STATE OF IDAHO)
County of KOOTENAI)ss

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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 _____ 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

_____
Jeanne Clausen, Deputy Clerk