Howell*, 111 Idaho 132 (Ct. App. 1986).

The applicable Idaho Rule of Civil Procedure states:

> Any objection to the allowance of attorney's fees, or to the amount thereof, shall be made in the same manner as an objection to costs as provided by Rule 54(d)(6). The court may conduct an evidentiary hearing if it deems it necessary, regarding the award of attorney's fees.

See I.R.C.P. 54(e)(6) (emphasis added).

As noted above, the rules require any objection to a claimed cost within fourteen (14) days of service of the memorandum of cost. *See* I.R.C.P. 54(d)(6). Indeed, the Supreme Court of Idaho has held that an attorney's affidavit is sufficient memorandum to comport with Rule 54. See *Great Plains Equip., Inc., v. Northwest Pipeline Corp.*, 132 Idaho 754 (1999). Also, the Supreme Court has held that a motion filed prematurely shall be deemed filed timely. See *Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818 (1984). Indeed, it is the policy of the rule to require timely objection to both the entitlement of the attorney's fee and the amount thereof so that trial courts can expeditiously rule on such objections and bring cases to conclusion. See *Operating Eng'rs Local Union 370 v. Goodwin Const. Co.*, 104 Idaho 83 (Ct. App. 1982). However, if a party fails to timely object to the request for an award of attorney's fees, and has a

good reason for doing so, that party may petition a court to enlarge such time to answer. See *Ada Co. Hwy. Dist. ex rel. Fairbanks v. Acarrequi*, 105 Idaho 873 (1983); see also *Camp v. Jiminez*, 107 Idaho 878 (Ct. App. 1984).

In this case, the motion for attorney's fees was filed on February 9, 2010. *See* Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; *see also* Aff. K. Paukert, ¶ 14. The motion was served upon Defendants the same day via certified mail. *See* Aff. K. Mihara (May), ¶ 19, Ex. "13;" *see also* Aff. K. Paukert, ¶ 14. Fourteen days from the date of service was February 23, 2010. Defendants' initial appearance was signed on February 23, 2010 and filed with the Court on or about March 1, 2010. *See* Notice of Appearance. Fourteen (14) days from February 23, 2010 is March 9, 2010 and fourteen days from March 1, 2010 is March 15, 2010. Defendants' filed the joint motion and stipulated order to dismiss on or about March 2, 2010, and this Court entered the requested order on March 3, 2010. *See* Joint Motion. Fourteen days from said dates are March 17 and 18, 2010, respectively. Defendants filed their answer on April 12, 2010. *See* Answer. Fourteen days from April 12, 2010 is April 27, 2010. Defendants' objections to Plaintiffs' motion can be found in their response to Plaintiffs' motion for attorney's fees which was filed on May 9, 2010. *See* Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839.

At no time prior to the filing of this motion for summary judgment have Defendants formally petitioned this Court seeking to enlarge the time to respond.

Further, in her affidavit, Ms. Paukert states,

> Moreover, I believed that no response to his motion was required until he noted it for hearing. . . Mr. Mihara, at no time, advised me that he considered his Motion for Attorney's Fees to be a cost memorandum to which I had 14 days to respond. .

See Aff. K. Paukert, ¶¶ 14 and 15 (emphasis added). The rhetorical question would be: why would Ms. Paukert submit such a statement in defense of Plaintiffs' pending motion for attorney's fees if she did not realize that there was, indeed, a fourteen (14) day requirement to respond to such filings?

Plaintiffs will concede that the motion for attorney's fees was served upon Defendants along with the complaint, summons, and other material. Plaintiffs would ask the Court to note, however, that Plaintiffs did not move to default Defendants on this issue and attempted to find resolution with Defendants prior to seeking Court involvement. Again, Plaintiffs would point out that Defendants have made their untimely arguments without first seeking leave of the Court despite Idaho law providing for a mechanism to do so. Defendants not only failed to answer within fourteen (14) days from service of the motion, Defendants failed to answer within fourteen days from the date of their initial appearance, the date of their initial motion, and the date of their answer. Simply put, Defendants' objections contained in their response to Plaintiffs' motion are untimely.

In essence, Plaintiffs are entitled to summary judgment because Defendants have waived all objection to Plaintiffs' entitlement as well as to the amount claimed by failing to timely object to the same and/or by failing to seek leave of the Court to respond to Plaintiffs' motion outside of the time allowed.

III. CONCLUSION

All other applicable legal arguments contained within Plaintiffs' motion for summary

judgment and response to Defendants' motion to compel or to dismiss are incorporated herein as if expressly listed. It is for the foregoing reasons why Plaintiffs are entitled to their attorney's fees in the amount sought.

Respectfully submitted this 17th day of May, 2010.

Kinzo H. Mihara
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2010, I caused a true, accurate, and correct copy of the foregoing document to be served on the Defendants attorney via the method indicated below:

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-0677 **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

COME NOW, the Defendants in the above-entitled cause of action, by and through their undersigned counsel, and respectfully submit the following memorandum in opposition to

Plaintiffs' Motion for Summary Judgment. For the reasons set forth below, Plaintiffs' Motion for Summary Judgment should be denied.

I. STATEMENT OF FACTS

A detailed explanation of the facts of the matter was previously set forth in Defendants' Memorandum of Authorities in Support of Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees filed April 28, 2010. For the sake of brevity, only the most relevant facts necessary to respond to Plaintiffs' Motion for Summary Judgment will be reiterated below.

On October 25, 2009, Benjamin Holland passed away as a result of a motor vehicle accident. (*See*, Civil Complaint ("Complaint"), filed January 26, 2010) Subsequently, Plaintiffs, through attorney Kinzo H. Mihara, submitted claims against three MetLife policies. (*See*, Affidavit of Danelee Davis (submitted in opposition to Plaintiffs' Motion for Attorney's Fees) ("Aff. of Davis"), filed May 7, 2010, ¶ 3) On January 26, 2010, without Defendants' counsel's knowledge, Plaintiffs filed a lawsuit against Defendants. (*See*, Affidavit of Kathleen H. Paukert (submitted in opposition to Plaintiffs' Motion for Attorney's Fees) ("Aff. of Paukert"), filed April 13, 2010, ¶ 12)

On February 3, 2010, the parties reached settlement in this matter and the Plaintiffs agreed to sign a full release of their claims against MetLife. (Ibid., at ¶¶ 10-12) On February 3, 2010, following Mr. Mihara's confirmation that his clients had accepted MetLife's settlement offer, Defendants' Attorney Kathleen H. Paukert contacted Mr. Mihara to confirm that his clients would be providing MetLife with the full release. (Ibid., at ¶ 12) Mr. Mihara said that his clients would, but for the first time, informed Ms. Paukert that he was now making a claim for attorney's

fees. (Ibid.) Ms. Paukert reminded Mr. Mihara that his clients agreed to provide a full release of their claims. (Ibid.) He responded that they would, but that he was personally going to sue MetLife for attorney's fees. (Ibid.) Mr. Mihara further informed Ms. Paukert, for the first time, that Plaintiffs had filed a Civil Complaint on January 26, 2010, prior to settlement. (Ibid.)

On February 8, 2010, Mr. Mihara faxed Ms. Paukert a copy of the Civil Complaint. (Ibid., at ¶ 13) Despite the settlement reached, on February 9, 2010, Mr. Mihara mailed Ms. Paukert a letter that included a Motion for Attorney's Fees and other supporting documents. (Ibid., at ¶ 14)

Following Plaintiffs' effort to renege on the settlement as well as their agreement to sign a full release of their claims against the Defendants, the parties filed a "Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees" on March 3, 2010. (*See,* Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees ("Stipulated Order to Dismiss"), filed March 3, 2010) It is important to note the precise language used in the Stipulated Order to Dismiss:

> COME NOW the parties, by and through their counsel of record and hereby move this Court to dismiss, with prejudice, **all claims in the above-captioned matter, except for Plaintiff's Motion for Attorney Fees Pursuant to I.C. § 41-1839 filed on February 9, 2010.** The parties further stipulate to the Order below. This motion is made pursuant to I.R.C.P. 41(a)(1)(ii). The basis of this motion is that the parties have fully resolved all claims in this matter except for the **pending motion for attorney fees referenced above**.
>
> ...
>
> THE COURT, pursuant to the joint motion of the parties above, and upon good cause appearing, **does ORDER that all claims in the above-captioned matter, except for Plaintiffs' Motion for Attorney Fees filed on February 9, 2010,** are dismissed with prejudice and without cost to either party.

(*See,* Stipulated Order to Dismiss) (emphasis added)

By its terms, the Stipulated Order to Dismiss dismissed all claims except Plaintiffs' pending Motion for Attorney's Fees. In other words, the Civil Complaint was dismissed, leaving only Plaintiffs' pending Motion for Attorney's Fees remaining. (Ibid.) Nonetheless, although no answer was required (because all claims had been dismissed except Plaintiffs' pending Motion for Attorney's Fees) to make the record clear, Defendants answered Section IV, paragraph 34, of Plaintiffs' Complaint by denying that the Plaintiffs are entitled to attorney's fees pursuant to I.C. § 41-1839 and asserting affirmative defenses regarding the same. (*See*, Defendants' Answer and Affirmative Defenses ("Answer"), filed April 12, 2010)

Stated another way, although believing that no Answer was required as only Plaintiffs' pending Motion for Attorney's Fees remained, given the past disappointing behavior exhibited by Plaintiffs' attorney, Defendants filed an Answer with the Release of All Claims attached thereto in order to secure against Plaintiffs' attempting to seek a default against Defendants; and to crystallize the sole remaining issue for adjudication. (Ibid.) This intention is further expressed in the Preamble to Defendants' Answer which states, in relevant part,: "[n]o Answer is required as

to paragraphs 1 through 33, as all claims, except the claim for I.C. § 41-1839 attorney's fees, alleged in paragraph 34 of the Complaint, have been dismissed with prejudice." (Ibid.)[1]

II. ARGUMENT

A. Summary Judgment Standard

Summary judgment may be granted "if pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law." Smith v. Meridian Joint School Dist. No. 2, 128 Idaho 714, 718, 918 P.2d 583 (1996), *citing,* I.R.C.P 56(c). "The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment." Ibid., at 719, 918 P.2d 583, *citing,* Tingley v. Harrison, 125 Idaho 86, 89, 867 P.2d 960 (1994). To meet this burden, "the moving party must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the moving party's case." Ibid., *citing,* Thomson v. Idaho Ins. Agency, Inc., 126 Idaho 527, 530, 887 P.2d 1034 (1994). The Court should liberally construe the record in favor of the party opposing the motion and "draw all reasonable inferences and conclusions in that party's

[1] At the outset of this case, Plaintiffs' counsel represented that Plaintiffs' Motion for Attorney's Fees would be scheduled for a date convenient to both counsel. (*See,* Affidavit of William J. Schroeder in Opposition to Plaintiffs' Motion for Summary Judgment ("Aff. of Schroeder in Opposition to Plaintiffs' SJ"), filed May 25, 2010, ¶ 3) On March 26, 2010, Plaintiffs' noted their Motion for Attorney's Fees for an evidentiary hearing scheduled for May 12, 2010. (*See,* Note for Hearing, filed March 26, 2010) Under Idaho Civil Rule 7(b)(3), such hearing date triggered the deadline for responsive pleadings – with any responsive brief by Defendants due seven (7) days prior to the hearing. I.R.C.P § 7(b)(3). The parties then proceeded with discovery. (*See, e.g.,* Defendants' Notice of Service of Discovery requests, filed April 6, 2010, *see, also,* Plaintiffs' Notice of Service of Plaintiffs' First Request for Discovery to Defendants, filed April 8, 2010) Despite prior representations, on April 6, 2010, Plaintiffs' counsel advised Mr. Schroeder that he was taking the position that, under Idaho Civil Rule 54, a response to his Motion for Attorney's Fees was past due. (*See,* Aff. of Schroeder in Opposition to Plaintiffs' SJ, ¶ 3) On April 29, 2010, Plaintiffs' filed their Amended Notice of Hearing, resetting the evidentiary hearing on Plaintiffs' Motion for Attorney's Fees for June 2, 2010. (*See,* Amended Notice of Hearing, filed April 29, 2010) Notably, Plaintiffs again reserved the right to introduce evidence and/or call witnesses at the evidentiary hearing. (Ibid.)

favor." Friel v. Boise City Housing Authority, 126 Idaho 484, 485, 887 P.2d 29 (1994), *citing*, Farm Credit Bank of Spokane v. Stevenson, 125 Idaho 270, 272, 869 P.2d 1365 (1994). "If the record contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied." Harris v. Dep't of Health & Welfare, 123 Idaho 295, 298, 847 P.2d 1156 (1992).

In the present case, the parties' Stipulated Order to Dismiss dismissed "all claims" with prejudice leaving only Plaintiffs' pending Motion for Attorney's Fees remaining; consequently, only paragraph 34 of Plaintiffs' Complaint, if any, needed to be addressed by Defendants. Moreover, Defendants have asserted a viable defense that the Doctrine of Estoppel precludes Plaintiffs' request for attorney's fees under I.C. § 41-1839. Finally, even if, *arguendo*, the Court finds a legal basis for an award of attorney's fees, the fees sought by the Plaintiffs are excessive and unreasonable. Plaintiffs' Motion for Summary Judgment should, therefore, be denied.

B. The Parties' Stipulated Order to Dismiss Precludes Plaintiffs' Argument that Defendants Have Admitted All Facts Necessary For Summary Judgment By Failing to Address Particular Paragraphs in Plaintiffs' Complaint

In the present motion, instead of addressing the merits of the case, Plaintiffs take the disappointing position that they may (1) enter into a Stipulated Order dismissing "all claims" with prejudice and leaving only their pending Motion for Attorney's Fees; (2) accept settlement; (3) observe Defendants' Answer addressing the sole remaining claim for attorney's fees; (4) say nothing; and (5) then argue that "by failing to deny paragraphs 9, 10, 13, 16, 17, and 18 of Plaintiffs' complaint, Defendants have admitted the facts necessary for adjudication of this matter and have negated any need for an evidentiary hearing." (*See*, Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Summary Judgment Memo."), filed May

17, 2010, pp. 6-7) Such argument is indicative of Plaintiffs' counsel's continued disappointing behavior in this matter.

At the outset, given the Order entered by the Court, the only responsive pleading required was to Plaintiffs' pending Motion for Attorney's Fees. However, out of an abundance of caution, an Answer was submitted as to the sole remaining claim. In that regard, Defendants' Answer specifically sets forth the reason such paragraphs were not addressed – namely, "[n]o Answer is required as to paragraphs 1 through 33, as all claims, except the claim for I.C. § 41-1839 attorney's fees, alleged in paragraph 34 of the Complaint, have been dismissed with prejudice." (*See*, Answer) Also, notably, Defendants have put the issue of whether Plaintiffs are entitled to attorney's fees pursuant to I.C. § 41-1839 in controversy before this Court, including the factual assertions identified by the Plaintiffs in their summary judgment as unanswered. (*See*, e.g., Defendants' Memorandum of Authorities in Support of Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, filed April 28, 2010, *see, also, e.g.*, Plaintiffs' First Request for Admissions to Defendants [And Responses Thereto], RFA Nos. 1, 2, 5, 12, 13, 15, 20, 26 and 27, att'd to Aff. of Schroeder in Opposition to SJ, ¶ 4, Exhibit A; Plaintiffs' First Interrogatories and Requests for Production of Documents to Defendants [And Responses Thereto], Interrog. Nos. 1, 6 and 7, att'd to Aff. of Schroeder in Opposition to SJ, ¶ 5, Exhibit B; *see, also, e.g.*, Aff. of Davis; Aff. of Paukert; Supplemental Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees) ("Supp. Aff. of Paukert"), filed May 7, 2010)

Furthermore, critically, the parties' Stipulated Order to Dismiss, which was entered by the Court, dismissed "all claims" with prejudice, leaving only Plaintiffs' pending Motion for

Attorney's Fees. (*See,* Stipulated Order to Dismiss) At a minimum, given the unique circumstances of this case, in which only Plaintiffs' Motion for Attorney's Fees remains, direction from the Court is necessary if Defendants are required to answer previously dismissed claims. Assuming, *arguendo*, that this Court finds that such factual paragraphs in Plaintiffs' Complaint need to be addressed by Defendants, Defendants request leave of Court to file an Amended Answer addressing the same. Such leave is appropriate, given the unique circumstances of this case and the Stipulated Order to Dismiss entered by the Court. Accordingly, Plaintiffs' request for summary judgment should be denied.

C. **Plaintiffs Are Estopped From Claiming Attorney's Fees**

For the sake of brevity, Defendants incorporate by reference Defendants' argument that "Plaintiffs' Claim for Attorney's Fees is Barred by the Doctrine of Estoppel" contained in Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, filed May 10, 2010. However, in doing so, Defendants will address Plaintiffs' argument, as application of the Doctrine of Estoppel is entirely appropriate in this case.[2]

Plaintiffs are incorrect in claiming that Defendants have failed to set forth evidence, in support of their Estoppel Argument, demonstrating a "false representation" or a "concealment of material fact." (*See,* Plaintiffs' Summary Judgment Memo., p. 7) The following demonstrate "false representations" or "concealment of material facts" on the part of the Plaintiffs:

- In a December 7, 2009, telephone conversation, Ms. Davis advised Mr. Mihara that she would be leaving on a three week vacation and would not return to her

[2] Defendants acknowledge that the Doctrine of Estoppel contains the following elements: (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) the party asserting estoppel did not know and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice. Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 21-22, 644 P.2d 341 (1982).

office until January 6, 2010. She informed Mr. Mihara that as a result she would be unable to review the claims made against the two additional MetLife policies in which Mr. Holland's parents were the named insureds, until she returned. Ms. Davis asked if that would be acceptable. Mr. Mihara responded it would. (*See*, Aff. of Davis, ¶¶ 3, 11)

- Mr. Mihara stated to Ms. Paukert that he was handling the Estate of Benjamin Holland pro bono several times. (*See*, Aff. of Paukert, ¶¶ 4, 17)

- Mr. Mihara had several discussions with Ms. Paukert in which he indicated that he knew MetLife had agreed to pay the policy limits on the Initial Claim, but made it clear that Plaintiffs did not want the policy limits under that Initial Claim. (*See*, Supp. Aff. of Paukert, ¶ 18)

- Mr. Mihara concealed from Ms. Paukert that Plaintiffs had filed a lawsuit against Defendants on January 26, 2010. (*See*, Supp. Aff. of Paukert, ¶¶ 22-23)

- Plaintiffs, through Attorney Mr. Mihara, accepted Defendants' settlement offer agreeing to a full release of their claims, before reneging on such settlement. (*See*, Aff. of Paukert, ¶¶ 11-12, Exhibit 1)

The foregoing, constitute "false representations" or "concealment of material facts" relied upon by Defendants: (a) in taking additional time to find coverage for Plaintiffs; (b) in holding off on paying the policy limits for the Initial claim; and (c) in reaching a compromise settlement with Plaintiffs. In light of the preceding, among other actions by Plaintiffs, Plaintiffs' current position that they are entitled to attorney's fees based on the thirty-day attorney's fees provision under I.C. § 41-1839, is inconsistent with their prior acts and representations. Plaintiffs intended that Defendants rely upon these acts as demonstrated through the actions of Plaintiffs' counsel rendering Defendants unable to discover the same.

On good faith reliance on these prior acts and representations, including statements Mr. Mihara made to Ms. Davis and Ms. Paukert, Defendants invested significant amounts of time and effort in order to find coverage under alternative theories for the Additional Claims, and may suffer injury if Plaintiffs are permitted to proceed in their newly-adopted position. Accordingly,

the Doctrine of Estoppel is applicable to the case at bar, and Plaintiffs' request for summary judgment should be denied.

D. The Attorney's Fees Sought by the Plaintiffs Are Excessive and Unreasonable

For the sake of brevity, Defendants incorporate by reference Defendants' argument that "if, *arguendo*, attorney's fees are awarded under I.C. § 41-1839, the amount requested by Plaintiffs is unreasonable" as contained in Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, filed May 10, 2010. However, *arguendo*, Defendants will address Plaintiffs' argument, as the amount of attorney's fees requested by Plaintiffs is excessive and unreasonable.[3]

As Plaintiffs note, coverage and liability under the Additional Claims were at issue when the Plaintiffs, with knowledge that Defendants were exploring possible legal theories to provide coverage, filed their Complaint on January 26, 2010 (*See*, Plaintiffs' Summary Judgment Memo., p. 9) However, the statement by Plaintiffs that they filed the Complaint as a result of Ms. Paukert making the statement to Mr. Mihara that "[i]t was my final opinion that the majority of states would not find coverage" is simply disingenuous. (Ibid., at pp. 9, 12) Mr. Mihara was well aware that those statements pertained to only one proffered theory and that Defendants were actively exploring alternative theories, evidenced by the fact Mr. Mihara contacted Defendants counsel thereafter several times regarding the same. (Ibid.) Moreover, such knowledge is

[3] Defendants acknowledge that courts look to the following factors when assessing reasonable attorney's fees: (a) the time and labor required; (b) the novelty and difficulty of the question; (c) the skill, ability and experience of the attorney; (d) the prevailing charges for like work; (e) whether the fee is fixed or contingent; (f) time limitations; (g) the amount involved and result obtained; (h) undesirability of the case; (i) nature of the relationship with the client; (j) awards in similar cases; (k) cost of legal research; and (l) any other factor the court deems appropriate in a particular case. Idaho R. Civ. P. 54(e)(3).

demonstrated through Mr. Mihara's failure to inform Ms. Paukert that a Complaint had been filed until after a settlement was reached.

Furthermore, Plaintiffs' statements "that MetLife would have denied coverage for Plaintiffs' claims under the higher policy limits if they could have" and "[t]hey were looking for every opportunity to do so" is without merit, as the record shows such coverage was reached with the encouragement of MetLife, and through the efforts of Ms. Paukert. (Ibid., at 10) In addressing the reasonableness of Plaintiffs' potential attorney's fees, the following points are critical:

- The settlement reached had nothing to do with this lawsuit, because Mr. Mihara concealed the lawsuit from Ms. Paukert until after settlement. (*See*, Aff. of Paukert, ¶ 12)

- Settlement was a result of Ms. Paukert's efforts, with the encouragement of MetLife, in locating alternative theories of coverage for the Additional Claims, other than those proffered by Mr. Mihara. (*See*, Aff. of Paukert, ¶¶ 7, 8 and 16)

- Mr. Mihara acknowledges that he was handling the case *pro bono* just prior to filing Plaintiffs' Complaint – which was itself filed without the knowledge of Defendants. (*See*, Plaintiffs' Summary Judgment Memo., p. 9)

Also, telling is Plaintiffs' statement during their analysis of the Idaho Supreme Court case Walton v. Hartford Ins. Co., 120 Idaho 616, 818 P.2d 320 (1991) – "like in this case, counsel for plaintiffs waited until he had obtained the best result he believed he could for his clients until he advised the insurance company that he would be seeking statutory attorney's fees." First, that does not appear to be what occurred in Walton. Second, the statement amounts to an acknowledgement by Mr. Mihara that he deliberately waited until after a compromised settlement was reached on the coverage dispute before informing Defendants he was making a claim for attorney's fees. (*See*, Plaintiffs' Summary Judgment Memo., p. 11)

In summary, Mr. Mihara represented he was operating *pro bono*, rejected payment for the Initial Claim, withheld information from Defendants' attorney that he had filed a lawsuit, reached a compromise settlement of disputed claims, and then claimed, after the fact, that he had entered into a contingency fee agreement with the Plaintiffs and is now entitled to attorney's fees. Defendants submit that, given the foregoing fact pattern, it is within the discretion of the Court to limit attorney's fees to those associated with drafting the Complaint, or, at a minimum, attorney's fees incurred after January 22, 2010, as Mr. Mihara states he would have operated *pro bono* up to that date. (*See,* Plaintiffs' Summary Judgment Memo., p. 12)

III. CONCLUSION

For the reasons set forth above, Defendants request that Plaintiffs' Motion for Summary Judgment be denied.

DATED this 25 day of May, 2010.

PAINE HAMBLEN LLP

By _____
William J. Schroeder, ISB No. 6674
Patrick E. Miller, ISB No. 1771
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May, 2010, I caused to be served a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**, to the following:

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Debbie Miller

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-677 **AFFIDAVIT OF WILLIAM J. SCHROEDER IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

STATE OF WASHINGTON)
:ss
COUNTY OF SPOKANE)

WILLIAM J. SCHROEDER, being first duly sworn on oath, deposes and states that:

1. I am over the age of eighteen and competent to testify.

2. I am licensed to practice law in both Idaho and Washington.

3. At the outset of this case, Plaintiffs' Counsel, Kinzo H. Mihara, represented to me that Plaintiffs' Motion for Attorney's Fees would be scheduled for a date convenient to both of us. Along these lines, originally, Plaintiffs' Counsel, on March 26, 2010, noted Plaintiffs' Motion for Attorney's Fees for an evidentiary hearing scheduled for May 12, 2010. Both parties then proceeded with discovery. Despite these prior representations, on April 6, 2010, Mr. Mihara advised me that he was taking the position that, under Idaho Civil Rule 54, a response to his Motion for Attorney's Fees was past due.

4. A true and correct copy of Defendants' responses to Plaintiffs' First Request for Admissions to Defendants, served on Plaintiffs April 29, 2010, is attached as **Exhibit A**.

5. A true and correct copy of Defendants' responses/answers to Plaintiffs' First Interrogatories and Requests for Production of Documents to Defendants, served on Plaintiffs May 3, 2010, is attached as **Exhibit B**.

By: _____
William J. Schroeder

SUBSCRIBED AND SWORN to before me this 25th day of May, 2010, by WILLIAM J. SCHROEDER.

DEBBIE K MILLER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES NOV. 19, 2011

_____
NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My commission expires: 11-19-2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of May, 2010, I caused to be served a true and correct copy of the foregoing **AFFIDAVIT OF WILLIAM J. SCHROEDER IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**, to the following:

Kinzo H. Mihara
Attorney at Law
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83816-0969

✓ DELIVERED
____ U.S. MAIL
____ OVERNIGHT MAIL
____ TELECOPY (FACSIMILE)
____ E-MAIL

Debbie Miller

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Rec'd 4-27-10

COPY

William J. Schroeder, ISB No. 6674
Patrick E. Miller, ISB No. 1771
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701 Front Avenue, Suite 101
P. O. Box E
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Mailing Address:
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Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007

Attorney for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-677 PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS TO DEFENDANTS [AND RESPONSES THERETO]

TO: DEFENDANTS and their attorney of record, William J. Schroeder, Esq., Paine Hamblen, LLP

Please answer these discovery requests in the time-frames allowed under Idaho law.

I. GENERAL INSTRUCTIONS AND DEFINITIONS

GENERAL INSTRUCTIONS

1. Scope of Discovery. These document requests are directed to the above-named Defendant(s) and cover all information in its possession, custody and control, including information in the possession of officers, employees, agents, servants, representatives, attorneys, or other persons directly or indirectly employed or retained by them, or anyone else acting on their behalf or otherwise subject to their control, and any merged, consolidated, or acquired predecessor or successor, parent, subsidiary, division, or affiliate.

2. Time Period. Unless otherwise indicated, these document requests apply to the time period from October 1, 2009 to the present.

3. Supplemental Responses. These document requests are continuing; supplemental documents must be provided pursuant to the Idaho Rules of Civil Procure - between the date these requests are answered and the hearing on this matter.

4. Deletions from Documents. Where anything has been deleted from a document produced in response to a document request:

a. specify the nature of thematerialdele.ted;
b. specify the reason for the deletion; and
c. identify the person responsible for the deletion.

5. Organization of Documents in Response. Documents submitted pursuant to a document request should be grouped and labeled according to the individual paragraph(s) of the document request Within each group, the documents should be arranged, to the extent possible, in chronological order. If any document is responsive to more than one document request, you may provide a single copy indicating the paragraphs to which it is responsive.

6. Document No Longer in Possession. If any document requested is no longer in the possession, custody, or control of the Defendant(s), state:

a. what was done with the document;
b. when such document was made;
c. the indentify and address of the current custodian of the document;
d. the person who made the decision to transfer or dispose of the document; and
e. the reasons for the transfer or disposition.

7. Privilege as Applied to Document Production. If objection is made to producing any document, or any portion thereof, or to disclosing any information contained therein, on the basis of any claim of privilege, Defendant(s) are requested to specify in writing the nature of such information and documents, and the nature of the claim of privilege, so that the Court may rule on the propriety of the objection. In the case of documents, the Defendant should state:

a. the title of the document;
b. the nature of the document (e.g., interoffice memorandum, correspondence, report, etc.);
c. the author or sender;
d, the addressee;
e. the date of the document;
f. the name of each person to whom the original or a copy was shown or circulated;
g. the names appearing on any circulation list relating to the document;
h. the basis on which privilege is claimed; and
i. a summary statement of the subject matter of the document in sufficient detail to permit the Court to rule on the propriety of the objection.
Upon the agreement of counsel, certain documents may be excluded from these requirements.

8. Singular/Plural. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural.

9. "And" and "Or." The words "and" and "of' shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive,

DEFINITIONS

Unless otherwise, indicated, the following definitions shall apply to these discovery requests:

1. "Court" shall mean the District Court of the First Judicial District of Idaho.

2. "Compensation" shall mean anything of pecuniary value, to include but not limited to: cash, other forms of money, stock, stock options, silver, gold, and perquisites.

3. "Defendant" shall mean the Defendants named in the above encaptioned matter.

4. "Document" means all writings of any kind, including, without limitation, the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, bills of lading, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, interoffice and intra-office communications, notations of any conversations (including, without limitation; telephone call% meetings, and other communications), bulletins, printed matter, computer printouts, teletypes, telefax, invoices, worksheets, graphic or oral records or representations of any kind (includ.ing, without limitation, photographs, charts, graphs, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic, mechanical, or electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings and computer memories), and all drafts, alterations, modifications, changes and amendments of any of the foregoing.

5. "Relate to," "relating to," or "relates to" means constituting, defining, concerning, embodying, reflecting, identifying, stating, referring to, dealing with, or in any way pertaining to.

6. "Subject matter of this action" shall mean the above encaptioned matter, the underlying events of this matter from October 1, 2009 to the present.

7. "You" and "your," unless otherwise indicated, means the Defendant corporate and every past or present employee, agent, attorney, or other servant of Defendant.

You are requested to file within thirty (30) days a written response to request on the (attached Document Schedule) and to produce those documents for inspection and copying on Plaintiffs' attorney at office address specified above.

(a) Your written response shall state with respect to each item or category, that inspection-related activities will be permitted as requested, unless request is refused, in which event the reasons for refusal shall be stated. If the refusal relates to part of an item or category, that part shall be specified.

(b) In accordance, the documents shall be produced as they are covered in the usual course of business or you shall organize and label them to correspond with the categories in the request.

(c) These requests shall encompass all items within your possession, custody or control.

(d) These requests are continuing in character so as to require you to promptly amend or supplement your response if you obtain further material information.

(e) If in responding to these requests you encounter any ambiguity in construing any request, instruction or definition, set forth the matter deemed ambiguous in the construction used in responding.

II. REQUESTS FOR ADMISSION

Request for Admission No. 1: Please admit that on or about November 12, 2009, Defendants sent a letter to Plaintiffs' attorney seeking certain information related to the claims made by Plaintiffs under their policies of insurance:

Response: **It is admitted that a letter was sent. The document speaks for itself and Defendants deny any statement in Request for Admission No. 1 that is inconsistent with the letter.**

Request for Admission No. 2: Please admit that on or about November 17, 2009, Plaintiffs' attorney sent Defendants a letter with enclosures in response to the letter identified in Request for Admission No. 1.

Response: **It is admitted that a letter was sent. The document speaks for itself and Defendants deny any statement in Request for Admission No. 2 that is inconsistent with the letter.**

Request for Admission No. 3: Please admit that attached hereto as exhibit "A" is a true, accurate, and admissible copy of the November 12, 2009 letter identified in Request for Admission No. 1.

Response: **Attachment A was not provided with the Requests for Admission. This fact was brought to Plaintiffs' counsel's attention and a request for Attachment A was made. Plaintiffs' counsel advised that the Attachment would be provided but, to date, Attachment A has not been provided. As a result, the Defendants lack information and, therefore, Request for Admission No. 3 is denied. If Attachment A is provided, this response will be supplemented.**

Request for Admission No. 4: Please admit that attached hereto as exhibit "B" is a true, accurate, and admissible copy of the November 17, 2009 letter identified in Request for Admission No. 2.

Response: **Attachment B was not provided with the Requests for Admission. This fact was brought to Plaintiffs' counsel's attention and a request for Attachment B was made. Plaintiffs' counsel advised that the Attachment would be provided but, to date, Attachment B has not been provided. As a result, the Defendants lack information and, therefore, Request for Admission No. 4 is denied. If Attachment B is provided, this response will be supplemented.**

Request for Admission No. 5: Please admit that there were at least two, and possibly three policies of insurance, issued by Defendants, that provided for coverage for Plaintiffs' claimed losses in the above en-captioned matter.

Response: **Objection: The request is an incomplete hypothetical. Without waiving the objection, Request for Admission No. 5 is denied.**

Request for Admission No. 6: Please admit that on or about December 1, 2009, Plaintiffs' attorney sent Defendants a copy of a letter addressed to Plaintiffs' attorney purporting to be a tender of policy limits by Derrick Dryden's insurer, Allstate Insurance Company.

Response: **It is admitted that a letter was sent. The document speaks for itself and Defendants deny any statement in Request for Admission No. 6 that is inconsistent with the letter.**

Request for-Admission No. 7: Please admit that attached hereto as exhibit "C" is a true, accurate, and admissible copy of the December 1, 2009 letter identified in Request for Admission No. 6.

Response: **Attachment C was not provided with the Requests for Admission. This fact was brought to Plaintiffs' counsel's attention and a request for Attachment C was made. Plaintiffs' counsel advised that the Attachment would be provided but, to date, Attachment C has not been provided. As a result, the Defendants lack information and, therefore, Request for Admission No. 7 is denied. If Attachment C is provided, this response will be supplemented.**

Request for Admission No. 8: Please admit that it is usual and customary for Plaintiffs' attorneys in Kootenai County, Idaho to charge an approximate contingency fee of one third (1/3) for any recovery in a personal injury action.

Response: **Objection: This is not a proper request for admission under I.R.C.P. Rule 36. Without waiving the objection, Request for Admission No. 8 is denied. A contingency fee agreement is a contract between counsel and client. Such a contract can vary depending on the circumstances of each case.**

Request for Admission No. 9: Please admit that Defendants did not tender, or offered to tender, $200,000 to Plaintiffs at any time prior to February 2, 2010.

Response: **Admit.**

Request for Admission No. 10: Please admit that Plaintiffs will be able to call to the stand a qualified expert in the matter of attorney's fees at the hearing of this matter.

Response: **Defendants are without sufficient information or knowledge and, therefore, deny the same.**

Request for Admission No. 11: Please admit that Plaintiffs will be able to elicit testimony from a qualified expert witness to the effect of the amount of attorney's fees requested in this matter is reasonable given the facts and circumstances of this case.

Response: **Defendants are without sufficient information or knowledge and, therefore, deny the same.**

Request for Admission No. 12: Please admit that the "amount justly due," as defined by Idaho law, under the insurance policies covering Plaintiffs' losses, was $200,000.

Response: Denied.

Request for Admission No. 13: Please admit that the attorney's fees sought in Plaintiffs' pending motion for attorney's fees pursuant to I.C. § 41-1839 is reasonable.

Response: Denied.

Request for Admission No. 14: Please admit that Defendants' coverage counsel, Katherine Paukert, Esq., made a statement to the effect of: Plaintiffs' counsel was an excellent advocate for his clients.

Response: Objection: This is not a proper request for admission under I.R.C.P., Rule 36. Without waiving the objection, Request for Admission No. 14 is denied. The comment Ms. Kathleen Paukert made is as set forth in her April 13, 2010 Affidavit.

Request for Admission No. 15: Please admit that it is the public policy of the state of Idaho to allow for attorney's fees in instances where insurers fail to tender amounts justly due to their insureds within thirty (30) days after the insured provide proof of loss and insureds incur attorney's fees.

Response: Objection: This is not a proper request for admission under I.R.C.P., Rule 36. Without waiving the objection, Defendants admit that, I.C. § 41-1839 is the statute regarding attorney fees and denies Request for Admission No. 15 to the extent it is inconsistent with I.C. § 41-1839.

Request for Admission No. 16: Please admit that combined, Plaintiffs held three insurance policies with Defendants.

Response: It is admitted that combined there were three policies. It is denied that the Plaintiffs each held three policies.

Request for Admission No. 17: Please admit that Plaintiffs made three claims under the policies of insurance issued by Defendants.

Response: Admit.

Request for Admission No. 18: Please admit that Defendants assigned three claim numbers to Plaintiffs' claims, one for each policy of insurance.

Response: Admit.

Request for Admission No. 19: Please admit that Defendants tendered two checks to Plaintiffs for settlement of all of Plaintiffs' claims, one check in the amount of $150,000,00 and the, other in the amount of $50,000.00.

Response: Admit.

Request for Admission No. 20: Please admit that Defendants settled the underlying claims in this matter while allowing the claim for attorney's fees to proceed.

Response: Denied. The parties reached a settlement of all claims on February 3, 2010. After the settlement was reached, in breach of the settlement, Plaintiffs submitted a claim for attorney's fees. Defendants have a pending motion to enforce the terms of the settlement.

Request for Admission No. 21: Please admit that counsel for Defendants, in conjunction with counsel for Plaintiffs drafted the settlement release in this matter.

Response: It is admitted that counsel for Defendants, in conjunction with counsel for Plaintiffs, drafted the Release in this matter.

Request for Admission No. 22: Please admit that the settlement release in this matter was drafted subsequent to the filing of Plaintiffs' motion for attorney's fees.

Response: It is admitted that the Release was drafted subsequent to the filing of Plaintiffs' motion for attorney's fees.

Request for Admission No. 23: Please admit that Defendants' first settlement release draft tendered to Plaintiffs included a provision, for indemnity for both Paukert & Troppmann, PLLC and for Katherine Paukert, Esq.

Response: It is admitted that the first release draft contained a provision for indemnity. The document speaks for itself and Defendants deny any statement in Request for Admission No. 23 that is inconsistent with the first release draft.

Request for Admission No. 24: Please admit the settlement release draft identified in Request for Admission No. 23 was sent to Plaintiffs' counsel contemporaneously with the settlement drafts identified above in Request for Admission No. 19:

Response: **It is admitted that the release draft was sent to Plaintiffs' counsel contemporaneously with the settlement checks identified above in Request for Admission No. 19.**

Request for Admission No. 25: Please admit that Plaintiffs have never personally met, nor have ever entered into any business arrangement with either Katherine Paukert, Esq. and/or Paukert & Troppmann, PLLC.

Response: **Admit.**

Request for Admission No 26: Please admit that Defendants' counsel, Katherine Paukert, Esq. attempted to revoke tender of the amount justly due in this matter upon learning of Plaintiffs' attorney's fees.

Response: **Denied. As explained in Ms. Kathleen Paukert's April 13, 2010 Affidavit, after a settlement of all claims was reached, Plaintiffs, in derogation of the settlement, submitted a claim for attorney's fees. Defendants have a pending motion to enforce the terms of the settlement.**

Request for Admission No. 27: Please admit that Defendants' counsel, Katherine Paukert, Esq. attempted to condition settlement of this matter to include attorney's fees subsequent to Plaintiffs' acceptance of Defendants' offer to settle.

Response: **Denied. As explained in Ms. Kathleen Paukert's April 13, 2010 Affidavit, after a settlement of all claims was reached, Plaintiffs, in derogation of the settlement, submitted a claim for attorney's fees. Defendants have a pending motion to enforce the terms of the settlement.**

I certify the responses in accordance with Idaho Rules of Civil Procedure Rule 26(f).

DATED this 29 day of April, 2010.

PAINE HAMBLEN LLP

By: _____
William J. Schroeder, ISB No. 6674
Patrick E. Miller, ISB No. 1771
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2010, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS TO DEFENDANTS [AND RESPONSES THERETO]**, by the method indicated below and addressed to the following:

Kinzo H. Mihara
Attorney at Law
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83816-0969

- ✓ DELIVERED
- ___ U.S. MAIL
- ___ OVERNIGHT MAIL
- ___ TELECOPY (FACSIMILE)
- ___ E-MAIL

Debbie Miller

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NH

COPY

William J. Schroeder, ISB No. 6674
PAINE HAMBLEN LLP
701 Front Avenue, Suite 101
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Mailing Address:
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Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007

Attorney for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-677 PLAINTIFFS' FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS [AND **RESPONSES THERETO]**

TO: DEFENDANTS and their attorney of record, William J. Schroeder, Esq., Paine Hamblen, LLP

Please answer these discovery requests in the time-frames allowed under Idaho law.

I. GENERAL INSTRUCTIONS AND DEFINITIONS

GENERAL INSTRUCTIONS

1. Scope of Discovery. These document requests are directed to the above-named Defendant(s) and cover all information in its possession, custody and control, including information in the possession of officers, employees, agents, servants, representatives, attorneys, or other persons directly or indirectly employed or retained by them, or anyone else acting on their behalf or otherwise subject to their control, and any merged, consolidated, or acquired predecessor or successor, parent, subsidiary, division, or affiliate.

2. Time Period. Unless otherwise indicated, these document requests apply to the time period from October 1, 2009 to the present.

3. Supplemental Responses. These document requests are continuing; supplemental documents must be provided pursuant to the Idaho Rules of Civil Procedure - between the date these requests are answered and the hearing on this matter.

4. Deletions from Documents. Where anything has been deleted from a document produced in response to a document request:

a. specify the nature of thematerialdeleted;

b. specify the reason for the deletion; and

c. identify the person responsible for the deletion.

5. Organization of Documents in Response. Documents submitted pursuant to a document request should be grouped and labeled according to the individual paragraph(s) of the document request Within each group, the documents should be arranged, to the extent possible, in chronological order. If any document is responsive to more than one document request, you may provide a single copy indicating the paragraphs to which it is responsive.

6. Document No Longer in Possession. If any document requested is no longer in the possession, custody, or control of the Defendant(s), state:

a. what was done with the document;

b. when such document was made;

c. the indentify and address of the current custodian of the document;

d. the person who made the decision to transfer or dispose of the document; and

e. the reasons for the transfer or disposition.

7. Privilege as Applied to Document Production. If objection is made to producing any document, or any portion thereof, or to disclosing any information contained therein, on the basis of any claim of privilege, Defendant(s) are requested to specify in writing the nature of such information and documents, and the nature of the claim of privilege, so that the Court may rule on the propriety of the objection. In the case of documents, the Defendant should state:

a. the title of the document;

b. the nature of the document (e.g., interoffice memorandum, correspondence, report, etc.);

c. the author or sender;

d, the addressee;

e. the date of the document;

f. the name of each person to whom the original or a copy was shown or circulated;

g. the names appearing on any circulation list relating to the document;

h. the basis on which privilege is claimed; and

i. a summary statement of the subject matter of the document in sufficient detail to permit the Court to rule on the propriety of the objection.

Upon the agreement of counsel, certain documents may be excluded from these requirements.

8. Singular/Plural. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural.

9. "And" and "Or." The words "and" and "of' shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

DEFINITIONS

Unless otherwise, indicated, the following definitions shall apply to these discovery requests:

1. "Court" shall mean the District Court of the First Judicial District of Idaho.

2. "Compensation" shall mean anything of pecuniary value, to include but not limited to: cash, other forms of money, stock, stock options, silver, gold, and perquisites.

3. "Defendant" shall mean the Defendants named in the above encaptioned matter.

4. "Document" means all writings of any kind, including, without limitation, the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, bills of lading, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, interoffice and intra-office communications, notations of any conversations (including, without limitation; telephone call% meetings, and other communications), bulletins, printed matter, computer printouts, teletypes, telefax, invoices, worksheets, graphic or oral records or representations of any kind (includ.ing, without limitation, photographs, charts, graphs, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic, mechanical, or electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings and computer memories), and all drafts, alterations, modifications, changes and amendments of any of the foregoing.

5. "Relate to," "relating to," or "relates to" means constituting, defining, concerning, embodying, reflecting, identifying, stating, referring to, dealing with, or in any way pertaining to.

6. "Subject matter of this action" shall mean the above encaptioned matter, the underlying events of this matter from October 1, 2009 to the present.

7. "You" and "your," unless otherwise indicated, means the Defendant corporate and every past or present employee, agent, attorney, or other servant of Defendant.

You are requested to file within thirty (30) days a written response to request on the (attached Document Schedule) and to produce those documents for inspection and copying on Plaintiffs' attorney at office address specified above.

(a) Your written response shall state with respect to each item or category, that inspection-related activities will be permitted as requested, unless request is refused, in which event the reasons for refusal shall be stated. If the refusal relates to part of an item or category, that part shall be specified.

(b) In accordance, the documents shall be produced as they are covered in the usual course of business or you shall organize and label them to correspond with the categories in the request.

(c) These requests shall encompass all items within your possession, custody or control.

(d) These requests are continuing in character so as to require you to promptly amend or supplement your response if you obtain further material information.

(e) If in responding to these requests you encounter any ambiguity in construing any request, instruction or definition, set forth the matter deemed ambiguous in the construction used, in responding.

III. INTERROGATORIES

Interrogatory No. 1: Please state the basis of Defendants' contention that Plaintiffs' requested attorney's fee is unreasonable.

Answer: **As set forth in Ms. Paukert's April 13, 2010 Affidavit filed with the Court (and incorporated by reference herein), a compromise settlement was reached on February 3, 2010. As part of that settlement, Plaintiff was to provide a full release as to all claims. As a result, Plaintiffs' request for attorney's fees should be dismissed. Defendants have a pending motion to dismiss the request for attorney's fees because of the settlement reached.**

In addition to the above, as stated in Ms. Paukert's Affidavit, two of the claims made on behalf of Plaintiffs were unsupported by Idaho law. MetLife looked for coverage under an alternative theory than what Plaintiffs' counsel provided. (*See*, Ms. Paukert's Affidavit)

Plaintiffs' counsel advised MetLife's Adjuster that he would grant her additional time to review the claims since she was going to be on vacation for three weeks in December 2009. Based upon statements Plaintiffs' counsel made to the MetLife Adjuster and Ms. Paukert, Plaintiffs are estopped from making a claim for attorney's fees.

Plaintiffs' counsel advised Ms. Paukert, as set forth in Ms. Paukert's April 13, 2010 Affidavit, that he was handling the case pro bono. As some point just prior to January 26, 2010, Plaintiffs' counsel signed a contingent fee agreement. After the parties reached a settlement, Plaintiffs' counsel announced that he was making a claim for attorney's fees. If, *arguendo*, attorney's fees are allowed, fees should be limited to the time expended in preparing the Complaint.

Defenses to Plaintiffs' claim for attorney's fees are also set forth in Defendants' Answer and Affirmative Defenses. Said Answer and Affirmative Defenses are incorporated by reference herein.

Defendants reserve the right to supplement this answer after Plaintiffs' provide responses to discovery requests.

Interrogatory No. 2: Please state any case law or statute which Defendants rely upon in making any legal arguments.

Answer: **Objection: This request seeks attorney work product. Without waiving the objection, the case law or statue Defendants will rely upon will be set forth in its memorandum of authorities filed with the Court in response to, and in support of, motions filed.**

Interrogatory No. 3: Pursuant to I.R.C.P. 26, please state the name of any witnesses, lay or expert, that Defendants intend to call to the stand at the scheduled hearing of this matter.

Answer: **It is Defendants' understanding that the hearing scheduled for 6/2/10 will be based upon Affidavits. Ms. Paukert will submit Affidavits and Danicce Davis will submit an Affidavit. If this matter is set over for an evidentiary trial, this answer will be supplemented.**

Interrogatory No. 4: Please state the compensation arrangement between the law firm Paukert and Troppmann, PLLC and Defendants.

Answer: **Objection: The requested information is not relevant and will not lead to the discovery of admissible evidence.**

Interrogatory No. 5: Please state the compensation arrangement between to the law firm Paine Hamblen, LLP and Defendants.

Answer: **Objection: The requested information is not relevant and will not lead to the discovery of admissible evidence.**

Interrogatory No. 6: Please state the amount of money that Defendants valued Plaintiffs' claims at.

Answer: **Objection: It is vague as to what is being requested. Without waiving the objection, as discussed in Ms. Paukerts' Affidavit, a compromised settlement was reached on 2/3/10. The settlement was $200,000.00 in exchange for a full release of all claims.**

Interrogatory No. 7: Please state the date of valuation of the amount requested in Interrogatory No. 6 above.

Answer: **Objection: It is vague as to what is being requested. Without waiving the objection, as discussed in Ms. Paukerts' Affidavit, a compromised settlement was reached on 2/3/10. The settlement was $200,000.00 in exchange for a full release of all claims.**

IV. REQUESTS FOR PRODUCTION OF DOCUMENTS

Request for Production of Documents No. 1: Please produce a true, accurate, and admissible complete, unredacted copy of correspondence between Plaintiffs and Defendants and between Defendants and any second or third parties in this matter.

Response: **Objection: Correspondence between Plaintiffs and Defendants is in Plaintiffs' possession. Without waiving the objection, Defendants' claim file, redacted for attorney-client privilege, will be provided.**

Request for Production of Documents No. 2: Please produce a true, accurate, and admissible complete, unredacted copy of Defendants' claim file in this matter.

Response: **Objection: To the extent Plaintiffs seek attorney-client communications, an objection is hereby made. Without waiving the objection, Defendants' claim file, with attorney-client communications redacted, will be provided.**

Request for Production of Documents No. 3: Please produce a true, accurate, and admissible copy of Defendants' agent, Joe Foredyce's telephone records for the months of January and February, 2010.

Response: **Objection. The records are not relevant and will not lead to the discovery of admissible evidence concerning the sole remaining claim.**

Request for Production of Documents No. 4: Please produce a true, accurate, and admissible copies of documents which Defendants intend to introduce at the hearing of this matter.

Response: **Objection: Work product. Without waiving the objection, a determination has not been made as to Exhibits. All Exhibits used will be attached to the Affidavits filed with the Court. If the case is set over for an evidentiary hearing, this response will be supplemented.**

Request for Production of Documents No. 5: Please produce a true, accurate, and admissible copy of Defendants' counsel, Katherine Paukert, Esq. and Paukert & Troppmann, PLLC's telephone records for the months of January and February, 2010.

Response: **Objection: The records are not relevant and will not lead to the discovery of admissible evidence. Moreover, the records would include all of that Firm's contacts with clients from various cases and thereby implicates the attorney-client privilege.**

Request for Production of Documents No. 6: Please produce a true, accurate, and correct copy of Defendants' attorney's billings in this matter. This request is intended to include, the billings of all principles and employees of Paukert & Troppmann, PLLC and Paine Hamblen LLP.

Response: **Objection: The records are not relevant and will not lead to the discovery of admissible evidence. Moreover, the billings would disclose attorney-client communications and attorney work product.**

Request for Production of Documents No. 7: Pursuant to I.R.C.P. 26(b)(2), please produce a true, accurate, and correct copy of any insurance agreements which may be used to satisfy part of or all of any judgment which may be entered in this case.

Response: **None as to the sole remaining claim of attorney's fees.**

I certify the responses in accordance with Idaho Rules of Civil Procedure Rule 26(f).

DATED this 3 day of May, 2010.

PAINE HAMBLEN LLP

By: _____
William J. Schroeder, ISB No. 6674
Patrick E. Miller, ISB No. 1771
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of May, 2010, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS' FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS [AND RESPONSES THERETO]** to the following:

Kinzo H. Mihara
Attorney at Law
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Coeur d'Alene, Idaho 83816-0969

✓ DELIVERED
____ U.S. MAIL
____ OVERNIGHT MAIL
____ TELECOPY (FACSIMILE)
✓ E-MAIL

Debbie Miller

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Counsel for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-0677 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiffs, by and through their attorney of record and hereby reply to Defendants' opposition to their motion for summary judgment as follows:

UNDISPUTED FACTS

The undisputed facts in this case have been relayed several times by both parties and, for brevity's sake, will not be recited again herein.

STANDARD OF REVIEW

Plaintiffs would assert that both parties correctly state the legal standards of review.

ARGUMENT

A. **Defendants' cite neither statute, case law, nor legal doctrine to support their contention that the stipulated order in this case precludes Plaintiffs' motion for summary judgment.**

In reviewing Defendants' opposition to Plaintiffs' motion for summary judgment, Plaintiffs are unable to find a single case, a singe statute, or a single doctrine of law that Defendants rely upon to defend against the main thrust of Plaintiffs' motion for summary judgment – that their answer failed to address the factual allegations of Plaintiffs' complaint.

Indeed, after reviewing the Court's order in this case, Plaintiffs cannot determine how Defendants' statement that, "given the Order by the Court, the only responsive pleading required was to Plaintiffs' pending Motion for Attorney's Fees," can be a correct statement of the law. *See* Defs' Memorandum in Opposition to Plfs' Motion for Summary Judgment, p. 7. Indeed, upon review of this Court's order, it is apparent that the Court did not dispense with any of the pleading requirements in its order, nor did the parties do so via their stipulation. *See* Joint Motion and Stipulated Order to Dismiss All Claims Except for Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839. Despite the language cited on page 3 of their opposition, Defendants fail to parse out, or explain how their utter failure to address the factual allegations of Plaintiffs' complaint is addressed by the stipulation or the Court's order. Plaintiffs believe, but cannot be sure, that Defendants confuse the terms 'factual allegations' and 'claims' and use those terms interchangeably in their opposition. In short, it was Defendants who decided to file answer, and to utilize the language used in that answer. Defendants should now be bound by that language.

Plaintiffs would simply assert that Defendants' opposition is an admission by Defendants that, for whatever reason, they failed to deny the factual allegations contained within Plaintiffs' complaint. Plaintiffs can not advise this Court of any law as they have been able to find, case or statute, regarding how a defendant's intent is relevant in failing to deny a factual allegation.

Defendants state in their opposition brief:

> In the present motion, instead of addressing the merits of the case, Plaintiffs take the disappointing position that they may (1) enter into a Stipulated Order dismissing "all claims" with prejudice and leaving only their pending Motion for Attorney's Fees; (2) accept settlement; (3) observe Defendants' Answer addressing the sole remaining claim for attorney's fees; (4) say nothing; and (5) argue that "by failing to deny paragraphs 9, 10, 13, 16, 17, and 18 of Plaintiffs' complaint, Defendants have admitted the facts necessary for adjudication of this matter and have negated any need for an evidentiary hearing. . . Such argument is indicative of Plaintiffs' counsel's disappointing behavior in this matter.

See Defs' Memorandum in Opposition to Plfs' Motion for Summary Judgment, p. 6-7 (emphasis added). Plaintiffs would argue that arguing the law and the facts is exactly what has been indicative of their attorney's behavior since the inception of this case. Defendants have been the only party disappointed as they have been on the low ground; morally, legally, and factually.

Defendants state in their opposition brief, "Defendants' Answer specifically sets forth the reason such paragraphs were not addressed. . ." *Id.* at 7 (emphasis added). Hence, Defendants' very argument in opposition to Plaintiffs' motion for summary judgment is that they did not address, hence did not answer, the factual allegations of Plaintiffs' complaint.

It is for the foregoing reasons why Plaintiffs' motion for summary judgment should be granted.

B. **Defendants ask this Court to award attorney's fees incurred after January 22, 2010.**

Plaintiffs observe that Defendants state in their opposition that it is within the Court's discretion to award, "at a minimum, attorney's fees incurred after January 22, 2010, as Mr.

Mihara states he would have operated *pro bono* up to that date." *See* Defs' Opposition, p.12 (*emphasis in original*). It is undisputed that the contingency fee agreement was signed after January 22, 2010. *See* Aff. K. Mihara (May), Ex. "2;" *see also* Defs' Response to Plaintiffs' Motion for Attorney's Fees, p. 21 (citing the Aff. K. Paukert) ("At some point just prior to January 26, 2010, Mr. Mihara signed a contingency fee agreement with the Plaintiffs."). It is further undisputed that Plaintiffs attorney as spent a significant amount of time on this case since January 22, 2010. *See* Aff. K. Mihara (Feb.); *see also* Aff. K. Mihara (May); *see also* Aff. K. Paukert; *see also* Aff. D. Davis; *see also* Aff. W. Schroeder.

In short, Defendants invite this Court to award attorney's fees incurred after January 22, 2010. Finally, Plaintiffs and Defendants can agree. It is for the foregoing reason why Plaintiffs' motion for summary judgment should be granted and this case be closed.

C. **Defendants fail to address how the attorney's fees sought by Plaintiffs are excessive or unreasonable.**

Defendants correctly note that I.R.C.P. 54(e)(3) contains the factors to which the Court must look to determine a reasonable attorney's fee. Defendants do not, however, go through those factors to come to a conclusion as to what a reasonable attorney's fee would be in this case. Defendants' foundation for their sole argument that the attorney's fee claimed by Plaintiffs is excessive and unreasonable is that they made their offer without the knowledge of the fact that a complaint had been filed in this case.[1]

Defendants statement that they were "exploring possible legal theories to provide coverage. . .," is just window dressing to the fact that they were posturing to deny coverage

[1] Defendants make their argument despite admitting that the offer was made on February 2, 2010, accepted on February 3, 2010, and that their agent told them that the lawsuit had been filed on January 29, 2010 and that their attorney had the opportunity to, and did, investigate the allegation. *C.f.* Aff. K. Mihara, ¶¶ 11 and 14; Exs. "7," "10," and "11."

under the higher limit policies and were likely buying time to file a declaratory action against Plaintiffs.[2]

Hypothetically, should Defendants had tendered the limits of the higher policies into the Court's registry and filed a declaratory action, prior to Plaintiffs filing a complaint – and without telling Plaintiffs prior to filing, Defendants would now be claiming that the statute allows them to do just that and avoid having to pay attorney's fees. *See* I.C. § 41-1839(2).

It is for the foregoing reasons why Plaintiffs' motion for summary judgment should be granted.

D. **Defendants' "false representations" or "concealment of material facts" neither addresses how such representations were "false" or how "material" facts were concealed. Further, application of the doctrine of estopple does not pertain to the statutory construction of the statute at issue.**

Plaintiffs take issue with the first bullet point under section C, page 8 of Defendants' Opposition filing. The second bullet point is uncontested. Plaintiffs further contest the third, fourth, and fifth bullet points contained on page 9 of Defendants' opposition. Plantiffs would offer that the first, third, fourth, and fifth bullet points do not create a dispute of a 'material fact' to preclude summary judgment.

The Idaho code is explicit in its requirement for entitlement to attorney's fees. *See* I.C. § 41-1839(1) and (2). There are no exceptions if the adjustor goes on vacation.[3] *Id.* There is no exception to the statute when the attorney is acting pro bono. *Id.* There is no exception if the insured tells the insurer that they want a higher limit under another policy. *Id.* There is no exception if the insurer does not know that the lawsuit is filed. *Id.* There is no exception if Plaintiffs accept settlement after the lawsuit is filed. *Id.* The only exceptions under the law that

[2] As noted in Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 14. ("Moreover, the Defendants could have simply decided to bring a declaratory judgment action.")

would shield Defendants from the application of the statute are that (1) the insurer tenders the amount justly due within thirty (30) days from the date the insured provides proof of loss (I.C. § 41-1839(1)), and/or (2) if the insurer tenders the amount justly due to the insured prior to the filing of the lawsuit, is rejected, and subsequently tenders that amount into the Court's registry (I.C. § 41-1839(2)).

Indeed, the Supreme Court of Idaho has interpreted the statute to include other requirements, but has only gone on to reverse itself noting the simple application of the statute. See *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746-47, 152 P.3d 614, 617-18 (2007). The Court noted:

> A cardinal rule of statutory construction is that where a statute is plain, clear, and unambiguous, courts are constrained to follow the plain meaning, and neither add to the statute or take away by judicial construction. . . In *Martin v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 244, 61 P.3d 601 (2002), we held that Idaho Code § 41-1839(1) contains two requirements for an insured to be entitled to an award of attorney's fees: (1) the insured must provide proof of loss as required by the insurance policy; and (2) the insurer must fail to pay the amount justly due within thirty days after receipt of the proof of loss. *Martin* also made it clear that any argument regarding the requirements for obtaining an award of attorney's fees under Idaho Code § 41-1839(1) must be based on the wording of the statute. The issue is one of statutory construction. Arguments for additional requirements not contained in the statutory language must be made by the legislature, not this Court.

See *Parsons* at 617-18. (*emphasis in oringial*) (emphasis added).

It is abundantly apparent from review of Defendants' arguments that their bases for opposition, therefore, are neither based on the language of the statute, nor the application thereof. In short, the application of the statute is mandatory, and Defendants' arguments are meaningless in light of the case law surrounding the statute.

---

[3] Plaintiffs concede that, if, *arguendo*, extension were granted then such an extension would be an equitable consideration in coming to a reasonable attorney's fee under I.R.C.P. 54(e)(3). Plaintiffs specifically deny that such was the understanding of the parties on or about early December of 2009. *See* Aff. K. Mihara (May), Ex. "21."

It is for the foregoing reason why Plaintiffs' motion for summary judgment should be granted.

E. **Defendants' 'critical points' arguments that the attorney's fees sought are excessive and unreasonable are contradictory to their previous filings.**

In a comparison to the following "critical" points that Defendants note, Plaintiffs would ask the Court to observe the contradictory arguments Defendants have made in other filings:

(1) "The settlement reached had nothing to do with the lawsuit, because Mr. Mihara concealed the lawsuit from Ms. Paukert until after settlement." *See* Defs' Memo in Opposition, p. 11.

> *C.f.* Aff. D. Davis, ¶ 8 ("[O]n January 29, 2010. . . Mr. Foredyce told me he saw in the COEUR D'ALENE PRESS that the Estate of Benjamin Holland had filed suit against MetLife), *c.f.* Supp. Aff. K. Paukert, ¶ 25 ("On January 29, 2010, I received a call from. . . Daneice Davis. She told me that someone had seen in the COEUR D'ALENE PRESS that the Holland Estate had sued MetLife. I had an assistant check with the Court and was advised that there was not a record of such a filing."), *c.f.* Aff. K. Mihara, ¶¶ 10, 11, Exs. "7" and "22."

The above shows that not only did Defendants know about the lawsuit before they made the offer, but that despite their claims of "good-faith" dealings, at least up to that point, neither Daneice Davis nor Katherine Paukert even attempted to call Plaintiffs' attorney to see if he had filed a lawsuit.[4] To be sure, the only documentary evidence before this Court shows that Plaintiffs' attorney attempted multiple written notifications to Defendants on the day the lawsuit was filed.

(2) "Settlement was a result of Ms. Paukert's efforts, with the encouragement of MetLife, in locating alternative theories of coverage for the Additional Claims, other than those proffered by Mr. Mihara." *See* Defs' Memo in Opposition, p. 11.

[4] Please note that either Ms. Paukert or Ms. Davis could have simply called counsel and asked if a lawsuit had been filed. A party cannot intentionally maintain ignorance in light of likely facts and then benefit as a result of that ignorance.

C.f. Defs' Response to Plaintiffs' Motion for Attorney's Fees, p. 17 ("Moreover, during the process in which Mr. Mihara and Ms. Paukert conversed and proffered theories back and forth in an effort to find coverage, such research and theories necessitated additional proof of loss documentation...") *c.f., Id.*, p. 19 ("including Plaintiffs' attorney Mr. Mihara, who has been an active participant in searching for theories that would allow coverage under the additional claims...") and ("Mr. Mihara was an active participant in the parties' attempt to find coverage under the Additional Claims, including, but not limited to, providing a seventeen-page memorandum outlining his theories for coverage under the Additional Claims on January 14, 2010, and numerous conversations between the period of January 14, 2010 and February 2, 2010 with Defendants' counsel Ms. Paukert, regarding various potential legal theories that would provide coverage under the Additional Claims.") (emphasis added).

The foregoing shows how Defendants twist and contort the facts in an attempt to marshal anything that could resemble a deformed semblance of a defense. For example, when discussing the reasonableness of the fee, the coverage theory under which the settlement was based was totally Katherine Paukert's idea with encouragement from MetLife and nothing to do with Plaintiffs' counsel.[5] However, when it comes to an argument of estopple or potential defense of timely settlement, then of course Plaintiffs' counsel was in the thick of it and was actively engaging in finding coverage theories.[6] Defendants' own filings show the extent to which they are willing to go in their attempt to evade paying a reasonable attorney's fee in this case.

(3) "Mr. Mihara acknowledges that he was handling the case pro bono just prior to filing Plaintiffs' Complaint – which was itself filed without the knowledge of Defendants." *See* Defs' Memo in Opposition, p. 11

C.f. Aff. D. Davis, ¶ 8 ("[O]n January 29, 2010. . . Mr. Foredyce told me he saw in the COEUR D'ALENE PRESS that the Estate of Benjamin Holland had filed suit against MetLife), *c.f.* Supp. Aff. K. Paukert, ¶ 25 ("On January 29, 2010, I received a call from. . . Daneice Davis. She told me that someone had seen in the COEUR D'ALENE PRESS that the Holland Estate had sued MetLife. I had an assistant check with the Court and was advised that there was not a record of such a filing."), *c.f.* Aff. K. Mihara, ¶¶ 10, 11, Exs. "7" and "22."

[5] *See* Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 14. *See also* Def's Opposition to Plaintiffs' Motion for Summary Judgment, p. 11.
[6] *See* Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 17-19.

Again, in yet another filing, Defendants do not parse out how Plaintiffs' attorney's willingness to help out a family who had just lost their only son, *pro bono*, up until negotiations with their insurer reached intolerable levels, and waiting well after the statutory time limit had expired - to the point where a complaint was necessary, is any reason to stiff Plaintiffs' attorney out of a reasonable attorney's fee and give a windfall to an insurer who failed to act in a timely manner to come to a coverage decision. Defendants don't have such an argument because such an argument simply cannot be made under Idaho law.

Plaintiffs would ask the Court to note the contradictory arguments forwarded by Defendants, and the way the defense of this case has been handled when coming to decision on a reasonable attorney's fee. Plaintiffs shudder to think what litigation would be like if hundreds of thousands of dollars, or more, were at stake and liability for the underlying claims was still being contested.

It is for the foregoing reason why this Court should grant Plaintiffs' summary judgment on the issue of entitlement to a reasonable attorney's fee in this case.

F. **The public policy of encouraging attorneys to handle pro bono cases demands a reasonable award in this case.**

It is well known in the legal community that the bench and the public desire access to justice. This access comes in the form of legal counsel. It is also well known in the legal community that cases such as these rarely, if at all, receive pro bono treatment by attorneys. To allow Defendants in this case to prevail on such paltry and insulting arguments, arguments not based on the law, but based on a twisted and contorted version of 'insurance company equity' would be to send a message to the bar that no good deed goes unpunished and that despite legitimate entitlement to statutory attorney's fees the court will turn their backs on attorney's

who donate their services to members of the public who sustain catastrophic loss.[7] Plaintiffs' counsel should not have to forego a justly earned fee just because Defendants could not figure out the terms of their own policies.

It is for the foregoing reason why this Court should grant Plaintiffs' summary judgment on the issue of entitlement to a reasonable attorney's fee in this case.

CONCLUSION

It is for the foregoing reasons why this Court should grant Plaintiffs' motion for summary judgment.

DATED this 26th day of May, 2010.

Kinzo H. Mihara
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May, 2010, I caused a true, accurate, and correct copy of the foregoing document to be served on the Defendants attorney via the method indicated below:

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Kinzo H. Mihara

[7] Guidance is actually given by the courts to attorneys who receive statutory attorney's fees in pro bono cases. *See* I.R.P.C. 6.1, commentary note 4. (Attached hereto pursuant to the Court's scheduling order of May 20, 2010).

Idaho Rules

IDAHO RULES OF PROFESSIONAL CONDUCT - IRPC Effective 7-1-2004

Public Service

Includes all amendments throught June 5, 2006

Rule 6.1. VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Commentary

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Idaho State Bar urges all lawyers to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as the Idaho Volunteer Lawyers Program, homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render

free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
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CLERK DISTRICT COURT
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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-677 **SUR-REPLY TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES PURSUANT TO I.C. § 41-1839**

COME NOW, the Defendants in the above-entitled cause of action, by and through their undersigned counsel, and respectfully submit the following Sur-Reply to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839.

I. STATEMENT OF FACTS

Plaintiffs' filed their Motion and Memorandum for Attorney's Fees Pursuant to I.C. § 41-1839 on February 9, 2010. (*See*, Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839 ("Plaintiffs' Motion for Attorney's Fees"), filed February 9, 2010; *see, also*, Memorandum in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, filed February 9, 2010) The following correspondence between Plaintiffs' Attorney, Kinzo H. Mihara, and Defendants' Attorney, William J. Schroeder, is relevant to Plaintiffs' argument that they are entitled to attorney's fees under Idaho Civil Rule 54 for Defendants' failure to timely object:

- A February 12, 2010 letter from Mr. Mihara to Mr. Schroeder discussing a potential hearing date on Plaintiffs' Motion for Attorney's Fees, which states, in pertinent part: "Should we need to set a hearing on this matter, I will understand, however [I] would ask that we meet and confer regarding our mutual schedules prior to setting a hearing date." (*See*, Supplemental Affidavit of William J. Schroeder in Support of Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839 ("Supp. Aff. of Schroeder"), filed May 26, 2010, at ¶ 5, Exhibit A)

- A February 22, 2010 e-mail from Mr. Mihara to Mr. Schroeder, which states, in pertinent part: "Please let me know whether you want me to set the pending motion for attorney's fees for hearing or if you want to discuss the matter further." (Ibid., at ¶ 6, Exhibit B)

- A February 25, 2010 letter from Mr. Mihara to Mr. Schroeder, which states, in relevant part: "[h]ow much time do you think that you will need to research the attorney's fees issue? If you would like to discuss, please do not hesitate to contact me, otherwise, I plan on setting the matter for hearing. I would like to get the attorney's fees issue resolved sooner rather than later, however, I am willing to give you adequate time to research the law and confer with your client." (Ibid., at ¶ 7, Exhibit C)

- A March 16th and 17th, 2010 e-mail exchange between Mr. Mihara and Mr. Schroeder, which states, in pertinent part:

> Mr. Schroeder [March 16, 2010, 7:27 AM]: "On the attorney fees issue, we probably need to have that issue resolved by the Court. I suggest we coordinate our schedules and find a date convenient for both of us."
>
> Mr. Mihara [March 16, 2010, 9:07 AM]: "As to the attorney's fees, I believe we are set to discuss the timing of setting the hearing tomorrow

morning along with any necessary discovery. Does 8:30am work for you again? If not, please let me know."

. . .

Mr. Mihara [March 17, 2010, 1:02 PM]: "Also, per our conversation this morning, I have talked with Jeannie over at Judge Mitchell's chambers and we are set to go at 3:30pm on Wednesday, May 12, 2010." (Ibid., at ¶ 8, Exhibit D)

On March 26, 2010, Plaintiffs' noted their Motion for Attorney's Fees for an evidentiary hearing on May 12, 2010. (*See*, Note for Hearing, filed March 26, 2010) The parties then proceeded with discovery. (*See, e.g.*, Defendants' Notice of Service of Discovery Requests, filed April 6, 2010, *see, also*, Plaintiffs' Notice of Service of Plaintiffs' First Request for Discovery to Defendants, filed April 8, 2010) Despite prior representations, on April 6, 2010, Plaintiffs' counsel advised Mr. Schroeder that he was taking the position that, under Idaho Civil Rule 54, a response to Plaintiffs' Motion for Attorney's Fees was past due. In response, on April 12, 2010, Mr. Schroeder sent an e-mail to Mr. Mihara discussing Plaintiffs' position that they are entitled to attorney's fees under Idaho Civil Rule 54:

> I reviewed IRCP 54(e)(5) and 54(e)(6) that your referenced in our call on 4/6. As I expected, they deal with post-judgment issues. Moreover, under 54(d)(5), after a judgment has been entered, the request needs to be made as part of a Memorandum of Costs. As you are aware, a judgment has not been entered in this case and the issue of whether your clients are entitled to attorney's fees has never been adjudicated.
>
> Putting to one side the fact that IRCP 54 is inapplicable since a judgment has not been entered, your new position is inconsistent with the request in your motion, your numerous written and oral representations to me, your Notice of Hearing and the discovery request you served.
>
> . . .
>
> One final note, please let me know if, after reviewing the matter further, you intend to make the IRCP Rule 54 argument. If you do, I want to get that issue

> before the Court as soon as possible. Also, given the above, I will be filing a counter motion if an IRCP Rule 54 argument is made.

(*See*, Supp. Aff. of Schroeder, at ¶ 10, Exhibit F)

Given the above, Defendants' Counsel advised Mr. Mihara that in his opinion Rule 54 dealt with post-judgment proceedings and was inapplicable to the case at hand, as no judgment had been entered. (Ibid.) Moreover, since this was the first time Mr. Mihara had raised this issue, and because it was inconsistent with his prior representations and the pleadings he filed, Defendants' Counsel expressed his surprise and disappointment in his newly adopted position. (Ibid.) On April 29, 2010, Plaintiffs' filed their Amended Notice of Hearing, resetting the evidentiary hearing on Plaintiffs' Motion for Attorney's Fees for June 2, 2010. (*See*, Amended Notice of Hearing, filed April 29, 2010) In doing so, Plaintiffs reserved the right to introduce evidence and/or call witnesses at the evidentiary hearing. (Ibid.)

Defendants filed their Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839 on May 10, 2010. (*See*, Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, filed May 10, 2010) The Defendants were served with Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839 on May 17, 2010 (hereinafter "Plaintiffs' Reply"). (*See*, Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839 ("Plaintiffs' Reply"), filed May 17, 2010) Plaintiffs' Reply inappropriately raises new issues, arguments and documents in responsive pleadings.

II. ARGUMENT

Initially, Plaintiffs untimely raise new issues, arguments and documents for the first time in Plaintiffs' Reply, including, but not limited to, reference to an Idaho Federal Bankruptcy case,

an argument under Idaho Civil Rule 54 and repeated citations to the Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion for Summary Judgment (hereinafter "Affidavit of Mihara"), including over 100 pages of exhibits attached thereto. Such issues, arguments and documents should be stricken as untimely for being raised, in the first instance, in Plaintiffs' Reply.

Assuming, *arguendo*, that the Court is inclined to consider Plaintiffs' newly raised issues, arguments and documents, they nonetheless do little to support Plaintiffs' position. First, Plaintiffs' reliance on the Idaho Federal Bankruptcy Case In re Darice Jones, 401 B.R. 456 (Bkrtcy. D. Idaho 2009) is misplaced, as that case is distinguishable from the present. Second, Mr. Mihara's claim that he informed Defendants' Attorney Kathleen Paukert that he had filed a Civil Complaint prior to settlement is factually incorrect.[1] And, finally, Idaho Civil Rule 54 is inapplicable to the case at hand because it applies to post-judgment proceedings and is inconsistent with prior representations made by Plaintiffs' Counsel.

A. Plaintiffs Should be Prohibited From Untimely Raising New Issues, Arguments and Documents in Their Reply Briefing.

Plaintiffs have attempted to circumvent long-standing Idaho common law by untimely raising new issues, arguments and documents for the first time in Plaintiffs' Reply. (*See*, Plaintiffs' Reply) Particularly, Plaintiffs make an argument under Idaho Civil Rule 54 and reference an Idaho Federal Bankruptcy case, In re Jones, 401 B.R. 456 (Bkrtcy. D. Idaho 2009), for the first time in Plaintiffs' Reply. (ibid.) Furthermore, Plaintiffs make repeated citations in their Reply to the Affidavit of Mihara, including over 100 pages of attached exhibits attached

[1] At a minimum, a question of fact exists on this point.

thereto. (Ibid.) From the outset, such reference is inappropriate because the Affidavit of Mihara is in support of Plaintiffs' Motion for Summary Judgment, not Plaintiffs' Motion for Attorney's Fees. (Ibid.) Moreover, the Affidavit of Mihara has well over 100 pages of attached exhibits – that raise new issues, arguments and documents at the eleventh hour.

These actions circumvent long standing Idaho common law, which prohibits arguments and issues being raised for the first time in reply briefing. *See. e.g.*, Struhs v. Protection Technologies, Inc., 133 Idaho 715, 722, 992 P.2d 164 (1999) ("Because [Plaintiff] raised this issue only in his reply brief, this Court will not address it."), *citing* Hernandez v. State, 127 Idaho 685, 687, 905 P.2d 86 (1995); State v. Raudebaugh, 124 Idaho 758, 763, 864 P.2d 596 (1993); *see, also,* State v. Gamble, 146 Idaho 331, 336, 193 P.3d 878 (App. 2008) ("[I]ssues raised for the first time in the reply brief will ordinarily not be addressed by this Court."), *citing* State v. Killinger, 126 Idaho 737, 740, 890 P.2d 323 (1995); *see, also,* Henman v. State, 132 Idaho 49, 51, 966 P.2d 49 (App. 1998); Myers v. Workmen's Auto Ins. Co., 140 Idaho 495, 508, 95 P.3d 977 (2004).

In light of Plaintiffs new issues, arguments and documents, raised for the first time in Plaintiffs' Reply, Defendants request that this Court strike Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, together with the Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion for Summary Judgment, in their entirety. In the alternative, Defendant requests that the Court consider this Sur-Reply in response to the new issues raised by Plaintiffs.

B. Response to Plaintiffs' New Issues.

1. *The United States Bankruptcy Case In re Darice Jones, 401 B.R. 456 (Bkrtcy. D. Idaho 2009), Cited by Plaintiffs for the First Time in Plaintiffs' Reply, is Distinguishable From the Present Case.*

In an effort to overextend the scope of the attorney's fees provision under Idaho Code § 41-1839, Plaintiffs raise, for the first time in Plaintiffs' Reply, the United States Bankruptcy case In re Darice Jones, 401 B.R. 456 (Bkrtcy. D. Idaho 2009), and argue that, under the Bankruptcy Court's decision, "settlement within the context of a contested claim results in a finding of the 'amount justly due.'" (*See*, Plaintiffs' Reply, p. 4) The Bankruptcy Court's decision is distinguishable from the present case on multiple levels. At the outset, contrary to Plaintiffs' claim, coverage was not contested in that case. The insured was injured in an automobile accident caused by the negligence of another driver on March 3, 2004, incurring $60,000 in medical expenses as a result of injuries suffered in the accident. In re Darice Jones, 401 B.R. at 460. The insured sued the negligent driver and recovered the negligent driver's policy limit of $25,000. Ibid. Thereafter, on August 2, 2007, the insured filed a chapter 7 bankruptcy petition. Ibid. On November 14, 2007, the Court approved the trustee's employment of counsel to represent the insured and trustee in pursuing collection of damages from the insured's March 3, 2004 automobile accident. Ibid.

The insured was undisputedly covered by a $25,000 underinsured motorist ("UIM") coverage policy, as well as medical payment benefits in the amount of $10,000. Ibid., at 460-61. In fact, the insurer never disputed that the insured's damages exceeded the negligent driver's policy limits. Ibid., at 465. On March 27, 2008, the insured's counsel sent the insurer a letter containing various documents supporting UIM benefits pursuant to the policy. Ibid. at 461. On

June 12, 2008, the insured, through her counsel, sent the insurer a demand letter for payment of the $25,000 in UIM benefits and the $10,000 in medical payments, as coverage was undisputed. Ibid. This letter also requested approval for the insured to accept payment of the negligent driver's $25,000 policy limit. Ibid. When the insurer failed to pay, on July 15, 2008, the insured filed a lawsuit against the insurer under the UIM coverage. Ibid. In response to the lawsuit, on July 25, 2008, 42 days after the June 12, 2008 letter and 10 days after the lawsuit was commenced, the insurer tendered $35,000 to the insured, which she accepted as full payment. Ibid. On August 4, 2008, the insured filed an amended complaint, seeking an award of attorney's fees pursuant to I.C. § 41-1839. Ibid.

Those facts are distinguishable from the present in several respects. Unlike the insured in Jones, the Plaintiffs in this case agreed to sign a full release of their claims against MetLife as part of a compromise settlement over a coverage dispute that, if litigated, may have resulted in a determination that no sum was owing. Along these lines, Plaintiffs' citation to a quote reiterated in Jones from the Idaho Supreme Court case of Martin v. State Farm Mut. Auto Ins. Co., 138 Idaho 244, 248, 61 P.3d 601 (2002) is telling of this distinction:

> If the amount tendered by the insurer is unconditionally accepted by the insured, then it will represent the "amount justly due" and the case ends.

Notably, in Jones, the Court found the insurer paid the $35,000 "unconditionally" to the insured, which "she accepted as the amount justly due to her for benefits under the policy." Ibid., at 467. As the Court noted, "this was the amount she sought to collect from Defendant [insurer] from the beginning." Ibid., at 467. Moreover, there was no "condition" to payment. Ibid. In fact, Plaintiffs simply amended their Complaint seeking attorney's fees and costs after the insurer tendered the $35,000. Ibid., at 461.

Here, settlement was predicated on Plaintiffs "conditionally" signing a full release of their claims – which they agreed to do so. Stated another way, in this case, the parties entered a compromise settlement, neither side admitting liability nor acknowledging that the settlement amount was "justly due" to the Plaintiffs. As here, Jones may well have turned out differently had payment of the $35,000 been conditioned on the insured signing a full release of her claims.

In addition, unlike the lawsuit in Jones, in which the complaint was filed and served with the insurer's knowledge prior to settlement, here the Plaintiffs filed the lawsuit, settled the case, and *then* disclosed the Complaint to MetLife's counsel. Were the Defendants in this matter seeking to settle with the Plaintiffs in response to the lawsuit, there might be an argument that attorney's fees are applicable. However, that is not the case before this Court. Likewise, as discussed above, in Jones, there was no dispute as to coverage. In contrast, in this case, although not disputing coverage under the Initial Claim, coverage under the Additional Claims was disputed, thus requiring the assistance of coverage counsel, research by counsel and the submission of an additional proof of loss.[2]

To find now that the Plaintiffs are entitled to attorney's fees would create a dangerous precedent beyond that contemplated by the Idaho Legislature. In practical effect, it would permit future insured's to file lawsuits without service, settle disputed coverage claims, and then serve the lawsuit on the insurer for attorney's fees following settlement. Ultimately, if litigated, the Court may have determined that there was no coverage under the Parents' Policies and, therefore, no money owing. However, instead, the Defendants worked with their insureds to find a possible alternative theory for coverage and then entered a compromised settlement of disputed

[2] The issue of when proof of loss is sufficient is ordinarily a question of fact for the jury. Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 142 Idaho 589, 130 P.3d 1127 (2006).

claims concerning coverage. It should not be later punished for those efforts by virtue of Plaintiffs' tactical nondisclosure of the pendency of the current lawsuit.

2. ***Mr. Mihara's Claim That he Informed Ms. Paukert of the January 26, 2010 Lawsuit Prior to Settlement is Incorrect.***

In an attempt to avoid the implications of his own disappointing behavior, Mr. Mihara contends that he informed Defendants' Attorney Kathleen Paukert that he had filed a Complaint on behalf of Plaintiffs against Defendants on January 26, 2010 prior to settlement. Initially, Defendants were unaware Plaintiffs had filed a Complaint prior to settlement. (*See*, Affidavit of Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees) ("Aff. of Davis"), filed May 7, 2010, ¶ 7, *see, also,* Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees) ("Aff. of Paukert"), filed April 13, 2010, ¶ 12; Supplemental Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees) ("Supp. Aff. of Paukert"), filed May 7, 2010, ¶ 18)

In making such claim, Mr. Mihara states that he left Ms. Paukert a message on her phone and sent her an e-mail on January 26, 2010, the same day the Complaint was filed, informing her of the same. (Plaintiffs' Reply, p. 6) Ms. Paukert never received a voice message informing her that a Complaint had been filed by Plaintiffs, and the e-mail asserted by Mr. Mihara as informing Ms. Paukert of the lawsuit fails to do the same. Instead, it states, in relevant part:

> **Subject:** RE: Holland v. MetLife (Unfiled); Demand and Statement of Legal Position
>
> Kathy: Hope all is well. I have left a voice message on your machine. Please advise as to your interpretation of the dynamics of the current situation. I called Daneice Davis without results. Regards Kinzo

(*See*, Affidavit of Mihara, ¶ 11, Exhibit 7) Also, notably, paragraph 11 of Mr. Mihara's Affidavit states: "It was the email dated January 26, 2010, (3:00pm) (Exhibit "7" above) that memorializes the call I made to Ms. Paukert to apprise her of the fact that I had just filed a lawsuit against MetLife. As noted by the email correspondence, I left her a message." (Ibid.)

From the outset, besides the fact that no voice message was left with Ms. Paukert informing her of the same, the email does not reference a lawsuit in the heading or the body, nor did Mr. Mihara attach the Complaint, a common professional courtesy. Moreover, Mr. Mihara's Affidavit claims that he had just filed the lawsuit, and that he subsequently sent an e-mail informing Ms. Paukert of the same – yet, peculiarly, the subject line of the email uses the language "Unfiled,"[3] despite the lawsuit already being filed. (Ibid.) In addition, no cause number was provided. (Ibid.) Also, Mr. Mihara failed to make any mention of this lawsuit in a January 27, 2010 telephone conversation he had with Daneice Davis, the adjuster, despite the lawsuit being filed the prior day. (*See*, Aff. of Davis, ¶ 7)

Instead of taking responsibility for his disappointing behavior, Mr. Mihara claims – "It is not Plaintiffs' responsibility and/or duty to meet and confer with Defendants prior to taking action in this case" – apparently, standing by his behavior of withholding that the lawsuit had been filed, reaching a compromise settlement of disputed claims, and then informing Ms. Paukert that a lawsuit had been filed thereafter.

[3] Notably, Plaintiffs' Counsel used the term "Unfiled" in his caption on correspondence dating back to at least January 14, 2010. (*See*, Affidavit of Mihara, ¶¶ 10-11, Exhibit 7)

3. Idaho Civil Rule 54 is Inapplicable to This Case.

(a) Plaintiffs' Argument Under Idaho Civil Rule 54 is Inconsistent With Plaintiffs' Counsel's Prior Representations.

At the outset of this case, Plaintiffs' Counsel, Mr. Mihara, represented that Plaintiffs' Motion for Attorney's Fees would be scheduled for a date convenient to both counsel, making the following statements in correspondence:

- February 12, 2010 - "Should we need to set a hearing on this matter, I will understand, however [I] would ask that we meet and confer regarding our mutual schedules prior to setting a hearing date." (*See*, Supp. Aff. of Schroeder, ¶ 5, Exhibit A)

- February 22, 2010 - "Please let me know whether you want me to set the pending motion for attorney's fees for hearing or if you want to discuss the matter further." (Ibid., at ¶ 6, Exhibit B)

- February 25, 2010 – "How much time do you think that you will need to research the attorney's fees issue? If you would like to discuss, please do not hesitate to contact me, otherwise, I plan on setting the matter for hearing. I would like to get the attorney's fees issue resolved sooner rather than later, however, I am willing to give you adequate time to research the law and confer with your client." (Ibid., at ¶ 7, Exhibit C)

- March 16, 2010 – "As to the attorney's fees, I believe we are set to discuss the timing of setting the hearing tomorrow morning along with any necessary discovery. Does 8:30am work for you again? If not, please let me know." (Ibid., at ¶ 8, Exhibit D)

- March 17, 2010 – "Also per our conversation this morning, I have talked with Jeannie over at Judge Mitchell's chambers and we are set to go at 3:30pm on Wednesday, May 12, 2010." (Ibid.)

These representations included proceeding with discovery. (*See, e.g.*, Defendants' Notice of Service of Discovery Requests, *see, also*, Plaintiffs' Notice of Service of Plaintiffs' First Request for Discovery to Defendants)

Despite these prior representations, on April 6, 2010, Plaintiffs' counsel once again took a disappointing stance, advising Defendants' Counsel of his position that, under Idaho Civil Rule 54, a response to Plaintiffs' Motion for Attorney's Fees was past due. In response, on April 12,

2010, Defendants' Counsel sent an e-mail to Mr. Mihara informing him that in his opinion Idaho Civil Rule 54 was inapplicable and expressing disappointment with this newly adopted position -- stating in pertinent part: "Putting to one side the fact that IRCP 54 is inapplicable since a judgment has not been entered, your new position is inconsistent with the request in your motion, your numerous written and oral representations to me, your Notice of Hearing, and the discovery request you served." (*See*, Supp. Aff. of Schroeder, at ¶ 10, Exhibit F)

In light of the preceding, Plaintiffs' counsel's argument under Idaho Civil Rule 54 is disappointing and misleading. Moreover, Defendants' Counsel had a right to rely upon such representations; consequently, Plaintiffs should be prohibited from claiming they are entitled to attorney's fees under Idaho Civil Rule 54.

(b) Plaintiffs' Actions are Inconsistent with Idaho Civil Rule 54.

On March 26, 2010, Plaintiffs' noted their Motion for Attorney's Fees for an evidentiary hearing scheduled for May 12, 2010. (*See*, Note for Hearing) The parties then proceeded with discovery. (*See, e.g.*, Defendants' Notice of Service of Discovery Requests, *see, also*, Plaintiffs' Notice of Service of Plaintiffs' First Request for Discovery to Defendants) On April 29, 2010, Plaintiffs' filed their Amended Notice of Hearing, resetting the evidentiary hearing on Plaintiffs' Motion for Attorney's Fees for June 2, 2010. (*See*, Amended Notice of Hearing) In doing so, Plaintiffs reserved the right to introduce evidence and/or call witnesses at the evidentiary hearing. (Ibid.) Under Idaho Civil Rule 7(b)(3), such hearing date triggered the due date for Defendants' responsive pleadings – with responsive briefs due by Defendants seven (7) days prior to the hearing.

Plaintiffs' actions are inconsistent with Idaho Civil Rule 54. Specifically, Idaho Civil Rule 54(d)(5), entitled "Memorandum of Costs," provides, in relevant part:

> At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment . . .

(emphasis added). Thus, Idaho Civil Rule 54, does not contemplate a motion being filed, but instead, the submission of a "memorandum of costs," to which, such costs may include a claim for attorney's fees, allowing timely objection by the opposing party.

Here, instead of filing and serving a "memorandum of costs" on Defendants, Plaintiffs noted their motion for an evidentiary hearing, reserving the right to introduce evidence and/or call witnesses. (*See*, Amended Notice of Hearing) Such actions triggered Defendants' responsive briefing schedule. I.R.C.P. § 7(b)(3). Plaintiffs' actions are not contemplated by this Idaho Civil Rule 54 – namely, Plaintiffs' noted their motion for hearing (rather than submitting a cost memorandum), reserved the right to introduce evidence and/or call witnesses (rather than submitting a cost memorandum and permitting the opposing party to object), and triggered responsive briefing (rather than submitting a cost memorandum and permitting the opposing party to object within fourteen (14) days). In sum, Plaintiffs' actions are inconsistent with the Idaho Civil Rule 54 – essentially, because such Rule is inapplicable to the case at hand. Therefore, Plaintiffs' argument under Idaho Civil Rule 54 fails for the foregoing reasons.

(c) Idaho Civil Rule 54 Does Not Apply Because No Judgment Was Entered.

Even ignoring that Plaintiffs' argument under Idaho Civil Rule 54 was raised for the first time in Plaintiffs' Reply, Idaho Civil Rule 54 is inapplicable to the case at hand. Initially, Idaho

Civil Rule 54 applies to post-judgment issues; consequently, such rule is inapplicable here because no judgment has been entered. Specifically, Idaho Civil Rule 54(e)(6), "Objection to Attorney Fees," states, in pertinent part, that: "[a]ny objection to the allowance of attorney fees, or to the amount thereof, shall be made in the same manner as an objection to costs as provided by Rule 54(d)(6)." Idaho Civil Rule 54(d)(6), "Objection to Costs," states, in relevant part: "[a] party may object to the claimed costs of another party set forth in a memorandum of costs by filing and serving on the adverse parties a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of cost." (emphasis added) Idaho Rule 54(d)(5), "Memorandum of Costs," states: "[a]t any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment." (emphasis added).

Thus, Idaho Civil Rule 54 is inapplicable where no judgment has been entered, as is the case here. Along these lines, in each case cited by Plaintiffs there was a judgment. *See e.g.*, Conner v. Dake, 103 Idaho 761, 761, 653 P.2d 1173 (1982) ("In the proceedings below, Judgment was entered against the appellants . . . "); Fearless Farris Wholesale v. Howell, 105 Idaho 699, 701, 672 P.2d 577 (App. 1983) ("The trial court entered judgment in favor of Fearless Farris"); Farber v. Howell, 111 Idaho 132, 136, 721 P.2d 731 (App. 1986) ("Thus, the Howells had ten days (now fourteen days) following such service to object to the costs and attorney fees awarded in the judgment"); Great Plains Equip. v. N.W. Pipeline, 132 Idaho 754, 759, 979 P.2d 627 (1999) ("The collective amount of the final judgment . . "); Crowley v. Lafayette Life Ins. Co., 106 Idaho 818, 823, 683 P.2d 554 (1984) ("Thereafter . . . the trial court filed its

Memorandum Decision and Judgment"); Operating Eng. Local Union 370 v. Goodwin, 104 Idaho 83, 84, 656 P.2d 144 (App. 1982) ("The judgment, entered the same date as the order . . ."); Ada County High. Dist. v. Acarrequi, 105 Idaho 873, 673 P.2d 1067 (1983) ("This is an appeal from only that portion of a judgment awarding attorneys' fees and costs . . . "); Camp v. Jiminez, 107 Idaho 878, 693 P.2d 1080 (App. 1984) ("The district court entered a summary judgment . . . ").

Therefore, instead of addressing the merits of this case, and despite Mr. Mihara's prior representations, Plaintiffs now argue that they are entitled to attorney's fees pursuant to Idaho Civil Rule 54 for Defendants failure to answer within fourteen (14) days from any one of the following dates – service of this motion, initial appearance, Defendants' initial motion, and Defendants' Answer. (*See,* Plaintiffs' Reply, pp. 13-15) Such argument is erroneous in several respects. Initially, Plaintiffs' counsel orally and verbally represented that Plaintiffs' Motion for Attorney's Fees would be scheduled for a date convenient to both counsel, and yet now takes the incongruous position that, under Idaho Civil Rule 54, Defendants' response to Plaintiffs' Motion for Attorney's Fees is past due.

Given the foregoing, Plaintiffs' Counsel's argument under Idaho Civil Rule 54 is disappointing and misleading. In sum, Idaho Civil Rule 54 applies to post-judgment issues and is inapplicable to the case at hand.

III. CONCLUSION

For the reasons stated above, together with those set forth in Defendants' Response to Plaintiffs' Motion for Attorney's Fees, Defendants request that Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839 be denied.

DATED this 26 day of May, 2010.

PAINE HAMBLEN LLP

By: _____
William J. Schroeder, ISB No. 6674
Patrick E. Miller, ISB No. 1771
Attorneys for Defendants

I:\SPODOCS\00199\00153\PLEAD\811410

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May, 2010, I caused to be served a true and correct copy of the foregoing **SUR-REPLY TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES PURSUANT TO I.C. § 41-1839** to the following:

Kinzo H. Mihara
Attorney at Law
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83816-0969

✓ DELIVERED
____ U.S. MAIL
____ OVERNIGHT MAIL
____ TELECOPY (FACSIMILE)
____ E-MAIL

Debbie Miller

I:\RPODOCS\00199\00152\PLEAD\811410

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
FILED:
#575 LG
2010 MAY 26 AM 9:52

CLERK DISTRICT COURT
DEPUTY

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Attorney for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-677 **SUPPLEMENTAL AFFIDAVIT OF WILLIAM J. SCHROEDER IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES PURSUANT TO I.C. § 41-1839**

STATE OF WASHINGTON)
:ss
COUNTY OF SPOKANE)

WILLIAM J. SCHROEDER, being first duly sworn on oath, deposes and states that:

That on May 10, 2010, I provided an Affidavit concerning this matter and, in that Affidavit, there were two paragraphs. To avoid confusion, I begin this Supplemental Affidavit with paragraph No. 3.

3. I am over the age of eighteen and competent to testify.

4. I am licensed to practice law in both Idaho and Washington.

5. A true and correct copy of Kinzo Mihara's correspondence dated February 12, 2010, addressed to me is attached as **Exhibit A**.

6. A true and correct copy of Kinzo Mihara's February 22, 2010 e-mail to me is attached as **Exhibit B**.

7. A true and correct copy of Kinzo Mihara's correspondence dated February 25, 2010, addressed to me is attached as **Exhibit C**.

8. True and correct copies of e-mails between me and Kinzo Mihara dated March 16, 2010 and March 17, 2010, are attached as **Exhibit D**.

9. A true and correct copy of Plaintiffs' Notice of Hearing regarding Plaintiffs' pending motion seeking attorney's fees filed March 26, 2010, is attached as **Exhibit E**.

10. A true and correct copy of my e-mail to Kinzo Mihara dated April 12, 2010 is attached as **Exhibit F**.

By: _____
William J. Schroeder

SUBSCRIBED AND SWORN to before me this 26 day of May, 2010, by WILLIAM J. SCHROEDER.

DEBRA K. MILLER NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES NOV. 19, 2011

_____
NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My commission expires: 11-19-2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May, 2010, I caused to be served a true and correct copy of the foregoing **SUPPLEMENTAL AFFIDAVIT OF WILLIAM J. SCHROEDER IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES PURSUANT TO I.C. § 41-1839**, to the following:

Kinzo H. Mihara
Attorney at Law
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83816-0969

✓ DELIVERED
____ U.S. MAIL
____ OVERNIGHT MAIL
____ TELECOPY (FACSIMILE)
____ E-MAIL

Debbie Miller

I:\Spalding\00199\00153\PLEAD\00810883.DOC

Kinzo H. Mihara, Esq.
424 Sherman Avenue, P.O. Box 969
Coeur d'Alene, Idaho 83816-0969
Ph. (208) 667-5486
Fax (208) 667-4695

February 12, 2010

VIA PAINE HAMBLEN, LLP COURIER

Mr. William J. Schroeder, Esq.
PAINE HAMBLEN, LLP
717 W. Sprague Ave.
Suite 1200
Spokane, WA 99201

Re: Estate of Benjamin C. Holland, et al. v. MetLife Auto & Home, et al.
Case No. CV-10-0677

Dear Mr. Schroeder:

Please let this letter confirm receipt of a check from your client in the amount of $200,000 made payable to my clients.

To the extent that I am now in receipt of your client's tender, I will have my client review and execute the full release as agreed upon. It is my understanding that Kathleen Paukert, Esq. is preparing a release that she wishes to present to my clients. I have already transmitted a draft copy of a full release that I have prepared to her, a copy of which is enclosed. Should Ms. Paukert's release include language concerning indemnity, attorney's fees, or any other matters other than a "full release," I will instruct my clients to sign the release I have sent Ms. Paukert and consider my clients' obligation to yours complete.

As it has taken your clients nine (9) days to present my clients with a check following the settlement of this matter, please give my clients nine (9) calendar days to forward a full release to your clients. I anticipate having said release delivered to your offices no later than Monday February 22, 2010. Pursuant to my email to Daneice Davis of MetLife dated February 4, 2010, I will forward an electronic copy of the release along with proof of mailing prior to presenting the check to my clients for their negotiation. Do you wish me to send the electronic copy of the release and mailing to Ms. Davis, or to yourself? Please advise. Should you have any issues with the exchange of documents as proposed, please let me know immediately.

It is my further understanding that the only outstanding issue between our clients is the attorney's fees issue. As you will see from the material enclosed, I have filed a motion, memorandum, and affidavit in support of my claim to attorney's fees, however, I

look forward to working with you to resolve that issue short of Court involvement. Should we need to set a hearing on this matter, I will understand, however would ask that we meet and confer regarding our mutual schedules prior to setting a hearing date.

In addition, per our discussion on the telephone yesterday and your request for a copy of the filings in this case, enclosed please find a copy of all of the filings in this case to date. Further enclosed are documents that I recently sent to Ms. Paukert. Specifically, enclosed are: (1) Complaint, (2) Summons, (3) Motion for Attorney's Fees, (4) Memorandum in Support of Motion for Attorney's Fees, (5) Affidavit in Support of Motion for Attorney's Fees, (6) Letter to K. Paukert, dated 2/9/10, (7) Draft Joint Motion and Stipulated Order to Dismiss, and (8) Draft Full Release.

I trust that MetLife's file on this matter is complete, however, should you run into an issue with regards to a document sent or received that may not be in your file, please advise and I will check my files and make copies as requested.

As always, should you have any other questions or concerns, please do not hesitate to contact me.

Regards,

Kinzo H. Mihara

Cc: Greg and Kathy Holland
Enclosures (as noted)

From: Kinzo Mihara [kmihara@indian-law.org]
Sent: Monday, February 22, 2010 11:33 AM
To: William J. Schroeder
Cc: hollank@hotmail.com
Subject: RE: Holland Estate - Revised Draft ROAC
Attachments: 100222.Release.MetLife.DOC

Bill:

I have made the following changes to the release that you sent me:

* I have inserted the following language pursuant to our telephone call:

"IT IS FURTHER UNDERSTOOD AND AGREED that Metropolitan Property and Casualty Insurance Company, and MetLife Auto and Home waives its subrogation interests in this matter."

I also changed the signatures of Greg and Kathy to read "Gregory" and "Kathleen" and then put their abbreviated names after in brackets, i.e., (Greg). "as the Personal Representative for the Estate of Benjamin Holland" at the end of the signature line and deleted the last signature – I believe that signing twice would be duplicative, however, if you want, we can reinsert. Both Greg and Kathy are co-personal representatives of the Estate of Benjamin Holland with the power to bind the estate. I believe that MetLife already has a copy of the PR paperwork, but if you would like a copy I can forward via fax.

Please reply to this email and let me know if the attached release meets with your approval. If it does, I plan on discussing with my clients and anticipate that they will sign. I will have my clients execute the release in duplicate, one original for your client and one for my clients. Please also give me approval to disburse the checks in my possession once the attached document is fully executed.

Please also forward the draft Stipulated Motion to Dismiss at your convenience. Please also let me know whether you want me to set the pending motion for attorney's fees for hearing or if you want to discuss the matter further.

I thank you for your consideration and attention in this matter.

R/

Kinzo

received 2/26/10

Kinzo H. Mihara, Esq.
424 Sherman Avenue, P.O. Box 969
Coeur d'Alene, Idaho 83816-0969
Ph. (208) 667-5486
Fax (208) 667-4695

February 25, 2010

VIA FACSIMILE: (509) 838-0007
VIA USPS

Mr. William J. Schroeder, Esq.
PAINE HAMBLEN, LLP
717 W. Sprague Ave.
Suite 1200
Spokane, WA 99201

Re: Estate of Benjamin C. Holland, et al. v. MetLife Auto & Home, et al.
Case No. CV-10-0677

Dear Mr. Bill Schroeder:

Enclosed is an advanced copy of the executed, signed release, original letter and enclosures to follow via USPS. With this submission, I believe that my clients have complied with all of the settlement terms.

Also enclosed is a signed motion to dismiss. To that end, how much time do you think that you will need to research the attorney's fees issue? If you would like to discuss, please do not hesitate to contact me, otherwise, I plan on setting the matter for hearing. I would like to get the attorney's fees issue resolved sooner rather than later, however, I am willing to give you adequate time to research the law and confer with your client.

As always, should you have any other questions or concerns, please do not hesitate to contact me.

Regards,

K. H. M.

Kinzo H. Mihara

Cc: Greg and Kathy Holland
Enclosures (as noted)

From: Kinzo Mihara [mailto:kmihara@indian-law.org]
Sent: Wednesday, March 17, 2010 1:02 PM
To: William J. Schroeder
Subject: RE: Holland/ MetLife

Bill:

Thanks for the speedy reply.

Attached please find a draft stipulation for the upcoming hearing on attorney's fees. Please feel free to give me a call to discuss.

Also, per our conversation this morning, I have talked the Jeannie over at Judge Mitchell's chambers and we are set to go at 3:30pm on Wednesday, May 12, 2010.

Please feel free to let me know if you have any further questions or concerns.

Regards,

Kinzo

From: William J. Schroeder [mailto:william.schroeder@painehamblen.com]
Sent: Wednesday, March 17, 2010 11:40 AM
To: Kinzo Mihara
Subject: RE: Holland/ MetLife

Kinzo –

Thanks for the heads up. Feel free to call the MetLife representative to work out the 1099 issue.

Regards,
Bill

From: Kinzo Mihara [mailto:kmihara@indian-law.org]
Sent: Wednesday, March 17, 2010 11:15 AM
To: William J. Schroeder
Subject: RE: Holland/ MetLife

Bill –

Just received a call from a "Barbara" (x3867) from MetLife regarding the 1099 issue. I advised her that my clients were currently engaged in litigation with MetLife and I was working through you on this issue. If you do not have a problem, I will call her back directly and work through the 1099 issue with her – I believe that all she needs is some

information, but did not get to that as I advised her that I wanted to get direction from you before speaking with her about specifics. Please advise.

Regards.

Kinzo

From: William J. Schroeder [mailto:william.schroeder@painehamblen.com]
Sent: Tuesday, March 16, 2010 9:48 AM
To: Kinzo Mihara
Subject: RE: Holland/ MetLife

Will do - Bill

From: Kinzo Mihara [mailto:kmihara@indian-law.org]
Sent: Tuesday, March 16, 2010 9:07 AM
To: William J. Schroeder
Subject: RE: Holland/ MetLife

Bill:

Per our conversation this am, please have MetLife make the 1099 out to: The Estate of Benjamin C. Holland. I believe that the company already has the Tax ID number, but if not, the number is 27-6316986. His home is sold, so please use Greg and Kathy's address on Holland Road.

As to the attorney's fees, I believe that we are set to discuss the timing of setting the hearing tomorrow morning along with any necessary discovery. Does 8:30am work for you again? If not, please let me know.

Talk to you tomorrow.

Regards,

Kinzo

From: William J. Schroeder [mailto:william.schroeder@painehamblen.com]
Sent: Tuesday, March 16, 2010 7:27 AM
To: kmihara@indian-law.org
Subject: Holland/ MetLife

Kinzo –

Sorry I missed your call yesterday. On the 1099-Misc. issue, it appears we can get that changed. I would appreciate you sending me an e-mail advising how you want the 1099-Misc. to read.

On the attorney fees issue, we will probably need to have that issue resolved by the Court. I suggest we coordinate our schedules and find a date convenient for both of us.

Regards,
Bill

Kinzo H. Mihara ISB # 7940
Attorney at Law
424 Sherman Ave., Ste. 308
P.O. Box 969
Coeur d'Alene, Idaho 83816-0969
P (208) 667-5486
F (208) 667-4695

Counsel for Plaintiffs

STATE OF IDAHO
COUNTY OF KOOTENAI ss
FILED

2010 MAR 26 PM 4:31

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, And KATHLEEN HOLLAND,	Case No. CV-10-0677
Plaintiffs,	NOTICE OF HEARING
v.	
METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, And METLIFE AUTO & HOME	
Defendants.	

TO: DEFENDANTS, and their attorney of record, WILLIAM J. SCHROEDER, Esq. Paine Hamblen, LLP

Please take notice that a hearing has been set and will be held on Plaintiffs' pending motion seeking attorney's fees pursuant to I.C. 41-1839 before the First District, Kootenai County District Court, Hon. John T. Mitchell presiding, Justice Building, 324 W. Garden

Avenue, Coeur d'Alene, Idho, 83814, on the 12th day of May, 2010 at 3:30 p.m. in the afternoon or as soon thereafter as such motion may be heard. Please be on notice that Plaintiffs may introduce evidence and/or call witnesses in support of said motion at such time as said motion may be heard. Please participate as you deem appropriate.

Respectfully submitted this 26th day of March, 2010.

Kinzo H. Mihara
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Kinzo H. Mihara, certify that I caused the foregoing document to be served upon Defendants via their attorney by serving them with such by the following method this 26th day of March, 2010:

William J. Schroeder, ISB No. 6674
PAINE HAMBLEN LLP
701 Front Avenue, Suite 101
P. O. Box E
Coeur d'Alene, Idaho 83816-0328
Telephone: (208-664-8115
Facsimile: (208) 664-6338

Mailing Address:
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007

[✓] HAND-DELIVERY
[ ] FACSIMILE @ (208) 664-6338
[ ] FACSIMILE @ (509) 838-0007
[ ] VIA FIRST-CLASS MAIL

Kinzo H. Mihara

From: William J. Schroeder
Sent: Monday, April 12, 2010 3:24 PM
To: 'Kinzo Mihara'
Subject: Holland Estate
Attachments: Holland - Answer.pdf

Kinzo –

I reviewed IRCP 54(e)(5) and 54(e)(6) that you referenced in our call on 4/6. As I expected, they deal with post-judgment issues. Moreover, under 54(d)(5), after a judgment has been entered, the request needs to be made as part of a Memorandum of Costs. As you are aware, a judgment has not been entered in this case and the issue of whether your clients are entitled to attorney's fees has never been adjudicated.

Putting to one side the fact that IRCP 54 is inapplicable since a judgment has not been entered, your new position is inconsistent with the request in your motion, your numerous written and oral representations to me, your Notice of Hearing and the discovery request you served.

With respect to the evidentiary hearing you have scheduled for May 12, 2010 at 3:30 p.m., please let me know if you intend to call witnesses as your Notice seems to indicate. If so, please advise how much time has been reserved with the Court. If witnesses will be called, I expect the hearing will take 3-4 hours.

I suggest we attempt to schedule a Status Conference with the Court to discuss how we are proceeding in this matter. I presume that if there are disputed issues of material fact, the Court will provide us with a trial date.

In reviewing this matter further, I would like to work toward preparing extensive nonclusory stipulated facts in hopes that we can avoid a full evidentiary trial on this matter.

One final note, please let me know if, after reviewing the matter further, you intend to make the IRCP Rule 54 argument. If you do, I want to get that issue before the Court as soon as possible. Also, given the above, I will be filing a counter motion if an IRCP Rule 54 argument is made.

Bill

STATE OF IDAHO)
County of KOOTENAI)ss

FILED 1-20-10

AT 8:30 O'Clock A M
CLERK OF DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

THE ESTATE OF BENJAMIN HOLLAND, DECEASED, ET AL,

Plaintiffs,

vs.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, ET AL.

Defendants.

Case No. **CV 2010 677**

MEMORANDUM DECISION AND ORDER: 1) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; 2) DENYING PLAINTIFFS' MOTION FOR ATTORNEY FEES AND 3) GRANTING DEFENDANTS' MOTION TO COMPEL PERFORMANCE UNDER THE SETTLEMENT AND DISMISS THE PLAINTIFFS' MOTION FOR ATTORNEY FEES.

Attorneys: For the Plaintiffs: Kinzo Mihara
For the Defendants: William Schroeder

I. PROCEDURAL HISTORY AND BACKGROUND.

This case involves a settled dispute over insurance coverage, with the issue of attorney fees still in dispute.

On January 26, 2010, plaintiffs Estate of Benjamin Holland, deceased, Gregory Holland and Kathleen Holland (Hollands) filed this action alleging defendants Metropolitan Property and Casualty Insurance and MetLife Auto and Home (MetLife) wrongfully failed to pay the amounts due under an insurance contract within thirty days of being provided proof of loss as required under the contract. Hollands claim three counts of breach of contract, two counts each of negligent and intentional infliction of emotional distress, and three counts of bad faith. Additionally, Hollands claim:

> The Estate of Benjamin Holland, Gregory Holland, and Kathleen Holland are entitled to reasonable attorney's fees pursuant to I.C. § 12-120, § 12-121, § 41-1839, and any other applicable statutory authority and/or judicial doctrine which allows for recovery of attorney fees.

Complaint for Damages, p. 7, ¶ IV.

Benjamin Holland died October 25, 2009, as a result of a motor vehicle accident involving an underinsured motorist. Complaint for Damages, p. 3, ¶¶ 6, 7. Benjamin owned a policy of insurance with MetLife which named Benjamin as the named insured, and had limits of $100,000 per person and $300,000 per accident. *Id.*, p. 2, ¶ 3. Benjamin's parents, Gregory and Kathleen Holland, also owned a policy with MetLife, with limits of $250,000 per person and $500,000 per accident, which extended coverage to relatives who resided in their household. *Id.*, ¶ 4. Hollands claim just prior to the accident and Benjamin's ensuing death, Benjamin was in the process of moving into a house he had bought, but still had a significant portion of his personal property at his parents' home, and Benjamin continued to receive mail at his parents' home. *Id.*, p. 3, ¶ 6.

On February 9, 2010, Hollands filed "Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. 41-1839", an "Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839", and "Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. 41-1839". Hollands claim their counsel are entitled to reasonable attorney's fees in the amount of $60,000, that amount being 30% (under a contingency fee agreement) of the $200,000 ultimately recovered from MetLife, pursuant to I.C. § 41-1839, as a result of MetLife's alleged failure to pay the amount justly due under the insurance contract within thirty days after receiving proof of loss.

On March 2, 2010, the parties stipulated to dismiss all claims, but for the pending

motion for attorney's fees, and the Court entered an Order dismissing all claims with prejudice and without costs to either party on March 3, 2010. MetLife filed "Defendants' Answer and Affirmative Defenses" on April 12, 2010, addressing only the Hollands' claims for attorney's fees under I.C. § 41-1839, because given the Court's dismissal of all other claims with prejudice, "no Answer is required as to paragraphs 1 through 33, as all claims, except for the claim for I.C. § 41-1839 attorney's fees, alleged in paragraph 34 of the Complaint, have been dismissed with prejudice." Defendants' Answer and Affirmative Defenses, p. 2. On April 13, 2010, MetLife filed an "Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiff's Motion for Attorney Fees)." Kathleen Paukert was retained by MetLife on January 8, 2010, to provide a coverage opinion concerning claims made against MetLife by Holland. *Id.*, p. 2, ¶ 3. On April 28, 2010, MetLife filed a "Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees" and a "Memorandum of Authorities in Support of Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees". In addition to the initial Paukert affidavit, on May 7, 2010, MetLife filed in support of its motion to compel the "Supplemental Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)" and the affidavit of "Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)" (Davis), the adjuster assigned by MetLife to the claims made by Benjamin Holland's estate. On May 10, 2010, MetLife filed "Defendants' Response to Plaintiffs' Motion for Attorney's fees Pursuant to I.C. § 41-1839", and the "Affidavit of William J. Schroeder in Support of Defendant's Response to Plaintiffs' Motion for Attorney's Feesw Pursuant to I.C. 41-1839." On May 11, 2010, MetLife filed the "Supplemental Affidavit of Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)". On May 17, 2010, Hollands filed "Plaintiffs' Motion for Summary Judgment,

"Memorandum in Support of Plaintiffs' Motion for Summary Judgment", "Plaintiffs' Response to Defendants' Motion to Compel Performance or Dismiss Plaintiffs' Motion for Attorney's Fees", and "Plaintiffs' Reply to Defendants Response to Plantiffs' Motion for Attorneys' Fees Pursuant to I.C. § 41-1839". On May 20, 2010, Hollands filed "Plaintiffs' Motion to Shorten Time for Hearing on Their Motion for Summary Judgment." In Hollands' motion for summary judgment they argue their entitlement to attorney's fees in the amount of $60,000 or entitlement to fees in general are based on MetLife's failure to have specifically denied the allegations of Hollands in the Complaint. On May 24, 2010, MetLife objected to Hollands' motion to shorten time on their motion for summary judgment because Hollands' chosen course of proceeding did not provide for a briefing schedule as contemplated in the civil rules. Defendants' Response to Plaintiffs' Motion to Shorten Time for Hearing on Plaintiffs' Motion for Summary Judgment, p. 2. However, MetLife assured the Court:

> Defendants' response to Plaintiffs' Motion for Summary Judgment will be filed and served on May 25, 2010. Defendants have no objection to having Plaintiffs' May 17, 2010 Motion for Summary Judgment heard on June 2, 2010, if the Court has sufficient time to hear all of the motions.

Id. On May 25, 2010, MetLife filed "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment" and an "Affidavit of William J. Schroeder in Opposition to Plaintiffs' Motion for Summary Judgment". On May 26, 2010, MetLife filed its "Sur-Reply to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839", and the "Supplemental Affidavit of Mr. Schroeder William J. Schroeder in Support of Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839." On May 26, 2010, Hollands filed "Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment." Finally, on May 28, 2010, MetLife filed "Defendants' Reply Memorandum in Support of Defendants' Motion to Compel

Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney Fees."

In summary, before the Court now are Hollands' motions for attorney's fees, motion to shorten time on summary judgment, and for summary judgment on the issue of entitlement to attorney's fees. Also before the Court is MetLife's motion to compel (actually a motion to enforce a settlement) and motion to dismiss Hollands' motion for attorney's fees. All of these motions are interrelated.

Oral argument was held on June 2, 2010. Due to the extremely large amount of briefing filed a short amount of time before oral argument, the Court was required to take these motions under advisement.

II. STANDARD OF REVIEW.

Under Idaho Rule of Civil Procedure 56, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20,

650 P.2d 657, 661-62 (1982). In the present case, neither party has requested a trial by jury. Accordingly, this Court can reach the most probable inferences from the undisputed material facts before it.

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford,* 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). Subsection (3) of I.R.C.P. 54 obligates the Court to consider factors (A) through (K) in determining an amount of fees through the use of mandatory "shall" language. The Rule requires the District Court to consider all eleven factors plus any others that the Court deems appropriate. *Lettunich v. Lettunich,* 141 Idaho 425, 435, 111 P.3d 110, 120 (2005). The Court need not address each one of the factors in its decision, but the record must demonstrate that the Court considered them all. *Parsons v. Mut. Of Enumclaw Ins. Co.,* 143 Idaho 743, 747, 152 P.3d 614, 618 (2007) (quoting *Boel v. Stewart Title Guar. Co.,* 137 Idaho 9, 16, 43 P.3d 168, 775 (2002)).

III. ANALYSIS.

A. Hollands' Motion for Attorney's Fees Pursuant to I.C. § 41-1839.

Hollands move this Court for attorney's fees under I.C. § 41-1839. Hollands argue MetLife wrongfully failed to pay on the insurance contract within thirty days of being provided with proof of loss. Memorandum in Support of Motion to Determine Attorney's Fees, p. 6. Hollands argue attorney fees in the amount of $60,000, or 30% of the $200,000 settlement in this mater, are appropriate and reasonable in light of the factors in I.R.C.P. 54(e)(3)(A)-(K), with emphasis on the amount of recovery obtained for the clients and the recovery having been obtained without "...having to bear the emotional burden of litigating the underlying claims." *Id.*, p. 8.

Hollands provide a factual background for the Court in their memorandum. *Id.*, pp. 2-4. On October 25, 2009, Benjamin Holland died as a result of an accident in Nez Perce County, Idaho. Benjamin and his parents, Gregory and Kathleen, had three policies with MetLife. On November 8, 2009, Hollands' claim their attorney Kinzo Mihara (Mihara) tendered notice of a claim to MetLife. *Id.* At that time Mihara was acting *pro bono*. *Id.*, p. 2. MetLife designated this initial claim as Claim No. FRD 373130, and assigned the matter to MetLife insurance adjuster Daneice Davis. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 2; Affidavit of Daneice Davis, ¶ 3. On November 12, 2009, MetLife requested additional documentation to support the claim. Memorandum in Support of Motion to Determine Attorney's Fees, p. 2. Hollands contend that information was submitted on November 17, 2009. *Id.*, and Complaint, p. 3, ¶10. On December 8, 2009, Mihara claims he discovered the two policies held by Gregory and Kathleen Holland may also support claims by the estate of Benjamin Holland. *Id.* MetLife claims Mihara on December 7, 2009, stated the matter could not be concluded by payment of the initial policy limits because Hollands had decided to make claims against the two additional MetLife policies. Mihara claims he discussed these claims with MetLife's adjuster on December 8, 2009, and was made aware that the adjuster had made a request for extension of a response until after the Christmas and New Year's holidays. Memorandum in Support of Motion to Determine Attorney's Fees, p. 2. Those claims were assigned Claim No. FRD 408440. *Id.*, p. 3. This was an automobile policy held by Gregory and Kathleen Holland. There was also a claim made on a motorcycle policy which was assigned Claim No. FRD 408370. Defendants' Response to Plaintiffs' Motion for attorney's Fees Pursuant to I.C. 41-1839, p. 3. "After the holidays", Mihara

then "demanded that MetLife come to a decision and tender an amount justly due by January 8, 2010." Memorandum in Support of Motion to Determine Attorney's Fees, p. 3. On January 8, 2010, the adjuster for MetLife indicated to Mihara that MetLife could not decide whether or not coverage was applicable under the policy and that a coverage opinion would be sought from an independent attorney. *Id.* On January 13, 2010, the independent attorney, Kathleen Paukert (Paukert), contacted Mihara and requested an extension to come to a coverage decision. *Id.*, p. 4. Mihara granted an extension until January 22, 2010. *Id.* On January 22, 2010, Paukert contacted Mihara and requested another extension, which Mihara denied.

On January 26, 2010, Mihara filed the Complaint in this case on behalf of Hollands. On February 2, 2010, Paukert advised Mihara that, based on her research, there was no coverage on the policies on the theories argued by Mihara, but there was possible coverage on the motorcycle policy under a theory Mihara had not advanced. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; Affidavit of Paukert, ¶ 9. Paukert advised Mihara that MetLife was offering to pay $200,000 ($250,000 limits less the $50,000 Hollands had received from the negligent party), provided Hollands signed a full release. *Id.* On February 26, 2010, counsel for the parties signed a "Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees", representing that "the parties have fully resolved all claims in the matter except for the pending motion for attorney fees." On March 3, 2010, this Court signed the Order dismissing all claims between the parties "except for Plaintiffs' Motion for Attorney fees filed on February 9, 2010."

MetLife responds to Holland's motion for fees by arguing: (1) any claim by Hollands to fees under I.C. § 41-1839 is barred by the Settlement agreement,

discussed *infra;* (2) Hollands were not the prevailing party and are therefore not entitled to fees; (3) MetLife's tender of their coverage decision and amounts justly due were not untimely (beyond the 30-day time limit in I.C. § 41-1839) because "additional theories, developed through the course of shared research, required supplemental documentation demonstrating proof of loss, the thirty-day clock arguably did not begin until January 27, 2010, the date the last proof of loss was requested by the Defendants" (Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 17.); (4) Hollands' claim for fees is barred by judicial estoppel as Hollands previously had taken the position that they did not want the policy limits under the initial claim filed (upon which a determination had been reached as early as December 7, 2009, but subsequent to which Mihara informed MetLife's Daneice Davis that Hollands would make additional claims against the two policies held by Gregory and Kathleen Holland) and had actively participated with MetLife in finding coverage for the additional claims up until February 2, 2010 (in addition to granting an extension for a coverage decision deadline), and then after February 2, 2010, Hollands took the position that MetLife failed to pay amounts justly due within thirty days; (5) that disputed questions of material fact remain; (6) that the award of fees requested by Hollands is unreasonable in part because the settlement amount had nothing to do with the lawsuit as MetLife (and its agents Davis and Paukert) were unaware a lawsuit had been filed at the time the settlement was reached; and (7) MetLife asks the Court to limit fees, if any are granted, to the time Hollands' counsel was not operating *pro bono.* Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 10-23.

1. Did Hollands "Prevail"?

As argued by MetLife, to be entitled to fees under I.C. § 41-1839, an insured must "prevail" in an action. *Arreguin v. Farmers Ins. Co. of Idaho,* 145 Idaho 459, 464,

180 P.3d 498, 503 (2008). To prevail, the insured need not obtain a verdict for the full amount requested, only an amount greater than that tendered by the insurer. *Halliday v. Farmers Ins.*, 89 Idaho 293, 301, 404 P.2d 634, 638-39 (1965). The determination of which party prevails, on which issues, and to what extent is in the discretion of the Court. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996). Importantly: "Where the insurer is sued for attorney fees incurred in a separate successful action...the insurer is obligated to pay attorney's fees only if its initial refusal to pay the claim were unreasonable." *Dawson v. Olson,* 94 Idaho 636, 641, 496 P.2d 97, 102 (1972) (discussing uninsured motorist insurance cases). In *Parsons v. Mutual of Enumclaw Ins. Co.,* 143 Idaho 743, 152 P.3d 614 (2007), the Idaho Supreme Court upheld a $20,000 contingency fee award to Parsons pursuant to I.C. § 41-1839, where the insurer tendered $60,000 in uninsured motorists coverage on November 12, 2004, and where Parsons had filed her lawsuit on October 26, 2004, and served Mutual of Enumclaw the next day. 143 Idaho 743, 745, 152 P.3d 614, 616. Parsons had received the $50,000 Allstate policy limit from the negligent driver who caused the accident she was involved in, she then sought Mutual of Enumclaw to pay the amount she was justly due under her $100,000 underinsured motorist coverage with them as her damages exceeded the liability coverage limits of the Allstate policy. *Id.* Parsons filed a motion seeking attorney's fees under I.C. § 41-1839, and the Idaho Supreme Court upheld the District Court's award of $20,000, finding there was no abuse of discretion in fixing the award amount. 143 Idaho 743, 748, 152 P.3d 614, 619.

In response to MetLife's argument, Hollands argue prior to their lawsuit MetLife was ready to tender only $50,000 to settle the claims, not the $200,000 ultimately

offered which led to settlement. Plaintiffs' Reply to Defendants' Response to Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 5. Hollands also note the settlement release entered into by the parties specifically references the lawsuit. *Id.*, p. 6; Exhibit A to Answer, p. 1. That document was signed by the parties on February 24, 2010. And, Hollands argue Davis and Paukert had notice of the lawsuit as early as January 29, 2010, before the settlement by the parties was reached. *Id.*

The facts before the Court indicate that MetLife was prepared to pay policy limits in Claim No. FRD 373130, the initial claim, but that Hollands' counsel Mihara was seeking to make additional claims under Gregory and Kathleen Holland's policies and would not consider the initial matter concluded. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 3. As such, there was no tender on or about December 7, 2009. Also, to the extent there was a tender as to Claim No. FRD 373130, subsequent to the December 7, 2009, offer on that claim number, claims under the two polices held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370, and those claims were clearly not contemplated within the initial $50,000 offer. And, unlike the *Parsons* case, the facts in this case do not indicate MetLife was served with a Complaint and Summons or otherwise knew of the Hollands' lawsuit at the time the offer was tendered. Although Hollands cite to the Affidavits of Davis and Paukert, in which both discuss the Coeur d'Alene Press listing regarding Hollands having sued MetLife, both also state Paukert's assistant could find no record of this filing when she investigated with the Court. *See* Supplemental Affidavit of Kathleen Paukert, p. 4, ¶ 25, Affidavit of Daneice Davis, p. 3, ¶ 8. Thus, there is a dispute of material fact as to the timing of MetLife's knowledge of Holldand's lawsuit. Even if that dispute of fact were resolved in favor of Hollands, Hollands face a daunting task trying to prove Hollands prevailed within the meaning of

I.C. § 41-1839 and *Parsons* where: 1) there was no initial refusal by MetLife to pay, and 2) where MetLife was not served with a Summons and Complaint in this matter at the time their offer was tendered, and arguably had no knowledge at all of Hollands' lawsuit at the time their offer was tendered. Because there is a dispute of fact as to knowledge, and the facts surrounding the reasonableness of the initial refusal to pay the claim, determination of prevailing party cannot be decided at this time.

2. Did Hollands' Counsel Mihara Grant an Extension Which Resulted in Settlement Being Timely?

MetLife points out their December 7, 2009, settlement offer for the policy limits on Hollands' initial claim on Benjamin's policy was not accepted by Hollands as their counsel Mihara informed adjuster Davis that additional claims would be made against two policies owned by Gregory and Kathleeen Holland. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 14. In her Affidavit, Davis states she informed Holland's counsel Mihara she would be going on a three-week vacation and would not return until January 6, 2010, at which time the two new claims would be reviewed. Affidavit of Daneice Davis, p. 2, ¶ 3. Davis states this delay was acceptable to Hollands, but that she did not send out a letter confirming her conversation with Hollands' counsel. *Id.* Thereafter, Paukert was retained by MetLife on January 8, 2010, and she had contact with Holland's counsel regularly from January 13, 2010, through February 2, 2010, to discuss theories coverage on the additional claims assigned Claim Numbers FRD 408440 and 408370. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 15-17. MetLife argues the conversation Davis had begins the thirty-day clock running on January 6, 2010, rendering the February 3, 2010, settlement timely. *Id.*

Hollands reply they provided proof of loss on November 10, 2009. Plaintiffs'

Reply to Defendants' Motion for Attorney's Fees Under I.C. § 41-1839, p. 7. Hollands also state that the cumulative time between November 10, 2009, to December 7, 2009, added to the period from January 7, 2010, to January 26, 2010, amounts to well over the thirty days after proof of loss in which MetLife was required to pay an amount justly due. *Id.*, p. 9. Finally, Hollands argue MetLife had knowledge of the lawsuit having been filed at the time of settlement because they were told on January 29, 2010, that notice had been published in the Coeur d'Alene Press. *Id.*

This will be discussed more fully in the analysis of MetLife's Motion to Enforce Settlement Agreement, but there are flaws in Hollands' motion for attorney fees and Hollands' argument that the settlement was untimely. **First,** there are *separate offers* made at *separate times* on *separate policies*. As mentioned above, MetLife was prepared to pay policy limits in Claim No. FRD 373130, the initial claim, but Hollands' counsel Mihara was seeking to make additional claims under Gregory and Kathleen Holland's policies and would not consider the initial matter concluded. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 3. As such, there was no acceptance of the tender on or about December 7, 2009. Also, to the extent there was a tender as to Claim No. FRD 373130, subsequent to the December 7, 2009, offer on that claim number, claims under the two polices held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370, and those claims were clearly not contemplated within the initial $50,000 offer. Again, in her Affidavit, Davis states she informed Mihara she would be going on a three-week vacation and would not return until January 6, 2010, at which time the two new claims would be reviewed. Affidavit of Daneice Davis, p. 2, ¶ 3. Davis states this delay was acceptable to Hollands, but that she did not send out a letter confirming her

conversation with Hollands' counsel. *Id.* Thereafter, Paukert was retained by MetLife on January 8, 2010, and Paukert had contact with Holland's counsel regularly from January 13, 2010, through February 2, 2010, to discuss coverage theories on the additional claims assigned Claim Numbers FRD 408440 and 408370. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 15-17. MetLife argues the conversation Davis had begins the thirty-day clock running on January 6, 2010, rendering the February 3, 2010, settlement timely. *Id.* **Second,** counsel for Hollands has provided no law to support the innovative argument that these time periods on these separate offers made at separate times on separate policies should be *aggregated*. Again, Hollands argue the cumulative time between November 10, 2009, to December 7, 2009, added to the period from January 7, 2010, to January 26, 2010, amounts to well over the thirty days after proof of loss in which MetLife was required to pay an amount justly due. *Id.*, p. 9. This Court can find no such case law to support such a novel argument. Due to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods. **Third,** if Paukert on behalf of MetLife found the coverage theory that would provide a larger recovery for the Hollands, and if Mihara on behalf of Hollands accepted that higher amount based on the coverage theory that MetLife's attorney developed, how can Hollands prove there was an unreasonable refusal to pay Hollands' claim under I.C. § 41-1839? Suffice it to say that regarding Hollands' motion for attorney fees under I.C. § 41-1839, that motion must be denied at this time. The question remains, following an analysis of MetLife's Motion to Support Settlement Agreement, whether there will be a "later time" for Hollands.

Another issue for this Court is whether the proof of loss submitted by Hollands provided MetLife with sufficient information to allow it to investigate and determine its

liability. *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006). This issue also precludes this Court from awarding Hollands attorney fees at this time. The November 10, 2009, notice was met with an offer on December 7, 2009. This falls within the time limits of the statute. On December 8, 2009, MetLife was informed that additional alternative claims were being made on two other polices, those of Gregory and Kathleen Holland. Memorandum in Support of Motion to Determine Attorney's Fee, p. 2. Thereafter, Hollands granted a determination extension until January 22, 2010. *Id.*, p. 3. A material question of fact remains for this Court as to whether in light of the research and theories discussed by Holland's counsel Mihara, and MetLife's counsel Paukert, including a request by MetLife for a legible copy of a motorcycle title on January 27, 2010, even after the January 22, 2010, deadline imposed by Hollands, MetLife had sufficient information to investigate and determine its liability. Because of remaining disputed facts in this regard, this Court cannot properly find a date certain on which proof of loss submitted by Hollands was sufficient to start the clock on the 30 day timeline. Arguably, a question of fact also remains regarding MetLife's knowledge of when the lawsuit was filed, although it is unclear why a direct question in that regard was never posed to Hollands' counsel. In any event, disputes of fact remain precluding the Court from granting Hollands' motion for attorney fees at this stage.

3. Are Hollands Estopped from Bringing the Fees Claim?

MetLife argues Hollands initially took the position that they did not want the policy limits under the initial claim filed upon which a determination had been reached as early as December 7, 2009, but subsequently, Hollands' counsel Mihara informed Davis that Hollands would make additional claims against the two additional policies held by Gregory and Kathleen Holland. Hollands then granted an extension for a

coverage determination on those additional policies, and Hollands actively participated with MetLife in finding coverage for the additional claims up until February 2, 2010. Hollands thereafter took the position that MetLife failed to pay amounts justly due within 30 days. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 19. MetLife states it relied on the representations that additional time would be given to find coverage for the additional claims made on December 8, 2009, invested time and effort to find additional coverage under alternative theories, and would suffer if Hollands are permitted to maintain their position that the 30-day attorney's fee provision in I.C. § 41-1839 is applicable here. *Id.*, pp. 19-20.

Hollands reply the reasons set forth in their response to MetLife's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees addresses the estoppel argument. Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 9-10. In that brief, Hollands argue in part MetLife should be estopped from now arguing the settlement precludes their recovery of attorney's fees where they previously had agreed to settle all claims but for the claim for attorney's fees. Plaintiffs' Response to MetLife's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 3.

Both parties in essence (albeit regarding different issues) argue the other should be estopped from taking a position inconsistent with one previously taken in the same matter. Here, there is no evidence before the Court that Hollands ever claimed no lawsuit would be filed or that no attorney's fees would be sought. In fact, the notice Davis received from MetLife demanding a coverage decision on the alternate claims by January 8, 2010, indicated Hollands believed the 30-day clock was not only running, but was about to expire. Equitable estoppel, as discussed by MetLife, requires:

> (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.

Willig v. State, Dep't of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). Quasi-estoppel, a related doctrine, does not require the first or fourth elements and applies when it would be unconscionable to allow a party to assert a right inconsistent with a prior position. *Id.* Here, it is difficult to see at this juncture what false representation or concealment of a material fact (*before* the suit was filed on January 26, 2010, and not directly disclosed until February 2, 2010) was made which caused MetLife to rely on statements or concealments by Hollands to its prejudice. Similarly, MetLife never purported to be unapposed to Hollands' claim for attorney fees.

4. Are Hollands Requested Fees Reasonable?

Hollands requested fees of $60,000 or 30% of the amount settled for are unreasonable per MetLife. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 21-22. MetLife makes this argument on the basis of Hollands' counsel having originally taken the case *pro bono* but having entered into a contingency fee agreement with Hollands thereafter (it is unknown when the contingency fee agreement was entered into as the agreement itself is undated [Exhibit 2, Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion for Summary Judgment], and the affidavit of Mihara itself does not provide such date [*Id.*, p. 2, ¶ 4]); Hollands having not disclosed their filing of the suit during conversation on January 27, 2010; and the settlement not having been reached because of the lawsuit, as MetLife had no knowledge of the suit at the time it was settled. *Id.*, pp. 21-22. As such, MetLife argues fees, if awarded at all, should be limited to the time during which Hollands' counsel was

not acting *pro bono*. *Id.* p. 23. Hollands reply MetLife has set forth no support for the contention that their counsel's having initially appeared *pro bono* should result in a downward departure from the sought amount of fees. Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 1012. Hollands also note the purported tender on December 7, 2009 was not in writing and therefore does not amount to actual production or tender. *Id.*, citing I.C. § 9-1501.

Hollands' argument is well-taken. *Parsons v. Mutual of Enumclaw* involves the Supreme Court discussing this issue. There, the Supreme Court upheld an award of a contingency fee under I.C. § 41-1839, reasoning that so long as a court clearly recognized the matter of fees as a matter of discretion and acted within that discretion, the Court would not be overturned. 142 Idaho 743, 748, 152 P.3d 614, 619. The factors for the Court to determine the reasonableness of the award of fees sought by Hollands can be found in I.R.C.P 54(e)(3), and the arguments set forth by MetLife find no support in Idaho statutes, rules, or case law.

In sum, although MetLife's arguments regarding estoppel and the unreasonableness of fees fail at this juncture, whether Hollands have prevailed and when the 30-day time limit began to run also remain material questions of fact in dispute. Therefore, this Court cannot exercise its discretion and grant Hollands' motion for fees at this time.

B. Hollands' Motion for Summary Judgment.

Hollands moved for summary judgment on the question of their entitlement to fees in this matter on May 17, 2010. The matter was not noticed up for hearing until May 21, 2010, but MetLife only objected to the motion to shorten time and the Court's hearing the motion for summary judgment to the extent the Court would not have the time to hear all the motions during the June 2, 2010, hearing time set aside for these

matters. Defendants' Response to Plaintiffs' Motion to Shorten Time, p. 2.

Hollands argues three things: (1) MetLife's failure to deny the allegations in the Complaint amount to an admission and Hollands are therefore entitled to summary judgment on all issues; (2) MetLife has failed to present any support for its equitable estoppel argument in opposition to the claim for fees; and (3) Hollands' claim for fees is reasonable and proper as Paukert's and Davis' affidavits recite the amount of time and effort which went into settling this matter. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pp. 6-11. In response, MetLife argues the parties' stipulated motion and Order to Dismiss precludes its having to deny claims made by Hollands in their Complaint. Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 6. MetLife then reiterates the arguments it has previously made regarding estoppel of Hollands' claim for fees and the unreasonableness of fees claimed. *Id.*, pp 8-12.

The estoppel argument is discussed *supra*. In sum, at the time MetLife arguably relied upon any statements of Hollands' in deciding to further research coverage in this matter, i.e. between the time it was notified of the additional claims on December 8, 2009, and the time Davis went on vacation, and again from the time Davis returned on January 6, 2010, until the expiration of the extension (until January 22, 2010) granted by Hollands, there were no statements made by Hollands upon which MetLife could reasonably rely that no lawsuit would be forthcoming. *See supra*. Similarly, MetLife's reasonableness of fees argument must likely also fail because the question of fees is one committed to the discretion of the Court with the consideration of the factors in I.R.C.P. 54(e)(3) mandatory upon the Court. The statement by MetLife that the settlement had nothing to do with the lawsuit raises a question of material fact with regard to whether Hollands are the "prevailing" party within the meaning of that term in

I.C. § 41-1839, but has nothing to do with the award, if any, of fees by this Court. Likewise, Hollands' counsel holding himself out as *pro bono* and later entering into a contingency agreement is merely one of several factors for the Court to consider.

Remaining is Hollands' argument that all claims in the Complaint are deemed admitted for failure by MetLife to deny them. Indeed, all averments in a complaint not denied are deemed admitted. *Jacobsen v. State,* 99 Idaho 45, 48, 577 P.2d 24, 27 (1978), quoting I.R.C.P. 8 (d). But here, as argued by MetLife, the Court's February 3, 2010, Order dismissed all claims with prejudice except for the attorney's fee claim. Defendants' Motion in Opposition to Plaintiffs' Motion for Summary Judgment, p. 7. Therefore, MetLife argues, only a responsive pleading to the pending motion for attorney's fees was required or, alternatively, MetLife asks for direction from this Court with respect to which portions of a previously dismissed Complaint Defendants would be expected to answer. *Id.*, pp. 7-8.

This Court dismissed all claims "except for Plaintiffs' Motion for Attorney fees filed on February 9, 2010,...with prejudice and without costs to either party." Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees, pp. 2-3. It follows that only paragraph 34 on page 7 of the Complaint remained at issue and, because the February 9, 2010, motion only addressed fees under I.C. § 41-1839, this statute would be the only possible basis for recovery by Hollands. Hollands' argument that MetLife's failure to deny paragraphs 9, 10, 13, 16, 17 and 18 of the Complaint operates as admissions is without merit. The plain language of this Court's Order excepts only "Plaintiff's Motion for Attorney fees filed on February 9, 2010"; therefore, no averments in the Complaint, even if deemed true, remain before the Court. In effect, all of the Complaint was dismissed with prejudice on February 3, 2010, and Hollands' are not entitled to judgment as a matter of law on this

issue.

C. MetLife's Motion to Enforce the Settlement Agreement.

In response to the motion for attorney's fees filed by Hollands, MetLife filed a motion to compel Holland's performance under the settlement and to dismiss their claim for attorney's fees. MetLife argues the February 3, 2010, settlement between counsel for Hollands and the coverage evaluator, Paukert, contemplated Hollands would sign a "full release" of "all claims" in consideration of MetLife's offer of $200,000 and, as such, their February 9, 2010, request for attorney's fees should be dismissed. Memorandum of Authorities in Support of Defendant's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 7. MetLife submitted the affidavits of Paukert and Davis in support of its motion. In her affidavit, Paukert states she and counsel for Hollands discussed on several occasions his appearing for them *pro bono*. Affidavit of Kathleen Paukert, p. 2, ¶ 4.

> On or about February 3, 2010, upon receiving Mr. Mihara's confirmation that his clients had accepted MetLife's offer, I called Mr. Mihara to confirm that his clients would provide MetLife with a full release. He said that they would, but that he was now making a claim for attorney's fees. I reminded Mr. Mihara that he had agreed that his clients would provide a full release. He said that they would; however, he was personally going to sue MetLife for attorney's fees. I believe that it was during this conversation that Mr. Mihara, for the first time, told me that he had filed a lawsuit against MetLife on January 26, 2010. It may have been on February 2, 2010. It was absolutely after a settlement had been reached.

Id., p. 5, ¶ 12.

Hollands reply to the motion to compel performance under the settlement essentially makes four arguments: (1) that MetLife cites no rule basis or other authority for its motion; (2) that MetLife should be judicially estopped from stipulating to dismiss all claims but the fees issue and thereafter claim the settlement would preclude the Court form awarding statutory attorney's fees; (3) that the agreement reached on

February 3, 2010, by email, was not an enforceable contract as material terms were left to be negotiated, namely the full release itself; and (4) that Hollands did not have the authority to waive their counsel's entitlement to attorney's fees because I.C. § 41-1839 establishes a statutory duty for an insurer to pay attorney's fees and this duty cannot be waived or exempted. Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, pp. 2-9.

In response to Hollands' motion for fees, MetLife argues the settlement agreement must be enforced. Although MetLife's motion is captioned a motion to compel, it is actually a motion to enforce settlement, i.e. an action in contract. A settlement agreement is a new contract settling an old dispute. *Wilson v. Bogert*, 81 Idaho 535, 347 P.2d 341 (1959). The settlement of a legal dispute constitutes an executory accord. *Hershey v. Simpson*, 111 Idaho 491, 725 P.2d 196 (Ct. App. 1986). Such an agreement supersedes all prior claims and defenses. However, if one party breaches the agreement, the other party has the option of enforcing the executory accord or rescinding it and proceeding with the original cause of action. *Id.* The interpretation of a settlement agreement is an issue of law. *Mays v. United States Postal Service*, 995 F.2d 1056 (Fed.Cir.1993). To the extent the settlement agreement is clearly stated and understood by the parties, it is enforced according to its terms. If any ambiguity is found, the court's role is to implement the intent of the parties at the time the agreement was made. *King v. Department of Navy*, 130 F.3d 1031 (Fed.Cir.1997). For a contract to exist, there must be a distinct and common understanding between the parties. *Hoffman v. S.V. Co., Inc.*, 102 Idaho 187, 628 P.2d 218 (1981).

Here, the agreement was reached on or about February 3, 2010. However, the parties disagree as to whether attorney fees were covered by that agreement. Both Davis and Paukert state in their affidavits they had no knowledge a suit had been filed by Hollands until February 8, 2010. Affidavit of Daneice Davis, p. 4, ¶ 10; Affidavit of Kathleen Paukert, p. 5, ¶ 13. Thus, MetLife argues attorney fees were not contemplated in the February 3, 2010, agreement. While this Court appreciates MetLife's argument that settling the matter and requiring a full release contemplated no claim by Hollands for attorney fees (Defendants' Reply Memorandum in Support of Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney Fees, pp. 2-3), that argument has been undermined by *Straub v. Smith,* 145 Idaho 65, 175 P.3d 754 (2007). In *Straub,* the parties stipulated to dismiss the lawsuit with prejudice, but that stipulation was silent on the issue of attorney fees. This Court decided that failing to include the attorney fee issue in the stipulation indicated the parties intended to bear their own attorney fees. The Idaho Supreme Court disagreed, and held Smith did not waive his right to argue costs and fees when the stipulation was silent on the issue. 145 Idaho 65, 69, 175 P.3d 754, 758. "Furthermore, we have said costs and attorney fees are collateral issues which do not go to the merits of an action and that a district court retains jurisdiction to make such an award after a suit has been terminated." *Id., citing Inland Group of Cos., Inc. v. Obendorff,* 131 Idaho 473, 475, 959 P.2d 454, 456 (1998).

While MetLife through its agents believed the matter had been settled such that a full release regarding all claims would bring an end to the matter, and that Hollands had not filed suit and were represented *pro bono,* Hollands believed they were settling a matter after suit had been filed and after their counsel had entered into a contingency fee agreement with them, so that an entitlement for attorney's fees under I.C. § 41-

1839 existed. This issue of fact precludes Hollands' motion for summary judgment, *see infra.* However, a motion to enforce a settlement agreement involves a *new* contract settling an *old* dispute. *Wilson,* 81 Idaho 535, 542, 347 P.2d 341, 345 (1959). In *Wilson,* the Idaho Supreme Court wrote:

> Where the parties to a legal controversy, in good faith enter into a contract compromising and settling their adverse claims, such agreement is binding upon the parties, and, in the absence of fraud, duress or undue influence, is enforceable either at law or in equity according to the nature of the case. *Ticknor v. McGinnis*, 33 Idaho 308, 193 P. 850; *Nelson v. Krigbaum*, 38 Idaho 716, 226 P. 169; *Moran v. Copeman,* 55 Idaho 785, 47 P.2d 920; *Stub v. Belmont*, 20 Cal.2d 208, 124 P.2d 826; 11 Am.Jur., *Compromise and Settlement*, § 35, p. 283. Such a contract stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally. 11 Am.Jur., *Compromise and Settlement, § 35, p. 283.* An agreement of compromise and settlement is a merger and bar of all pre-existing claims which the parties intended to settle thereby. *Moran v. Copeman, supra; Shriver v. Kuchel,* 113 Cal.App.2d 421, 248 P.2d 35; 15 C.J.S. *Compromise and Settlement* § 24, p. 739. Such prior claims are thereby superseded and extinguished. The compromise agreement becomes the sole source and measure of the rights of the parties involved in the previously existing controversy. The existence of a valid agreement of compromise and settlement is a complete defense to an action based upon the original claim. *Bruce v. Oberbillig*, 46 Idaho 387, 268 P. 35; *Shriver v. Kuchel, supra*; *Argonaut Ins. Exch. v. Industrial Acc. Commission,* 49 Cal.2d 706, 321 P.2d 460; 11 Am.Jur., *Compromise and Settlement,* § 36, p. 284.
>
> In an action brought to enforce an agreement of compromise and settlement, made in good faith, the court will not inquire into the merits or validity of the original claim. *Heath v. Potlatch Lumber Co.*, 18 Idaho 42, 108 P. 343, 27 L.R.A.,N.S., 707; *Nelson v. Krigbaum*, supra.

Id. The Court discounts Hollands' argument that no rule basis or other authority exists pursuant to which MetLife can seek enforcement of the settlement agreement. *See* Memorandum of Authorities in Support of Defendants' Motion to Compel Performance Under Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 6, citing *Young Elec. Sign Co. v. Winder,* 135 Idaho 804, 808, 25 P.3d 117 (2001). At issue is whether the agreement reached by the parties' emails constitutes a meeting of the minds

sufficient to support a contract. An enforceable contract requires "distinct understanding common to both parties." *Hoffman v. S V Co., Inc.*, 102 Idaho 187, 189, 628 P.2d 218, 220 (1981). Acceptance must be unequivocal and identical to the offer and the parties' minds must meet as to all terms before a contract is formed. *Turner v. Mendenhall,* 95 Idaho 426, 429, 510 P 2d 490, 493 (1973). Proof of a meeting of the minds requires evidence of mutual understanding as to the terms of the agreement and the assent of both parties. *Thomas v. Schmelzer,* 118 Idaho 353, 356, 796 P.2d 1026, 1029 (Ct.App. 1990).

A settlement agreement by the parties, purportedly evidenced by the email from Paukert to Hollands' counsel on February 2, 2010, offering $200,000 and a full release, and from Holland's counsel to Paukert on February 3, 2010, accepting the offer and stating Hollands "will sign a full release of their claims against MetLife", appears to constitute a meeting of the minds. *See* Affidavit of Kathleen Paukert, pp. 4-5, ¶ ¶ 10-11 However, "[t]he question of whether there was a sufficient meeting of the minds to form an express agreement is to be determined by the trier of fact." *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 359, 986 P.2d 1019, 1025 (Ct.App. 1999) citing *Bischoff v. Quong-Watkins Properties,* 113 Idaho 826, 828, 748 P.2d 410, 412 (Ct.App. 1987). At issue here is whether the full release contemplated in the emails would include the claim for attorney's fees because on the one hand MetLife claimed to have had no knowledge of the suit having been filed or of Holland's counsel incurring any fees as they believed him to be appearing *pro bono,* and on the other hand, Hollands' had filed suit and now claim they fully intended to seek attorney's fees at the time the settlement was accepted by them. Hollands argue the agreement reached is not an enforceable contract because material terms were not negotiated: the "material terms" which

Hollands identify are limited to release at issue in this case. Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 6. "It is also undisputed that subsequent to the February 3, 2010, emails, the parties' attorneys negotiated the specific terms of the release in this case." *Id.*, citing Affidavit of Kinzo Mihara. In order to grant MetLife's motion to compel on this theory, the Court would require additional evidence on the question of a meeting of the minds sufficient to support a contract or settlement in this matter, both on the question of what a "full release" constituted in general and on the question of whether MetLife and Hollands' counsel specifically contemplated the settlement to settle all claims including any fees at the time the settlement agreement was entered into. *Straub* certainly indicates there is no presumption that attorney fees are not included if the agreement is silent on the issue.

Thus, this Court cannot grant MetLife's Motion to Compel Performance Under Settlement upon MetLife's argument that fees were not contemplated in the settlement agreement, under either a contract interpretation analysis or a waiver analysis.

Hollands also make the argument that MetLife should be estopped from taking the position that the settlement agreement, entered into voluntarily and expressly excluding the claim for fees from settlement, should now be viewed by the Court as a basis for denying the claim for fees because it settled *all* pending claims. Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 3. What is confusing here is Hollands' use of "settlement document." Is it the "Joint Motion to Dismiss All Claims Except for the Pending Motion for Attorney's Fees" to which Hollands refer, or is it the email exchange which MetLife argues amounts to a settlement of all claims?

As discussed *supra*, equitable estoppel requires:

> (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.

Willig v. State, Dep't of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). And, quasi-estoppel, a related doctrine, does not require the first or fourth elements and applies when it would be unconscionable to allow a party to assert a right inconsistent with a prior position. *Id.* Because the issue of fees remained at the time the Order granting the joint motion to dismiss all claims was entered, there was no false representation or concealment of material fact made by MetLife. Indeed, it was Hollands who arguably had concealed the fact that a lawsuit was filed and attorney's fees would be sought at the time the settlement for $200,000 and a full release was entered into by the parties.

As mentioned above (pages 12-15 of this decision), there are questions of fact as to whether there was an extension of time within which MetLife could respond. Ultimately, material questions of fact also remain as to whether the agreement reached through the February 3, 2010, email was an enforceable contract. And, although Hollands' estoppel argument fails, a material question in dispute remains as to whether the settlement agreement constituted a meeting of the minds. As such, the Hollands' having "waived" their counsel's right to fees via the release turns on whether the settlement agreement giving rise to the release was a valid contract between the parties. See Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, pp. 7-8.

Here, questions of material fact remain surrounding the formation of the settlement agreement. Thus, contrary to MetLife's arguments, the existence of the

purported settlement agreement alone does not provide a basis for granting MetLife's Motion to Compel Performance Under the Settlement Agreement.

However, there is a basis upon which MetLife's Motion to Compel Performance Under the Settlement Agreement must be granted. In this area, the above issues of disputed fact are not relevant.

Idaho Code § 41-1839 (and sanctions under I.C. § 12-123) provides the exclusive basis for recovery of attorney's fees in actions between insureds and insurers involving disputes arising under insurance policies. I.C. § 41-1839(4). An insurer who fails to pay an amount justly due under a policy for thirty days after proof of loss has been furnished shall be liable for reasonable attorney's fees as adjudged by the Court in any action thereafter brought against the insurer for recovery under the terms of the policy. I.C. § 41-1839(1). The statute requires: (1) the insured to provide proof of loss as required by the insurance policy and (2) the insurer must fail to pay the amount justly due within thirty days after receipt of the proof of loss. *Parsons v. Mutual of Enumclaw Ins. Co.*, 143 Idaho 743, 746-47, 152 P.3d 614, 617-18 (2007). "As defined by this Court [the Supreme Court of Idaho], a submitted proof of loss is sufficient when an insured provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006); *citing Brinkman v. AID Ins. Co.*, 115 Idaho 346, 349-50, 766 P.2d 1227, 1230-31 (1988).

This Court is simply unable to find that Hollands have met their burden under *Greenough* and *Brinkman*, because Hollands "submitted proof of loss" but not a proof of loss which was "sufficient...to provide the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." *Id.* Keep

in mind that it was MetLife and its directive to its attorney Paukert to be creative in trying to find *additional* coverage for Hollands. The only theories for additional coverage expounded by Hollands' counsel Mihara were determined by MetLife to be without merit. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; Affidavit of Paukert, ¶ 9.

As discussed above in analyzing Hollands' motion for attorney fees, there are additional reasons that, in analyzing MetLife's Motion to Enforce Settlement Agreement, show MetLife was not provided with "a reasonable opportunity to investigate and determine its liability", given the January 22, 2010, deadline that Mihara agreed to and beyond which he was unwilling to extend. As set forth above, on January 8, 2010, the adjuster for MetLife indicated to Mihara that MetLife could not decide whether or not coverage was applicable under the policy and that a coverage opinion would be sought from an independent attorney. Memorandum in Support of Motion to Determine Attorney's Fees, p. 3. On January 13, 2010, the independent attorney, Kathleen Paukert (Paukert), contacted Mihara and requested an extension to come to a coverage decision. *Id.*, p. 4. Mihara granted an extension until January 22, 2010. *Id.* On January 22, 2010, Paukert contacted Mihara and requested another extension, which Mihara denied. On January 26, 2010, Mihara filed the Complaint in this case on behalf of Hollands. A few days later, on February 2, 2010, Paukert advised Mihara that, based on her research, there was no coverage on the policies on the theories argued by Mihara, but there was possible coverage on the motorcycle policy under a theory Mihara had not advanced. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; Affidavit of Paukert, ¶ 9. Paukert advised Mihara that MetLife was offing to pay $200,000 ($250,000 limits less the $50,000 Hollands had received from the negligent party), provided Hollands signed a full release. *Id.*

Obviously, MetLife on January 22, 2010, felt Mihara's theories were not plausible, but MetLife was still working on coming up with its own theories to provide additional coverage. Ten days later, those theories, developed only by MetLife and not by Mihara, resulted in additional coverage which in turn resulted in settlement on February 2, 2010. Hollands have provided no facts which would counter such findings. In light of such, Hollands, through Mihara, did not provide MetLife with "a reasonable opportunity to investigate and determine its liability".

The following was discussed above at pages 13-14, but is now analyzed in more detail. **First,** this started out as somewhat of a moving target for Hollands, and thus, MetLife. This impacted MetLife's "reasonable opportunity to investigate and determine its liability". As mentioned above, there were *separate offers* made at *separate times* on *separate policies*. MetLife was prepared to pay policy limits in Claim No. FRD 373130, the initial claim, but that Hollands' counsel Mihara was seeking to make additional claims under Gregory and Kathleen Holland's policies and would not consider the initial matter concluded. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 3. As such, there was no tender on or about December 7, 2009. Also, to the extent there was a tender as to Claim No. FRD 373130, subsequent to the December 7, 2009, offer on that claim number, claims under the two polices held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370, and those claims were clearly not contemplated within the initial $50,000 offer. In her Affidavit, Davis states she informed Holland's counsel Mihara she would be going on a three-week vacation and would not return until January 6, 2010, at which time the two new claims would be reviewed. Affidavit of Daneice Davis, p. 2, ¶ 3. Davis states this delay was acceptable to Hollands, but that she did not send out a letter confirming her conversation with Hollands' counsel. *Id.*

Thereafter, Paukert was retained by MetLife on January 8, 2010, and she had contact with Holland's counsel regularly from January 13, 2010, through February 2, 2010, to discuss theories coverage on the additional claims assigned Claim Numbers FRD 408440 and 408370. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 15-17. MetLife argues the conversation Davis had begins the 30-day clock running on January 6, 2010, rendering the February 3, 2010, settlement timely. *Id.* **Second,** counsel for Hollands has provided no law to support the innovative argument that these time periods on these separate offers made at separate times on separate policies should be *aggregated.* Again, Hollands argue the cumulative time between November 10, 2009, to December 7, 2009, added to the period from January 7, 2010, to January 26, 2010, amounts to well over the thirty days after proof of loss in which MetLife was required to pay an amount justly due. *Id.*, p. 9. This Court can find no such case law to support such a novel argument. Due to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods. **Third,** if Paukert on behalf of MetLife, found the theory that would provide a larger recovery for the Hollands, and Mihara on behalf of Hollands accepts that higher amounts based on the theory MetLife's attorney created, how can Hollands' claim at this time that MetLife was provided "a reasonable opportunity to investigate and determine its liability"?

For these reasons alone, this Court finds Hollands have failed to meet their burden under *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006) and *Brinkman v. AID Ins. Co.,* 115 Idaho 346, 349-50, 766 P.2d 1227, 1230-31 (1988), because Hollands failed to prove they submitted proof of loss with sufficient information to allow the MetLife a reasonable opportunity to

investigate and determine its liability, when it was MetLife that came up with the creative theory for additional coverage.

MetLife's Motion to Enforce Settlement Agreement must be granted, and Hollands are not entitled to attorney fees.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Motion for Summary Judgment must be denied. Additionally, questions of material fact remain regarding the motion for attorney's fees and the motion to compel performance under the settlement.

IT IS HEREBY ORDERED Hollands' Motion to Shorten Time to hear Hollands' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED Hollands' Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED Hollands' Motion for Attorney Fees is DENIED.

IT IS FURTHER ORDERED MetLife's Motion to Compel Performance Under the Settlement Agreement and to Dismiss Plaintiffs' Motion for Summary Judgment is GRANTED. The Settlement Agreement is enforced. As a result of the granting of MetLife's Motion to Compel Performance Under the Settlement Agreement and to Dismiss Plaintiffs' Motion for Summary Judgment, Hollands are not entitled to attorney fees under I.C. § 41-1839.

Entered this 20th day of July, 2010.

John T. Mitchell, District Judge

I certify that on the 20 day of July, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Kinzo H. Mihara	667-4695 ✓	William J. Schroeder	509-838-0007 ✓

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-677 **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL PERFORMANCE UNDER THE SETTLEMENT AND DISMISS PLAINTIFFS' MOTION FOR ATTORNEY'S FEES**

I. INTRODUCTION

A settlement, in its most basic sense, is a resolution of a disagreement between two parties. The question presented in this matter is simple – whether a party may enter into a

compromise settlement agreement over a disputed claim, acknowledge entering into such agreement, renege on such settlement agreement after the fact and then be permitted to avoid the settlement. As addressed below, this questions must be answered in the negative.

In the present case, it is undisputed that Plaintiffs filed a Civil Complaint on January 26, 2010, and that such Complaint included Plaintiffs' claims against three MetLife insurance policies and a claim in Section IV, paragraph 34, for attorney's fees pursuant to I.C. § 41-1839. (*See,* Civil Complaint ("Complaint"), filed January 26, 2010)

Further, it is undisputed that on February 2, 2010, Defendants' Attorney, Kathleen H. Paukert, informed Plaintiffs' Attorney, Kinzo H. Mihara, that MetLife was willing to settle the matter for payment of the motorcycle policy limit, provided Plaintiffs sign a full release. (*See*, Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees) ("Aff. of Paukert"), filed April 13, 2010, at ¶ 9) Likewise, it is undisputed that, following their conversation, on February 2, 2010, Ms. Paukert sent the following e-mail offer to Mr. Mihara:

> **Subject: Offer**
>
> Dear Mr. Mihara:
>
> This letter confirms **Met is offering your client** the limits of the motorcycle policy minus the offset. It is my understanding, the Motorcycle policy is $250,000 and you received $50,000 from the tortfeasor. Therefore, **Mets offer is $200,000.00. Obviously, we will require a full release**.
>
> Sincerely,
>
> Kathleen H. Paukert

(Ibid., at ¶ 10, Exhibit 1, e-mail from Ms. Paukert to Mr. Mihara (emphasis added))

It is also undisputed that on February 3, 2010, at 8:43 a.m., Ms. Paukert received the following e-mail acceptance from Mr. Mihara:

> **Subject: [SPAM] Acceptance**
>
> Ms. Paukert:
>
> **Please let this letter confirm that my clients accept MetLife's offer of $200,000. My clients will sign a full release of their claims against MetLife.** At your earliest convenience, please send certified funds payable to:
>
> Gregory and Kathleen Holland
> c/o Kinzo H. Mihara
> 424 Sherman Ave., Ste. 308
> Coeur d'Alene, Idaho 83816
>
> Yours very truly and sincerely,
>
> Kinzo H. Mihara

(Ibid., at ¶ 11, Exhibit 1, e-mail from Mr. Mihara to Ms. Paukert (emphasis added))

The following facts are also undisputed. On February 3, 2010, following Mr. Mihara's confirmation that his clients had accepted MetLife's settlement offer, Ms. Paukert called Mr. Mihara to confirm that his clients would be providing MetLife with a full release. (Ibid., at ¶ 12) During that conversation, Mr. Mihara said that his clients would, but, for the first time, informed Ms. Paukert that he was now making a claim for attorney's fees. (Ibid.) Ms. Paukert reminded Mr. Mihara that his clients had agreed to a full release of their claims. (Ibid.) He responded that they would, but that he was personally going to sue MetLife for attorney's fees. (Ibid.) Mr. Mihara further informed Ms. Paukert, for the first time, that Plaintiffs had filed a Civil Complaint on January 26, 2010, prior to settlement. (Ibid.)

In addition, Plaintiffs acknowledge that on February 3, 2010, Plaintiffs accepted Defendants' settlement offer, stating in relevant part:

> One of the primary factors that went into the decision to accept the amount due was that acceptance of the offer extended in Exhibit "A" [referring to the February 2nd and 3rd e-mail exchange above] of the aforementioned affidavit was that acceptance would effectively end the litigation and allow Ben Holland's family to continue their grieving process without have to simultaneously battle their insurer in litigation

(*See*, Memorandum in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, filed February 9, 2010, at p. 8)

On February 8, 2010, Mr. Mihara faxed Ms. Paukert a copy of the Complaint. (*See*, Aff. of Paukert, at ¶ 13) Despite the settlement reached, on February 9, 2010, Mr. Mihara mailed Ms. Paukert a letter that included a Motion for Attorney's Fees and other supporting documents. (Ibid., at ¶ 14)

After reneging on the compromise settlement reached, as well as their agreement to sign a full release of their claims against the Defendants, the parties filed a "Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees" on March 3, 2010. (*See,* Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees ("Stipulated Order to Dismiss"), filed March 3, 2010) It is important to note the precise language used in the Stipulated Order to Dismiss:

> COME NOW the parties, by and through their counsel of record and hereby move this Court to dismiss, with prejudice, all claims in the above-captioned matter, except for Plaintiff's Motion for Attorney Fees Pursuant to I.C. § 41-1839 filed on February 9, 2010. The parties further stipulate to the form of the Order below. This motion is made pursuant to I.R.C.P. 41(a)(1)(ii). The basis of this motion is that the parties have fully resolved all claims in this matter except for the pending motion for attorney fees referenced above.
>
> ...
>
> THE COURT, pursuant to the joint motion of the parties above, and upon good cause appearing, does ORDER that all claims in the above-captioned matter,

except for Plaintiffs' Motion for Attorney Fees filed on February 9, 2010, are dismissed with prejudice and without cost to either party.

(*See,* Stipulated Order to Dismiss)

By its terms, the Stipulated Order to Dismiss dismissed all claims except Plaintiffs' pending Motion for Attorney's Fees. In other words, the Complaint was dismissed, leaving only Plaintiffs' pending Motion for Attorney's Fees. (Ibid.) Nonetheless, although no Answer was required (because all claims had been dismissed except Plaintiffs' pending Motion for Attorney's Fees), to make the record clear, Defendants answered Section IV, paragraph 34 of Plaintiffs' Complaint by denying that the Plaintiffs are entitled to attorney's fees pursuant to I.C. § 41-1839 and asserting Affirmative Defenses regarding the same. (*See,* Defendants' Answer and Affirmative Defenses ("Answer"), filed April 12, 2010)

The foregoing facts are not disputed by Plaintiffs. (*See*, Plaintiffs' Response to Defendants' Motion to Compel Performance or Dismiss Plaintiffs' Motion for Attorney's Fees, filed May 17, 2010, pp. 1-2)

Nonetheless, Plaintiffs now take the position that the February 3, 2010 compromise settlement agreement – resulting in a resolution between the parties and acknowledged as such by Plaintiffs – did not include the claim for attorney's fees in Section IV, paragraph 34 of Plaintiffs' Complaint. (*See,* Complaint) As discussed below, the grounds offered by Plaintiffs to avoid enforcement of the compromise settlement agreement are not supported by the law. Therefore, Defendants respectfully ask this Court for an Order compelling the Plaintiffs herein to render performance under the compromise settlement agreement, and dismiss Plaintiffs' Motion for Attorney's Fees.

II. ARGUMENT

A. Plaintiffs' Contention That Defendants Have Failed to Cite Law or Authority For Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees is in Error, and Reflects an Effort to Avoid Addressing the Merits of this Motion

In responding to the current motion, Plaintiffs painstakingly avoid discussion of the issue actually before the Court; namely, enforcement of the compromise settlement agreement reached by the parties on February 3, 2010. Instead, Plaintiffs argue that Defendants' motion fails to state the rule or law upon which it is based, and thus, must be denied. (*See,* Plaintiffs' Response to Defendants' Motion to Compel Performance or Dismiss Plaintiffs' Motion for Attorney's Fees ("Plaintiffs' Response"), filed May 17, 2010, p. 2)[1]

In doing so, Plaintiffs correctly cite Idaho Civil Rule 7(b)(1) as the rule addressing motions, which states, in relevant part:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought. . . .

I.R.C.P. § 7(b)(1). Here, Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees complies with the rule. (*See*, Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees ("Motion to Compel Perf. Under the Settlement"), filed April 28, 2010)

[1] It should be noted that Plaintiffs even go as far as to change the heading of Defendants' motion. Specifically, Plaintiffs avoid using the phrase "Defendants' Motion to Compel Performance Under the Settlement," and insert an "or" where Defendants used an "and." Defendants seek to compel performance under the settlement reached by the parties on February 3, 2010, which would effectively dismiss Plaintiffs' motion for attorney's fees; thus, the "or" used by the Plaintiffs is inappropriate in this context.

It is undisputed that Defendants' Motion is in "writing" and sets forth the "relief sought" – namely, an Order compelling performance under the settlement reached on February 3, 2010, and dismissing Plaintiffs' Motion for Attorney's Fees. (Ibid.) Moreover, Defendants' Motion refers the Court to Defendants' Memorandum of Authorities in Support of Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, which provides ample common law authority in support of enforcement of the parties' settlement agreement; thus, specifying the "grounds" for which relief is sought. (Ibid., *see, also,* Defendants' Memorandum of Authorities in Support of Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees ("Memo. to Compel Perf. Under the Settlement"), filed April 28, 2010) Notably, common law provides grounds for enforcement of the parties' settlement agreement; thus, contrary to Plaintiffs' contention, citation to court rule and statute is not needed.

Given the above, Plaintiffs' argument that Defendants' Motion fails to state the rule or law upon which it is based is without merit, and enforcement of the compromise settlement agreement is appropriate.

B. Plaintiffs' Judicial Estoppel Argument Relies Exclusively on Actions Taken Following Plaintiffs' Failure to Comply With the Terms of the Compromise Settlement Reached by the Parties, and Thus, Is Inapplicable to Defendants' Effort to Enforce the Settlement Reached by the Parties on February 3, 2010

In an attempt to avoid the implications of the parties' compromise settlement, Plaintiffs contend that the Stipulated Order to Dismiss, executed post-settlement, precludes Defendants from enforcing the compromise settlement reached on February 3, 2010. (*See*, Plaintiffs' Response, pp. 3-5)

To this end, Plaintiffs' argument is exclusively post-settlement, relying only on the Stipulated Order to Dismiss. In other words, the argument is premised on actions following Plaintiffs' refusal to comply with the terms of the compromise settlement reached by the parties on February 3, 2010 and, for which, Defendants seek enforcement.[2] In this regard, Plaintiffs' argument is circular, in that Defendants' post-settlement actions were a consequence of Plaintiffs' underlying refusal to abide by the settlement that had been reached. As such, Plaintiffs' argument is both circular in nature and inapplicable to the case at hand, as it avoids discussion of the issue actually before the Court – enforcement of the compromise settlement agreement reached by the parties on February 3, 2010.

Essentially, Plaintiffs' argument would permit them to: (a) file a Complaint making a claim for attorney's fees under I.C. § 41-1839 (Section IV, paragraph 34 of Plaintiffs' Complaint); (b) reach a compromise settlement with Defendants agreeing to "sign a full release of their claims against MetLife"; (c) acknowledge that a settlement was reached; (d) renege on the settlement by refusing to dismiss the claim for attorney's fees under I.C. § 41-1839; and (e) then argue, after the fact, that such behavior precludes Defendants from enforcing the settlement agreement originally reached by the parties.[3]

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[2] In fact, it should be noted that Defendants' Answer includes, as an Affirmative Defense, that "Plaintiffs' claim for attorney fees under I.C. § 41-1839 are barred because Plaintiffs agreed to sign a full release of their claims against MetLife." (*See,* Answer)

[3] Remarkably, Plaintiffs have also attempted to avoid responsibility for their breach by suggesting that Ms. Paukert attempted to revoke the amount of the settlement and/or improperly condition the payment of the same. As explained in response to Plaintiffs' First Request for Admissions to Defendant, those aspersions by Plaintiffs are both factually incorrect and improper (*See,* Plaintiffs' First Request for Admissions to Defendants, Request Nos. 26 and 27, attached to the Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion of Summary Judgment, as Exhibit 19)

Given the foregoing, Defendants contend that Plaintiffs' argument of judicial estoppel, relying exclusively on actions that occurred because of Plaintiffs' failure to comply with the terms of the compromise settlement, are inapplicable to Defendants' efforts to enforce the settlement reached by the parties on February 3, 2010.

C. Contrary to Plaintiffs' Contention, the February 3, 2010 Compromise Settlement Was Enforceable, With All Material Terms Negotiated

Plaintiffs next contend that the compromise settlement reached on February 3, 2010 was unenforceable because material terms still needed to be negotiated. (*See*, Plaintiffs' Response, pp. 5-7) To support their position, Plaintiffs rely upon Lawrence v. Hutchinson, 146 Idaho 892, 204 P.3d 532 (App. 2009). A review of that case, however, reveals that it does not support Plaintiffs' position, but rather lends credence to Defendants' claim that an enforceable settlement agreement was reached on February 3, 2010.

In Lawrence, the defendants' counsel spoke with the plaintiff by phone, agreeing upon a payment amount to settle a legal malpractice action brought against defendants. Ibid., at 895, 204 P.3d 532. Subsequent thereto, the defendants discovered that the plaintiff had assigned all of his claims to a medical provider, potentially exposing them to further liability. Ibid., at 896, 204 P.3d 532. Over a year later, for the first time, the plaintiff argued that an enforceable settlement agreement had been reached, and should be enforced against the defendants. Ibid., at 896, 204 P.3d 532. The defendants argued that no settlement was reached because the confidentiality and indemnity provisions were material to the agreement, were not agreed upon, and, therefore, no enforceable settlement agreement existed. Ibid., at 897, 204 P.3d 532. Thus, the primary issue was whether the parties had entered into an enforceable settlement agreement when the parties

orally agreed to a monetary figure to settle a legal malpractice action, which the Court ruled in the negative. Ibid., at 897-898, 204, P.3d 532.

Those facts are distinguishable from the present matter in several important respects. Initially, unlike the parties in Lawrence, the settlement agreement in this case was in writing. Moreover, Plaintiffs, in this case, agreed to sign a full release of all their claims against MetLife for a specific sum of money, as part of a compromise settlement over a coverage dispute. All the material terms were present – payment of $200,000 in exchange for release of all their claims. Notably, these facts are undisputed and explicitly set forth in writing. (*See*, Aff. of Paukert, at ¶¶ 10-11, Exhibit 1, e-mails)

Also, in Lawrence, the Court found that the only term that was agreed to was the "money amount of settlement." Lawrence, 899, 204 P.3d 532. By contrast, in the present case, the parties did more than simply determine the "money amount of settlement." Instead, they reached a definitive agreement to pay $200,000 in exchange for release of all Plaintiffs' claims. In addition, unlike Lawrence, in which the Court emphasized that the plaintiff only sought to enforce the settlement one year later, here, the Defendants filed this Motion within three months of settlement. (*See*, Motion to Compel Perf. Under the Settlement) Moreover, the Defendants denied that the Plaintiffs are entitled to attorney's fees pursuant to I.C. § 41-1839 in their Answer, and asserted Affirmative Defenses regarding the same, stating, in relevant part, that "Plaintiffs' claim for attorney fees under I.C. § 41-1839, are barred because Plaintiffs agreed to sign a full release of their claims against MetLife." (*See*, Answer) Given these distinctions, Lawrence supports enforcement of the settlement agreement reached in this case on February 3, 2010.

Moreover, again, similar to Plaintiffs' previous argument, Plaintiffs' position is circular, in that it relies on actions that occurred post-settlement – *e.g.*, the Stipulated Order to Dismiss, the Release and the payment of $200,000 – to avoid enforcement of the settlement agreement. (*See*, Plaintiffs' Response, pp. 6-7) Along those lines, Defendants' actions post-settlement were a consequence of Plaintiffs' refusal to abide by the settlement reached, including their refusal to honor their promise to execute "a full release of their claims against MetLife." (*See*, Aff. of Paukert, at ¶¶ 10-11, Exhibit 1, e-mails)

In sum, while Plaintiffs claim that they "have fully complied with their obligations under any agreement reached on February 3, 2010," just the opposite is true. (*See*, Plaintiffs' Memorandum, p. 7) Defendants received the following e-mail acceptance on February 3, 2010:

> **Subject: [SPAM] Acceptance**
>
> Ms. Paukert:
>
> **Please let this letter confirm that my clients accept MetLife's offer of $200,000. My clients will sign a full release of their claims against MetLife.** At your earliest convenience, please send certified funds payable to:
>
> * * *
>
> Yours very truly and sincerely,
>
> Kinzo H. Mihara

(Ibid. at ¶ 11, Exhibit 1, e-mail from Mr. Mihara to Ms. Paukert (emphasis added)) Pursuant to the settlement agreement reached, Defendants paid Plaintiffs $200,000 in certified funds. (*See*, Plaintiffs' Response, p. 6) Reneging on the settlement agreement, Plaintiffs refused to release their claim for attorney's fees under I.C. § 41-1839 in Section IV, paragraph 34 of the Complaint.

Such actions support compelling the Plaintiffs to render performance under the settlement agreement and dismissing Plaintiffs' Motion for Attorney's Fees.

D. Plaintiffs' Claim that an Insured May Not Reach a Settlement Agreement, Releasing a Potential Claim For Attorney's Fees Under I.C. § 41-1839 is Without Merit

Assuming, *arguendo*, Plaintiffs are entitled to seek attorney's fees under I.C. § 41-1839, Plaintiffs take the remarkable position that they lack the authority to settle such attorney's fees claim (asserted in Section IV, paragraph 34 of their Complaint), claiming instead that "statutory rights and duties may not be waived or exempted by contract."[4] (*See*, Plaintiffs' Response, p. 7) In doing so, Plaintiffs emphasize that this attorney's fees law, governing insurance relationships, has existed in Idaho for "almost sixty (60) years." Nonetheless, Plaintiffs can point to no case holding that an insured may not reach a compromise settlement of a disputed claim, releasing any potential claim for attorney's fees under such statute. (Ibid.)

Instead, Plaintiffs reference a personal injury case, Lee v. Sun Valley Co., 107 Idaho 976, 695 P.2d 361 (1984), misconstrue both the Court's reasoning and its holding and then manipulate quotes from the Court to support their unfounded premise. In Lee, the plaintiff argued that the release agreement, absolving the defendant from liability arising out of injury to its guests, was invalid because a statute controlled the relationship between outfitters, guides and their guests, imposing a public duty on the defendant. The defendant was licensed in Idaho as an outfitter and guide and provided equestrian trail rides for tourists, while the plaintiff was a guest who was injured on such ride. Ibid., at 977-78, 695 P.2d 361. The Idaho Supreme Court held that the

[4] Plaintiffs' citation to the Penrose v. Commercial Travelers Insur. Co., 75 Idaho 524, 275 P.2d 969 (1954) case is not applicable as Defendants do not contest the constitutionality of the attorney's fees statue at issue, or that it was within the police power's of the state to enact such statute, which was the thrust of that case.

release agreement did not absolve the defendant of its statutory "public duty" because the Legislature expressly intended the statute to establish a standard of care within the tourist industry. Ibid., at 978, 695 P.2d 361.

In contrast to Lee, Plaintiffs can point to no legislative history or case that stands for their contention that an insured may not reach a settlement releasing any potential claim for attorney's fees under I.C. § 41-1839. Moreover, Plaintiffs make claims that are inconsistent with the Court's reasoning and holding in Lee. For example, Plaintiffs claim the Court in Lee – "recognized the general rule of law that statutory rights and duties may not be waived or exempted by contract." (*See*, Plaintiffs' Response, p. 7) However, the Court never made such a statement, instead, finding the contrary – "[t]here are some statutory rights and duties which may be waived or exempted by contract," "[o]ther statutory rights and duties may not be waived or exempted by contract,"[5] "[w]e do not attempt to articulate a general rule applicable to all statutes," and "the general rule [is] validating exculpatory contracts." Ibid., at 979, 695 P.2d 361. Likewise, in support of Plaintiffs' argument, Plaintiffs manipulate the following quote in Lee:

> However, we do hold that where the legislature has addressed the rights and duties pertaining to personal injuries arising out of the relationship between two groups, *i.e.*, employers/employees, outfitters and guides/participants, and has granted limited liability to one group in exchange for adherence to specific duties, then such duties become a "public duty" within the exception to the general rule validating exculpatory contracts. . . .

Ibid., (emphasis added) Thus, the Court found that where the Legislature has addressed the rights and duties pertaining to "personal injuries" between two groups, in some situations, such

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[5] Among others, the Court referenced (a) minimum wage; (b) property exemptions from attachment and execution; (c) worker's compensation benefits; (d) statute of limitations; (e) unemployment compensation; and (f) statutory right of exemption. Ibid., at 979, 695 P.2d 361. When noting such exemptions, the Court states: [t]he citations above are merely examples of other jurisdictions' treatment of specific contractual waivers of statutory rights. They are not necessarily precedent for the same disposition in Idaho." Ibid., FN2.

rights and duties may not be waived or exempted by contract. Ibid. Nonetheless, Plaintiffs manipulate the quote, removing the word "personal" from "personal injuries," attempting to apply the quote to the situation at hand. Given these distinctions, together with Plaintiffs' failure to identify any case holding that an insured may not reach a settlement releasing potential claims for attorney's fees under I.C. § 41-1839, Lee supports enforcement of the settlement agreement reached on February 3, 2010.

Likewise, Plaintiffs' contention that – "only the state may 'release' a defendant from liability [referring to I.C. § 41.1839]" – is without legal foundation. Simply stated, there is no authority to support such claim and if the State of Idaho is required to sign off on any such settlement, then it would be a necessary party to this action. As such, Plaintiffs' claim that they did not have the legal authority to reach a settlement with the Defendants that would encompass a claim for attorney's fees under I.C. § 41-1839 is without merit and should not be adopted by this Court.

III. CONCLUSION

A settlement, in its most basic sense, is a resolution of a disagreement between two parties. On February 3, 2010, the parties in this matter reached such a resolution, wherein the Plaintiffs agreed to accept $200,000, in exchange for signing "a full release of their claims" against Defendants. In light of the foregoing, as well as the points and authorities discussed in Defendants' Memo. to Compel Perf. Under the Settlement, Defendants respectfully ask the Court for an Order (a) compelling Plaintiffs to render performance under the settlement agreement; and (b) dismissing Plaintiffs' Motion for Attorney's Fees.

DATED this 28 day of May, 2010.

PAINE HAMBLEN LLP

By: _____
William J. Schroeder, ISB No. 6674
Patrick E. Miller, ISB No. 1771
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 2010, I caused to be served a true and correct copy of the foregoing **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL PERFORMANCE UNDER THE SETTLEMENT AND DISMISS PLAINTIFFS' MOTION FOR ATTORNEY'S FEES**, to the following:

Kinzo H. Mihara
Attorney at Law
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83816-0969

✓ DELIVERED
_____ U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FACSIMILE)
_____ E-MAIL

Debbie Miller

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STATE OF IDAHO)
County of KOOTENAI)ss
FILED 1-20-10
AT 8:30 O'Clock A M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

THE ESTATE OF BENJAMIN HOLLAND, DECEASED, ET AL,

Plaintiffs,

vs.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, ET AL.

Defendants.

Case No. **CV 2010 677**

MEMORANDUM DECISION AND ORDER: 1) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; 2) DENYING PLAINTIFFS' MOTION FOR ATTORNEY FEES AND 3) GRANTING DEFENDANTS' MOTION TO COMPEL PERFORMANCE UNDER THE SETTLEMENT AND DISMISS THE PLAINTIFFS' MOTION FOR ATTORNEY FEES.

Attorneys: For the Plaintiffs: Kinzo Mihara
For the Defendants: William Schroeder

I. PROCEDURAL HISTORY AND BACKGROUND.

This case involves a settled dispute over insurance coverage, with the issue of attorney fees still in dispute.

On January 26, 2010, plaintiffs Estate of Benjamin Holland, deceased, Gregory Holland and Kathleen Holland (Hollands) filed this action alleging defendants Metropolitan Property and Casualty Insurance and MetLife Auto and Home (MetLife) wrongfully failed to pay the amounts due under an insurance contract within thirty days of being provided proof of loss as required under the contract. Hollands claim three counts of breach of contract, two counts each of negligent and intentional infliction of emotional distress, and three counts of bad faith. Additionally, Hollands claim:

> The Estate of Benjamin Holland, Gregory Holland, and Kathleen Holland are entitled to reasonable attorney's fees pursuant to I.C. § 12-120, § 12-121, § 41-1839, and any other applicable statutory authority and/or judicial doctrine which allows for recovery of attorney fees.

Complaint for Damages, p. 7, ¶ IV.

Benjamin Holland died October 25, 2009, as a result of a motor vehicle accident involving an underinsured motorist. Complaint for Damages, p. 3, ¶¶ 6, 7. Benjamin owned a policy of insurance with MetLife which named Benjamin as the named insured, and had limits of $100,000 per person and $300,000 per accident. *Id.,* p. 2, ¶ 3. Benjamin's parents, Gregory and Kathleen Holland, also owned a policy with MetLife, with limits of $250,000 per person and $500,000 per accident, which extended coverage to relatives who resided in their household. *Id.,* ¶ 4. Hollands claim just prior to the accident and Benjamin's ensuing death, Benjamin was in the process of moving into a house he had bought, but still had a significant portion of his personal property at his parents' home, and Benjamin continued to receive mail at his parents' home. *Id.,* p. 3, ¶ 6.

On February 9, 2010, Hollands filed "Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. 41-1839", an "Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839", and "Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. 41-1839". Hollands claim their counsel are entitled to reasonable attorney's fees in the amount of $60,000, that amount being 30% (under a contingency fee agreement) of the $200,000 ultimately recovered from MetLife, pursuant to I.C. § 41-1839, as a result of MetLife's alleged failure to pay the amount justly due under the insurance contract within thirty days after receiving proof of loss.

On March 2, 2010, the parties stipulated to dismiss all claims, but for the pending

motion for attorney's fees, and the Court entered an Order dismissing all claims with prejudice and without costs to either party on March 3, 2010. MetLife filed "Defendants' Answer and Affirmative Defenses" on April 12, 2010, addressing only the Hollands' claims for attorney's fees under I.C. § 41-1839, because given the Court's dismissal of all other claims with prejudice, "no Answer is required as to paragraphs 1 through 33, as all claims, except for the claim for I.C. § 41-1839 attorney's fees, alleged in paragraph 34 of the Complaint, have been dismissed with prejudice." Defendants' Answer and Affirmative Defenses, p. 2. On April 13, 2010, MetLife filed an "Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiff's Motion for Attorney Fees)." Kathleen Paukert was retained by MetLife on January 8, 2010, to provide a coverage opinion concerning claims made against MetLife by Holland. *Id.*, p. 2, ¶ 3. On April 28, 2010, MetLife filed a "Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees" and a "Memorandum of Authorities in Support of Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees". In addition to the initial Paukert affidavit, on May 7, 2010, MetLife filed in support of its motion to compel the "Supplemental Affidavit of Kathleen H. Paukert (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)" and the affidavit of "Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)" (Davis), the adjuster assigned by MetLife to the claims made by Benjamin Holland's estate. On May 10, 2010, MetLife filed "Defendants' Response to Plaintiffs' Motion for Attorney's fees Pursuant to I.C. § 41-1839", and the "Affidavit of William J. Schroeder in Support of Defendant's Response to Plaintiffs' Motion for Attorney's Feesw Pursuant to I.C. 41-1839." On May 11, 2010, MetLife filed the "Supplemental Affidavit of Daneice Davis (Submitted in Opposition to Plaintiffs' Motion for Attorney's Fees)". On May 17, 2010, Hollands filed "Plaintiffs' Motion for Summary Judgment,

"Memorandum in Support of Plaintiffs' Motion for Summary Judgment", "Plaintiffs' Response to Defendants' Motion to Compel Performance or Dismiss Plaintiffs' Motion for Attorney's Fees", and "Plaintiffs' Reply to Defendants Response to Plaintiffs' Motion for Attorneys' Fees Pursuant to I.C. § 41-1839". On May 20, 2010, Hollands filed "Plaintiffs' Motion to Shorten Time for Hearing on Their Motion for Summary Judgment." In Hollands' motion for summary judgment they argue their entitlement to attorney's fees in the amount of $60,000 or entitlement to fees in general are based on MetLife's failure to have specifically denied the allegations of Hollands in the Complaint. On May 24, 2010, MetLife objected to Hollands' motion to shorten time on their motion for summary judgment because Hollands' chosen course of proceeding did not provide for a briefing schedule as contemplated in the civil rules. Defendants' Response to Plaintiffs' Motion to Shorten Time for Hearing on Plaintiffs' Motion for Summary Judgment, p. 2. However, MetLife assured the Court:

> Defendants' response to Plaintiffs' Motion for Summary Judgment will be filed and served on May 25, 2010. Defendants have no objection to having Plaintiffs' May 17, 2010 Motion for Summary Judgment heard on June 2, 2010, if the Court has sufficient time to hear all of the motions.

Id. On May 25, 2010, MetLife filed "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment" and an "Affidavit of William J. Schroeder in Opposition to Plaintiffs' Motion for Summary Judgment". On May 26, 2010, MetLife filed its "Sur-Reply to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839", and the "Supplemental Affidavit of Mr. Schroeder William J. Schroeder in Support of Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839." On May 26, 2010, Hollands filed "Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment." Finally, on May 28, 2010, MetLife filed "Defendants' Reply Memorandum in Support of Defendants' Motion to Compel

Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney Fees."

In summary, before the Court now are Hollands' motions for attorney's fees, motion to shorten time on summary judgment, and for summary judgment on the issue of entitlement to attorney's fees. Also before the Court is MetLife's motion to compel (actually a motion to enforce a settlement) and motion to dismiss Hollands' motion for attorney's fees. All of these motions are interrelated.

Oral argument was held on June 2, 2010. Due to the extremely large amount of briefing filed a short amount of time before oral argument, the Court was required to take these motions under advisement.

II. STANDARD OF REVIEW.

Under Idaho Rule of Civil Procedure 56, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 518-20,

650 P.2d 657, 661-62 (1982). In the present case, neither party has requested a trial by jury. Accordingly, this Court can reach the most probable inferences from the undisputed material facts before it.

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford,* 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). Subsection (3) of I.R.C.P. 54 obligates the Court to consider factors (A) through (K) in determining an amount of fees through the use of mandatory "shall" language. The Rule requires the District Court to consider all eleven factors plus any others that the Court deems appropriate. *Lettunich v. Lettunich,* 141 Idaho 425, 435, 111 P.3d 110, 120 (2005). The Court need not address each one of the factors in its decision, but the record must demonstrate that the Court considered them all. *Parsons v. Mut. Of Enumclaw Ins. Co.,* 143 Idaho 743, 747, 152 P.3d 614, 618 (2007) (quoting *Boel v. Stewart Title Guar. Co.,* 137 Idaho 9, 16, 43 P.3d 168, 775 (2002)).

III. ANALYSIS.

A. Hollands' Motion for Attorney's Fees Pursuant to I.C. § 41-1839.

Hollands move this Court for attorney's fees under I.C. § 41-1839. Hollands argue MetLife wrongfully failed to pay on the insurance contract within thirty days of being provided with proof of loss. Memorandum in Support of Motion to Determine Attorney's Fees, p. 6. Hollands argue attorney fees in the amount of $60,000, or 30% of the $200,000 settlement in this mater, are appropriate and reasonable in light of the factors in I.R.C.P. 54(e)(3)(A)-(K), with emphasis on the amount of recovery obtained for the clients and the recovery having been obtained without "...having to bear the emotional burden of litigating the underlying claims." *Id.,* p. 8.

Hollands provide a factual background for the Court in their memorandum. *Id.*, pp. 2-4. On October 25, 2009, Benjamin Holland died as a result of an accident in Nez Perce County, Idaho. Benjamin and his parents, Gregory and Kathleen, had three policies with MetLife. On November 8, 2009, Hollands' claim their attorney Kinzo Mihara (Mihara) tendered notice of a claim to MetLife. *Id.* At that time Mihara was acting *pro bono. Id.*, p. 2. MetLife designated this initial claim as Claim No. FRD 373130, and assigned the matter to MetLife insurance adjuster Daneice Davis. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 2; Affidavit of Daneice Davis, ¶ 3. On November 12, 2009, MetLife requested additional documentation to support the claim. Memorandum in Support of Motion to Determine Attorney's Fees, p. 2. Hollands contend that information was submitted on November 17, 2009. *Id.*, and Complaint, p. 3, ¶10. On December 8, 2009, Mihara claims he discovered the two policies held by Gregory and Kathleen Holland may also support claims by the estate of Benjamin Holland. *Id.* MetLife claims Mihara on December 7, 2009, stated the matter could not be concluded by payment of the initial policy limits because Hollands had decided to make claims against the two additional MetLife policies. Mihara claims he discussed these claims with MetLife's adjuster on December 8, 2009, and was made aware that the adjuster had made a request for extension of a response until after the Christmas and New Year's holidays. Memorandum in Support of Motion to Determine Attorney's Fees, p. 2. Those claims were assigned Claim No. FRD 408440. *Id.*, p. 3. This was an automobile policy held by Gregory and Kathleen Holland. There was also a claim made on a motorcycle policy which was assigned Claim No. FRD 408370. Defendants' Response to Plaintiffs' Motion for attorney's Fees Pursuant to I.C. 41-1839, p. 3. "After the holidays", Mihara

then "demanded that MetLife come to a decision and tender an amount justly due by January 8, 2010." Memorandum in Support of Motion to Determine Attorney's Fees, p. 3. On January 8, 2010, the adjuster for MetLife indicated to Mihara that MetLife could not decide whether or not coverage was applicable under the policy and that a coverage opinion would be sought from an independent attorney. *Id.* On January 13, 2010, the independent attorney, Kathleen Paukert (Paukert), contacted Mihara and requested an extension to come to a coverage decision. *Id.*, p. 4. Mihara granted an extension until January 22, 2010. *Id.* On January 22, 2010, Paukert contacted Mihara and requested another extension, which Mihara denied.

On January 26, 2010, Mihara filed the Complaint in this case on behalf of Hollands. On February 2, 2010, Paukert advised Mihara that, based on her research, there was no coverage on the policies on the theories argued by Mihara, but there was possible coverage on the motorcycle policy under a theory Mihara had not advanced. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; Affidavit of Paukert, ¶ 9. Paukert advised Mihara that MetLife was offering to pay $200,000 ($250,000 limits less the $50,000 Hollands had received from the negligent party), provided Hollands signed a full release. *Id.* On February 26, 2010, counsel for the parties signed a "Joint Motion and Stipulated Order to Dismiss All Claims Except for the Pending Motion for Attorney Fees", representing that "the parties have fully resolved all claims in the matter except for the pending motion for attorney fees." On March 3, 2010, this Court signed the Order dismissing all claims between the parties "except for Plaintiffs' Motion for Attorney fees filed on February 9, 2010."

MetLife responds to Holland's motion for fees by arguing: (1) any claim by Hollands to fees under I.C. § 41-1839 is barred by the Settlement agreement,

discussed *infra;* (2) Hollands were not the prevailing party and are therefore not entitled to fees; (3) MetLife's tender of their coverage decision and amounts justly due were not untimely (beyond the 30-day time limit in I.C. § 41-1839) because "additional theories, developed through the course of shared research, required supplemental documentation demonstrating proof of loss, the thirty-day clock arguably did not begin until January 27, 2010, the date the last proof of loss was requested by the Defendants" (Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 17.); (4) Hollands' claim for fees is barred by judicial estoppel as Hollands previously had taken the position that they did not want the policy limits under the initial claim filed (upon which a determination had been reached as early as December 7, 2009, but subsequent to which Mihara informed MetLife's Daneice Davis that Hollands would make additional claims against the two policies held by Gregory and Kathleen Holland) and had actively participated with MetLife in finding coverage for the additional claims up until February 2, 2010 (in addition to granting an extension for a coverage decision deadline), and then after February 2, 2010, Hollands took the position that MetLife failed to pay amounts justly due within thirty days; (5) that disputed questions of material fact remain; (6) that the award of fees requested by Hollands is unreasonable in part because the settlement amount had nothing to do with the lawsuit as MetLife (and its agents Davis and Paukert) were unaware a lawsuit had been filed at the time the settlement was reached; and (7) MetLife asks the Court to limit fees, if any are granted, to the time Hollands' counsel was not operating *pro bono*. Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 10-23.

1. Did Hollands "Prevail"?

As argued by MetLife, to be entitled to fees under I.C. § 41-1839, an insured must "prevail" in an action. *Arreguin v. Farmers Ins. Co. of Idaho,* 145 Idaho 459, 464,

180 P.3d 498, 503 (2008). To prevail, the insured need not obtain a verdict for the full amount requested, only an amount greater than that tendered by the insurer. *Halliday v. Farmers Ins.*, 89 Idaho 293, 301, 404 P.2d 634, 638-39 (1965). The determination of which party prevails, on which issues, and to what extent is in the discretion of the Court. *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 857, 920 P.2d 67, 73 (1996). Importantly: "Where the insurer is sued for attorney fees incurred in a separate successful action...the insurer is obligated to pay attorney's fees only if its initial refusal to pay the claim were unreasonable." *Dawson v. Olson,* 94 Idaho 636, 641, 496 P.2d 97, 102 (1972) (discussing uninsured motorist insurance cases). In *Parsons v. Mutual of Enumclaw Ins. Co.,* 143 Idaho 743, 152 P.3d 614 (2007), the Idaho Supreme Court upheld a $20,000 contingency fee award to Parsons pursuant to I.C. § 41-1839, where the insurer tendered $60,000 in uninsured motorists coverage on November 12, 2004, and where Parsons had filed her lawsuit on October 26, 2004, and served Mutual of Enumclaw the next day. 143 Idaho 743, 745, 152 P.3d 614, 616. Parsons had received the $50,000 Allstate policy limit from the negligent driver who caused the accident she was involved in, she then sought Mutual of Enumclaw to pay the amount she was justly due under her $100,000 underinsured motorist coverage with them as her damages exceeded the liability coverage limits of the Allstate policy. *Id.* Parsons filed a motion seeking attorney's fees under I.C. § 41-1839, and the Idaho Supreme Court upheld the District Court's award of $20,000, finding there was no abuse of discretion in fixing the award amount. 143 Idaho 743, 748, 152 P.3d 614, 619.

In response to MetLife's argument, Hollands argue prior to their lawsuit MetLife was ready to tender only $50,000 to settle the claims, not the $200,000 ultimately

offered which led to settlement. Plaintiffs' Reply to Defendants' Response to Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 5. Hollands also note the settlement release entered into by the parties specifically references the lawsuit. *Id.*, p. 6; Exhibit A to Answer, p. 1. That document was signed by the parties on February 24, 2010. And, Hollands argue Davis and Paukert had notice of the lawsuit as early as January 29, 2010, before the settlement by the parties was reached. *Id.*

The facts before the Court indicate that MetLife was prepared to pay policy limits in Claim No. FRD 373130, the initial claim, but that Hollands' counsel Mihara was seeking to make additional claims under Gregory and Kathleen Holland's policies and would not consider the initial matter concluded. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 3. As such, there was no tender on or about December 7, 2009. Also, to the extent there was a tender as to Claim No. FRD 373130, subsequent to the December 7, 2009, offer on that claim number, claims under the two polices held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370, and those claims were clearly not contemplated within the initial $50,000 offer. And, unlike the *Parsons* case, the facts in this case do not indicate MetLife was served with a Complaint and Summons or otherwise knew of the Hollands' lawsuit at the time the offer was tendered. Although Hollands cite to the Affidavits of Davis and Paukert, in which both discuss the Coeur d'Alene Press listing regarding Hollands having sued MetLife, both also state Paukert's assistant could find no record of this filing when she investigated with the Court. *See* Supplemental Affidavit of Kathleen Paukert, p. 4, ¶ 25; Affidavit of Daneice Davis, p. 3, ¶ 8. Thus, there is a dispute of material fact as to the timing of MetLife's knowledge of Holldand's lawsuit. Even if that dispute of fact were resolved in favor of Hollands, Hollands face a daunting task trying to prove Hollands prevailed within the meaning of

I.C. § 41-1839 and *Parsons* where: 1) there was no initial refusal by MetLife to pay, and 2) where MetLife was not served with a Summons and Complaint in this matter at the time their offer was tendered, and arguably had no knowledge at all of Hollands' lawsuit at the time their offer was tendered. Because there is a dispute of fact as to knowledge, and the facts surrounding the reasonableness of the initial refusal to pay the claim, determination of prevailing party cannot be decided at this time.

2. Did Hollands' Counsel Mihara Grant an Extension Which Resulted in Settlement Being Timely?

MetLife points out their December 7, 2009, settlement offer for the policy limits on Hollands' initial claim on Benjamin's policy was not accepted by Hollands as their counsel Mihara informed adjuster Davis that additional claims would be made against two policies owned by Gregory and Kathleeen Holland. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 14. In her Affidavit, Davis states she informed Holland's counsel Mihara she would be going on a three-week vacation and would not return until January 6, 2010, at which time the two new claims would be reviewed. Affidavit of Daneice Davis, p. 2, ¶ 3. Davis states this delay was acceptable to Hollands, but that she did not send out a letter confirming her conversation with Hollands' counsel. *Id.* Thereafter, Paukert was retained by MetLife on January 8, 2010, and she had contact with Holland's counsel regularly from January 13, 2010, through February 2, 2010, to discuss theories coverage on the additional claims assigned Claim Numbers FRD 408440 and 408370. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 15-17. MetLife argues the conversation Davis had begins the thirty-day clock running on January 6, 2010, rendering the February 3, 2010, settlement timely. *Id.*

Hollands reply they provided proof of loss on November 10, 2009. Plaintiffs'

Reply to Defendants' Motion for Attorney's Fees Under I.C. § 41-1839, p. 7. Hollands also state that the cumulative time between November 10, 2009, to December 7, 2009, added to the period from January 7, 2010, to January 26, 2010, amounts to well over the thirty days after proof of loss in which MetLife was required to pay an amount justly due. *Id.*, p. 9. Finally, Hollands argue MetLife had knowledge of the lawsuit having been filed at the time of settlement because they were told on January 29, 2010, that notice had been published in the Coeur d'Alene Press. *Id.*

This will be discussed more fully in the analysis of MetLife's Motion to Enforce Settlement Agreement, but there are flaws in Hollands' motion for attorney fees and Hollands' argument that the settlement was untimely. **First,** there are *separate offers* made at *separate times* on *separate policies.* As mentioned above, MetLife was prepared to pay policy limits in Claim No. FRD 373130, the initial claim, but Hollands' counsel Mihara was seeking to make additional claims under Gregory and Kathleen Holland's policies and would not consider the initial matter concluded. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 3. As such, there was no acceptance of the tender on or about December 7, 2009. Also, to the extent there was a tender as to Claim No. FRD 373130, subsequent to the December 7, 2009, offer on that claim number, claims under the two polices held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370, and those claims were clearly not contemplated within the initial $50,000 offer. Again, in her Affidavit, Davis states she informed Mihara she would be going on a three-week vacation and would not return until January 6, 2010, at which time the two new claims would be reviewed. Affidavit of Daneice Davis, p. 2, ¶ 3. Davis states this delay was acceptable to Hollands, but that she did not send out a letter confirming her

conversation with Hollands' counsel. *Id.* Thereafter, Paukert was retained by MetLife on January 8, 2010, and Paukert had contact with Holland's counsel regularly from January 13, 2010, through February 2, 2010, to discuss coverage theories on the additional claims assigned Claim Numbers FRD 408440 and 408370. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 15-17. MetLife argues the conversation Davis had begins the thirty-day clock running on January 6, 2010, rendering the February 3, 2010, settlement timely. *Id.* **Second,** counsel for Hollands has provided no law to support the innovative argument that these time periods on these separate offers made at separate times on separate policies should be *aggregated.* Again, Hollands argue the cumulative time between November 10, 2009, to December 7, 2009, added to the period from January 7, 2010, to January 26, 2010, amounts to well over the thirty days after proof of loss in which MetLife was required to pay an amount justly due. *Id.*, p. 9. This Court can find no such case law to support such a novel argument. Due to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods. **Third,** if Paukert on behalf of MetLife found the coverage theory that would provide a larger recovery for the Hollands, and if Mihara on behalf of Hollands accepted that higher amount based on the coverage theory that MetLife's attorney developed, how can Hollands prove there was an unreasonable refusal to pay Hollands' claim under I.C. § 41-1839? Suffice it to say that regarding Hollands' motion for attorney fees under I.C. § 41-1839, that motion must be denied at this time. The question remains, following an analysis of MetLife's Motion to Support Settlement Agreement, whether there will be a "later time" for Hollands.

Another issue for this Court is whether the proof of loss submitted by Hollands provided MetLife with sufficient information to allow it to investigate and determine its

liability. *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006). This issue also precludes this Court from awarding Hollands attorney fees at this time. The November 10, 2009, notice was met with an offer on December 7, 2009. This falls within the time limits of the statute. On December 8, 2009, MetLife was informed that additional alternative claims were being made on two other polices, those of Gregory and Kathleen Holland. Memorandum in Support of Motion to Determine Attorney's Fee, p. 2. Thereafter, Hollands granted a determination extension until January 22, 2010. *Id.,* p. 3. A material question of fact remains for this Court as to whether in light of the research and theories discussed by Holland's counsel Mihara, and MetLife's counsel Paukert, including a request by MetLife for a legible copy of a motorcycle title on January 27, 2010, even after the January 22, 2010, deadline imposed by Hollands, MetLife had sufficient information to investigate and determine its liability. Because of remaining disputed facts in this regard, this Court cannot properly find a date certain on which proof of loss submitted by Hollands was sufficient to start the clock on the 30 day timeline. Arguably, a question of fact also remains regarding MetLife's knowledge of when the lawsuit was filed, although it is unclear why a direct question in that regard was never posed to Hollands' counsel. In any event, disputes of fact remain precluding the Court from granting Hollands' motion for attorney fees at this stage.

3. Are Hollands Estopped from Bringing the Fees Claim?

MetLife argues Hollands initially took the position that they did not want the policy limits under the initial claim filed upon which a determination had been reached as early as December 7, 2009, but subsequently, Hollands' counsel Mihara informed Davis that Hollands would make additional claims against the two additional policies held by Gregory and Kathleen Holland, Hollands then granted an extension for a

coverage determination on those additional policies, and Hollands actively participated with MetLife in finding coverage for the additional claims up until February 2, 2010. Hollands thereafter took the position that MetLife failed to pay amounts justly due within 30 days. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, p. 19. MetLife states it relied on the representations that additional time would be given to find coverage for the additional claims made on December 8, 2009, invested time and effort to find additional coverage under alternative theories, and would suffer if Hollands are permitted to maintain their position that the 30-day attorney's fee provision in I.C. § 41-1839 is applicable here. *Id.*, pp. 19-20.

Hollands reply the reasons set forth in their response to MetLife's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees addresses the estoppel argument. Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 9-10. In that brief, Hollands argue in part MetLife should be estopped from now arguing the settlement precludes their recovery of attorney's fees where they previously had agreed to settle all claims but for the claim for attorney's fees. Plaintiffs' Response to MetLife's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 3.

Both parties in essence (albeit regarding different issues) argue the other should be estopped from taking a position inconsistent with one previously taken in the same matter. Here, there is no evidence before the Court that Hollands ever claimed no lawsuit would be filed or that no attorney's fees would be sought. In fact, the notice Davis received from MetLife demanding a coverage decision on the alternate claims by January 8, 2010, indicated Hollands believed the 30-day clock was not only running, but was about to expire. Equitable estoppel, as discussed by MetLife, requires:

> (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.

Willig v. State, Dep't of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). Quasi-estoppel, a related doctrine, does not require the first or fourth elements and applies when it would be unconscionable to allow a party to assert a right inconsistent with a prior position. *Id.* Here, it is difficult to see at this juncture what false representation or concealment of a material fact (*before* the suit was filed on January 26, 2010, and not directly disclosed until February 2, 2010) was made which caused MetLife to rely on statements or concealments by Hollands to its prejudice. Similarly, MetLife never purported to be unapposed to Hollands' claim for attorney fees.

4. Are Hollands Requested Fees Reasonable?

Hollands requested fees of $60,000 or 30% of the amount settled for are unreasonable per MetLife. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 21-22. MetLife makes this argument on the basis of Hollands' counsel having originally taken the case *pro bono* but having entered into a contingency fee agreement with Hollands thereafter (it is unknown when the contingency fee agreement was entered into as the agreement itself is undated [Exhibit 2, Affidavit of Kinzo H. Mihara in Support of Plaintiffs' Motion for Summary Judgment], and the affidavit of Mihara itself does not provide such date [*Id.,* p. 2, ¶ 4]); Hollands having not disclosed their filing of the suit during conversation on January 27, 2010; and the settlement not having been reached because of the lawsuit, as MetLife had no knowledge of the suit at the time it was settled. *Id.,* pp. 21-22. As such, MetLife argues fees, if awarded at all, should be limited to the time during which Hollands' counsel was

not acting *pro bono. Id.* p. 23. Hollands reply MetLife has set forth no support for the contention that their counsel's having initially appeared *pro bono* should result in a downward departure from the sought amount of fees. Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839, pp. 1012. Hollands also note the purported tender on December 7, 2009 was not in writing and therefore does not amount to actual production or tender. *Id.,* citing I.C. § 9-1501.

Hollands' argument is well-taken. *Parsons v. Mutual of Enumclaw* involves the Supreme Court discussing this issue. There, the Supreme Court upheld an award of a contingency fee under I.C. § 41-1839, reasoning that so long as a court clearly recognized the matter of fees as a matter of discretion and acted within that discretion, the Court would not be overturned. 142 Idaho 743, 748, 152 P.3d 614, 619. The factors for the Court to determine the reasonableness of the award of fees sought by Hollands can be found in I.R.C.P 54(e)(3), and the arguments set forth by MetLife find no support in Idaho statutes, rules, or case law.

In sum, although MetLife's arguments regarding estoppel and the unreasonableness of fees fail at this juncture, whether Hollands have prevailed and when the 30-day time limit began to run also remain material questions of fact in dispute. Therefore, this Court cannot exercise its discretion and grant Hollands' motion for fees at this time.

B. Hollands' Motion for Summary Judgment.

Hollands moved for summary judgment on the question of their entitlement to fees in this matter on May 17, 2010. The matter was not noticed up for hearing until May 21, 2010, but MetLife only objected to the motion to shorten time and the Court's hearing the motion for summary judgment to the extent the Court would not have the time to hear all the motions during the June 2, 2010, hearing time set aside for these

matters. Defendants' Response to Plaintiffs' Motion to Shorten Time, p. 2.

Hollands argues three things: (1) MetLife's failure to deny the allegations in the Complaint amount to an admission and Hollands are therefore entitled to summary judgment on all issues; (2) MetLife has failed to present any support for its equitable estoppel argument in opposition to the claim for fees; and (3) Hollands' claim for fees is reasonable and proper as Paukert's and Davis' affidavits recite the amount of time and effort which went into settling this matter. Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pp. 6-11. In response, MetLife argues the parties' stipulated motion and Order to Dismiss precludes its having to deny claims made by Hollands in their Complaint. Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 6. MetLife then reiterates the arguments it has previously made regarding estoppel of Hollands' claim for fees and the unreasonableness of fees claimed. *Id.*, pp. 8-12.

The estoppel argument is discussed *supra.* In sum, at the time MetLife arguably relied upon any statements of Hollands' in deciding to further research coverage in this matter, i.e. between the time it was notified of the additional claims on December 8, 2009, and the time Davis went on vacation, and again from the time Davis returned on January 6, 2010, until the expiration of the extension (until January 22, 2010) granted by Hollands, there were no statements made by Hollands upon which MetLife could reasonably rely that no lawsuit would be forthcoming. *See supra.* Similarly, MetLife's reasonableness of fees argument must likely also fail because the question of fees is one committed to the discretion of the Court with the consideration of the factors in I.R.C.P. 54(e)(3) mandatory upon the Court. The statement by MetLife that the settlement had nothing to do with the lawsuit raises a question of material fact with regard to whether Hollands are the "prevailing" party within the meaning of that term in

I.C. § 41-1839, but has nothing to do with the award, if any, of fees by this Court. Likewise, Hollands' counsel holding himself out as *pro bono* and later entering into a contingency agreement is merely one of several factors for the Court to consider.

Remaining is Hollands' argument that all claims in the Complaint are deemed admitted for failure by MetLife to deny them. Indeed, all averments in a complaint not denied are deemed admitted. *Jacobsen v. State,* 99 Idaho 45, 48, 577 P.2d 24, 27 (1978), quoting I.R.C.P. 8 (d). But here, as argued by MetLife, the Court's February 3, 2010, Order dismissed all claims with prejudice except for the attorney's fee claim. Defendants' Motion in Opposition to Plaintiffs' Motion for Summary Judgment, p. 7. Therefore, MetLife argues, only a responsive pleading to the pending motion for attorney's fees was required or, alternatively, MetLife asks for direction from this Court with respect to which portions of a previously dismissed Complaint Defendants would be expected to answer. *Id.,* pp. 7-8.

This Court dismissed all claims "except for Plaintiffs' Motion for Attorney fees filed on February 9, 2010,...with prejudice and without costs to either party." Joint Motion and Stipulated Order to Dismiss all Claims Except for the Pending Motion for Attorney Fees, pp. 2-3. It follows that only paragraph 34 on page 7 of the Complaint remained at issue and, because the February 9, 2010, motion only addressed fees under I.C. § 41-1839, this statute would be the only possible basis for recovery by Hollands. Hollands' argument that MetLife's failure to deny paragraphs 9, 10, 13, 16, 17 and 18 of the Complaint operates as admissions is without merit. The plain language of this Court's Order excepts only "Plaintiff's Motion for Attorney fees filed on February 9, 2010"; therefore, no averments in the Complaint, even if deemed true, remain before the Court. In effect, all of the Complaint was dismissed with prejudice on February 3, 2010, and Hollands' are not entitled to judgment as a matter of law on this

issue.

C. MetLife's Motion to Enforce the Settlement Agreement.

In response to the motion for attorney's fees filed by Hollands, MetLife filed a motion to compel Holland's performance under the settlement and to dismiss their claim for attorney's fees. MetLife argues the February 3, 2010, settlement between counsel for Hollands and the coverage evaluator, Paukert, contemplated Hollands would sign a "full release" of "all claims" in consideration of MetLife's offer of $200,000 and, as such, their February 9, 2010, request for attorney's fees should be dismissed. Memorandum of Authorities in Support of Defendant's Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 7. MetLife submitted the affidavits of Paukert and Davis in support of its motion. In her affidavit, Paukert states she and counsel for Hollands discussed on several occasions his appearing for them *pro bono*. Affidavit of Kathleen Paukert, p. 2, ¶ 4.

> On or about February 3, 2010, upon receiving Mr. Mihara's confirmation that his clients had accepted MetLife's offer, I called Mr. Mihara to confirm that his clients would provide MetLife with a full release. He said that they would, but that he was now making a claim for attorney's fees. I reminded Mr. Mihara that he had agreed that his clients would provide a full release. He said that they would; however, he was personally going to sue MetLife for attorney's fees. I believe that it was during this conversation that Mr. Mihara, for the first time, told me that he had filed a lawsuit against MetLife on January 26, 2010. It may have been on February 2, 2010. It was absolutely after a settlement had been reached.

Id., p. 5, ¶ 12.

Hollands reply to the motion to compel performance under the settlement essentially makes four arguments: (1) that MetLife cites no rule basis or other authority for its motion; (2) that MetLife should be judicially estopped from stipulating to dismiss all claims but the fees issue and thereafter claim the settlement would preclude the Court form awarding statutory attorney's fees; (3) that the agreement reached on

February 3, 2010, by email, was not an enforceable contract as material terms were left to be negotiated, namely the full release itself; and (4) that Hollands did not have the authority to waive their counsel's entitlement to attorney's fees because I.C. § 41-1839 establishes a statutory duty for an insurer to pay attorney's fees and this duty cannot be waived or exempted. Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, pp. 2-9.

In response to Hollands' motion for fees, MetLife argues the settlement agreement must be enforced. Although MetLife's motion is captioned a motion to compel, it is actually a motion to enforce settlement, i.e. an action in contract. A settlement agreement is a new contract settling an old dispute. *Wilson v. Bogert*, 81 Idaho 535, 347 P.2d 341 (1959). The settlement of a legal dispute constitutes an executory accord. *Hershey v. Simpson*, 111 Idaho 491, 725 P.2d 196 (Ct. App. 1986). Such an agreement supersedes all prior claims and defenses. However, if one party breaches the agreement, the other party has the option of enforcing the executory accord or rescinding it and proceeding with the original cause of action. *Id.* The interpretation of a settlement agreement is an issue of law. *Mays v. United States Postal Service*, 995 F.2d 1056 (Fed.Cir.1993). To the extent the settlement agreement is clearly stated and understood by the parties, it is enforced according to its terms. If any ambiguity is found, the court's role is to implement the intent of the parties at the time the agreement was made. *King v. Department of Navy*, 130 F.3d 1031 (Fed.Cir.1997). For a contract to exist, there must be a distinct and common understanding between the parties. *Hoffman v. S.V. Co., Inc.*, 102 Idaho 187, 628 P.2d 218 (1981).

Here, the agreement was reached on or about February 3, 2010. However, the parties disagree as to whether attorney fees were covered by that agreement. Both Davis and Paukert state in their affidavits they had no knowledge a suit had been filed by Hollands until February 8, 2010. Affidavit of Daneice Davis, p. 4, ¶ 10; Affidavit of Kathleen Paukert, p. 5, ¶ 13. Thus, MetLife argues attorney fees were not contemplated in the February 3, 2010, agreement. While this Court appreciates MetLife's argument that settling the matter and requiring a full release contemplated no claim by Hollands for attorney fees (Defendants' Reply Memorandum in Support of Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney Fees, pp. 2-3), that argument has been undermined by *Straub v. Smith,* 145 Idaho 65, 175 P.3d 754 (2007). In *Straub,* the parties stipulated to dismiss the lawsuit with prejudice, but that stipulation was silent on the issue of attorney fees. This Court decided that failing to include the attorney fee issue in the stipulation indicated the parties intended to bear their own attorney fees. The Idaho Supreme Court disagreed, and held Smith did not waive his right to argue costs and fees when the stipulation was silent on the issue. 145 Idaho 65, 69, 175 P.3d 754, 758. "Furthermore, we have said costs and attorney fees are collateral issues which do not go to the merits of an action and that a district court retains jurisdiction to make such an award after a suit has been terminated." *Id., citing Inland Group of Cos., Inc. v. Obendorff,* 131 Idaho 473, 475, 959 P.2d 454, 456 (1998).

While MetLife through its agents believed the matter had been settled such that a full release regarding all claims would bring an end to the matter, and that Hollands had not filed suit and were represented *pro bono*, Hollands believed they were settling a matter after suit had been filed and after their counsel had entered into a contingency fee agreement with them, so that an entitlement for attorney's fees under I.C. § 41-

1839 existed. This issue of fact precludes Hollands' motion for summary judgment, *see infra.* However, a motion to enforce a settlement agreement involves a *new* contract settling an *old* dispute. *Wilson,* 81 Idaho 535, 542, 347 P.2d 341, 345 (1959). In *Wilson,* the Idaho Supreme Court wrote:

> Where the parties to a legal controversy, in good faith enter into a contract compromising and settling their adverse claims, such agreement is binding upon the parties, and, in the absence of fraud, duress or undue influence, is enforceable either at law or in equity according to the nature of the case. *Ticknor v. McGinnis*, 33 Idaho 308, 193 P. 850; *Nelson v. Krigbaum*, 38 Idaho 716, 226 P. 169; *Moran v. Copeman,* 55 Idaho 785, 47 P.2d 920; *Stub v. Belmont*, 20 Cal.2d 208, 124 P.2d 826; 11 Am.Jur., *Compromise and Settlement*, § 35, p. 283. Such a contract stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally. 11 Am.Jur., *Compromise and Settlement, § 35, p. 283.* An agreement of compromise and settlement is a merger and bar of all pre-existing claims which the parties intended to settle thereby. *Moran v. Copeman, supra; Shriver v. Kuchel,* 113 Cal.App.2d 421, 248 P.2d 35; 15 C.J.S. *Compromise and Settlement* § 24, p. 739. Such prior claims are thereby superseded and extinguished. The compromise agreement becomes the sole source and measure of the rights of the parties involved in the previously existing controversy. The existence of a valid agreement of compromise and settlement is a complete defense to an action based upon the original claim. *Bruce v. Oberbillig*, 46 Idaho 387, 268 P. 35; *Shriver v. Kuchel, supra*; *Argonaut Ins. Exch. v. Industrial Acc. Commission*, 49 Cal.2d 706, 321 P.2d 460; 11 Am.Jur., *Compromise and Settlement*, § 36, p. 284.
>
> In an action brought to enforce an agreement of compromise and settlement, made in good faith, the court will not inquire into the merits or validity of the original claim. *Heath v. Potlatch Lumber Co.*, 18 Idaho 42, 108 P. 343, 27 L.R.A.,N.S., 707; *Nelson v. Krigbaum*, supra.

Id. The Court discounts Hollands' argument that no rule basis or other authority exists pursuant to which MetLife can seek enforcement of the settlement agreement. *See* Memorandum of Authorities in Support of Defendants' Motion to Compel Performance Under Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 6, citing *Young Elec. Sign Co. v. Winder,* 135 Idaho 804, 808, 25 P.3d 117 (2001). At issue is whether the agreement reached by the parties' emails constitutes a meeting of the minds

sufficient to support a contract. An enforceable contract requires "distinct understanding common to both parties." *Hoffman v. S V Co., Inc.*, 102 Idaho 187, 189, 628 P.2d 218, 220 (1981). Acceptance must be unequivocal and identical to the offer and the parties' minds must meet as to all terms before a contract is formed. *Turner v. Mendenhall,* 95 Idaho 426, 429, 510 P.2d 490, 493 (1973). Proof of a meeting of the minds requires evidence of mutual understanding as to the terms of the agreement and the assent of both parties. *Thomas v. Schmelzer,* 118 Idaho 353, 356, 796 P.2d 1026, 1029 (Ct.App. 1990).

A settlement agreement by the parties, purportedly evidenced by the email from Paukert to Hollands' counsel on February 2, 2010, offering $200,000 and a full release, and from Holland's counsel to Paukert on February 3, 2010, accepting the offer and stating Hollands "will sign a full release of their claims against MetLife", appears to constitute a meeting of the minds. *See* Affidavit of Kathleen Paukert, pp. 4-5, ¶ ¶ 10-11. However, "[t]he question of whether there was a sufficient meeting of the minds to form an express agreement is to be determined by the trier of fact." *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 359, 986 P.2d 1019, 1025 (Ct.App. 1999) citing *Bischoff v. Quong-Watkins Properties,* 113 Idaho 826, 828, 748 P.2d 410, 412 (Ct.App. 1987). At issue here is whether the full release contemplated in the emails would include the claim for attorney's fees because on the one hand MetLife claimed to have had no knowledge of the suit having been filed or of Holland's counsel incurring any fees as they believed him to be appearing *pro bono,* and on the other hand, Hollands' had filed suit and now claim they fully intended to seek attorney's fees at the time the settlement was accepted by them. Hollands argue the agreement reached is not an enforceable contract because material terms were not negotiated; the "material terms" which

Hollands identify are limited to release at issue in this case. Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 6. "It is also undisputed that subsequent to the February 3, 2010, emails, the parties' attorneys negotiated the specific terms of the release in this case." *Id.,* citing Affidavit of Kinzo Mihara. In order to grant MetLife's motion to compel on this theory, the Court would require additional evidence on the question of a meeting of the minds sufficient to support a contract or settlement in this matter, both on the question of what a "full release" constituted in general and on the question of whether MetLife and Hollands' counsel specifically contemplated the settlement to settle all claims including any fees at the time the settlement agreement was entered into. *Straub* certainly indicates there is no presumption that attorney fees are not included if the agreement is silent on the issue.

Thus, this Court cannot grant MetLife's Motion to Compel Performance Under Settlement upon MetLife's argument that fees were not contemplated in the settlement agreement, under either a contract interpretation analysis or a waiver analysis.

Hollands also make the argument that MetLife should be estopped from taking the position that the settlement agreement, entered into voluntarily and expressly excluding the claim for fees from settlement, should now be viewed by the Court as a basis for denying the claim for fees because it settled *all* pending claims. Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, p. 3. What is confusing here is Hollands' use of "settlement document." Is it the "Joint Motion to Dismiss All Claims Except for the Pending Motion for Attorney's Fees" to which Hollands refer, or is it the email exchange which MetLife argues amounts to a settlement of all claims?

As discussed *supra,* equitable estoppel requires:

> (1) a false representation or concealment of a material fact made with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not and could not have discovered the truth; (3) an intent that the misrepresentation or concealment be relied upon; and (4) that the party asserting estoppel relied on the misrepresentation or concealment to his or her prejudice.

Willig v. State, Dep't of Health & Welfare, 127 Idaho 259, 261, 899 P.2d 969, 971 (1995). And, quasi-estoppel, a related doctrine, does not require the first or fourth elements and applies when it would be unconscionable to allow a party to assert a right inconsistent with a prior position. *Id.* Because the issue of fees remained at the time the Order granting the joint motion to dismiss all claims was entered, there was no false representation or concealment of material fact made by MetLife. Indeed, it was Hollands who arguably had concealed the fact that a lawsuit was filed and attorney's fees would be sought at the time the settlement for $200,000 and a full release was entered into by the parties.

As mentioned above (pages 12-15 of this decision), there are questions of fact as to whether there was an extension of time within which MetLife could respond. Ultimately, material questions of fact also remain as to whether the agreement reached through the February 3, 2010, email was an enforceable contract. And, although Hollands' estoppel argument fails, a material question in dispute remains as to whether the settlement agreement constituted a meeting of the minds. As such, the Hollands' having "waived" their counsel's right to fees via the release turns on whether the settlement agreement giving rise to the release was a valid contract between the parties. *See* Plaintiffs' Response to Defendants' Motion to Compel Performance Under the Settlement and Dismiss Plaintiffs' Motion for Attorney's Fees, pp. 7-8.

Here, questions of material fact remain surrounding the formation of the settlement agreement. Thus, contrary to MetLife's arguments, the existence of the

purported settlement agreement alone does not provide a basis for granting MetLife's Motion to Compel Performance Under the Settlement Agreement.

However, there is a basis upon which MetLife's Motion to Compel Performance Under the Settlement Agreement must be granted. In this area, the above issues of disputed fact are not relevant.

Idaho Code § 41-1839 (and sanctions under I.C. § 12-123) provides the exclusive basis for recovery of attorney's fees in actions between insureds and insurers involving disputes arising under insurance policies. I.C. § 41-1839(4). An insurer who fails to pay an amount justly due under a policy for thirty days after proof of loss has been furnished shall be liable for reasonable attorney's fees as adjudged by the Court in any action thereafter brought against the insurer for recovery under the terms of the policy. I.C. § 41-1839(1). The statute requires: (1) the insured to provide proof of loss as required by the insurance policy and (2) the insurer must fail to pay the amount justly due within thirty days after receipt of the proof of loss. *Parsons v. Mutual of Enumclaw Ins. Co.,* 143 Idaho 743, 746-47, 152 P.3d 614, 617-18 (2007). "As defined by this Court [the Supreme Court of Idaho], a submitted proof of loss is sufficient when an insured provides the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006); *citing Brinkman v. AID Ins. Co.,* 115 Idaho 346, 349-50, 766 P.2d 1227, 1230-31 (1988).

This Court is simply unable to find that Hollands have met their burden under *Greenough* and *Brinkman,* because Hollands "submitted proof of loss" but not a proof of loss which was "sufficient...to provide the insurer with enough information to allow the insurer a reasonable opportunity to investigate and determine its liability." *Id.* Keep

in mind that it was MetLife and its directive to its attorney Paukert to be creative in trying to find *additional* coverage for Hollands. The only theories for additional coverage expounded by Hollands' counsel Mihara were determined by MetLife to be without merit. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; Affidavit of Paukert, ¶ 9.

As discussed above in analyzing Hollands' motion for attorney fees, there are additional reasons that, in analyzing MetLife's Motion to Enforce Settlement Agreement, show MetLife was not provided with "a reasonable opportunity to investigate and determine its liability", given the January 22, 2010, deadline that Mihara agreed to and beyond which he was unwilling to extend. As set forth above, on January 8, 2010, the adjuster for MetLife indicated to Mihara that MetLife could not decide whether or not coverage was applicable under the policy and that a coverage opinion would be sought from an independent attorney. Memorandum in Support of Motion to Determine Attorney's Fees, p. 3. On January 13, 2010, the independent attorney, Kathleen Paukert (Paukert), contacted Mihara and requested an extension to come to a coverage decision. *Id.*, p. 4. Mihara granted an extension until January 22, 2010. *Id.* On January 22, 2010, Paukert contacted Mihara and requested another extension, which Mihara denied. On January 26, 2010, Mihara filed the Complaint in this case on behalf of Hollands. A few days later, on February 2, 2010, Paukert advised Mihara that, based on her research, there was no coverage on the policies on the theories argued by Mihara, but there was possible coverage on the motorcycle policy under a theory Mihara had not advanced. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Pursuant to I.C. § 41-1839; Affidavit of Paukert, ¶ 9. Paukert advised Mihara that MetLife was offing to pay $200,000 ($250,000 limits less the $50,000 Hollands had received from the negligent party), provided Hollands signed a full release. *Id.*

Obviously, MetLife on January 22, 2010, felt Mihara's theories were not plausible, but MetLife was still working on coming up with its own theories to provide additional coverage. Ten days later, those theories, developed only by MetLife and not by Mihara, resulted in additional coverage which in turn resulted in settlement on February 2, 2010. Hollands have provided no facts which would counter such findings. In light of such, Hollands, through Mihara, did not provide MetLife with "a reasonable opportunity to investigate and determine its liability".

The following was discussed above at pages 13-14, but is now analyzed in more detail. **First,** this started out as somewhat of a moving target for Hollands, and thus, MetLife. This impacted MetLife's "reasonable opportunity to investigate and determine its liability". As mentioned above, there were *separate offers* made at *separate times* on *separate policies*. MetLife was prepared to pay policy limits in Claim No. FRD 373130, the initial claim, but that Hollands' counsel Mihara was seeking to make additional claims under Gregory and Kathleen Holland's policies and would not consider the initial matter concluded. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, p. 3. As such, there was no tender on or about December 7, 2009. Also, to the extent there was a tender as to Claim No. FRD 373130, subsequent to the December 7, 2009, offer on that claim number, claims under the two polices held by Gregory and Kathleen Holland were thereafter assigned Claim Numbers FRD 408440 and 408370, and those claims were clearly not contemplated within the initial $50,000 offer. In her Affidavit, Davis states she informed Holland's counsel Mihara she would be going on a three-week vacation and would not return until January 6, 2010, at which time the two new claims would be reviewed. Affidavit of Daneice Davis, p. 2, ¶ 3. Davis states this delay was acceptable to Hollands, but that she did not send out a letter confirming her conversation with Hollands' counsel. *Id.*

Thereafter, Paukert was retained by MetLife on January 8, 2010, and she had contact with Holland's counsel regularly from January 13, 2010, through February 2, 2010, to discuss theories coverage on the additional claims assigned Claim Numbers FRD 408440 and 408370. Defendants' Response to Plaintiffs' Motion for Attorney's Fees Under I.C. § 41-1839, pp. 15-17. MetLife argues the conversation Davis had begins the 30-day clock running on January 6, 2010, rendering the February 3, 2010, settlement timely. *Id.* **Second,** counsel for Hollands has provided no law to support the innovative argument that these time periods on these separate offers made at separate times on separate policies should be *aggregated.* Again, Hollands argue the cumulative time between November 10, 2009, to December 7, 2009, added to the period from January 7, 2010, to January 26, 2010, amounts to well over the thirty days after proof of loss in which MetLife was required to pay an amount justly due. *Id.,* p. 9. This Court can find no such case law to support such a novel argument. Due to the fact that these are separate offers made at separate times on separate policies, there certainly is no factual basis to aggregate these two discrete time periods. **Third,** if Paukert on behalf of MetLife, found the theory that would provide a larger recovery for the Hollands, and Mihara on behalf of Hollands accepts that higher amounts based on the theory MetLife's attorney created, how can Hollands' claim at this time that MetLife was provided "a reasonable opportunity to investigate and determine its liability"?

For these reasons alone, this Court finds Hollands have failed to meet their burden under *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho. 589, 593, 130 P.3d 1127, 1131 (2006) and *Brinkman v. AID Ins. Co.,* 115 Idaho 346, 349-50, 766 P.2d 1227, 1230-31 (1988), because Hollands failed to prove they submitted proof of loss with sufficient information to allow the MetLife a reasonable opportunity to

investigate and determine its liability, when it was MetLife that came up with the creative theory for additional coverage.

MetLife's Motion to Enforce Settlement Agreement must be granted, and Hollands are not entitled to attorney fees.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Motion for Summary Judgment must be denied. Additionally, questions of material fact remain regarding the motion for attorney's fees and the motion to compel performance under the settlement.

IT IS HEREBY ORDERED Hollands' Motion to Shorten Time to hear Hollands' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED Hollands' Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED Hollands' Motion for Attorney Fees is DENIED.

IT IS FURTHER ORDERED MetLife's Motion to Compel Performance Under the Settlement Agreement and to Dismiss Plaintiffs' Motion for Summary Judgment is GRANTED. The Settlement Agreement is enforced. As a result of the granting of MetLife's Motion to Compel Performance Under the Settlement Agreement and to Dismiss Plaintiffs' Motion for Summary Judgment, Hollands are not entitled to attorney fees under I.C. § 41-1839.

Entered this 20th day of July, 2010.

John T. Mitchell, District Judge

I certify that on the 20 day of July, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
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Jeanne Clausen, Deputy Clerk

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED:

2010 AUG -2 PM 1:21

CLERK DISTRICT COURT
Kathy Bagley
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

The ESTATE of BENJAMIN HOLLAND, DECEASED, GREGORY HOLLAND, and KATHLEEN HOLLAND, Plaintiffs, vs. METROPOLITAN PROPERTY and CASUALTY INSURANCE COMPANY, and METLIFE AUTO & HOME, Defendants.	Case No. CV 10-0677 **AFFIDAVIT OF KINZO H. MIHARA IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION**

State of Idaho)
) ss.
County of Kootenai)

COMES NOW, Kinzo H. Mihara, after being duly sworn before an officer authorized to administer oaths, swears and declares as follows:

1) My name is Kinzo H. Mihara. I am an attorney duly authorized to practice law in the state of Idaho. I am competent to testify to matters herein.

2) I represent Plaintiffs' herein.

3) On or about January 21, 2010, Daneice Davis sent me a certified copy of the policy of insurance in effect between MetLife and Benjamin C. Holland, policy no. MPL 6010-000 (under claim no. FRD 37313). Attached hereto as Exhibit "1" is a true, accurate, and correct copy of policy MPL 6010-000.

4) Attached hereto as Exhibit "2" are true, accurate, and correct copies of the declaration pages of all three policies at issue between Plaintiffs and Defendants prior to February 3, 2010. The bottom front of all three declarations pages purport to show form MPL 6010-000 to be the controlling insurance form for the respective declarations pages.

5) Attached hereto as Exhibit "3" is a true, accurate, and correct copy of a letter with attachment that MetLife sent to me on or about December 29, 2009 that transmitted a check for $1,000 for med-pay coverage and funeral benefit to the Estate of Benjamin Holland.

6) Attached hereto as Exhibit "4" is a true, accurate, and correct copy of documents bates 00084-00088; 00126-00129; 00361-00362 I received from MetLife during the discovery process in the above encaptioned lawsuit. I did not have these documents in my possession at or prior to filing the lawsuit in this matter. Defendants' agents did not apprise me to the existence of these documents at or prior to filing the lawsuit in this matter.

7) On or about November 8, 2009, I placed a telephone call to Joe Foredyce in an attempt to give proof of loss of Plaintiffs' claims. I spoke to Mr. Foredyce. I was instructed to call the claim in to MetLife's toll-free telephone number. I called MetLife's toll-free telephone number. I spoke with an agent of MetLife who I

gave the information required by the insurance contracts between Plaintiffs and Defendants. I also gave the agent of MetLife all the additional information that he requested from me at that time. I was told that MetLife would be assigning an adjustor to the matter. Soon thereafter I was contacted by Daneice Davis.

Further your affiant sayeth naught.

Respectfully submitted this 2nd day of August, 2010.

Kinzo H. Mihara

Subscribed and sworn before me this 2nd day of August, 2010.

MARCELLA J. HARRISON NOTARY PUBLIC STATE OF IDAHO

Notary Public
Residing at: Coeur d'Alene
My commission expires: 4-14-14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of August, 2010, I caused a true, accurate, and correct copy of the foregoing document to be served on the Defendants attorney via the method indicated below:

William J. Schroeder
PAINE HAMBLEN LLP
701 Front Avenue, Suite 101
P. O. Box E
Coeur d'Alene, Idaho 83816-0328
Telephone: (208-664-8115
Facsimile: (208) 664-6338

[✓] VIA HAND-DELIVERY
[ ] VIA FACSMILE @ (208) 664-6338
[ ] VIA FIRST-CLASS MAIL

Mailing Address:
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
Telephone: (509) 455-6000
Facsimile: (509) 838-0007

Kinzo H. Mihara

EXHIBIT "1"

MetLife Auto & Home®

Auto
Insurance Policy

MetLife Auto & Home is a brand of Metropolitan Property and Casualty Insurance Company and its Affiliates, Warwick, RI

AUTO INSURANCE POLICY

WHERE TO FIND IT

THE COMPANY NAMED IN THE DECLARATIONS
Administrative Offices: Warwick, Rhode Island

AUTO INSURANCE POLICY

INSURANCE AGREEMENT AND DECLARATIONS

This insurance policy is a legal contract between **you** (the policyholder) and **us** (the Company named in the Declarations). It insures **you** and **your automobile** for the various kinds of insurance **you** have selected, as shown in the Declarations. The Declarations are an important part of this policy. By accepting this policy, **you** agree that the statements contained in the Declarations and in any application are **your** true and accurate representations. This policy is issued and renewed in reliance upon the truth of those representations. This policy contains all agreements between **you** and **us** and any of **our** sales representatives relating to this insurance. **You** must pay the required premium.

The exact terms and conditions are explained in the following pages.

GENERAL DEFINITIONS

The following words and phrases appear in bold-face type repeatedly throughout this policy. They have a special meaning and are to be given that meaning whenever used in connection with this policy and any endorsement which is part of this policy:

"AUTOMOBILE" means a private passenger automobile, pick-up truck, panel truck or van, designed for use mainly on public roads.

"BODILY INJURY" means any bodily injury, sickness, disease or death sustained by any person.

"LOSS" means direct and accidental loss or damage.

"MOTOR VEHICLE" means a land motor vehicle designed for use mainly on public roads other than:

1. a farm type tractor or other farm equipment designed for use principally off public roads, while not upon public roads;

2. a vehicle operated on rails or crawler-treads;

3. a vehicle while located for use as a residence or premises; or

4. a vehicle used as a dwelling or place of business.

"OCCUPYING" and **"OCCUPIED"** mean being in or upon, entering into, or alighting from a **motor vehicle.**

"PROPERTY DAMAGE" means physical injury to or destruction of tangible property, including the loss of use of such property.

"RELATIVE" means a person related to **you** by blood, marriage or adoption (including a ward or foster child) and who resides in **your** household.

"TRAILER" means a trailer designed for use with an **automobile** which is not used as an office, store,

display, or passenger trailer. A farm wagon or farm implement is a trailer when used with an **automobile.**

"WE", "US", "OUR" and **"COMPANY"** mean the company named in the Declarations.

"YOU" and **"YOUR"** mean the person(s) named in the Declarations of this policy as named insured and the spouse of such person or persons if a resident of the same household.

AUTOMOBILE LIABILITY

ADDITIONAL DEFINITIONS FOR THIS COVERAGE

The following definitions apply to this coverage only:

"COVERED AUTOMOBILE" means:

1. an **automobile** owned by **you** or hired under a written contract for one year or more, which is described in the Declarations, and for which a specific premium is charged.
2. an **automobile** newly acquired by **you,** if:
   a. it replaces a vehicle described in the Declarations; or
   b. it is an additional **automobile,** but only if:
      i. **we** insure all other **automobiles** owned by **you** on the date of acquisition;
      ii. **you** notify **us** within 30 days of acquisition of **your** election to make this and no other policy issued by **us** applicable to the **automobile;** and
      iii. **you** pay any additional premium required by **us.**
3. a **substitute automobile.**

"INSURED" means:

1. with respect to a **covered automobile:**
   a. **you;**
   b. any **relative;** or
   c. any other person using it within the scope of **your** permission.
2. with respect to a **non-owned automobile, you** or any **relative.**

   The operation or use of such vehicle must have been with the permission of, or reasonably believed to have been with the permission of, the owner. The operation or use must also have been within the scope of the permission given.
3. any other person or organization if liable due to the acts or omissions of any person described in 1. or 2. above. This provision does not apply if the vehicle is a **non-owned automobile** owned or hired by the person or organization.

"NON-OWNED AUTOMOBILE" means:

1. an **automobile** which is not owned by, furnished to, or made available for regular use to **you** or any resident in **your** household.

   EXCEPTION: An **automobile** owned by, furnished to, or made available for regular use to any resident in **your** household, is considered a **non-owned automobile** when used by **you.**

2. a commercially rented **automobile** used by **you** or a **relative** on a temporary basis.

"SUBSTITUTE AUTOMOBILE" means a **motor vehicle** not owned by **you** or any resident of the same household and which is used with the owner's permission to replace for a short time a **covered automobile.** The **covered automobile** has to be out of use for servicing or repair or because of breakdown, **loss** or destruction.

COVERAGE PROVIDED

We will pay damages for **bodily injury** and **property damage** to others for which the law holds an **insured** responsible because of an accident which results from the ownership, maintenance or use of a **covered automobile,** a **non-owned automobile** or a **trailer** while being used with a **covered automobile** or **non-owned automobile. We** will defend the **insured,** at **our** expense with attorneys of **our** choice, against any suit or claim seeking these damages. **We** may investigate, negotiate or settle any such suit or claim.

ADDITIONAL BENEFITS WE WILL PROVIDE

In addition to the limits of liability, **we** will pay the following expenses incurred in connection with any claim or suit to which the policy applies:

1. Premiums on the following bonds:

   a. Appeal bonds in any suit **we** defend.

   b. Bonds to release attachments in any suit **we** defend. The total amount of the bonds must not exceed **our** limit of liability.

   c. Up to $250 for any bail bond needed because of an accident or traffic violations arising out of the ownership, maintenance or use of a **covered automobile.**

   We have no duty to furnish or apply for any bonds.

2. Court costs levied against the **insured.**

3. Post-judgment interest on all damages following a judgment until **we** pay, offer or deposit in court the amount due up to **our** limit of liability.

4. Expenses incurred by the **insured** for first aid to others at the time of a **motor vehicle** accident.

5. Up to $200 per day for lost wages, but not for loss of other income, if **we** ask the **insured** to attend a hearing or trial.

6. Other reasonable expenses incurred at **our** request.

COVERAGE EXCLUSIONS

We do not cover:

A. **bodily injury** to any employee of an **insured** arising out of his or her employment, except domestic employees who are not covered or required to be covered under any workers compensation law.

B. **bodily injury** to a fellow employee while on the job and arising from the use of a **motor vehicle** or **trailer** in the business of his employers.

EXCEPTION: **You** are covered in this situation.

C. **bodily injury** or **property damage** covered under an atomic or nuclear energy liability insurance policy, or that would have been covered had that policy not been terminated upon exhaustion of its limit of liability.

D. any **motor vehicle** rented to others or used to carry persons for a charge.

EXCEPTION: This exclusion does not apply to shared expense car pools.

E. **bodily injury** or **property damage** arising out of the business or occupation of selling, leasing, repairing, servicing, storing, or parking vehicles or **trailers.**

EXCEPTION: This exclusion does not apply to the use of a **covered automobile** by **you,** a **relative,** or by any other person in any such business in which **you** have an interest as owner or partner.

F. any **non-owned automobile** while used by any person in any business or occupation.

EXCEPTION: This exclusion does not apply to an **automobile** or **trailer** used therewith, if driven or **occupied** by **you** or **your** chauffeur or domestic servant.

G. **property damage** caused by any **insured** to:

1. an **automobile** that is owned by, rented to, operated by, or in the care of that **insured;** or

2. any other property that is owned by, rented to, or in the care of any **insured.** This exclusion does not apply to a rented dwelling or private garage.

H. **bodily injury** or **property damage** caused intentionally by or at the direction of an **insured.**

I. **bodily injury** to **you** or any person related to an **insured** by blood, marriage, or adoption who resides in the same household. This exclusion applies regardless of whether demand is made or suit is brought against the **insured** by the injured person or by a third party seeking contribution or indemnity.

J. **bodily injury** or **property damage** awards designated as punitive, exemplary, or statutory multiple damages.

K. any **motor vehicle** while it is located inside a facility designed for racing, for the purpose of competing in, practicing for, or preparing for, any prearranged or organized racing or speed contest.

L. a **non-owned automobile** while used by a **relative** who owns, leases or has available for their regular use, a **motor vehicle** not described in the Declarations.

M. any motorized vehicle which has less than four wheels.

LIMIT OF LIABILITY

The limit of liability shown in the Declarations for "each person" for Bodily Injury Liability is the most **we** will pay for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death, arising out of **bodily injury** sustained by any one person as the result of any one accident. Subject to this limit for "each person", the limit shown in the Declarations for "each accident" for Bodily Injury Liability is the most **we** will pay for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death, arising out of **bodily injury** sustained by two or more persons resulting from any one accident.

The limit of liability shown in the Declarations for "each accident" for Property Damage Liability is the most **we** will pay for all damages to all property resulting from any one accident.

If a single limit of liability is shown in the Declarations for **bodily injury** and **property damage**, it is the maximum **we** will pay for any one accident for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death.

The limit of liability shown in the Declarations for this coverage is **our** maximum limit of liability for all damages resulting from any one accident. This is the most **we** will pay regardless of the number of:

1. covered persons;
2. claims made;
3. vehicles or premiums shown in the Declarations; or
4. vehicles involved in the accident.

A **motor vehicle** and attached **trailer** are considered one vehicle.

If notice of this policy is given in lieu of security or if **we** certify this policy as proof under any financial responsibility law, the limit of liability will be applied to provide separate limits for **bodily injury** liability and **property damage** liability to the extent required by such law. Such separate application will not increase the total limit of **our** liability.

CONFORMITY WITH FINANCIAL RESPONSIBILITY LAWS

If **we** certify this policy under any financial responsibility law, this liability coverage will comply to the extent of the liability coverage and limits required by the law.

OUT OF STATE INSURANCE

If any **insured** becomes subject to a financial responsibility law or the compulsory insurance law or similar laws of another state or Canada because of the ownership, maintenance, or use of a **covered automobile** in that state or Canada, **we** will interpret this policy to provide the coverage required by those laws. The coverage provided shall be reduced to the extent that other automobile liability insurance applies. No person may in any event collect more than once for the same **loss**.

REDUCTIONS

Any amount payable to any person under this section will be reduced by any amount that person is paid under the Uninsured and Underinsured Motorists coverage portion of this policy.

OTHER INSURANCE

If there is other similar insurance, **we** will pay **our** fair share.

However, with respect to a **non-owned automobile** or a **substitute automobile**, this insurance will be excess over any other insurance. If there is other excess or contingent insurance, **we** will pay **our** fair share.

Our fair share is the proportion that **our** limit bears to the total of all applicable limits.

PERSONAL INJURY PROTECTION

If applicable, see special state provisions.

AUTOMOBILE MEDICAL EXPENSE

ADDITIONAL DEFINITIONS FOR THIS COVERAGE

The following definitions apply to this coverage only:

"COVERED AUTOMOBILE" means:

1. an **automobile** owned by **you** or hired under a written contract for one year or more, which is described in the Declarations, and for which a specific premium is charged.
2. an **automobile** newly acquired by **you**, if:
   a. it replaces a vehicle described in the Declarations; or
   b. it is an additional **automobile**, but only if:
      i. **we** insure all other **automobiles** owned by **you** on the date of acquisition;
      ii. **you** notify **us** within 30 days of acquisition of **your** election to make this and no other policy issued by **us** applicable to the **automobile**; and
      iii. **you** pay any additional premium required by **us**.
3. a **substitute automobile**.

"MEDICAL EXPENSES" means usual, customary and reasonable expenses for necessary medical, surgical, x-ray, ambulance, hospital, professional nursing, funerals and dental services, including prosthetic devices.

"NON-OWNED AUTOMOBILE" means:

1. an **automobile**, while being used by **you** or a **relative** with the owner's permission, which is not owned by, furnished to, or made available for regular use to **you** or any resident in **your** household.

   EXCEPTION: An **automobile** owned by, furnished to, or made available for regular use to any resident in **your** household, is considered a **non-owned automobile** when used by **you**.

2. a commercially rented **automobile** used by **you** or a **relative** on a temporary basis.

"SUBSTITUTE AUTOMOBILE" means a **motor vehicle** not owned by **you** or any resident of the same household and which is used with the owner's permission to replace for a short time a **covered automobile.** The **covered automobile** has to be out of use for servicing or repair or because of breakdown, **loss** or destruction.

COVERAGE PROVIDED

We will pay reasonable **medical expenses** incurred by **you** or any **relative** for **bodily injury** as a result of an accident involving a **motor vehicle** or **trailer** while being used with an **automobile.**

We will pay reasonable **medical expenses** incurred by any other person for **bodily injury** as a result of:

1. **occupying** or using a **covered automobile** at the time of the accident with **your** consent;

2. being struck by a **covered automobile**; or

3. **occupying** a **non-owned automobile** if the **bodily injury** results from the operation or occupancy of such **non-owned automobile** by **you** or a **relative.**

COVERAGE EXCLUSIONS

We do not cover:

A. **medical expenses** incurred for services furnished more than three years after the date of accident.

B. any person injured while in a vehicle located for use as a residence or premises.

C. that portion of any **medical expense** for which benefits are available under any:

   1. premises insurance which affords benefits for **medical expenses;**

   2. law which provides workers compensation or disability benefits; or

   3. personal injury protection coverage of this policy.

D. **bodily injury** sustained while **occupying:**

   1. a motorized vehicle having less than four wheels; or

   2. a vehicle located for use as a residence or premises.

E. a **covered automobile** while hired or rented to others for a charge, or any **automobile** which **you** are driving while available for hire by the public.

   EXCEPTION: This exclusion does not apply to:

   1. **bodily injury** sustained as a pedestrian; or

   2. shared expense car pools.

F. **bodily injury** arising out of the business or occupation of selling, leasing, repairing, servicing, storing, or parking vehicles or **trailers.**

EXCEPTION: This exclusion does not apply to:

1. **bodily injury** sustained as a pedestrian; or

2. the use of a **covered automobile** by **you**, a **relative**, or by any other person in any business or occupation of selling, leasing, repairing, servicing, storing, or parking vehicles or **trailers**, in which **you** have an interest as owner or partner.

G. any **non-owned automobile** while used by any person in any business or occupation.

EXCEPTION: This exclusion does not apply to:

1. **bodily injury** sustained as a pedestrian; or

2. an **automobile** or its attached **trailer** used by **you**, **your** chauffeur or domestic servant.

H. medical treatment that is experimental in nature which is not accepted as effective therapy by:

1. the state medical association or board;

2. an approved medical specialty board; or

3. the American Medical Association.

I. a **non-owned automobile** while used by a **relative** who owns, leases or has available for their regular use, a **motor vehicle.**

LIMIT OF LIABILITY

The limit shown in the Declarations for "each person" is the maximum **we** will pay for any one person as a result of any one accident.

The limit of liability shown in the Declarations for this coverage is **our** maximum limit of liability for all damages resulting from any one accident. This is the most **we** will pay regardless of the number of:

1. covered persons;

2. claims made;

3. vehicles or premiums shown in the Declarations; or

4. vehicles involved in the accident.

The total amount **we** will pay includes funeral and burial expenses not to exceed $1000 for each person.

OTHER INSURANCE

If there is other similar insurance, **we** will pay **our** fair share. However, with respect to a **non-owned automobile** or a **substitute automobile**, this insurance will be excess over any other insurance. If there is other excess or contingent insurance, **we** will pay **our** fair share. This coverage shall be excess over any personal injury protection benefits paid or payable, except for a deductible under this or any other motor vehicle insurance policy, for **bodily injury** to an eligible person.

Our fair share is the proportion that **our** limit bears to the total of all applicable limits.

MEDICAL EXPENSE REVIEW

At **our** option, **we** may use various cost containment and utilization review measures to identify excessive or inappropriate treatments and expenses. For example, **we** may use medical bill audits, case management, preferred provider discounts or other such tools.

UNINSURED AND UNDERINSURED MOTORISTS

ADDITIONAL DEFINITIONS FOR THESE COVERAGES

The following definitions apply to these coverages only:

"COVERED AUTOMOBILE" means:

1. an **automobile** described in the Declarations to which the Automobile Liability coverage of this policy applies and for which a specific premium is charged.

2. an **automobile** newly acquired by **you**, if:

   a. it replaces a vehicle described in the Declarations; or

   b. it is an additional **automobile**, but only if:

      i. **we** insure all other **automobiles** owned by **you** on the date of acquisition;

      ii. **you** notify **us** within 30 days of acquisition of **your** election to make this and no other policy issued by **us** applicable to the **automobile**; and

      iii. **you** pay any additional premium required by **us**.

3. a **substitute automobile**.

4. a **motor vehicle**, while being operated by **you** or a **relative** with the owner's permission, which is not owned by, furnished to, or made available for the regular use to **you** or any **relative** in **your** household.

   EXCEPTION: A **motor vehicle** owned by, furnished to, or made available for regular use to any **relative** in **your** household is covered when operated by **you**.

"SUBSTITUTE AUTOMOBILE" means a **motor vehicle** not owned by **you** or any resident of the same household and which is used with the owner's permission to replace for a short time a **covered automobile**. The **covered automobile** has to be out of use for servicing or repair or because of breakdown, **loss** or destruction.

"UNINSURED MOTOR VEHICLE" means:

1. a **motor vehicle** for which, at the time of the accident, there is no insurance policy or other financial security applicable to the owner, or operator, or any other liable person or organization.

2. a **motor vehicle** which has a bodily injury liability bond or insurance policy in effect at the time of the accident, but the amount of **bodily injury** coverage under such bond or insurance policy is less than the minimum financial security requirements of the state in which the **covered automobile** is principally garaged.

3. a **motor vehicle** which has a bodily injury liabillity bond or insurance policy in effect at the time of the accident, but the company writing such bond or policy denies coverage, or is or becomes insolvent.

4. a hit and run **motor vehicle** which causes **bodily injury** to a person covered under this section as the result of striking that person or a **motor vehicle** which that person is **occupying** at the time of the accident, if:

   a. the identity of the driver and the owner of the hit and run vehicle is unknown;

   b. the accident is reported within 24 hours to a police officer, a peace or judicial officer, or the Commissioner or Director of Motor Vehicles;

   c. the injured person or someone on their behalf files with **us** within 30 days of the accident a statement under oath that the injured person or their legal representative has a cause of action due to the accident for damages against someone whose identity is unknown; and

   d. the injured person or their legal representative makes available for inspection by **us**, when requested, the **motor vehicle occupied** by that person at the time of the accident.

The term **uninsured motor vehicle** does not include:

1. a **covered automobile** or **motor vehicle** regularly furnished or available for the use of **you** or any **relative;**

2. an **automobile** owned and operated by a self-insurer as defined in the applicable motor vehicle financial responsibility law, compulsory insurance law, motor carrier law, or any other similar applicable law; or

3. an **automobile** owned by the United States of America, Canada, a state, a political subdivision of any such government, or an agency of any of the foregoing.

"UNDERINSURED MOTOR VEHICLE" means a **motor vehicle** which has a bodily injury liability bond or insurance policy in effect at the time of the accident, in at least the minimum amount required by the state in which the **covered automobile** is principally garaged, but less than the limits of this coverage provided by this policy as stated in the Declarations.

The term **underinsured motor vehicle** does not include:

1. a **covered automobile** or **motor vehicle** regularly furnished or available for the use of **you** or any **relative;**

2. an **automobile** owned and operated by a self-insurer as defined in applicable motor vehicle financial responsibility law, compulsory insurance law, motor carrier law, or any other similar applicable law; or

3. an **automobile** owned by the United States of America, Canada, a state, a political subdivision of any such government, or an agency of any of the foregoing.

UNINSURED MOTORISTS COVERAGE

This coverage is provided only if a premium is shown in the Declarations.

We will pay damages for **bodily injury** sustained by:

1. **you** or a **relative**, caused by an accident arising out of the ownership, maintenance, or use of an

uninsured motor vehicle, which **you** or a **relative** are legally entitled to collect from the owner or driver of an **uninsured motor vehicle**; or

2. any other person, caused by an accident while **occupying** a **covered automobile**, who is legally entitled to collect from the owner or driver of an **uninsured motor vehicle**.

We will also pay damages to any person for damages that person is entitled to recover because of **bodily injury** sustained by anyone described in 1. or 2. above.

UNDERINSURED MOTORISTS COVERAGE

This coverage is provided only if a premium is shown in the Declarations.

We will pay damages for **bodily injury** sustained by:

1. **you** or a **relative**, caused by an accident arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**, which **you** or a **relative** are legally entitled to collect from the owner or driver of an **underinsured motor vehicle**; or

2. any other person, caused by an accident while **occupying** a **covered automobile**, who is legally entitled to collect from the owner or driver of an **underinsured motor vehicle**.

We will also pay damages to any person for damages that person is entitled to recover because of **bodily injury** sustained by anyone described in 1. or 2. above.

COVERAGE EXCLUSIONS

We do not cover:

A. any person **occupying** or struck by a **motor vehicle** owned by **you** or a **relative**, other than a **covered automobile**.

B. any person who settles a **bodily injury** claim, with any liable party, without **our** written consent.

C. any claim which would benefit any insurer or self-insurer under any workers compensation, disability benefits, or similar law.

D. any claim for which benefits are provided under the Personal Injury Protection or Medical Expense coverage of this policy.

E. any person, other than **you**, or a **relative**, while **occupying**:

   1. a **covered automobile** while it is being used to carry persons or property for a fee.

      EXCEPTION: This exclusion does not apply to shared expense car pools.

   2. a vehicle while being used without the permission of the owner.

F. **bodily injury** or **property damage** awards designated as punitive, exemplary, or statutory multiple damages.

G. a **relative** who owns, leases or has available for their regular use, a **motor vehicle** not described in the Declarations.

SETTLEMENT

Whether any person is legally entitled to collect damages under this section, and the amount to which such person is entitled, will be determined by agreement between that person and **us**. Upon written consent of both parties, any disagreement will be settled by arbitration.

When arbitration applies, it will take place under the rules of the American Arbitration Association, unless other means are required by law or are agreed to by the injured party and **us**.

If a person seeking coverage files a suit against the owner or driver of the **uninsured** or **underinsured motor vehicle**, copies of suit papers must be forwarded to **us** and **we** have the right to defend on the issues of the legal liability of, and the damages owed by, such owner or driver. However, **we** are not bound by any judgment against any person or organization obtained without **our** written consent.

LIMIT OF LIABILITY

The limit of liability shown in the Declarations for "each person" is the most **we** will pay for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death, arising out of **bodily injury** sustained by any one person as the result of any one accident. Subject to this limit for "each person", the limit shown in the Declarations for "each accident" for **bodily injury** liability, is the most **we** will pay for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death, arising out of **bodily injury** sustained by two or more persons resulting from any one accident. This is the most **we** will pay regardless of the number of:

1. covered persons;

2. claims made;

3. vehicles or premiums shown in the Declarations; or

4. vehicles involved in the accident.

REDUCTIONS

The lesser of the limits of this insurance or the amount payable under this coverage will be reduced by any amount:

1. paid by or on behalf of any liable parties.

2. paid or payable under any workers compensation, disability benefits or similar laws.

3. paid or payable under the **AUTOMOBILE LIABILITY** section of this policy.

OTHER INSURANCE

If there is other similar insurance, **we** will pay only **our** fair share. The total amount of recovery under all policies will be limited to the highest of the applicable limits of liability of this insurance and such other insurance.

Our fair share is the proportion that **our** limit bears to the total of all applicable limits. However, if **you** do not own the **motor vehicle**, **our** insurance will be excess over other similar uninsured or underinsured insurance available but only in the amount by which the limit of liability of this policy exceeds the limits of liability of the other available insurance. If there is other excess or contingent insurance, **we** will pay **our** fair share.

No payments will be made until the limits of all other liability insurance and bonds that apply have been exhausted by payments.

PHYSICAL DAMAGE

ADDITIONAL DEFINITIONS FOR THESE COVERAGES

The following definitions apply to these coverages only:

"ACTUAL CASH VALUE" means the amount that it would cost to repair or replace damaged property, less allowance for physical deterioration and depreciation.

"COLLISION" means the upset of an **automobile** or the contact of an **automobile** with another object or vehicle.

"COVERED AUTOMOBILE" means:

1. an **automobile** or a **trailer** designed for use with an **automobile**, owned by **you** or hired under a written contract for one year or more and for which a specific premium is shown in the Declarations.

2. an **automobile** newly acquired by **you**, subject to the following:

   a. If Comprehensive or Collision coverage applies to any **automobile** shown in the Declarations:

      i. **we** will apply the broadest of these coverages to the newly acquired **automobile**;

      ii. **you** must notify **us** within 30 days of acquisition, of **your** election to make this and no other policy issued by **us** applicable to the newly acquired **automobile**; and

      iii. **you** must pay any additional premium required by **us**.

   b. If Comprehensive or Collision coverage does not apply to any **automobile** shown in the Declarations:

      i. **we** will provide Comprehensive and Collision coverage subject to a $500 **deductible** for the newly acquired **automobile**;

      ii. **you** must notify **us** within 6 days of acquisition, of **your** election to make this and no other policy issued by **us** applicable to the newly acquired **automobile**; and

      iii. **you** must pay any additional premium required by **us**.

3. a **substitute automobile**.

"DEDUCTIBLE" means the amount of **loss** to be paid by **you**. **We** pay for covered **loss** above the deductible amount.

"NON-OWNED AUTOMOBILE" means:

1. an **automobile** or **trailer** while being used by **you** or a **relative**, with the owner's permission, which is not owned by, furnished to, or made available for regular use to **you** or any resident in **your** household.

   EXCEPTION: An **automobile** or a **trailer** owned by, furnished to, or made available for regular use to

any resident in **your** household, is considered a **non-owned automobile** when used by **you.**

2. a commercially rented **automobile** or **trailer** used by **you** or a **relative** on a temporary basis.

"SUBSTITUTE AUTOMOBILE" means an **automobile** or a **trailer** not owned by **you** or any resident of the same household and which is used with the owner's permission to replace for a short time a **covered automobile.** The **covered automobile** has to be out of use for servicing or repair or because of breakdown, **loss** or destruction.

COVERAGES PROVIDED

The following coverages are applicable only if indicated in the Declarations. They apply to the vehicles for which a premium is shown.

COMPREHENSIVE

We will pay for **loss** to **your covered automobile** or to a **non-owned automobile,** including its equipment, not caused by **collision,** minus any applicable **deductible** shown in the Declarations. Coverage is included for a **loss** caused by, but not limited to, the following:

1. Falling objects or contact with a bird or animal;

2. Fire, explosion or earthquake;

3. Theft or larceny;

4. Windstorm, hail, water or flood;

5. Malicious mischief or vandalism;

6. Riot or civil commotion; or

7. Breakage of glass, even if caused by **collision.** If **your** Comprehensive and Collision coverages have different **deductibles,** the smaller **deductible** will apply to broken glass.

COLLISION

We will pay for **loss** to **your covered automobile** or to a **non-owned automobile,** caused by **collision,** including its equipment, minus any applicable **deductible** shown in the Declarations.

Deductible Waiver: We will waive the **deductible** if the **loss** is the result of **collision** with another vehicle insured by **us.**

TOWING AND LABOR

This coverage is provided for vehicles covered under Comprehensive or Collision, as shown in the Declarations.

If the **covered automobile** is disabled, **we** will pay up to the maximum limit shown in the Declarations for the costs of labor done at the place of disablement and costs of towing for each disablement.

The **deductible** does not apply to the above payments.

SUBSTITUTE TRANSPORTATION

We will pay for the cost of substitute transportation if the **covered automobile** is disabled as a result of a **loss** covered under Comprehensive or Collision. For **loss** caused by theft of the **covered automobile**, this coverage is provided in lieu of the substitute transportation costs provided by Item 3. of **ADDITIONAL COSTS WE WILL PAY.**

Payment will begin the day the **covered automobile** is:

1. out of use due to the **loss**, but, in the case of theft of the entire vehicle, 48 hours after the theft is reported to **us**; or

2. the day **you** leave it at the repair shop.

Payment will be made for the reasonable and necessary time required to repair or replace the **covered automobile**, but, in the case of theft of the entire vehicle, until **we** offer settlement for the theft.

We will pay for rental from an auto rental agency, as shown in the Declarations, up to the amount per day, but not more than the maximum amount for each disablement for any one **loss**.

However, if **you** do not rent from an auto rental agency, **we** will pay **you** $12 per day, but not more than the limit shown in the Declarations for each disablement for any one **loss**.

No **deductible** shall apply to payment for substitute transportation.

ADDITIONAL COSTS WE WILL PAY

1. If a disablement occurs as a result of **loss** to the **covered automobile**, **we** will pay up to $25 for transportation to reach the intended destination.

2. If a **loss** is caused to the **covered automobile** by a peril insured against under this section, **we** will pay up to $300 for **loss** to clothes and luggage belonging to **you** or a **relative** which are in the **covered automobile**.

3. If the **covered automobile** is stolen, **we** will pay up to $25 per day for substitute transportation for the period that will begin 48 hours after the theft is reported to **us** and will end when **we** offer settlement for the theft. If **you** do not rent from an auto rental agency, **we** will pay **you** $12 per day. However, the total amount **we** will pay will not be more than $750.

4. **We** will pay general average and salvage charges for which **you** become legally liable for transporting the **covered automobile**.

The **deductible** does not apply to the above payments.

COVERAGE EXCLUSIONS

We do not cover:

A. any **automobile** while used to carry persons for a fee.

   EXCEPTION: This does not apply to shared expense car pools.

B. a **motor vehicle** not owned by **you** while being used in the business or occupation of selling, leasing, repairing, servicing, storing, or parking **motor vehicles** or **trailers**.

C. any **loss** due and confined to wear and tear, freezing, or mechanical or electrical breakdown, unless the **loss** results from a theft.

D. tires unless stolen, damaged by fire or vandalism, or unless another **loss** happens at the same time for which there is coverage under this policy.

E. **loss** to any electronic equipment designed for the reception, recording or reproduction of sound or video, and any accessories used with such equipment. This includes, but is not limited to:

1. radios and televisions;

2. tape decks;

3. compact disc players; or

4. video cassette recorders.

This exclusion does not apply if the equipment is operated solely from the electrical system of the vehicle and is:

a. permanently installed in a housing unit or location used by the **automobile** manufacturer for such equipment; or

b. a component that is removable from a housing unit permanently installed in the location used by the **automobile** manufacturer for such equipment.

F. **loss** to electronic equipment designed for receiving or transmitting audio, visual or data signals and any accessories used with such equipment. This includes, but is not limited to:

1. citizens band radios;

2. two-way mobile radios;

3. telephones; or

4. personal computers.

This exclusion does not apply to:

a. any electronic equipment that operates solely from the electrical system of, and is necessary for the normal operation of the vehicle.

b. a telephone permanently installed in a location in the dashboard or console of the vehicle used by the **automobile** manufacturer for a telephone.

G. **loss** to tapes, records, discs, other media or other devices designed for use with equipment described in exclusions E. and F.

H. **loss** to a camper or living quarters unit designed for mounting on an **automobile**, unless the unit is reported to **us** and the required premium is paid before the **loss**.

I. **loss** due to war, civil war, insurrection, rebellion, or revolution.

J. **loss** due to radioactive contamination.

K. **loss** due to destruction or confiscation by governmental or civil authorities.

L. **loss** to an **automobile** located inside a facility designed for racing, for the purpose of competing in, practicing for, or preparing for, any prearranged or organized racing or speed contest.

M. a **non-owned automobile** while used by a **relative** who owns, leases or has available for their regular use, a **motor vehicle**.

N. radar and laser detectors.

O. **loss** to **your covered automobile** or any **non-owned automobile** due to any actual or perceived loss in market or resale value.

MAXIMUM AMOUNT WE WILL PAY

Our payments will not exceed the lesser of:

1. the **actual cash value** of the property at the time of **loss**; or

2. the cost to repair or replace the property with other of like kind and quality.

If the **loss** is only to a part of the property, **our** responsibility extends to that part only.

The most **we** will pay for **loss** to a **trailer you** do not own is $500.

OTHER INSURANCE

If **you** have other insurance against a **loss** covered by this policy, **we** will pay **our** fair share. **Our** fair share is the proportion that **our** limit bears to the total of all applicable limits. However, any insurance **we** provide with respect to **non-owned automobiles** or **substitute automobiles** will be excess over any other collectible insurance.

YOUR DUTIES IN THE EVENT OF LOSS

You must:

1. protect the **automobile** from further **loss**. **We** will pay **you** for reasonable expenses incurred for this protection. **We** will not cover any **loss** which results from **your** failure to protect the **automobile** from further **loss**.

2. file with **us** a proof of loss within 91 days or within the number of days required by law.

3. show **us** the damaged property and submit to examination under oath upon request.

NO BENEFIT TO BAILEE

This coverage shall not directly or indirectly benefit any carrier or bailee for hire for **loss** to the **covered automobile**.

RIGHT TO APPRAISAL

If within 60 days after proof of **loss** is filed, there is a disagreement as to the amount, **you** or **we** may demand an appraisal. Each party will select a competent appraiser. Each appraiser will state separately the **actual cash value** and the amount of **loss**. If they fail to agree, they must select and submit their

differences to a competent and disinterested umpire. Agreement by any two will determine the amount of **loss.** Each party will pay his chosen appraiser and will equally share the expenses of the appraisal and umpire.

PAYMENT OF LOSS

We may pay for the **loss** in money, repair the damaged property, or replace the damaged or stolen property. **We** may, at any time before the **loss** is paid or the property replaced, return at **our** own expense any stolen property. **We** will return the property to **you** or to the address shown in the Declarations, at **our** option. **We** may take all or part of the damaged property at the agreed or appraised value, but **you** cannot abandon the property to **us.** **We** may settle any claim or **loss** either with **you,** the owner, or any other party who has an interest, title, or lien on the property.

GENERAL POLICY CONDITIONS

1. **TERRITORY AND POLICY PERIOD**

   This policy applies to accidents and **losses** which happen while the policy is in effect:

   a. in the United States, its territories or possessions;

   b. in Canada;

   c. while the **covered automobile** is being shipped between their ports; and

   d. during the policy period shown by the effective date and expiration date in the Declarations, or until the effective date and time of cancellation at **your** address shown in the Declarations.

2. **PREMIUM CHANGES**

   a. All premiums for this policy will be computed in accordance with **our** rules, rates, rating plans, premiums and minimum premiums which apply to the insurance provided by this policy. The premiums **we** charge are based on the information provided by **you** on **your** application and other information **we** possess. **We** are permitted to adjust **your** premiums when this information changes.

      Changes during the policy period that may result in a premium increase or decrease include, but are not limited to, changes in:

      i. the number, type or use classification of the **covered automobiles.**

      ii. operators using the **covered automobiles,** including **you, relatives** and all licensed drivers in **your** household.

      iii. the principal garaging of the **covered automobiles.**

      iv. coverage, **deductible** or limits of the policy.

      If a change requires a premium adjustment, **we** will adjust the premium as of the effective date of the change. Premiums are payable on the dates set forth by **us.**

   b. **We** will round all premium adjustments made for any reason to the nearest dollar, in accordance with the manuals in use.

c. The policy premium may be re-computed upon expiration of the Policy Period as shown in the Declarations.

3. **FRAUD AND MISREPRESENTATION**

All coverages under this policy are void if, whether before or after a **loss**, **you** or any person seeking coverage has:

a. concealed or misrepresented any material fact or made any fraudulent statements; or

b. in the case of any fraud or attempted fraud, affected any matter regarding this policy or any **loss** for which coverage is sought.

4. **OTHER AUTOMOBILE INSURANCE WITH US**

If two or more automobile insurance policies issued by **us** apply to any accident or **loss**, the most **we** will pay is the highest dollar limit or benefit in any one such policy.

5. **IF AN ACCIDENT OR LOSS OCCURS**

You or someone on **your** behalf must notify **us** as soon as possible of any accident or **loss**. The notification should include as many details as possible, including names and addresses of drivers, injured persons and witnesses, and the time, place, and circumstances of the accident or **loss**. **We** may require it in writing.

In the event of a theft, **you** must promptly notify the police. If a claim or suit is made, immediately forward to **us** every claim, demand, notice, summons, or other process.

If any legal action is begun before **we** make payment under any coverage, a copy of the summons and complaint or other process must be forwarded to **us** immediately.

6. **YOUR DUTY TO COOPERATE**

You must cooperate with **us** in every effort to investigate the accident or **loss**, settle any claims and defend **you**.

You must attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. Except at **your** own cost, **you** will not voluntarily make any payment, assume any obligation, or incur any expense, other than for first aid to others at the time of the accident.

Under Uninsured and Underinsured Motorists coverage, **we** may require **you** to take appropriate action to preserve **your** right to recover damages from any other person responsible for the **bodily injury**. Also, in any lawsuit against **us**, **we** may require **you** to join the responsible person as a defendent.

You must submit to examinations under oath as often as **we** may reasonably require.

These duties also apply to any other person making a claim under this policy.

7. **LAWSUITS AGAINST US**

You may not sue **us** unless there is full compliance with all of the terms of the policy.

You may not sue **us** under the Automobile Liability coverage until the amount of legal liability has been finally determined either by judgment after actual trial or by written agreement of **you**, the claimant and

us. However, no one has the right to make **us** a party in a suit to determine legal responsibility. **Your** bankruptcy or insolvency will not relieve **us** of any obligation under this policy.

You may not sue **us** under Physical Damage coverage until 30 days after proof of **loss** is filed and the amount of **loss** is determined as provided in this policy.

These conditions also apply to any other person insured under this policy.

8. **MEDICAL REPORTS; PROOF AND PAYMENT OF CLAIM**

Any person making a claim as a result of **bodily injury**, which may result in payment from Personal Injury Protection coverage or Automobile Medical Expense coverage, must notify **us** in writing. This notification should be sent to **us** as soon as reasonably possible after the person's first examination or treatment resulting from the **bodily injury**. Another person may give **us** the required notice on behalf of the person making a claim.

Any person making a claim must, as soon as possible:

a. give **us** details about the death, injury, treatment, and other information **we** need to determine the amount payable. **We** have the right to make or obtain a review of **medical expenses** and services to determine if they are reasonable and necessary for the **bodily injury** sustained. Forms for providing this information may be provided by **us**.

b. consent to be examined by physicians chosen and paid by **us** when, and as often as, **we** reasonably may require.

c. execute authorizations to permit **us** to obtain medical reports and records. If the person is dead or unable to act, such authorizations must be executed by his or her legal representative.

d. submit to and provide all details concerning **loss** information through written or recorded statements or examinations under oath as often as **we** reasonably may require.

Under Personal Injury Protection coverage and Automobile Medical Expense coverage, **we** may pay the injured person or any person or organization rendering the services. Any such payment will reduce the total amount **we** will pay for the injury. Any payment by **us** will not constitute admission of liability.

Under Personal Injury Protection coverage and Uninsured and Underinsured Motorists coverage, **we** may pay any amount due to:

a. the injured person;

b. if the injured person is a minor, his parent or guardian;

c. if the person is deceased, the surviving spouse;

d. the person authorized by law to receive such payment; or

e. the person entitled by law to recover the damages, which the payment represents.

9. **OUR RECOVERY RIGHT**

In the event of any payment under this policy, **we** are entitled to all of the rights of recovery of the person to whom, or on whose behalf, payment was made.

That person must:

a. hold in trust for **us** all rights of recovery.

b. sign and deliver to **us** any legal papers relating to the recovery.

c. help **us** exercise those rights and do nothing after **loss** to prejudice **our** rights.

In the event of recovery, **we** must be repaid for all amounts paid out by **us** plus any related collection expenses. **We** will enforce this provision only in the manner and to the extent permitted under all applicable state laws.

10. **POLICY CHANGES**

a. This policy contains all of the agreements between **you** and **us**. The terms of this policy may not be changed or waived except by endorsement issued by **us**.

b. **We** will automatically give **you** the benefits of any extension or broadening of coverage if a policy change does not require additional premiums. The change will automatically apply to **your** policy as of the date **we** implement the change in **your** state.

c. **We** may replace this policy to reflect any changes introduced since it was issued. Paragraph b. of this section does not apply to changes implemented with a general revision that includes both the broadening and restriction of coverage, whether that general revision is implemented through introduction of:

i. a future edition of **your** policy; or

ii. an endorsement changing the policy.

However, any replacement policy will not change the limits of coverage with respect to any accident or **loss** which occurs before it was replaced.

11. **ASSIGNMENT**

No change of interest in this policy is effective unless **we** consent in writing by means of endorsement to this policy.

If **you** die, this policy will continue for:

a. the surviving spouse if a resident of the same household;

b. any legal representative to the extent he is acting within the scope of his duties as such; or

c. any person having proper temporary custody of the **covered automobile.**

12. **TERMINATION**

CANCELLATION

You may cancel this policy by telling **us** on what future date **you** wish to stop coverage.

We can cancel this policy by delivering to **you** or by mailing to **you**, at **your** last known address shown on **our** records, notice stating when the cancellation will be effective. This notice will be

mailed to **you** not less than the minimum statutory time permitted by state law, but:

1. not less than 10 days:

   a. for non-payment of premium; or

   b. if this policy has been in effect less than 60 days at the time notice of cancellation is mailed; and

2. not less than 20 days prior to the effective date of cancellation for underwriting reasons if **your** driver's license or the license of any other driver who either resides in the same household or customarily operates the **covered automobile** has been suspended or revoked during the 12 month period preceding the effective date of cancellation.

NONRENEWAL

If **we** decide not to renew or continue **your** policy, **we** will mail notice to **you** at the last known address shown on **our** records. Notice will be mailed at least 20 days before the end of the policy period. **We** will have the right not to renew or continue at the expiration date shown in the Declarations.

If **we** offer to renew or continue and **you** do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due shall mean that **you** have not accepted **our** offer.

OTHER TERMINATION PROVISIONS

a. If **you** obtain other insurance on **your covered automobile**, any similar insurance provided by this policy will terminate as to that **automobile** on the effective date of the other insurance.

b. If the law in effect in **your** state at the time this policy is issued, renewed or continued:

   i. requires a longer notice period;

   ii. requires a special form of or procedure for giving notice; or

   iii. modifies any of the stated termination reasons;

   we will comply with those requirements.

c. Proof of mailing of any notice shall be sufficient proof of notice.

d. If **you** cancel, premium may be computed on a short rate basis. If **we** cancel, premium shall be computed on a pro-rata basis. Return premium shall be rounded to the nearest dollar. Any refund may be returned either at the time cancellation is effected or as soon as possible after cancellation becomes effective, but refund or offer of refund is not a condition of cancellation.

e. The effective date of cancellation or termination stated in the notice shall become the end of the policy period.

13. **LOSS PAYABLE CLAUSE**

If a loss payee is shown in the Declarations, **we** may pay any comprehensive or **collision loss** to:

a. **you** and, if unpaid, the repairer;

b. **you** and the loss payee, as its interest may appear, when **we** find it is not practical to repair the **covered automobile**; or

c. the loss payee, as to its interest, if the **covered automobile** has been repossessed.

When **we** pay the loss payee for **loss**, **we** are entitled to the loss payee's right of recovery to the extent of **our** payment. **Our** right of recovery shall not impair the loss payee's right to recover the full amount of its claim.

The coverage for the loss payee's interest will not be invalidated by any act or neglect of **you** or the owner or person legally in possession of the vehicle except:

a. when **you** or the owner or person legally in possession of the **covered automobile** makes fraudulent statement(s) or engages in fraudulent conduct in connection with any **loss** for which coverage is sought.

b. when the vehicle is intentionally damaged, destroyed or concealed:

   i. by or at the direction of **you** or the owner or person legally in possession of the vehicle; or

   ii. as a result of any other act which constitutes a breach of contract between **you** or the owner and the loss payee.

c. if **you** do not have any insurable interest in the **covered automobile**.

The loss payee must file a claim in writing and comply with the conditions of the policy.

The loss payee's interest may be terminated as permitted by the terms and conditions of the policy and the date of termination of the loss payee's interest will be at least 10 days after the date **we** mail the termination notice.

IN WITNESS WHEREOF, **we** have caused this policy to be signed by its President and its Secretary at Warwick, Rhode Island. In the event that the President or Secretary who signed this contract cease to be **our** officers either before or after the contract is issued, the contract may be issued with the same effect as if they were still **our** officers.

Secretary

President

INDEX OF POLICY PROVISIONS

EXHIBIT "2"

Policy Number: 1193308780
Policy Effective Date: 08/07/2009
Policy Expiration Date: 02/07/2010
At: 12:01 A.M.

Renewal Effective Date: 08/07/2009

Discounts

The following have been included in the total semi-annual premium:

MetRewards Discount applies to 2003 HONDA 2002 HONDA 1996 TOYOT
Airbag Discount applies to 2003 HONDA 2002 HONDA 1996 TOYOT
Anti-lock Brake Discount applies to 2003 HONDA 2002 HONDA 1996 TOYOT
Active Anti-theft Discount applies to 1996 TOYOT
Passive Anti-theft Discount applies to 2003 HONDA 2002 HONDA
Good Student Discount applies to 1996 TOYOT
Auto Policy Plus, including
Homeowners

Rating Information

Household Drivers:

07/16/1955	GREG HOLLAND	Insured
03/30/1957	KATHY HOLLAND	Spouse/Co-Insured
10/13/1986	BENJAMIN C HOLLAND	Child

IF YOU HAVE A DRIVER IN YOUR HOUSEHOLD WHO IS NOT LISTED ABOVE, PLEASE NOTIFY US IMMEDIATELY.

Your policy is rated on the following information:

2003 HONDA	Driver Assigned: Commute 20 Miles	KATHY HOLLAND Multi-Car Rate Annual Mileage 15,000	Licensed 36 Years Married
2002 HONDA	Driver Assigned: Pleasure Use	GREG HOLLAND Multi-Car Rate Annual Mileage 0	Licensed 38 Years Married
1996 TOYOT	Driver Assigned: Commute 04 Miles	BENJAMIN C HOLLAND Multi-Car Rate Annual Mileage 0	Licensed 06 Years Unmarried

Interested Parties

2003 HONDA	Lien/Loss Payee:	HONDA FINANCE SERVICE PO BOX 5025	SAN RAMON	CA 94583
2002 HONDA	Lien/Loss Payee:	HONDA FINANCE SERV PO BOX 5025	SAN RAMON	CA 94583
1996 TOYOTA	Lien/Loss Payee:	HORIZON CREDIT UNION PO BOX 15128	SPOKANE VLY	WA 99215

For service or claims, see the Customer Service and Claim Directory located on the back of your cover page.

Your representative is:
FOREDYCE, JOSEPH
TEL: 208 - 777 - 7402
J05 - 153 - 5

Automobile Insurance Declaration

Policy Number: 1193308780
Policy Effective Date: 08/07/2009
Policy Expiration Date: 02/07/2010
At: 12:01 A.M.

Renewal Effective Date: 08/07/2009

Named Insured:
KATHY HOLLAND AND
GREGORY HOLLAND
18439 W HOLLAND
POST FALLS ID 83854

Bill To: Insured

Insured Vehicle(s)

Veh	Year	Make	Model	Body Type	Vehicle ID Number	Sym	Territory
1	2003	HONDA	CIVIC L	4DR	2HGES16693H611731	15	01
2	2002	HONDA	CIVIC L	4DR	2HGES16612H598892	14	01
3	1996	TOYOTA	TACOMA	PUCLCAB	4TAWM72N4TZ137339	15	01

Coverage Description	Applicable Limits	Semi-Annual Premiums 2003 HONDA	2002 HONDA	1996 TOYOT
Liability				
Bodily Injury	$ 250,000 Per Person/ $ 500,000 Per Occurrence	57	62	126
Property Damage	$ 250,000 Per Occurrence	39	41	87
Medical Expense	$ 10,000 Per Person	14	17	18
Uninsured Motorists				
Bodily Injury	$ 250,000 Per Person/ $ 500,000 Per Accident	7	7	7
Underinsured Motorists				
Bodily Injury	$ 250,000 Per Person/ $ 500,000 Per Accident	7	7	7
Physical Damage	2003 HONDA / 2002 HONDA / 1996 TOYOT			
Actual Cash Value (ACV) or Limit	ACV / ACV / ACV			
Collision less deductible	$ 500 / $ 500 / $ 1000	85	76	97
Comprehensive less deductible	$ 500 / $ 500 / $ 1000	49	53	63
Towing and Labor Limit	$ 50 / $ 50 / $ 50	Incl	Incl	Incl
Optional Coverages				
Substitute Transportation	$ 40 Day/$1200 Occurrence	18	18	
Glass Deductible Buyback		Incl	Incl	Incl
Total Semi-Annual Premium:	**$ 962.00** **Vehicle Totals:**	**276**	**281**	**405**

Deductible Savings Benefit (DSB) $ 150

Deductible Savings reduces Collision or Comprehensive deductibles, excluding towing and glass claims, effective 08/07/2009 for claims occurring after this date. Your next anniversary date is 08/07/2010. See Important Notice for details.

Forms and Endorsements

MPL 6010-000 ID700A V550 V702 V911 V506

olicy Number: 1193308781
olicy Effective Date: 09/24/2009
olicy Expiration Date: 09/24/2010
At: 12:01 A.M.

Renewal Effective Date: 09/24/2009

scounts

ıe following have been included in the total annual premium:

MetRewards Discount applies to 2005 SUZUK

ıting Information

ɔusehold Drivers:

7/16/1955	GREG HOLLAND	Insured
3/30/1957	KATHY HOLLAND	Spouse/Co-Insured
ɔ/13/1986	BENJAMIN HOLLAND	Child

YOU HAVE A DRIVER IN YOUR HOUSEHOLD WHO IS NOT LISTED ABOVE, PLEASE NOTIFY US IMMEDIATELY.

)05 SUZUK	Driver Assigned: Pleasure Use	BENJAMIN HOLLAND Annual Mileage 3,000	Licensed 06 Years Unmarried

ɔr service or claims, see the Customer
ervice and Claim Directory located on
e back of your cover page.

Your representative is:
FOREDYCE, JOSEPH
TEL: 208 - 777 - 7402
J05 - 153 - 5

Metropolitan Property and Casualty Insurance Company

Automobile Insurance Declaration

olicy Number: 1193308781
olicy Effective Date: 09/24/2009
olicy Expiration Date: 09/24/2010
At: 12:01 A.M.

Renewal Effective Date: 09/24/2009

lamed Insured:
;REG HOLLAND AND
ATHY HOLLAND
8439 W HOLLAND
'OST FALLS ID 83854

Bill To: Credit Card

Insured Vehicle(s)

eh	Year	Make	Model	Body Type	Vehicle Id Number	CCs	Territory
1	2005	SUZUKI	GSXR-60	CYCLE	JS1GN7CA052104636	0599	01

overage Description	Applicable Limits		2005 SUZUK
ability			
Bodily Injury	$ 250,000	Per Person/	
	$ 500,000	Per Occurrence	126
Property Damage	$ 250,000	Per Occurrence	156
ninsured Motorists			
Bodily Injury	$ 250,000	Per Person/	
	$ 500,000	Per Accident	8
nderinsured Motorists			
Bodily Injury	$ 250,000	Per Person/	
	$ 500,000	Per Accident	8
nysical Damage	2005 SUZUK		
:tual Cash Value (ACV) or Limit	ACV		
Collision less deductible	$ 500		42
Comprehensive less deductible	$ 500		32
Towing and Labor Limit	$ 75		Incl
otal Annual Premium:	$ 372.00	**Vehicle Totals:**	372

eductible Savings Benefit (DSB) $ 150

eductible Savings reduces Collision or Comprehensive deductibles, excluding towing and glass claims, effective /24/2009 for claims occurring after this date. Your next anniversary date is 09/24/2010. See Important Notice for :tails.

rms and Endorsements

MPL 6010-000 ID700A V130A V550 V702 V911

Policy Number: 0234338980
Policy Effective Date: 10/16/2009
Policy Expiration Date: 10/16/2010
At: 12:01 A.M.

Reinstatement Effective Date: 10/16/2009

iscounts

he following have been included in the total annual premium:

MetRewards Discount applies to 1996 TOYOT
Airbag Discount applies to 1996 TOYOT
Anti-lock Brake Discount applies to 1996 TOYOT
Active Anti-theft Discount applies to 1996 TOYOT
Auto Policy Plus, including
Homeowners

ating Information

lousehold Drivers:

0/13/1986 BENJAMIN C HOLLAND Insured

: YOU HAVE A DRIVER IN YOUR HOUSEHOLD WHO IS NOT LISTED ABOVE, PLEASE NOTIFY US IMMEDIATELY.

our policy is rated on the following information:

996 TOYOT	Driver Assigned: Commute 04 Miles	BENJAMIN C HOLLAND Annual Mileage 12,000	Licensed 07 Years Unmarried

nterested Parties

996 TOYOTA	Lien/Loss Payee:	HORIZON CREDIT UNION PO BOX 15128	SPOKANE VALLE	WA9921!

lessages

Cancellation void. Policy reinstated without lapse of coverage.

or service or claims, see the Customer ervice and Claim Directory located on ıe back of your cover page.

Your representative is:
FOREDYCE, JOSEPH
TEL: 208 - 777 - 7402
J05 - 153 - 5

Policy Number: 0234338980
Policy Effective Date: 10/16/2009
Policy Expiration Date: 10/16/2010
At: 12:01 A.M.

Reinstatement Effective Date: 10/16/2009

Named Insured:
BENJAMIN C HOLLAND
1359 W CARDINAL AVE
HAYDEN ID 83835

Bill To: Insured

Insured Vehicle(s)

Veh	Year	Make	Model	Body Type	Vehicle ID Number	Sym	Territory
1	1996	TOYOTA	TACOMA	PUCLCAB	4TAWM72N4TZ137339	15	01

Coverage Description		Applicable Limits		1996 TOYOT
Liability				
Bodily Injury	$	100,000	Per Person/	
	$	300,000	Per Occurrence	222
Property Damage	$	50,000	Per Occurrence	162
Medical Expense	$	10,000	Per Person	27
Uninsured Motorists				
Bodily Injury	$	100,000	Per Person/	
	$	300,000	Per Accident	12
Underinsured Motorists				
Bodily Injury	$	100,000	Per Person/	
	$	300,000	Per Accident	12
Physical Damage	1996 TOYOT			
Actual Cash Value (ACV) or Limit	ACV			
Collision less deductible	$ 1000			189
Comprehensive less deductible	$ 1000			158
Towing and Labor Limit	$ 100			Incl
Optional Coverages				
Glass Deductible Buyback				Incl
Total Annual Premium:	**$ 782.00**		**Vehicle Totals:**	**782**

Deductible Savings Benefit (DSB) $ 150

Deductible Savings reduces Collision or Comprehensive deductibles, excluding towing and glass claims, effective 2/10/2009 for claims occurring after this date. Your next anniversary date is 10/16/2010. See Important Notice for details.

Forms and Endorsements

MPL 6010-000 ID700A V550 V702 V911 V506

EXHIBIT "3"

MetLife Auto & Home®
Freeport Field Claim Office
Mail Processing Center
P.O. Box 410250
Charlotte, NC 28241
(800) 854-6011

MetLife®

December 29, 2009

Funke and Associates
Attn: Kinzo H Mihara.
P.O. Box 969
Coeur D Alene, ID 83816

Our Customer:	Benjamin C. Holland
Our Claim Number:	FRD37313 BG
Date of Loss:	October 25, 2009

Dear Kinzo H Mihara, Esq.:

Enclosed please find a check for $1,000.00 made payable to "Estate of Benjamin C. Holland".

Please call with any questions.

Sincerely,

Margaret Signalness
Metropolitan Property and Casualty Insurance Company
Claim Adjuster
(800) 854-6011 Ext. 7812
Fax: (866) 947-0224

D: Check for $1,000.00 made payable to "Estate of Benjamin C Holland". Please mail with the letter on top to Attorney.

IDAHO LAW REQUIRES US TO NOTIFY YOU OF THE FOLLOWING: Any person who knowingly, and with intent to defraud any insurance company, files a statement containing any false incomplete, or misleading information is guilty of a felony.

0003
: PO BOX 410400
CHARLOTTE NC 28241

MetLife Auto & Home

MetLife Auto & Home is a brand of
Metropolitan Property and Casualty Insurance Company
and its Affiliates, Warwick, RI

0003

FRD373130
ESTATE OF BENJAMIN C HOLLAND
P O BOX 969
COEUR D ALENE, ID 83816

INSURED: BENJAMIN C HOLLAND
CLAIMANT: BENJAMIN C HOLLAND

CHECK NUMBER: 002478683
CHECK AMOUNT: $1,000.00

One thousand and 00/100 Dollars

MED PAY COV, FUNERAL BENEFIT OF $1,000.00 FOR
BENJAMIN C HOLLAND

J8 BG BG 0938159 *

MetLife Auto & Home

0894 62-20/311

METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY

PO BOX 410400
CHARLOTTE NC 28241

MED PAY COV, FUNERAL BENEFIT OF $1,000.00 FOR
BENJAMIN C HOLLAND

Check Number 002478683

TIN

Claim No. FRD373130

Not Valid Before 12-29-2009

Void Nine (9) Months After This Date

One thousand and 00/100 Dollars

Pay to the Order of:

ESTATE OF BENJAMIN C HOLLAND
P O BOX 969
COEUR D ALENE, ID 83816

Amount ********$1,000.00

Citibank, N.A.
One Penns Way
New Castle, DE 19720

38157-2010

AUTHORIZED SIGNATURE

EXHIBIT "4"

Claim Number: FRD408370, Date/time: 12/7/2009 2:23 pm, Author: Wenger FRIAT, M, Keyword(s): New Claim

Cross Reference: FRD37313

Claim Number: FRD408370, Date/time: 12/7/2009 2:23 pm, Author: Wenger FRIAT, M, Keyword(s): Handler Alert

YX Freeport YX has been assigned as the AIU Adjuster handler for this claim.

Claim Number: FRD408370, Date/time: 12/7/2009 2:32 pm, Author: Knoph, J, Keyword(s): Handler Alert

LaRae Hill has been assigned as the AIU Adjuster handler for this claim.

Claim Number: FRD408370, Date/time: 12/7/2009 2:53 pm, Author: Wolman, I, Keyword(s): Handler Alert

Daneice Davis has been assigned as the Casualty - Auto handler for this claim.

Claim Number: FRD408370, Date/time: 12/7/2009 2:53 pm, Author: System,, Keyword(s): New Claim

New Casualty Claim

Claim Number: FRD408370, Date/time: 12/7/2009 2:54 pm, Author: Wolman, I, Keyword(s): Sup/Mgr Rev

This is a companion claim to one that Daneice Davis is already handling.

Claim Number: FRD408370, Date/time: 12/8/2009 9:12 am, Author: Davis, D, Keyword(s): Coverage, Loss Info

Orgin Date : 8/7/2001
No concurrent issues
Policy Term: 9/24/2009 - 9/24/2010
Loss Date: 10/25/2009
Listed Drivers:
Greg Holland 7/16/1955
Kathy Holland 3/30/1957
Benjamin Holland 10/13/1986
2005 Suzuki GSXR-60

Coverage: Metropolitan Property and Casualty Company
Motorcycle Policy
Endorsements: MPL 6010-00
ID700A
V130A
V550
V702
V911

Loss Reported: NI was passenger in non owned vehicle fatality.
There are other claims set up:
NI Auto Policy: FRD37313
Parent's Auto Policy: FRD40844

Contact has been made with attorney on cross refernece files.

Reserves: ON this file: I am setting a table AUB reserve as
Allstate the car the NI was a passenger in has $50/100 Limt
Metlife Auto Policy for Benjamin Holland has 100/300 Limit
Parents Policy: FRD40844 - $250/500

On this file I am completing an ROR for Residency Issues
Need R/S from both Named Insureds for residency issues
I have requested the Policy - Need to read as it appears Benjamin Holland may be a listed driver and not a named insured?

Claim Number: FRD408370, Date/time: 12/8/2009 10:49 am, Author: Davis, D, Keyword(s): Coverage, GREG HOLLAND

To Transmittal Desk:

Date of Request:December 8, 2009
Insured Name:Greg Holland
Insured Address:Greg Holland
18439 W Holland
Post Falls, ID 83854
Claim Number:FRD40837 CB
Date of Loss:October 25, 2009
Policy Number:119330878-1
Vehicle Year/Make:2005 Suzuski

Coverage Verification Requested For:

New Policy

Cancellation
Proof of Mailing
Copy of Letter
XCopy of Original Application

Manual Policy
DEC
Certified DEC
XCertified Copy of Policy / Endorsements
Copy of Policy / Endorsements

Copy of UM Election Form

Copy of P697

Copy of Underwriting File

PELP
Copy Required

Attach Coverage when Requesting Certified Documents / Underwriting Information

Other / Remarks:

394

00128

Claim Number: FRD408370, Date/time: 12/8/2009 11:02 am, Author: Davis, D, Keyword(s): Attorney

Called attorney's office and left message with Julie for LOR.

Claim Number: FRD408370, Date/time: 12/8/2009 11:54 pm, Author: MIP Requirement,, Keyword(s): Manager Intervention

The following Casualty key word(s) were found and triggered this alert: fatality, requiring a file review.

Claim Number: FRD408370, Date/time: 12/9/2009 3:20 pm, Author: Shick, M, Keyword(s): Coverage, Sup/Mgr Rev, BENJAMIN HOLLAND

Reviewed file...
xfile : FRD37313 - ni policy - Benjamin Holland
xfile: FRD40844 – parents policy,
this file has been set up per request from claimant attorney looking for additional coverage for our NI--Benjamin ..... this policy is the motorcycle policy that is in the ni parent's name but Benjamin is a listed driver.

xfile of FRD37313...we are about to tender ins policy limits when attorney has submitted these 2 add'l claims looking for coverage under these policies....NI was a passenger in an unowned vehicle. Per agent, there were no other policies...23 yr old ins lived on his own, purchased a home 10/9/09, owned his own vehicle, had his own insurance policy.
Liab 0/100----appears div fell asleep, losing control of iv, striking tree.

a/c Allstate has 50/100 abi limits and have tendered their policy limits....
auu table reserve has been set as a precaution as we determine coverage.

Daneice is ordering certified copies of this policy and parents policy and all uw notes and referring to defense counsel to review to assist in determining coverage.

Claim Number: FRD408370, Date/time: 12/30/2009 10:11 am, Author: System,, Keyword(s): Handler Alert

Daneice Davis is currently out of the office thru Jan 6 2010

Claim Number: FRD408370, Date/time: 12/30/2009 10:11 am, Author: Hardy, D, Keyword(s): HOCA

are we getting the requested materials, etc.? we may have an exposure under UIM under this policy, but a complete review is needed.

MetLife Auto & Home®

MONTHLY RECURRING CREDIT CARD AUTHORIZATION FORM

Yes, I want to pay my MetLife Auto & Home premiums through automatic monthly billing to the designated credit card.

1. **Select the policy(ies) you want billed to your credit card and provide us with the policy number(s):**

For Packaged Policy: COMBO or GrandProtect Account Number: _____
OR
For Individual Policy(ies): Automobile: _____ PELP: _____
Home: _____ Boat: _____
Other (specify): MOTORCYCLE 119330878

Please note:
- PAK II policies are not eligible for the Monthly Recurring Credit Card pay plan.
- A $2.00 processing fee may apply to each monthly bill.
- Policies that are currently being billed to your mortgage company will not be transferred.

2. **Provide credit card information:**
(All information in this section is required.)
Card type: (Visa) MasterCard Discover American Express
Print name as it appears on credit card: BRIAN HOWARD
Billing Address of Cardholder: 18439 W HOWARD, POST FALLS, ID 83854
Credit Card Account Number: 4665 9020 3573 5586 Expiration Date: 05/11
Process the charge on or about the 5th 12th 18th (28th) of the month.

BE SURE TO READ AND SIGN THE AGREEMENT AND MAKE A COPY OF THIS FORM FOR YOUR RECORDS.

3. **Sign:** I understand that MetLife Auto & Home will notify me in advance of any changes to the charged amount of more than $1.00. I must give **MetLife Auto & Home 25 days written notice to stop the charges** or to change my credit card account information. By completing this form, I hereby authorize Metropolitan Property and Casualty Insurance Company and its Affiliates and the credit card company identified on this authorization to process the charges authorized herein. I also authorize MetLife Auto & Home to make such charges on any future policy I may purchase, if I verbally give my consent. I understand that any refunds on the policy may be applied to the credit card account of the cardholder when the policy is billed to a credit card belonging to someone other than the insured.

Policyholder Name (Print): BRIAN HOWARD
Policyholder Signature: (BRIAN HOWARD)

4. If the premium is to be charged to a third party credit card account, the accountholder must complete and sign below:
I, BRIAN HOWARD agree to pay the monthly premiums for the above referenced policy on behalf of the named insured and hereby authorize Metropolitan Property and Casualty Insurance Company and its Affiliates and the credit card company identified on this authorization to process the charges authorized herein. I understand that any changes to the policy that may affect the charge amount will be communicated to the insured only.

Credit Card Accountholder Name (Print): BRIAN HOWARD
Credit Card Accountholder Signature: (BRIAN HOWARD)

If your policy is serviced by an independent Agent, mail to:
METLIFE AUTO & HOME
ATTENTION: PROCESSING UNIT
P.O. BOX 441
FREEPORT, ILLINOIS 61032-0441

All others:
METLIFE AUTO & HOME
ATTENTION: FINANCIAL
P.O. BOX 45020
DAYTON, OHIO 45475-0020

Or fax to:
1-888-421-0078

SEE ATTACHED FREQUENTLY ASKED QUESTIONS

MPL 9470-000 Printed in U.S.A. 0808

Sep 25 2008 8:07AM HP LASERJET FAX P.3
SEP-24-2008 03:35 PM Greg Holland 208 773 9782 P.04
Sep 24 2008 5:07PM HP LASERJET FAX P.4

00084

FA

GREG, KATHY, BEN HOLLAND
Name

119 30 828(
Policy Number

IDAHO
PROTECTION AGAINST UNINSURED AND UNDERINSURED MOTORISTS COVERAGE ELECTION/REJECTION FORM

This form is used to select your Uninsured and Underinsured Motorists Coverage Limits. Please read it carefully. If you are making a change in your policy, the completed form may be mailed to the address below. Your representative can provide you assistance in completing this form, or you may contact our Customer Service Department.

UNINSURED AND UNDERINSURED MOTORISTS COVERAGE

The **Uninsured Motorists Coverage** will pay loss resulting from bodily injury or death which you are legally entitled to collect from the owner or driver of an uninsured highway vehicle.

The **Underinsured Motorists Coverage** will pay loss resulting from bodily injury or death which you are legally entitled to collect from the owner or driver of an underinsured highway vehicle.

You may purchase Uninsured Motorists Coverage at limits of liability ranging from the minimum amount required by law up to a limit equal to the Bodily Injury limit of your policy or you may choose to reject Uninsured Motorists Coverage. You may purchase Underinsured Motorists Coverage at limits of liability equal to your Uninsured Motorists Coverage or you may choose to reject Underinsured Motorists Coverage.

Please indicate your selection by checking the options for the limits you desire. In no case can the limits you select for Uninsured Motorists Coverage be greater than your current Bodily Injury Liability Limits.

UNINSURED MOTORISTS COVERAGE LIMIT

- ☐ $25,000 per person/$50,000 per accident
- ☐ $50,000 per person/$100,000 per accident
- ☐ $100,000 per person/$300,000 per accident
- ☒ $250,000 per person/$500,000 per accident
- ☐ $100,000 per person/$100,000 per accident*
- ☐ $300,000 per person/$300,000 per accident*
- ☐ $500,000 per person/$500,000 per accident*

☐ I reject Uninsured Motorists Coverage in its entirety.

*available in Metropolitan Property and Casualty Insurance Company only

UNDERINSURED MOTORISTS COVERAGE LIMIT

☒ I select Underinsured Motorists Coverage at limits equal to my Uninsured Motorists Coverage limits.
☐ I reject Underinsured Motorists Coverage in its entirety.

Signature

9-24-08
Date

5104 Heyl

Mail to:

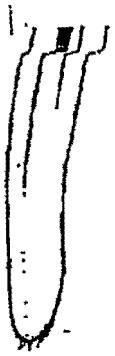
METLIFE AUTO & HOME
ATTENTION: CORRESPONDENCE UNIT
P.O. BOX 48020
DAYTON, OHIO 45475-0020

(MPL 1179-01)

Printed in U.S.A. 0808

Sep 25 2008 8:07AM HP LASERJET FAX P.2
Sep-24-2008 05:55 PM Grey Holland 208 773 9782 P.03
Sep 24 2008 5:07PM HP LASERJET FAX P.3

00085



AA

MetLife Auto & Home®

APPLICATION/AGREEMENT

		Application(s):	Effective Date	Downpayment Amount (if multiple)
☒	Metropolitan Property and Casualty Insurance Company			
☐	Metropolitan Casualty Insurance Company			
☐	Metropolitan General Insurance Company			
☐	Metropolitan Group Property and Casualty Insurance Company	☐ Auto		
☐	Metropolitan Direct Property and Casualty Insurance Company	☒ Home	10-7-09	0
☐	Economy Premier Assurance Company	☐ RV		
☐	Other _____	☐ Motorcycle		
		☐ Boat		
		☐ PELP		
		☐ GrandProtect		

(☐ Auto ☐ Home ☐ RV ☐ Motorcycle ☐ Boat ☐ PELP)

Applicant's Name:	Agent Name:	Agent ID:	Policy Number:
BEN HOLLAND	JOE FACTORY	JOS535	119330878

The items checked below are attached (if applicable):

☒ Downpayment Form $ 0
- ☐ Check
- ☐ Credit Card

Documents Authorization Code _____

☐ ExpressIT℠ Form and Voided Check

- ☐ Prior Declarations Page
- ☐ Consumer Reports
- ☐ Photo
- ☐ Proof of Anti-Theft/Safety Devices/Systems
- ☐ Certificate(s)
- ☐ Inspection or Acknowledgment Form
- ☐ Appraisals

- ☐ Underwriting Supplemental Documents
- ☐ State Required Documents
- ☐ Other _____

APPLICANT'S AGREEMENT, CONSUMER PRIVACY STATEMENT AND FRAUD STATEMENTS

Applicant's Agreement: I understand and agree that my application for insurance has been recorded, I am applying for the insurance coverages and limits shown on the application and I represent that: (1) (if automobile) I am the sole owner of the vehicle(s), except as otherwise stated, or properly described in the application; (2) I have provided the information recorded on the application to my agent and all of the information recorded on the application is true and correct; (3) I have had the coverages and limits fully explained to me, I have indicated my choices to my agent, and my choices have been recorded on the application; (4) I understand that upon receipt of any policy issued as a result of my application it is my responsibility to review the forms and conditions thereof, including the effective date, coverages and limits appearing on the policy Declarations Page, and either advise MetLife Auto & Home directly or notify my agent if there are any discrepancies; and (5) I understand that I am applying for insurance with MetLife Auto & Home and MetLife Auto & Home has my specific permission to share information about me with the MetLife Auto & Home affiliated companies and to issue and renew my insurance policy(ies) in what MetLife Auto & Home considers the appropriate MetLife Auto & Home affiliate. Any downpayment or premium payment may be applied to the MetLife Auto & Home company that insures me at the time such payment is due.

I understand that the "Estimated Total Premium" shown is an estimated premium and is subject to revision by the insurance company.

Consumer Privacy Information (required by law): I understand that as part of MetLife Auto & Home's underwriting and renewal procedures, information about me and members of my household may be collected to verify or add to information given in the application. Information may be gathered from other sources, such as other insurance companies, motor vehicle and court records, claim and credit records ("Consumer Reports"); family members, neighbors, and friends ("Investigative Consumer Reports"). This information may concern, when applicable, mode of living, character, general reputation, driving record, claim record, credit histories and other personal characteristics. Some of this information may be disclosed to others, but only to the extent permitted by Fair Credit Reporting Act(s). MetLife Auto & Home will notify me if the information is used against me and advise me how to obtain a copy of the applicable Credit Report and/or Investigative Consumer Report.

I acknowledge that I have received MetLife Auto & Home's Consumer Privacy Notice and I hereby authorize MetLife Auto & Home to obtain an Investigative Consumer Report and to maintain such information.

I wish to be interviewed in connection with any Investigative Consumer Report. ☐ Yes ☒ No

Warning and Fraud Statements:

Arkansas and Maine Fraud Warning: It is a crime to knowingly provide false, incomplete or misleading information to an insurance company for the purpose of defrauding the company. Penalties may include

00086

17

information to a policyholder or claimant for the purpose of defrauding or attempting to defraud the policyholder or claimant with regard to a settlement or award payable from insurance proceeds shall be reported to the Colorado Division of Insurance within the Department of Regulatory Agencies.

District of Columbia Fraud Warning: WARNING: IT IS A CRIME TO PROVIDE FALSE OR MISLEADING INFORMATION TO AN INSURER FOR THE PURPOSE OF DEFRAUDING THE INSURER OR ANY OTHER PERSON. PENALTIES INCLUDE IMPRISONMENT AND/OR FINES. IN ADDITION, AN INSURER MAY DENY INSURANCE BENEFITS IF FALSE INFORMATION MATERIALLY RELATED TO A CLAIM WAS PROVIDED BY THE APPLICANT.

Florida Fraud Warning: Any person who knowingly and with intent to injure, defraud, or deceive any insurer, files a statement of claim, or an application, containing any false, incomplete, or misleading information is guilty of a felony of the third degree.

Hawaii Fraud Warning: For your protection, Hawaii law requires you to be informed that presenting a fraudulent claim for payment of a loss or benefit is a crime punishable by fines or imprisonment, or both.

Kentucky Fraud Warning: Any person who knowingly and intentionally defrauds an insurance company or other person by filing an application for insurance containing any materially false information or conceals for the purpose of misleading, information concerning any material fact commits a fraudulent insurance act, which is a crime.

Massachusetts Warning: Notice: If you or someone else on your behalf knowingly gives us false, deceptive, misleading or incomplete information in this application and if such false, deceptive, misleading or incomplete information increases our risk of loss, we may refuse to pay claims under any or all of the Optional Insurance Parts and we may cancel your policy. Such information includes the description and the place of garaging of the vehicle(s) to be insured, the names of all household members and customary operators required to be listed and the answers given above for all listed operators. We may also limit our payments under Part 3 and Part 4. We will not pay for a collision or limited collision loss for an accident which occurs while your auto is being operated by a household member who is not listed as an operator on your policy. Payment is withheld when the household member, if listed, would require the payment of additional premium on your policy because the household member would be classified as an inexperienced operator or would be assigned a higher rating step under the Safe Driver Insurance Plan.

Minnesota Automobile Notice of Possible Cancellation: IN ACCORDANCE WITH MINNESOTA LAW, WE ARE REQUIRED TO INFORM YOU THAT THE INSURER MAY ELECT TO CANCEL COVERAGE AT ANY TIME DURING THE FIRST 59 DAYS FOLLOWING ISSUANCE OF THE COVERAGE FOR ANY REASON WHICH IS NOT SPECIFICALLY PROHIBITED BY STATUTE.

Nevada Warning: ANY PERSON WHO REFUSES TO ACCEPT THIS BINDER AS PROOF OF INSURANCE PURSUANT TO THE PROVISIONS OF NRS687B.196 IS SUBJECT TO THE PENALTIES PROVIDED IN THAT SECTION.

New Jersey Fraud Warning: Any person who includes any false or misleading information on an application for an insurance policy is subject to criminal and civil penalties.

New Mexico Fraud Warning: ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR KNOWINGLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY OF A CRIME AND MAY BE SUBJECT TO CIVIL FINES AND CRIMINAL PENALTIES.

New York Automobile Fraud Warning: Any person who knowingly and with intent to defraud any insurance company or other person files an application for commercial insurance or a statement of claim for any commercial or personal insurance benefits containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, and any person who, in connection with such application or claim, knowingly makes or knowingly assists, abets, solicits or conspires with another to make a false report of the theft, destruction, damage or conversion of any motor vehicle to a law enforcement agency, the department of motor vehicles or an insurance company, commits a fraudulent insurance act, which is a crime, and shall also be subject to a civil penalty not to exceed five thousand dollars and the value of the subject motor vehicle or stated claim for each violation.

Ohio Fraud Warning: Any person who, with the intent to defraud us or knowingly facilitating a fraud against us, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.

Oklahoma Fraud Warning: WARNING: Any person who knowingly, and with intent to injure, defraud or deceive any insurer, makes any claim for the proceeds of an insurance policy containing any false, incomplete or misleading information is guilty of a felony.

Pennsylvania Fraud Warning: Any person who knowingly and with intent to injure or defraud any insurer files an application or claim containing any false, incomplete or misleading information shall, upon conviction, be subject to imprisonment for up to seven years and payment of a fine of up to $15,000.

Tennessee and Virginia Fraud Warning: It is a crime to knowingly provide false, incomplete or misleading information to an insurance company for the purpose of defrauding the company. Penalties include imprisonment, fines and denial of insurance benefits.

West Virginia Fraud Warning: Any person who knowingly presents a false or fraudulent claim for payment of a loss or benefit or knowingly presents false information in an application for insurance is guilty of a crime and may be subject to fines and confinement in prison.

Applicant's Signature: (K) ______ SIGN HERE   Date and Time: 9-25-09   ☒ AM ☐ PM

BINDER

Relying upon the information on this form and in the application, MetLife Auto & Home binds, as of the effective date shown on the electronic application, the insurance applied for, subject to the terms and conditions of MetLife Auto & Home's current policy. This Binder expires 60 days from the effective date shown on the electronic application, unless terminated sooner by MetLife Auto & Home's written notice. This Binder and any policy issued is invalid and void if any of the information on this form or recorded on the application is materially misrepresented or omitted.

I have asked the applicant all questions on the application and the information on this form and in the application was furnished to me by the applicant in response to my questions and is complete to the best of my knowledge.

Agent's Signature: ______   Date and Time: 9-25-09   ☒ AM ☐ PM

MPL 1200GP-000   Printed in U.S.A. 0205

MetLife Auto & Home

ARS DOWNPAYMENT AND SIGNATURE DOCUMENT

- [x] Metropolitan Property and Casualty Insurance Company
- [ ] Metropolitan Casualty Insurance Company
- [ ] Metropolitan General Insurance Insurance Company
- [ ] Metropolitan Group Property and Casualty Insurance Company
- [ ] Metropolitan Direct Property and Casualty Insurance Company
- [ ] Economy Fire & Casualty Insurance Company
- [ ] Other _____

Line of Business	Effective Date:	Downpayment Amount:
[ ] Auto		
[ ] Home		
[ ] Boat		
[ ] PELP		
[x] Other Auto	9-24-08	[illegible]

*If multiple LOB

Applicant Name (name all persons in whom the title is vested)	Credit to MetLife Auto & Home Rep - Name:
GEE, PATTY, AKA [illegible]	JOE FORREST

Applicant Policy Number:	Brand/District Office:	Agency:	Initial:
119 538 8781	285	155	J

The items checked below are attached (if applicable):

- [x] Down Payment $ 96
  - [ ] Check
  - [x] Credit Card
    - Authorization Code 023308
  - [ ] Expense Form and Voided Check
- [ ] Prior Declarations Page
- [ ] Consumer Reports
- [ ] Photo
- [ ] Proof of Anti-Theft/Safety Devices/Systems
- [ ] Certificate(s)
- [ ] Inspection or Acknowledgment Form
- [ ] Application
- [ ] Underwriting Supplemental Documents
- [ ] State Required Documents
- [ ] Other _____

APPLICANT'S AGREEMENT AND CONSUMER PRIVACY STATEMENT

Applicant's Agreement: I understand and agree that my electronic application (application) for insurance has been recorded, I am applying for the insurance coverages and limits shown on the application and I represent that: (1) (if automobile) I am the sole owner of the vehicle(s) or property described in the application; (2) I have provided the information recorded on the application to my agent and all of the information recorded on the application is true and correct; (3) I have had the coverages and limits fully explained to me. I have indicated my choices to my agent, and my choices have been recorded on the application; (4) I understand that upon receipt of any policy issued as a result of my application it is my responsibility to review the terms and conditions thereof, including the effective date, coverages and limits appearing on the policy Declarations Page, and either advise MetLife Auto & Home directly or notify my agent if there are any discrepancies; and (5) I do not qualify for the company applied for, but do qualify for an affiliated company. A policy may be issued or renewed by that company and any premium I/we will be credited to that policy.

I understand that the "Estimated Total Premium" shown is an estimated premium and is subject to revision by the insurance company.

Consumer Privacy Information (required by law): I understand that as part of MetLife Auto & Home's underwriting and renewal procedures, information about me and members of my household may be collected to verify or add to information given in the application. Information may be gathered from other sources, such as other insurance companies, motor vehicle and court records, claim and credit records ("Consumer Reports") family members, neighbors, and friends ("Investigative Consumer Reports"). This information may concern, where applicable, medical history, character, general reputation, driving record, claim record, credit history and other personal characteristics. Some of this information may be disclosed to others, but only to the extent permitted by Fair Credit Reporting Act(s). MetLife Auto & Home will notify me if the reservations used against me and advise me how to obtain a copy of the applicable Credit Report and/or Investigative Consumer Report. Or, I can simply call my representative, Independent Agent or MetLife Auto & Home at 1-800-422-4272 or 1-800-GET-MET1 for Group Policyholders.

I acknowledge that I have received MetLife Auto & Home's Consumer Privacy Notice and I hereby authorize MetLife Auto & Home to obtain an investigative Consumer Report and to maintain such information.

I wish to be interviewed in connection with any investigative Consumer Report. [ ] Yes [x] No

Applicant's Signature: [signature] Date: 9-24-08

BINDER

Relying upon the information on this form and in the application MetLife Auto & Home binds, as of the effective date shown on the electronic application, the insurance applied for, subject to the terms and conditions of MetLife Auto & Home's current policy. This binder expires 30 days from the effective date shown on the electronic application, unless terminated sooner by MetLife Auto & Home's written notice. This binder and any policy issued is invalid and void if any of the information on this form or recorded on the application is materially misrepresented or omitted.

I have asked the applicant all questions on the application and the information on this form and in the application was furnished to me by the applicant in response to my questions and is complete to the best of my knowledge.

Agent's Signature: [signature] Date: 9-24-08

MetLife Auto & Home is the brand of Metropolitan Property and Casualty Insurance Company and its Affiliates, Warwick, RI

Sep 25 2008 8:07AM HP LASERJET FAX p.1

SEP-24-2008 03:54 PM Grey Holland 208 773 9782 p.02

Sep 24 2008 5:07PM HP LASERJET FAX p.2

Claim Number: FRD408440, Date/time: 1/12/2010 11:47 am, Author: Davis, D, Keyword(s): Coverage

REquested the coverages again. Never received the oorignal one.

Claim Number: FRD408440, Date/time: 1/21/2010 9:59 am, Author: Davis, D, Keyword(s): Coverage

Pending coverage response from Kathy Paukdert
509 232 7760
Kpaukert@pt-law.com.

Claim Number: FRD408440, Date/time: 1/29/2010 2:00 pm, Author: Davis, D, Keyword(s): Agent, Coverage

Called the agent Joe Fodeyece, 208 777 7402 , he advised that Ben did call to agent to add but he was under the impression that the parents were going to be on the title.

He also advised that it was in Coure D' Alene press that the attorney has filed suit against Met Life in this matter.

Claim Number: FRD408440, Date/time: 1/29/2010 2:32 pm, Author: Davis, D, Keyword(s): Coverage

Called Kathy Paukert
509 232 7760

Claim Number: FRD408440, Date/time: 1/29/2010 4:23 pm, Author: Hardy, D, Keyword(s): HOCA, Authority

reviewed this matter once again. I concur with DC Paukert that we have a $150k new UIM exposure under the mtorocycle file and am willing to tender it at this time. this is in addition to the $50k new UIM exposure under Ben's own Auto policy. I do not believe there is any coverage under the parent's Auto policy, but if there was, the payout would still be capped to the higher limit and it would not create an additional liability for us.

Claim Number: FRD408440, Date/time: 1/29/2010 4:26 pm, Author: Hardy, D, Keyword(s): FRD40837 File

the preceeding note belongs in the Motorcycle claim FRD40837.

Claim Number: FRD408440, Date/time: 2/10/2010 4:21 pm, Author: Groezinger, M, Keyword(s): Summary

QFT: I have a new EC Suit on this file so I need to split this file & open a new claim to handle the EC file. Please give the new file to me and transfer all the file notes & info on the Charlie tree from this file over. Thanks!

Claim Number: FRD408440, Date/time: 2/11/2010 8:45 am, Author: Myers, C, Keyword(s): Admin Support

Rcvd request, forwarded to QFT COV.
QFT

Claim Number: FRD408440, Date/time: 2/11/2010 4:23 pm, Author: Eckert, T, Keyword(s): Admin Support

Please set up another claim EXACTLY like this one. (please note, there is NO insd veh involved, so you will skip right over the "insured vehicle" tab). Thanks! -QFT

Claim Number: FRD408440, Date/time: 2/12/2010 11:32 am, Author: Eurli, M, Keyword(s): Loss Info, Admin Support

THIS CLAIM HAS BEEN RESET TO FRD50561.