FILED: APPELLATE DIVISION - 3RD DEPT 12/12/2019 02:27 PM
529615
NYSCEF DOC. NO. 11
RECEIVED NYSCEF: 12/12/2019

Appellate Division Docket No. 529615

New York Supreme Court
Appellate Division – Third Department

KIM E. SCHOCH, CNM, OB/GYN NP,

Plaintiff-Appellant,

- against -

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Respondent.

APPELLANT'S REPLY BRIEF

NOLAN HELLER KAUFFMAN LLP
Justin A. Heller, Esq.
Brendan J. Carosi, Esq.
Attorneys for Plaintiff-Appellant
Kim E. Schoch, CNM, OB/GYN
80 State Street, 11th Floor
Albany, New York 12207
(518) 449-3300
jheller@nhkllp.com
bcarosi@nhkllp.com

Saratoga County Supreme Court
Index No.: 20184228

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. DEFENDANT'S CLAIM THAT IT WAS THE "POLICYHOLDER" OF PLAINTIFF'S MLMIC POLICY IS PURE FICTION 3

II. DEFENDANT'S ROLE AS POLICY ADMINISTRATOR DID NOT CONFER A RIGHT TO THE CASH CONSIDERATION 4

III. DEFENDANT MISCHARACTERIZES THE INSURANCE LAW, PLAN OF CONVERSION, AND DFS DECISION IN AN UNAVAILING EFFORT TO SUPPORT A CLAIM TO THE CASH CONSIDERATION 5

A. Defendant Misreads Insurance Law § 7307(e)(3)'s Formula for Calculating the Amount of Cash Consideration. 5

B. Defendant Mischaracterizes the DFS Decision in a Hollow Attempt to Support its Misreading of Insurance Law § 7307(e)(3) 7

C. Defendant Misunderstands the Plan of Conversion's Objection and Escrow Procedure 9

IV. DEFENDANT'S ARGUMENTS URGING THIS COURT TO FOLLOW *SCHAFFER* ARE UNPERSUASIVE 11

A. Schaffer, and the Decisions of Other Courts That Have Followed It, Should Be Afforded No Precedential Value. 11

B. Defendant's Unjust Enrichment Argument Fundamentally Misunderstands That Plaintiff Bargained for Her MLMIC Policy and Received Her Membership Interest as an Incident Thereto. 13

C. Each of the Cases Relied On By Defendant Is Distinguishable or Inapposite 17

D. Defendant's Attempts to Distinguish the MLMIC and Other Mutual Insurance Company Case Law Relied Upon by Plaintiff Fall Flat 22

V. DEFENDANT FAILED TO MAKE AN EVIDENTIARY SHOWING SUFFICIENT TO DENY SUMMARY JUDGMENT AS PREMATURE UNDER CPLR § 3212(f), AND FAILED TO FILE A NOTICE OF APPEAL 25

A. Defendant's Affirmative Defenses and Counterclaims Are Subject To Dismissal 27

CONCLUSION 29

PRINTING SPECIFICATIONS STATEMENT PURSUANT TO COURT RULE 1250.8 (j) 31

TABLE OF AUTHORITIES

Cases

2 N. St. Corp. v. Getty Saugerties Corp., 68 A.D.3d 1392 (3d Dep't 2009 26

All Terrain Props., Inc. v. Hoy, 265 A.D.2d 87 (1st Dep't 2000) 16

Allstate Ins. Co. v. Sullivan, 230 A.D.2d 732 (2d Dep't 1996) 3

Anesthesia Grp. of Albany, P.C. v. State, 309 A.D.2d 1130 (3d Dep't 2003)........ 28

Aventine Inv. Mgt., Inc. v Canadian Imperial Bank of Commerce, 265 A.D.2d 513 (2d Dep't 1999) 28, 29

Bank of N.Y. v. Janowick, 470 F.3d 264 (6th Cir. 2006) 24

Bertalos Rest., Inc. v. Exchange Ins. Co., 240 A.D.2d 452 (2d Dep't 1997) 3

Bevens v. Tarrant Mfg. Co., Inc., 48 A.D.3d 939 (3d Dep't 2008)........................ 26

Burns v. Burns, 163 A.D.3d 210 (4th Dep't 2018) 14

Castelloti v. Free, 138 A.D.3d 198 (1st Dep't 2016) 14, 15

Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Brotherhood. of Teamsters, Case No. 02-cv-3115, 2005 U.S. Dist. LEXIS 42877 (N.D. Ill. Mar. 4, 2005) 17, 18

Columbia Mem'l Hosp. v. Hinds, 2019 NY Slip Op 51508(U) (Sup. Ct. Columbia Cty. 2019).. 9, 12, 22, 23

Dolman v. United States Tr. Co., 2 N.Y.2d 110 (1956) 14

Dorrance v. U.S., 809 F.3d 479 (9th Cir. 2015) 23, 24

Employers Mut. Cas. Co. v. Key Pharms., 75 F.3d 815 (2d Cir. 1996) 4

Fahs Constr. Grp., Inc. v. State of N.Y., 123 A.D.3d 1311 (3d Dep't 2014) 29

Greathouse v. City of E. Liverpool, 159 Ohio App.3d 251 (Ohio Ct. App. 2004) 20, 21

Hamlin Beach Camping, Catering & Concessions Corp. v. State, 303 A.D.2d 849 (3d Dep't 2003).. 28

IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132 (2009) 16

Kasen v. Morrell, 6 A.D.2d 816 (2d Dep't 1958).. 14

Maple-Gate Anesthesiologists, P.C. v. Nasrin, 96 N.Y.S.3d 837 (Sup. Ct. Erie Cty. 2019).. passim

Matter of Maple Medical LLP v. New York State Dept. of Fin. Servs., Index No. 65929/2018, Sup. Ct. Westchester Cty. Dec. 28, 2018 8

Matter of Reed v. Bernhardt, 33 A.D.3d 1160 (3d Dep't 2006) 25

Matter of Schaffer, Schonholz & Drossman, LLP v. Title (171 A.D.3d 465 (1st Dep't 2019) .... passim

Mell v. Anthem, Inc., 2010 U.S. Dist. LEXIS 19056 (S.D. Ohio Mar. 3, 2010) 19, 20

Mell v. Anthem, Inc., 688 F.3d 280 (6th Cir. 2012) 19, 20

Moran v. Erk, 11 N.Y.3d 452 (2008) 28

Murray v. Sysco Corp., 273 A.D.2d 760 (3d Dep't 2000) 27

N.Y. Insurance Law § 1211 .... 13, 21

People v. Gonzales, 96 A.D.2d 847 (2d Dep't 1983) 1

People v. Hobson, 39 N.Y.2d 479 (1976) 1

Rhine v. N.Y. Life Ins. Co., 248 A.D. 120 (1st Dep't 1936) 4

RLJCS Enters. v. Prof'l Benefit Trust, Inc., 438 F. Supp. 2d 903 (Dist. Ct. N.D. Ill. 2006) 19

Rochester Linoleum & Carpet Ctr., Inc. v. Cassin, 61 A.D.3d 1201 (3d Dep't 2009) 26

Rooney v. Slomowitz, 11 A.D.3d 864 (3d Dep't 2004) 29

Ruocco v. Bateman, Eichler, Hill, Richards, Inc., 903 F.2d 1232 (9th Cir. 1990) 17, 18

Shoback v. Broome Obstetrics and Gynecology, P.C., Index No. EFCA2018003334 (Sup. Ct. Broome Cty. Sept. 12, 2019) .... passim

Town of N. Haven v. N. Haven Educ. Ass'n, 2004 Conn. Super. LEXIS 15 (Conn. Super. Ct. Jan. 5, 2004) 21

Utica Fire Ins. Co. of Oneida County v. Gozdziak, 198 A.D.2d 775 (4th Dep't 1993) 4

Statutes

29 U.S.C. § 1103(c)(1) 17

CPLR 3212(f) 25, 26, 27

N.Y. Insurance Law § 1211(a) 6, 18
N.Y. Insurance Law § 7307 .... passim
N.Y. Insurance Law § 7307(e)(3) .... passim

PRELIMINARY STATEMENT[1]

Defendant-Respondent's Brief fails to demonstrate any basis for affirming the lower court's Judgment, which denied Plaintiff's motion, and granted Defendant's cross-motion, for summary judgment.

Defendant's arguments that the First Department's Decision in *Matter of Schaffer, Schonholz & Drossman, LLP v. Title* (171 A.D.3d 465 [1st Dep't 2019]) ("*Schaffer*") was binding on the lower court and should be followed by this Court are without merit. As explained in Plaintiff's opening Brief, the *Schaffer* decision, in just four sentences, summarily held that the doctor/policyholder would be unjustly enriched by receiving the Cash Consideration because her employer had paid her policy premiums. In so doing, the First Department overlooked Insurance Law § 7307(e)(3), the MLMIC Plan of Conversion, the DFS Decision approving the Plan, and established and controlling New York unjust enrichment law--all of which require that the Cash Consideration be paid to the Policyholder--and instead relied upon two inapposite ERISA cases.

Faced with a *Schaffer* Decision that, at best, is an "'errant footprint barely hardened overnight'" (*People v. Gonzales*, 96 A.D.2d 847, 848 [2d Dep't 1983] [quoting *People v. Hobson*, 39 N.Y.2d 479, 490 (1976)]), Defendant attempts to

[1] Capitalized terms shall have the meanings ascribed thereto in Plaintiff-Appellant's opening Brief unless otherwise defined herein.

bolster its purported entitlement to the Cash Consideration by proffering the pure fiction that its payment of Plaintiff's premiums and administration of her policy as Policy Administrator made Defendant the MLMIC "Policyholder." In an unavailing effort to support its fictional status as "Policyholder," Defendant (a) relies on insurance "endorsements" that had no effect on Plaintiff's status as Policyholder or ownership of her MLMIC Membership Interest, (b) ignores the plain language of the Insurance Law and Plan of Conversion as to who constitutes the "Policyholder" of a MLMIC policy, and (c) grossly mischaracterizes the Plan and the DFS Decision's discussions of a Policy Administrator's rights to object to the distribution of Cash Consideration to the Policyholder.

In short, as discussed in her opening Brief and herein, Plaintiff, as the Eligible Policyholder of her MLMIC policy, is entitled to receive her full share of the Cash Consideration paid on account of the MLMIC conversion and the resulting extinguishment of her MLMIC Membership Interest. *See Maple-Gate Anesthesiologists, P.C. v. Nasrin*, 96 N.Y.S.3d 837, 841-842 (Sup. Ct. Erie Cty. 2019) ("*Maple-Gate*") ("Insurance Law §7307 does not confer an ownership interest in...the cash consideration to anyone other than the policyholder"); *see also Shoback v. Broome Obstetrics and Gynecology, P.C.*, Index No. EFCA2018003334, at 4 (Sup. Ct. Broome Cty. Sept. 12, 2019) ("*Shoback*") (Employer's argument "that it paid the premiums and as such is entitled to the funds, is unpersuasive").

Finally, Defendant's alternative argument--that summary judgment should have been denied as premature pending discovery--is not only without merit and belied by its own cross-motion for summary judgment (which was granted); it is beyond the scope of this appeal because Defendant did not appeal the lower court's Judgment.

For the reasons set forth in Plaintiff's opening Brief and herein, Plaintiff respectfully requests that this Court decline to follow *Schaffer*, reverse the Judgment of the court below, grant Plaintiff's motion for summary judgment, and deny Defendant's cross-motion for summary judgment.

ARGUMENT

I. DEFENDANT'S CLAIM THAT IT WAS THE "POLICYHOLDER" OF PLAINTIFF'S MLMIC POLICY IS PURE FICTION

Defendant's claim that its payment of Plaintiff's premiums and administration of her MLMIC policy as Policy Administrator makes *Defendant* the Policyholder is pure fiction. As explained in detail in Plaintiff's opening Brief (at Point I[A]), the Plan of Conversion defines "Policyholder" as the person "identified on the declarations page of such [MLMIC] Policy as the insured" (R.79). The Plan's definition of Policyholder as the "insured" is consistent with New York case law, which routinely identifies the policyholder as the insured. *See, e.g., Bertalos Rest., Inc. v. Exchange Ins. Co.*, 240 A.D.2d 452 (2d Dep't 1997); *Allstate Ins. Co. v. Sullivan*, 230 A.D.2d 732, 732 (2d Dep't 1996); *Utica Fire Ins. Co. of Oneida*

County v. Gozdziak, 198 A.D.2d 775 (4th Dep't 1993); *Rhine v. N.Y. Life Ins. Co.*, 248 A.D. 120, 123 (1st Dep't 1936); *Employers Mut. Cas. Co. v. Key Pharms.*, 75 F.3d 815, 824 (2d Cir. 1996) (applying N.Y. law).

Here, Plaintiff was listed as the sole "Insured" on the Declarations Page of her MLMIC Policy (R.245). Thus, she was clearly the "Policyholder."

Defendant entirely ignores the foregoing and instead highlights the language in the Policy Endorsements (R.231-32, R.237-38, R.240-44, R.247) that the policy or endorsements were "issued" to Defendant in its capacity as Policy Administrator (Respondent's Brief, at 12). The mere fact that endorsements were issued to the Policy Administrator has no bearing on who the "insured" is under the policy. Indeed, the Policy Endorsements (*supra*) and the MLMIC Coverage Confirmation (R.233-34) uniformly and unequivocally state that Plaintiff is the sole "Insured."

II. DEFENDANT'S ROLE AS POLICY ADMINISTRATOR DID NOT CONFER A RIGHT TO THE CASH CONSIDERATION

Defendant's claimed entitlement to the Cash Consideration also rests on the fact that it was Plaintiff's Policy Administrator and, in that capacity, "selected, bargained for, contracted and purchased" her MLMIC Policy (*see* Respondent's Brief at 4). However, a Policy Administrator is, by express designation in the Policy Administrator Designation Form (R.29), the "agent" of the Policyholder for the purpose of performing the very administrative duties on which Defendant bases it claims. As discussed in Plaintiff's opening Brief, none of those limited rights

(including the receipt of dividends/refunded premiums) entitle Defendant to the Cash Consideration.

As aptly stated in *Maple-Gate*, "[b]eing designated as the policy administrator did not make the [employer] a policyholder, did not make the [employer] a member of MLMIC and did not entitle the [employer] to the cash consideration." 96 N.Y.S.3d at 841-42.

III. DEFENDANT MISCHARACTERIZES THE INSURANCE LAW, PLAN OF CONVERSION, AND DFS DECISION IN AN UNAVAILING EFFORT TO SUPPORT A CLAIM TO THE CASH CONSIDERATION

A. Defendant Misreads Insurance Law § 7307(e)(3)'s Formula for Calculating the Amount of Cash Consideration

Defendant's contention that under Insurance Law § 7307 ("§ 7307" or "Section 7307"), the party who pays the premiums is entitled to the Cash Consideration, is squarely based on its misreading and misunderstanding of § 7307(e)(3)'s formula for calculating Policyholders' shares of Consideration:

> "The plan [of conversion] shall include:... (3) The manner and basis of exchanging the equitable share of each eligible mutual policyholder for...consideration.... The plan shall also provide that **each person who had a policy of insurance in effect at any time during the three year period...shall be entitled to receive in exchange for such equitable share,...consideration** payable in voting common shares of the insurer or other consideration, or both. The equitable share of the policyholder in the mutual insurer shall be determined by *the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies in effect during the three years immediately preceding the adoption of the resolution by the*

board of directors under subsection (b) hereof bears to the total net premiums received by the mutual insurer from such eligible policyholders...." (Emphasis added).

Those italicized and underlined provisions on which Defendant relies merely address how the amount of consideration is to be determined, not to whom it is payable. The first portion of Section 7307(e)(3) (in bold) describes to whom the Cash Consideration is paid, and it is clear that it is the Policyholder who receives the Consideration. At no point does it provide that the Consideration is to be paid to the payor of the premiums. Simply put, Plaintiff's argument conflates the statutory language governing *how* the Consideration is to be calculated with the provision governing *who* should receive it (*i.e.*, "each person who had a policy of insurance in effect at any time during the three year period immediately preceding the date of adoption of the resolution").

While Defendant proffered a MLMIC newsletter from the Fall of 2016--*two years* before the Plan of Conversion was adopted--positing that "[i]n most cases, the person or entity that paid the premium will be considered the owner of the eligible policy" (R.255), MLMIC ultimately rejected the notion that the payor of the premiums would be the "owner" of the policy. Specifically, the Plan of Conversion (a) defined the "Members" (*i.e.*, the owners of the Policy under Insurance Law § 1211[a]) as the Policyholders, and the Policyholders as the "insured" listed on the Policy (R.78-79); and (b) defined "Eligible Premium" (the premiums on which the

amount of Consideration would be determined) as "with respect to *each Eligible Policyholder*, the sum of net premiums...properly and timely *paid on each Eligible Policy*." (R.87 [emphasis added]). In short, MLMIC recognized that under the Insurance Law, the Policyholder/Insured was entitled to the Cash Consideration.

B. Defendant Mischaracterizes the DFS Decision in a Hollow Attempt to Support its Misreading of Insurance Law § 7307(e)(3)

In a desperate attempt to support its above position as to § 7307(e)(3), Defendant flagrantly distorts and mischaracterizes the DFS Decision. Specifically, Defendant represents that the DFS Decision rejected the argument of insureds "who contend that all of the cash consideration should be paid to [policyholders]" (Respondent's Brief at 23 [quoting excerpt of DFS Decision at R.149, para 2]). In fact, the DFS Decision was reporting on comments from insureds "who contend that all of the cash consideration should be paid to Eligible Policyholders at closing, with no amounts held in escrow" (R.149, para 2 [emphasis added]). The only thing the DFS rejected was the elimination of the escrow provision.

Defendant also grossly misrepresents the DFS Decision as stating that "the definition of 'policyholder' under Insurance Law 7307(e) '*might or might not be the person who paid the premiums*'" (Respondent's Brief at 23 [quoting excerpt of DFS Decision at R.149, para 3, and adding emphasis thereto]. In fact, the DFS Decision states the opposite:

> "One commenter referred to the provision in Insurance Law § 7307(e) stating that in calculating each such person's equitable share one must factor in the amount 'such policyholder has properly and timely *paid* to the insurer on insurance policies in effect during the three years immediately preceding...' (emphasis added). The commenter suggested that this means that the person that paid the premium is automatically entitled to the proceeds of the sale. The Superintendent finds that this [i.e., *the above § 7307(e)(3) formula language*] is not determinative because the same provision [i.e., *governing who gets paid*] refers to the 'policyholder,' which might or might not be the person who paid the premiums." (R.149, para. 3 [emphasis added]).

In other words, the DFS (a) clarified that it rejected the position that the payor of premiums is entitled to the Cash Consideration, and (b) confirmed that the Consideration is to be paid *to the Policyholders*.

Moreover, following issuance of the DFS Decision, in an Article 78 proceeding challenging the DFS Decision's and Plan's interpretation of § 7307(e)(3) (*Matter of Maple Medical LLP v. New York State Dept. of Fin. Servs.* [Index No. 65929/2018, Sup. Ct. Westchester Cty. Dec. 28, 2018]), the court refused to disturb the DFS Decision, holding that DFS had a rational basis for approving the Plan, including its interpretation of § 7307(e)(3). (R.217). *See also Maple-Gate*, 96 N.Y.S.3d at 842 ("The DFS Decision reiterated that it was the policyholder who was entitled to the cash consideration.").

In sum, while Insurance Law § 7307(e)(3) "sets forth a formula regarding how to calculate the amount of consideration the policyholder would receive...[,] [n]o distinction is made between a policyholder who pays the premium out of his own

pocket versus a policyholder whose employer pays the premium as part of an employee compensation package." *Maple-Gate*, 96 N.Y.S.3d at 841 (emphasis added). *See also Columbia Mem'l Hosp. v. Hinds*, 2019 NY Slip Op 51508(U) at ¶4 (Sup. Ct. Columbia Cty. 2019) ("*Columbia Mem'l Hosp.*") (quoting *Maple-Gate*). Accordingly, as noted above, the Maple-Gate court concluded that "Insurance Law § 7307 does not confer an ownership interest in the stock or to the cash consideration to anyone other than the policyholder." *Maple-Gate*, 96 N.Y.S.3d at 841 (emphasis added).

C. Defendant Misunderstands the Plan of Conversion's Objection and Escrow Procedure

Defendant erroneously contends that the Plan's objection and escrow procedure acknowledges that a Policy Administrator may, based on its payment of premiums, contest distribution to a Policyholder on general notions of "fairness." This construction is obviously circular and would completely undermine the provisions of the Insurance Law and the Plan (and the DFS Decision's approval of the Plan) requiring that the Cash Consideration be distributed to the Policyholders.

Immediately following its above discussion rejecting the arguments of Policy Administrators that the Cash Consideration should be paid to the party that paid the premiums, the DFS Decision described the objection and escrow process:

> "Insurance Law § 7307(e)(3) defines the policyholders eligible to be paid their proportional shares of the purchase price, but also recognizes that such policyholders may have assigned such legal

> right to other persons. Therefore, the plan appropriately includes an objection and escrow procedure for the resolution of disputes for those persons who dispute whether the policyholder is entitled to the payment in a given case." (R.149 para. 4) (emphasis added).

Consistent with the foregoing, MLMIC's June 2018 Notice to Policyholders stated: "If there is a preference to have such distributions paid to a policy administrator as a matter of convenience or as a result of contractual obligations between you and your policy administrator, please execute the enclosed consent form…." (R.31 [emphasis added]).

Accordingly, under the Plan, a Policy Administrator could only have a right to the Cash Consideration if that right had been transferred by the Policyholder pursuant to an assignment, a designation or some other contractual arrangement. *See Maple-Gate*, 96 N.Y.S.3d at 842 (DFS Decision recognized that Policyholders may have assigned their legal right to the Cash Consideration to others, and "tied eligibility for the… escrow process to when the policyholder had, in fact, assigned the right to cash consideration…."). As the *Maple-Gate* court underscored, where there is no signed consent or assignment, "this alone is fatal to the [practice's] claim that it is entitled to the cash consideration." *Id.*

Here, Plaintiff did not sign the consent form designating Defendant to receive the Cash Consideration, nor did she assign the Consideration to Defendant. Accordingly, under the Insurance Law, Plan of Conversion and DFS Decision,

Plaintiff, as the Eligible Policyholder, is entitled to receive her share of the Cash Consideration.

IV. DEFENDANT'S ARGUMENTS URGING THIS COURT TO FOLLOW *SCHAFFER* ARE UNPERSUASIVE

A. Schaffer, and the Decisions of Other Courts That Have Followed It, Should Be Afforded No Precedential Value.

In a gross oversimplification of Plaintiff's argument in its opening Brief as to the numerous deficiencies in the First Department's Decision in *Schaffer* (*see* Point II), Defendant suggests that it can be assumed the First Department considered the Plan of Conversion because it was contained in the record and the parties made limited arguments concerning the Plan's definition of "Policyholder" and the objection/escrow process.

Significantly, however, the record did not include, and the parties did not brief, (a) the controlling provision of the Insurance Law, § 7307, which is fundamental to understanding the operation of the Plan, (b) the DFS Decision approving the Plan, which discussed the limited circumstances under which a Policy Administrator could have a legal right to the Cash Consideration (*i.e.*, designation by the consent form or an assignment), or (c) any New York unjust enrichment law, which precludes unjust enrichment based on Defendant's payment of premiums in accordance with its contractual obligation under the Employment Agreement.

Moreover, the First Department's Decision did <u>not</u> cite to the Insurance Law, did <u>not</u> reference the MLMIC Plan of Conversion or the DFS Decision, did <u>not</u> discuss the basic structure and operation of a mutual insurance company (i.e., that policyholders receive both a contractual right to insurance coverage *and* a membership interest), did <u>not</u> rely upon any New York unjust enrichment law, and did <u>not</u> provide any reasoning for its conclusion. Accordingly, as argued in Plaintiff's opening Brief (at Point II), *Schaffer* should be afforded no precedential weight.

Defendant's reliance on certain other lower court decisions as having "concurred" with *Schaffer* is misplaced (Respondent's Brief, at 16-18), because almost all of those decisions simply follow *Schaffer* as binding precedent. Moreover, like *Schaffer*, these other cases fail to consider any of the determinative factors described in Plaintiff's opening Brief and herein, including Insurance Law § 7307, the relevant terms and provisions of the Plan of Conversion and DFS Decision, the bargained for exchange of consideration under the employment agreements, and controlling principles of New York unjust enrichment law.

In contrast, the courts in *Maple-Gate*, *Shoback* and *Columbia Mem'l Hosp.* have issued decisions providing detailed and well-reasoned analyses of the relevant legal issues. Although these decisions, like *Schaffer*, are not binding on this Court, Plaintiff respectfully submits that they provide apt templates for the Court in

reaching a decision that comports with the Insurance Law, Plan of Conversion, DFS Decision, the basic concepts of a mutual insurance company, and controlling New York unjust enrichment law

B. Defendant's Unjust Enrichment Argument Fundamentally Misunderstands That Plaintiff Bargained for Her MLMIC Policy and Received Her Membership Interest as an Incident Thereto.

To support its unjust enrichment claim, Defendant erroneously argues (in reliance on *Schaffer*) that Defendant is entitled to the Cash Consideration because Plaintiff did not bargain for it. This reasoning fails because (a) Plaintiff bargained for a malpractice policy as a part of her Employment Agreement, and when Defendant elected to provide Plaintiff with a MLMIC policy, she received the rights of a MLMIC policyholder, which included her Membership Interest for which the Cash Consideration was paid; and (b) Defendant did not bargain, and does not even claim to have bargained, for the Consideration.

Notably, the controlling provisions of the Insurance Law (§§ 1211 and 7307) were enacted in 1984 (and were in force at the time of the June 18, 2007 Employment Agreement [R.17]). As such, Defendant knew (or should have known)--and cannot claim ignorance as to the fact--that Plaintiff obtained a Policyholder Membership Interest as an incident to becoming a Policyholder, and that upon a demutualization, the Policyholders would be entitled to the Cash Consideration under the Insurance Law. It is well-settled that "'[u]nless a contract provides otherwise, the law in force

at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein.'" *Burns v. Burns*, 163 A.D.3d 210, 213 (4th Dep't 2018) (quoting *Dolman v. United States Tr. Co.*, 2 N.Y.2d 110, 116 [1956]). *See also Kasen v. Morrell*, 6 A.D.2d 816, 817 (2d Dep't 1958) (same). In other words, Defendant's agreement to provide Plaintiff with (and pay for) a malpractice insurance policy must be "interpreted consistently with the corresponding statutory scheme." *Burns*, 163 A.D.3d at 213.

As the *Shoback* court explained:

> "Here, the defendant paid the premiums as part of its obligation under the Employment Agreement with plaintiff. She provided services and in return defendant was confident that she was covered (and hence it was covered) in terms of malpractice insurance. This arrangement benefitted both parties. ... The bottom line is that the cash consideration that is generated as a result of demutualization is a 'windfall', or 'a pot of money no one expected or even envisioned.' Here, it was a result of a restructuring of a mutual insurance company into a stock company. However, negative connotations aside, the fact that this is a 'windfall' does not, per se, render it illicit or unjust. The court is certainly inclined to agree with the plain language of the Plan and the Insurance Law that in this case, plaintiff, the policyholder should be entitled to receive it." *Shoback*, at 4-5.

Castelloti v. Free (138 A.D.3d 198 [1st Dep't 2016]), relied on by Defendant, is distinguishable, and underscores *Schaffer*'s (and the lower court's) misapplication of unjust enrichment law. *Castelloti*, a prototypical unjust enrichment case, involved a sibling who was removed as a beneficiary under his mother's will pending his divorce. Despite being removed as beneficiary, he orally agreed with his sister--the

now sole beneficiary of the mother's will--to pay the estate taxes in exchange for her sharing of the inheritance. The brother paid the estate taxes, but his sister reneged on her promise to share the inheritance. The court held that the oral agreement was unenforceable under the statute of frauds, but the brother sufficiently pled unjust enrichment because he conferred a benefit on his sister for which she provided nothing in exchange. In stark contrast to *Castelloti*, here, Defendant paid Plaintiff's MLMIC premiums pursuant to a written agreement and received Plaintiff' professional services in return.

Moreover, it is undisputed that to effectuate Defendant's payment of Plaintiff's MLMIC premiums, Plaintiff executed a Policy Administrator Designation Form which expressly limited Defendant's rights respecting Plaintiff's policy—specifically, "requesting changes in the policy,...[and] receiving dividends and any return Premiums when due" (R.29). As explained in Plaintiff's opening Brief (at Point I[C]), the Cash Consideration is not a dividend/refunded premium. In short, not only did Defendant agree to provide Plaintiff with a malpractice policy—a policy which included the Membership Interest for which the Cash Consideration was paid—Defendant agreed that it would only be entitled to exercise the rights afforded it as Policy Administrator. Those rights included the receipt of dividends/refunded premiums; they did *not* include the right to receive the proceeds of the Policyholder's Membership Interest.

Defendant's reference to Plaintiff's arguments to the court below concerning arbitration is also unavailing. Defendant asserted in its Answer to the Complaint that the dispute is subject to arbitration, based on the parties' agreement to arbitrate any "controversy, claim or breach *arising out of or relating*" to the Agreement (R.25 ¶20; R. 53 ¶54 [emphasis added]). As Plaintiff argued below, the present dispute is over the Cash Consideration from the October 1, 2018 demutualization of MLMIC—a transaction that occurred more than four years after Plaintiff left Defendant's employment (R. 11 ¶2). As such, Plaintiff contended that the dispute itself did not arise out of or relate to the terms of the Employment Agreement.

Moreover, the doctrine of judicial estoppel is inapplicable. Judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." *All Terrain Props., Inc. v. Hoy*, 265 A.D.2d 87, 93 (1st Dep't 2000). Here, Defendant did not contest the subject of arbitrability, summary judgment was granted in favor of Defendant, and the court below did not address it. Accordingly, judicial estoppel did not and does not bar Plaintiff's argument that since the Employment Agreement indisputably governed Defendant's payment of premiums, its unjust enrichment counterclaim based on those same payments failed as a matter of law. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (dismissal of unjust

enrichment claim was warranted because plaintiff's payment of the fees at issue "arose from services governed by an engagement letter").

C. Each of the Cases Relied On By Defendant Is Distinguishable or Inapposite

In support of its erroneous arguments, Defendant relies on several cases, each of which fails to establish its purported right to the Cash Consideration.

Defendant relies on the two ERISA cases cited by the First Department in *Schaffer—Ruocco v. Bateman, Eichler, Hill, Richards, Inc.* (903 F.2d 1232 [9th Cir. 1990]) ("*Ruocco*") and *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Brotherhood. of Teamsters* (Case No. 02-cv-3115, 2005 U.S. Dist. LEXIS 42877 [N.D. Ill. Mar. 4, 2005]) ("*Chi. Truck Drivers*")— which are plainly inapposite because neither involved a state law unjust enrichment claim.

Instead, both *Ruocco* and *Chi. Truck Drivers* concerned whether demutualization proceeds were ERISA "plan assets"—a question clearly not involved here. Whether the proceeds were "plan assets" was material because ERISA plan assets generally cannot "inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable [plan] expenses…." 29 U.S.C. § 1103(c)(1). Ultimately, the *Ruocco* and *Chi. Truck Drivers* courts determined whether the demutualization proceeds were plan assets (and if so, to whom they were

entitled) by looking to the applicable Department of Labor ("DOL") ERISA advisory opinions, ERISA statutes, and any contracts or legal instrument related to the ERISA plans.

Ruocco pre-dated the applicable ERISA advisory opinions (cited in *Chi. Truck Drivers*), and it appears that neither the ERISA statutes, nor any plan-related contracts or documents, provided any direction as to the distribution of the demutualization funds. As such, the court resorted to balancing the equities, concluding that the employees should receive the funds because (a) they paid the premiums (and the funds themselves were surplus premiums) , and (b) ERISA plans are intended to inure to the benefit of plan participants and beneficiaries (not employers). In *Chi. Truck Drivers*, the court was guided by the DOL ERISA advisory opinions and ERISA statutes.

Significantly, neither *Ruocco* nor *Chi. Truck Drivers* references any plan-related contracts or documentation that provided guidance as to the distribution of the demutualization proceeds. By contrast, in the instant case, the Plan of Conversion and the DFS Decision, as well as Insurance Law §§ 1211(a) and 7307(e)(3), expressly provide that (a) the Policyholders are the owners of their Membership Interests, and (b) absent a designation or assignment to the Policy Administrator (neither of which occurred here), the Policyholders are entitled to the Cash Consideration paid on account of the extinguishment of their Membership

Interests. *See RLJCS Enters. v. Prof'l Benefit Trust, Inc.*, 438 F. Supp. 2d 903, 912 (Dist. Ct. N.D. Ill. 2006) (declining to "balance the equities" as in *Ruocco* because "in the instant case, there was a contract that governed the administration of the Trust, and that contract stated that the Trust, not the Defendants, owned the policies.").

Defendant's reliance on *Mell v. Anthem, Inc.* (688 F.3d 280 [6th Cir. 2012] and 2010 U.S. Dist. LEXIS 19056 [S.D. Ohio Mar. 3, 2010]) is similarly misplaced. *Mell* involved a dispute between the City of Cincinnati, the holder of a group health insurance policy (rather than the individual polices at issue herein) and its employees, the holders of certificates of benefits under the policy (rather than policyholders/members/owners of the MLMIC policies at issue herein) over the proceeds of the demutualization of Anthem Insurance. The Ohio statute that governed "Rights of mutual policyholders" in a demutualization stated that "[s]hares shall be issued to the owner or owners of a mutual policy...as such owners appear on the face of the policy." While the Ohio statute used the terms "policyholder" and "owner," the latter was undefined.

Even though the record contained no evidence that the group policy named plaintiffs as policyholders, the District Court assumed as true the employees' claim that they were the statutory "policyholders." Nevertheless, the District Court sought to determine who the owner was, and thus the party entitled to the demutualization

proceeds. To determine the meaning of the word "owner," the District Court applied the standard maxim of statutory construction that the undefined term should be given its plain meaning. The District Court ultimately held that the employees could not be the "owners" of the policy, because the employees "had nothing to do with the choice of insurance carrier, nor with its governance, and they received what they bargained with the City to get: insurance coverage." 2010 U.S. Dist. LEXIS at *32-33.

The Sixth Circuit affirmed, holding that the pre-merger bylaws for Anthem's predecessor-in-interest, CMIC, "which adopted the policyholder definition found under Ohio insurance law," provided additional support for the City's claim to the proceeds. Specifically, the Court noted that CMIC's bylaws established that the City, as the member, would be the holder of the group master policy. 688 F.3d at 286. Accordingly, the employees' attempts to transmute themselves from mere beneficiaries of the insurance policy to "policyholders" was unavailing. *Id.* at 287.

Greathouse v. City of E. Liverpool (159 Ohio App.3d 251 [Ohio Ct. App. 2004]) is similar to *Mell*, and also involved a dispute over the Anthem demutualization. *Greathouse* involved a claim by a municipal employee to the Anthem demutualization proceeds resulting from a health insurance policy provided to him as an employment benefit. The court determined that the municipality was the owner of the policy, and therefore entitled to the proceeds. Although not

discussed in *Greathouse*, as explained in *Mell*, the Ohio statute did not define "owner." It was therefore appropriate for the court to consider indicia of ownership.

In the instant case, unlike the Ohio statute, Insurance Law § 7307(e)(3) does not use the undefined term "owner." Rather, Insurance Law §§ 1211 and 7307(e)(3) establish that a mutual company is owned by its "members," that the "members" are the "policyholders," and that upon demutualization, the "policyholders" are entitled to consideration in exchange for the extinguishment of their membership interest. Pursuant to those provisions, the Plan of Conversion and the DFS Decision require that the Cash Consideration be paid to the Policyholders (such as Plaintiff). *Mell* and *Greathouse*, as well as *Ruocco* and *Chi. Truck Drivers*, therefore are entirely inapposite.

Finally, *Town of N. Haven v. N. Haven Educ. Ass'n* (2004 Conn. Super. LEXIS 15 [Conn. Super. Ct. Jan. 5, 2004]) involved the limited issue of arbitrability of the dispute as to demutualization proceeds under the contract between the North Haven Education Association (the teachers/employees) and the North Haven Board of Education (the employer). The court's passing comment as to the "fairness" of permitting demutualization proceeds to be issued to the Town, the policyholder under whose policy the Board provided coverage to its employees, is pure dicta and should be afforded no weight.

D. **Defendant's Attempts to Distinguish the MLMIC and Other Mutual Insurance Company Case Law Relied Upon by Plaintiff Fall Flat**

Faced with relying on *Schaffer* and the above inapposite case law, Defendant attempts to distinguish the MLMIC and other mutual insurance company case law relied upon by Plaintiff—*Maple-Gate*, *Columbia Mem'l Hosp.*, *Shoback*, *Dorrance* (*infra*), and *Bank of N.Y.* (*infra*). Its efforts fall flat.

In an unavailing effort to distinguish *Maple-Gate*, Defendant cherry-picks the court's reference to the fact that the employer therein had not availed itself of the MLMIC objection process and had thereby implicitly acknowledged its lack of any right to the Cash Consideration. Defendant notably ignores that the *Maple-Gate* court's holding in favor of the employees rested on the operative provisions of the Insurance Law § 7307, the Plan of Conversion and the DFS Decision (as discussed herein and in Plaintiff's opening Brief)—not on the fact that the employer had foregone the MLMIC objection process.

Similarly, in selectively quoting *Columbia Mem'l Hosp.*, Defendant entirely disregards the Columbia County Supreme Court's holding that (a) *Schaffer*'s "prior erroneous interpretations of the law" could and should be corrected, and (b) Insurance Law § 7307(e)(3) repeatedly refers to the Policyholders as those eligible to receive the Cash Consideration, and that the Consideration, "by law, is not a return to the hospital of any insurance premiums it paid on behalf of the

defendant, it represents the policyholder's share in MLMIC." 2019 NY Slip Op 51508(U) at ¶¶5-6.

Regarding *Shoback*, Defendant focuses entirely on the Broome County Supreme Court's discussion of *Dorrance v. U.S.*, 809 F.3d 479 (9th Cir. 2015). While Defendant attempts to distinguish *Dorrance* (a) because it was a tax case involving stock (rather than cash) consideration from the demutualization and (b) based on Defendant's misunderstanding that the demutualization in *Dorrance* did value of consideration based on payment of premiums[2], its efforts fall flat. In fact, *Dorrance* is highly instructive as to the basic structure of a mutual insurance company, and the purpose and allocation of premium payments.

In short, as recognized by the *Shoback* court (at 4), Policyholders of a mutual insurance company receive both (a) a contractual right to insurance coverage, and (b) a membership interest. The latter does not "arise as a result of paying the premiums, but [is] intrinsic to the owner of the policy, the policyholder." *Shoback*, at 4 (discussing *Dorrance*, 809 F.3d at 485 [Policyholder's membership interest in a mutual insurance company is acquired "at no cost" as "an incident of the structure of mutual insurance policies."). (*See also* Opening Brief, Point I[C]). Premium

[2]The demutualizations in Dorrance did, in fact, value the consideration based on the amount of premiums paid, but, as the court emphasized, it was "error ... to assume that the value received upon demutualization was linked with some premium value paid by the policyholders in the past."). *Dorrance*, 809 F.3d at 486.

payments are not paid for or allocated to the Membership Interests; rather, they go "'toward the actual cost of the insurance benefits provided.'" *Shoback*, at 4 [quoting *Dorrance*, 809 F.3d at 485]).[3] (*See also* R.79 [Plan of Conversion underscores that MLMIC Policyholder Membership Interests do not include insurance coverages provided under the Policy.]).

Thus, as explained by the *Dorrance* court, demutualization proceeds "cannot be understood as a partial return on their past premium payments[,] and it is well understood that policyholders do not contribute capital to the companies." 809 F.3d at 481, 485-486. Rather, as emphasized by the *Maple-Gate* court, "the cash consideration was clearly intended to be in exchange for the extinguishment of the membership interest[s] in MLMIC." 96 N.Y.S.3d at 841. Accordingly, Defendant's right to receive premium refunds (i.e., dividends) from MLMIC did not entitle it to receive the Cash Consideration. Rather, Plaintiff retained that ownership right.

Finally, Defendant's attempt to distinguish *Bank of N.Y. v. Janowick* (470 F.3d 264 [6th Cir. 2006]) is misplaced. Plaintiff cited that case for the basic principle that rights to proceeds from a demutualization arise only when a mutual insurance company demutualizes; and in such a situation, the plan of conversion defines those

---

[3] As the *Dorrance* court noted, "'[p]ayment by each policyholder of the premiums called for by the insurance contracts issued by X represents payment for the cost of insurance and an investment in his contract but not an investment in the assets of X.'" 809 F.3d at 487-88 (quoting IRS Revenue Ruling 71-233) (emphasis added)).

rights. Despite Defendant's attempt to mischaracterize the MLMIC Plan's direction as to entitlement to Cash Consideration, "[t]he language of the Plan is clear and unambiguous, and as such must be accorded the plain meaning of its terms"—namely that "plaintiff is entitled to the money." *Shoback*, at 4. In short, as the *Shoback* court held, "Defendant's argument - that it paid the premiums and as such is entitled to the funds, is unpersuasive." *Id.*

V. DEFENDANT FAILED TO MAKE AN EVIDENTIARY SHOWING SUFFICIENT TO DENY SUMMARY JUDGMENT AS PREMATURE UNDER CPLR § 3212(f), AND FAILED TO FILE A NOTICE OF APPEAL

Defendant's "alternative" argument that there are issues of fact requiring discovery is directly controverted by its cross-motion and arguments that it was entitled to declaratory judgment as a matter of law, which the lower court granted. Moreover, Defendant did not file its own notice of appeal of the lower court's decision and may not now seek appellate review. *See generally Matter of Reed v. Bernhardt*, 33 A.D.3d 1160, 1161 (3d Dep't 2006) (Respondent's failure to cross-appeal precluded the Court's consideration of his request to modify the lower court's order).

In any event, Defendant has not met, and cannot meet, its burden to stay discovery pursuant to CPLR 3212(f). To successfully invoke CPLR 3212(f), the opposing party must make "an *evidentiary* showing" that "facts essential to justify opposition may exist but that such material facts are within the exclusive knowledge

and possession of the moving party." *2 N. St. Corp. v. Getty Saugerties Corp.*, 68 A.D.3d 1392, 1395-96 (3d Dep't 2009) (italics in original; underscore added). As explained by the Third Department in *Bevens v. Tarrant Mfg. Co., Inc.*:

> "Speculation by the opposing party will not suffice and, thus, such party must demonstrate **how** further discovery might reveal material facts in the exclusive knowledge of the movant or a codefendant."

48 A.D.3d 939, 942 (3d Dep't 2008) (emphasis added).[4]

Defendant clearly has not met this burden. The only discovery referenced by Defendant concerns "the parties' relationship, including their expectations and performance under the terms of the Employment Agreement and the MLMIC policy of insurance" (Respondent's Brief, 27-28). This is insufficient under CPLR 3212(f). The Employment Agreement is clear on its face, and the parties' subjective understanding of those terms is irrelevant to the issues at bar. In any event, Defendant fails to identify which, if any, terms are unclear and material to the determination of which party is entitled to the Cash Consideration, or how discovery would aid the Defendant. As for the parties' expectations with respect to the MLMIC policy, Defendant does not expound on the relevance of this request. Even assuming *arguendo* that the request were relevant (it is not), Defendant fails to even allege that the MLMIC Policy is exclusively in Plaintiff's possession as required to

---

[4] *See also Rochester Linoleum & Carpet Ctr., Inc. v. Cassin*, 61 A.D.3d 1201, 1202 (3d Dep't 2009) ("plaintiff was obliged to provide some evidentiary basis for its claim that further discovery would yield material evidence and also 'demonstrate how further discovery might reveal material facts in the movant's exclusive knowledge.'" [Citation omitted]).

invoke CPLR 3212(f) to defeat a motion for summary judgment.

Further, CPLR 3212(f) requires "affidavits" establishing that material and relevant facts essential to justify opposition may exist but cannot then be stated (emphasis added). Instead, Defendant submitted only the speculative, conclusory statements by its attorneys that the Motion was premature (R.283, ¶ 11). Defendant has therefore failed to meet the threshold requirements of CPLR 3212(f). *See Murray v. Sysco Corp.*, 273 A.D.2d 760, 762 (3d Dep't 2000). Accordingly, even if its CPLR 3212(f) were properly before this Court (it is not), Defendant's argument would fail as a matter of law.

A. Defendant's Affirmative Defenses and Counterclaims Are Subject To Dismissal

Defendant erroneously contends there are issues of fact with respect to its counterclaims, requiring denial of summary judgment in favor of Plaintiff (Respondent's Brief at 26).

Defendant's unjust enrichment counterclaim is based on the flawed notion that since it paid for (and administered) the policy, it would be a windfall—and therefore unjust enrichment—for Plaintiff to receive the funds. For all the reasons explained in Plaintiff's opening Brief and herein, Defendant's unjust enrichment counterclaim is subject to dismissal as a matter of law.

Defendant's counterclaim for money had and received fails for the same reason as its unjust enrichment counterclaim. A claim for money had and received

is a subset of a claim for unjust enrichment. *See Anesthesia Grp. of Albany, P.C. v. State*, 309 A.D.2d 1130, 1131-32 (3d Dep't 2003) ("[a] cause of action for money had and received is based upon unjust enrichment and is 'an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience [the party] ought not to retain and that belongs to another'" [internal quotation marks and citation omitted]); *see also Hamlin Beach Camping, Catering & Concessions Corp. v. State*, 303 A.D.2d 849, 852 (3d Dep't 2003) ("money had and received . . . is an equitable cause of action premised upon unjust enrichment, which is founded . . . on 'an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience [the party] ought not to retain and that belongs to another'").

Finally, Defendant's counterclaim for breach of the implied covenant of good faith and fair dealing also fails as a matter of law. New York law is clear that every contract has an implied covenant of good faith and fair dealing, "which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Aventine Inv. Mgt., Inc. v Canadian Imperial Bank of Commerce*, 265 A.D.2d 513, 514 (2d Dep't 1999). *See also Moran v. Erk*, 11 N.Y.3d 452, 456 (2008) ("[t]he implied covenant of good faith and fair dealing between parties to a contract embraces a pledge that 'neither party shall do anything

which will have the effect of destroying . . . the right of the other party to receive the fruits of the contract.'") (internal citation omitted); *see also Rooney v. Slomowitz*, 11 A.D.3d 864 (3d Dep't 2004). The implied covenant cannot be used to "create independent contractual rights" not already provided for in the agreement, or as a "substitute for an unsustainable breach of contract claim." *See also Fahs Constr. Grp., Inc. v. State of N.Y.*, 123 A.D.3d 1311, 1312 (3d Dep't 2014) ("the implied obligation is only 'in aid and furtherance of other terms of the agreement of the parties'" [internal citation omitted]). Thus, to sustain a counterclaim for breach of the implied covenant, a defendant must establish that "the plaintiff sought to prevent performance of the contract or to withhold its benefits from the [defendant]." *Aventine Inv. Mgt., Inc.*, 265 A.D.2d at 514.

Defendant cannot meet that burden. For all of the reasons explained in Plaintiff's opening Brief and herein, there is nothing about the Employment Agreement or otherwise entitling Defendant to the Cash Consideration, and, accordingly, Plaintiff has breached no implied duty in seeking recovery of the Cash Consideration to which she is entitled.

CONCLUSION

Based upon the foregoing, and on the Record herein, Plaintiff-Appellant respectfully requests that this Court reverse the Decision of the Court below in its entirety and grant declaratory judgment in her favor.

Dated: December 12, 2019
Albany, New York

NOLAN HELLER KAUFFMAN LLP

By: ______________________

Justin A. Heller, Esq.
Brendan J. Carosi, Esq.
Attorneys for Plaintiff-Appellant
80 State Street, 11th Floor
Albany, New York 12207
(518) 449-3300

PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO COURT RULE 1250.8 (j)

Brief prepared on:	Computer
Font Spacing:	Proportionally Spaced
Typeface:	Times New Roman
Point Size - Footnotes:	12 point
Point Size – Remainder:	14 point
Line Spacing Block Quotes and Footnotes:	Single-spaced
Line Spacing Remainder:	Double-spaced

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, and/or any authorized addendum containing statutes, rules, regulations, etc. is 6971.