DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): COLORADO CROSS-DISABILITY COALITION *et al*. v. Defendant(s): COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING *et al.*	▲ COURT USE ONLY ▲
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PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND REQUEST FOR ISSUANCE OF ORDER

Plaintiffs hereby move this Court enforce the settlement agreement reached by the parties pursuant to the Dispute Resolution Act, Colo. Rev. Stat. § 13-22-301 *et seq*. and enter the attached order.

CERTIFICATE OF COMPLIANCE WITH COLO. R. CIV. P. 121, § 1-15(8)

Defendants' counsel oppose this motion and the relief sought herein.

I. INTRODUCTION

Plaintiffs and Defendants Colorado Department of Health Care Policy and Financing (the "Department") reached a settlement agreement ("Agreement") in this case as more fully described below. As part of that Agreement, the parties agreed to negotiate in good faith plaintiffs' counsel's reasonable attorneys' fees and costs. After specifically requesting Plaintiffs mediate the issue of fees and costs under the Agreement, the Department is balking at paying reasonable attorneys' fees and costs. Payment of fees is and has been a material term of the Agreement. As set forth below, it is clear now that when the Department entered into the Agreement, the Department and its counsel did not believe the mediator had authority to resolve the fees issue, and defense counsel's conduct regarding mediation of fees was a ruse. Plaintiffs and their counsel spent significant time preparing for and attending the fees mediation, which could have been avoided.

As a result, Plaintiffs request this Court enforce the terms of the agreement and enter the attached order (Proposed Order), incorporating the terms of the Settlement Agreement. If the Court grants this motion and enters the Proposed Order, Plaintiffs will file a separate Motion for Reasonable Attorneys' Fees and Costs.

II. BACKGROUND

A. The Litigation.

In late 2009, undersigned counsel represented four Colorado Consumer Directed Attendant Support ("CDASS") clients in bringing suit against the Department based on alleged violations of Due Process Clause of the United States Constitution, 42 U.S.C. § 1983, various provisions of the Medicaid Act, 42 U.S.C. § 1396, and state law regarding the Department's obligations with respect to Medicaid services. *See* Class Action Complaint ("Complaint"), filed December 22, 2010. In 2010, nine more plaintiffs were added as plaintiffs. *See* Amended Class Action Complaint, filed June 21, 2010. On February 18, 2010, the Department moved to dismiss this lawsuit. On June 17, 2010, the Court denied Defendants' motion to dismiss. On August 16, 2010, Plaintiffs moved for class certification on behalf of all CDASS clients in Colorado. The parties engaged in discovery prior to the motion for class certification deadline. The parties continued to negotiate settlement during this time and were able to reach the Agreement in mediation two days before the Defendants were required to respond to the motion for class certification. The Court has not had to rule on the class certification motion and, as explained below, the Court vacated all pending deadlines, including the trial date.

The issues in the lawsuit involve the Department reducing the amount of funds CDASS clients have available each month to pay for necessary in-home attendant care under the Medicaid program without providing adequate notice and appeal rights. In addition, the Department made further reductions to CDASS clients' available attendant funds to pay a new fiscal management service without notifying CDASS clients. The details of the effects of these

reductions are contained in the Amended Class Action Complaint.

Although the class was not certified, counsel and counsel's staff have performed a significant amount of work in connection with this case. This included, for example: maintaining contact with 13 named plaintiffs and other CDASS clients, collecting and reviewing numerous documents from the Department and clients, responding to a motion to dismiss, communicating with federal agencies regarding the Department's obligations, and preparing a motion for class certification that would not have been required if the Department had agreed to resolution prior to the deadline. In addition, the parties have engaged in extensive settlement discussions, including three mediation sessions, and exchanged six draft agreements.

During the course of this litigation, the Department has been represented by two Assistant Attorneys General, Jennifer Weaver and Joan Smith. Late in the mediation process, Senior Assistant Attorney General, Litigation Division, Patricia Herron joined. Throughout this process, the Department's Legal Director, attorney Robert Douglas, has been an active participant. Mr. Douglas has negotiated terms of agreements, participated in calls between the Assistant Attorneys General and undersigned counsel, and attended all three mediation sessions as the client for the Department.

This is, essentially, an injunctive relief case. Plaintiffs sought an order compelling the Department to correct errors and reductions in CDASS client allocations based, in part, on inappropriate or non-existent notices and an order compelling the Department to provide advance notice of allocation reductions to all CDASS clients in the future. *See* Complaint, Prayer for Relief.

B. Settlement Negotiations

The Settlement Agreement ("Agreement") reached is provided as Exhibit 5 to the Affidavit of Kevin W. Williams (Williams Aff.).

Discussion of the settlement negotiations is necessary and serves, in part, as the basis for this motion.[1]

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[1] Undersigned counsel is cognizant of Colo. R. Evid. 408, which prohibits the introduction of compromise offers when offered to prove liability or the amount of a disputed claim and also Colo. Rev. Stat. § 13-22-301, which prohibits the introduction of evidence of "mediation communications" as defined in Colo. Rev. Stat. § 13-22-302(2.5). *See* Colo. Rev. Stat. § 13-22-307(2); *c.f. Yaekle v. Andrews*, 195 P.3d 1101, 1109 (Colo. 2008) ("mediation communications" protected from disclosure are limited to those made in the presence or at the behest of the mediator). The communications provided with this motion are not offered to prove liability or the amount of a disputed claim but rather to show the parties always understood that

On June 23, 2010, the parties spent an entire day in mediation with the Honorable Robbie Barr of the Judicial Arbiter Group. The mediation resulted in a preliminary settlement agreement prepared by undersigned counsel at that mediation. *See* Williams Aff. ¶ 5.[2] With the exception of the preliminary agreement draft and the final Agreement prepared on September 15, 2010, none of the other settlement agreement drafts were prepared during the course of mediation or at the behest of the mediator. The Department prepared a response to the preliminary proposal on July 2, 2010. Williams Aff. ¶ 6 & Exhibit 2. As a result of discovery and information obtained from Plaintiffs, undersigned counsel prepared a counter offer on July 16, 2010. Williams Aff. ¶ 7 & Exhibit 3. The Department responded again on August 17, 2010. Williams Aff. ¶ 8 & Exhibit 4. The parties returned to mediation on September 15, 2010. During that mediation session, the Agreement was reached and drafted by the parties during mediation. *See* Agreement, Williams Aff. ¶ 9 & Exhibit 5.[3] Each of these settlement agreements, including the September 15, 2010 version, contained a provision for the Department to pay fees. Williams Aff. ¶¶ 6-9 & Exhibit 2 ¶ 8 (fees to be determined), Exhibit 3 ¶ 6 (same), Exhibit 4 ¶ 8 (fees to be determined by court if no agreement in advance by parties), and Exhibit 5 ¶ 6 (fees to be determined by mediator in no agreement by parties in advance).

At the end of the day at the September 15, 2010 mediation, the parties did not reach agreement regarding the amount of reasonable attorneys' fees and costs to be paid. During the mediation, unknown to undersigned counsel or the mediator, the Department claimed it did not have settlement authority to resolve the fees issue. According to the Agreement, Plaintiffs provided a "statement of their reasonable attorneys' fees and costs" to date at the September 15 mediation. Williams Aff. ¶ 11 and Exhibit 5 at ¶ 6 .

On September 16, 2010, the day after the mediation, undersigned counsel received an e-mail message from Department counsel, Joan Smith, requesting the parties agree to a stay of

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payment of fees and costs was a material term of settlement. *Dillen v. HealthOne, L.L.C.*, 108 P.3d 297, 301-02 (Colo. App. 2004) (offers of compromise admissible for any purpose except to prove liability or amount of compromised claim); *Genova v. Longs Peak Emergency Physicians, P.C.*, 72 P.3d 454, 463 (Colo. App.2003).

[2] This document was prepared in the course of mediation proceedings and is protected from disclosure under Colo. Rev. Stat. § 13-22-307(2).

[3] The Agreement, signed by the Director of the Department of Health Care Policy and Financing and the State Controller is a non-confidential document available to members of the public through the Colorado Open Records Act process. It is also not protected by the Dispute Resolution Act as it is an agreement reduced to writing and signed by parties. Colo. Rev. Stat. ¶ 13-22-302(2.5).

proceedings to allow time to resolve the fees issue and for the Department to avoid having to respond to the motion for class certification due September 17, 2010. Williams Aff. ¶ 12 & Exhibit 6. Ms. Smith proposed the following: "That'll give us time to go the mediation route on the attorney fees, if necessary, and then ask the court to set a hearing if mediation fails." Undersigned counsel agreed. *Id*.

On September 17, 2010, instead of filing a motion to stay, the Department filed an "Advisement of Settlement." Department counsel had called the undersigned late in the day on September 16 to say the Department wanted to submit an advisement of settlement to the Court to avoid the class certification motion response deadline. The advisement, which was not provided to undersigned counsel in advance, neglected to inform this Court that the issue of determination of fees and costs was outstanding and needed to be resolved. As a result of the Department's September 17 Advisement, this Court entered an Order on September 22, 2010, vacating the trial date and requiring the parties to submit a stipulated motion to dismiss on or before October 12, 2010.

Under the Agreement, the Department was to respond to Plaintiffs' statement of fees and costs by September 27, 2010. *See* Agreement ¶ 6. On September 20, 2010, in case the parties did not reach agreement on September 27, the parties scheduled mediation to resolve the issue of fees and costs. The mediation was scheduled for October 5, 2010.

On September 27, 2010, Department counsel Jennifer Weaver e-mailed undersigned counsel and stated the Department would not provide a response to the statement of billing on that day, and that the State's tort litigation and risk management unit needed to make that determination. Williams Aff. ¶ 13 and Exhibit 7at p. 6 (Sept. 27, 2010 10:47 a.m. e-mail from Jennifer Weaver to Kevin Williams). In this e-mail exchange, undersigned counsel found out for the first time that a different Assistant Attorney General would be handling resolution of the fees issue, that no one had reviewed Plaintiffs' statement of billing, and the Department was unprepared for the October 5, 2010 mediation. *See* Exhibit 7 at pp. 1-6. The Department requested and rescheduled the mediation for October 12, 2010. October 12 was also the deadline for the parties to submit their stipulated motion to dismiss per this Court's October 22 order.

Despite the Department's longstanding agreement to resolution of the fees issue, on October 6, 2010, undersigned counsel received a letter from Patricia Herron, Senior Assistant Attorney General, Litigation Division, informing undersigned counsel of her view that Plaintiffs are not entitled to recovery of fees under the theory articulated in *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). As discussed in more detail below, *Buckhannon* has no application to this case.

This is a clear case of deception: (1) After the Agreement was signed and after the only question that remained regarding fees was the amount, Defendants' counsel claimed Plaintiffs

were not entitled to fees and costs because they settled with Defendants; and (2) the Court would dismiss the case on or before October 12, the newly scheduled date for mediation. On October 7, 2010 Plaintiffs filed a motion requesting until October 18, 2010 to file a stipulated motion to dismiss. In that motion, undersigned counsel informed the Court the parties had not resolved the fees issue and that the mediation had been rescheduled. This Court granted that motion on October 8, 2010. In that motion, undersigned counsel informed the Court the issue of fees and costs was unresolved.

The parties returned to mediation on October 12, 2010. The mediator did not make a determination regarding fees. Undersigned counsel requested that defense counsel agree per the Settlement Agreement to have the mediator make a final determination regarding fees. Williams Aff. ¶ 14 and Exhibit 8. Defense counsel refused to do so. *Id*. It is clear from Assistant Attorney General Herron's e-mail, even if the mediator arrived at a final fees determination, the Department rejected the mediator's authority to make a determination. *Id*. Apparently, the Department had no intention of resolving the issue in mediation.

Despite the Department's agreement to payment of fees and costs, there is no settlement among the parties on this issue, and the Department has made clear it will not pay fees in mediation or honor the terms of the agreement.

For this reason, Plaintiffs respectfully request this Court enforce the Agreement and order the Department to pay reasonable attorneys fees and costs.

D. The "Settlement"

If the Court determines that enforcement of this settlement agreement is appropriate as discussed below, the following describes the nature of the settlement agreement achieved.

As noted above, the relief sought is injunctive. The Agreement provides that all relief will apply to all CDASS clients. Part of the dispute in this case centers on whether the Department provided adequate notices of changes in allocation amounts prior to the lawsuit during the course of this litigation. *See* Complaint. As a result of Plaintiffs' efforts, subsequent notices were sent to CDASS clients allegedly correcting previous miscalculations in allocation amounts. Evidence showed not all CDASS clients received these correction notices.

Section 1 of the Agreement addresses this issue. All CDASS clients will receive notice explaining what they should have received and a method for obtaining any letter not received.

Section 2 addresses an issue regarding the approved Medicaid waiver application between the Department and the Centers for Medicaid and Medicare Services ("CMS"). Apparently, as a result of this lawsuit, CMS has determined that one of the allocation reductions

made -- an increase in the fee paid to the fiscal intermediary service taken from CDASS clients' allocation amounts -- was inappropriate. Williams Aff. ¶ 15 & Exhibit 9. CMS is the entity that determines whether the Department is in compliance with the requirements of the waiver for CDASS services. Since CMS has not yet made a determination regarding resolution of this issue, the parties agreed to allow CMS to make this determination. *See* Agreement ¶ 2.

Section 3 addresses how "allocation" amount is determined. Evidence showed that some CDASS clients' case managers were implementing reductions to allocation amounts incorrectly based on whether the reduction applied to the total allocation amount or just the amount available to pay attendants. Section 3 resolves this.

Section 4 is the paragraph addressing the injunctive relief sought. The Department had taken the position that CDASS clients were Medicaid "providers" and not entitled to notice of allocation reductions individually. *See* Department's Motion to Dismiss, filed February 18, 2010. As noted, this Court denied that motion. The parties first mediation was June 23, 2010.

Plaintiffs also complained about the haphazard way in which information about the allocation reductions was handled. Complaint ¶¶ 88-121. Information about reductions did not provide information about prior allocation amounts. Paragraph 4 requires a uniform method for the Department and all case managers. Section 4 also requires the Department comply with the appeal rights sections of 42 C.F.R. § 431.210 and 10 C.C.R. §2505-10, §8.057.

Section 5 addresses the issue of the Department seeking a recovery for "over spending" of the allocation amount. Under the Agreement, the Department will not seek a recovery of any over spending attributable to the allocation amounts affected by the reductions.

Sections 6, 8 and 9 are the paragraphs addressing payment of fees and the remaining outstanding joint motion to dismiss, which are addressed in the Argument section below. Under the Agreement, mutual releases are conditioned upon all parties signing the Agreement and all parties signing a Joint Motion to Dismiss with Prejudice (identified as "below") and execution of the Agreement. Section 6 specifically contemplates payment of fees, and paragraphs 8 and 9 specifically contemplate releasing claims after "all parties," including the Named Plaintiffs have signed and executed a joint motion to dismiss.

The rest of the sections govern interpretation and applicability of the Agreement.

In summary, the substantive terms of the Agreement, are acceptable to the parties; however, two important issues remain: (1) Payment of reasonable fees and costs under the Agreement; and (2) the language and mechanism for the stipulated or joint motion to dismiss.

This Court may enforce the terms of the Agreement, which is to be "interpreted and

enforced under the laws of the State of Colorado." Agreement ¶ 14, and it may be executed in counterparts and will be effective "when all parties" have executed a counterpart hereof, including the joint motion to dismiss. *Id*.

As explained below, the Agreement is either enforceable, meaning the Department is responsible for paying fees, or it is unenforceable, meaning this case continues, and the Agreement is void. If this Court determines the latter, Plaintiffs request a case conference.

III. ARGUMENT

The Department has agreed to pay fees in this case. Williams Aff ¶ 9 & Exhibit 5 ¶ 6. The basis for such an award is the lawsuit itself. This case arose under 42 U.S.C. § 1983. Under 42 U.S.C. § 1988(b), Plaintiffs are entitled to recover "a reasonable attorney's fee as part of the costs." After the parties arrived at an agreement on September 15, which included payment of fees and scheduled a mediation to determine fees on October 5, the Department's counsel raised, for the first time, its argument that Plaintiffs are not entitled to fees. Williams Aff. ¶ 16 & Exhibit 10.[4] The Department cannot, under basic principles of contract law, seek to enforce the agreement and deny payment of fees. In addition, this Court can and should, under the circumstances of this case, convert the settlement agreement into an enforceable order of this Court as permitted under state law and retain enforcement authority.

A. The Contract In This Case Is Enforceable As An Order of this Court.

The agreement reached has two unfulfilled conditions: (1) Payment of fees; and (2) the ultimate filing of a joint or stipulated motion to dismiss signed by the parties. Plaintiffs agree to the terms of the Agreement, which requires payment of reasonable attorneys fees and costs; however, given defense counsel's maneuvering, Plaintiffs can only do so if the final order requires this Court to convert the agreement into an order of the Court as set forth in the attached order. *See* Exhibit A and Williams Aff ¶ 10.

This Court has authority to convert the settlement agreement into an order of the Court pursuant to the Dispute Resolution Act, Colo. Rev. Stat. § 13-22-301 *et seq*., discussed more fully below and Colo. Rev. Stat. § 13-17-202 : "If an offer of settlement is accepted in writing within fourteen days after service of the offer, the offer of settlement shall constitute a binding settlement agreement, fully enforceable by the court in which the civil action is pending."

1. Dispute Resolution Act

[4] In this letter, Ms. Herron did offer a dollar amount, which, because the amount remains in dispute, has been redacted. As explained in this motion, the Department took the position later that it would not pay any fees.

Under the Dispute Resolution Act ("DRA"), Colo. Rev. Stat. § 13-22-308(1):

> If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement *may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.* (Emphasis added.)

The DRA structures efforts to resolve disputes through mediation rather than litigation. See §§ 13-22-301 to -313; *Yaekle v. Andrews*, 195 P.3d 1101, 1106 (Colo. 2008). As required under the Act, in this case, the parties have reached the basis for an agreement, which has been reduced to writing and approved by and signed by parties and their counsel. Plaintiffs now seek to have the agreement enforced as an order of this Court, including the requirement that the Department pay fees.

A court may only enforce a settlement agreement if it constitutes an enforceable contract. *Yaekle v. Andrews*, 195 P.3d at 1106 (*citing H.W. Houston Constr. Co. v. Dist. Court*, 632 P.2d 563, 565 (Colo. 1981). In this case, there was, in fact, a "meeting of the minds," or so it seemed, which contemplated payment of fees as a material condition, mediation to resolve the issue and the future preparation of a joint motion to dismiss negotiated by and signed by the parties.

Colorado recognizes the advantages of the DRA. "Cementing the agreement as an order of court provides the parties with certain benefits of judicial efficiency[; f]or example, it means that a party harmed by a later violation of that agreement can bring an enforcement action rather than being forced to litigate on the issue of contract formation, and that the court wields the power to hold the violator in contempt or otherwise direct specific performance." *Yaekle* at 1108.

2. The Parties Entered Into An Enforceable Contract.

Whether a contract exists is a question of fact to be determined in light of all the surrounding circumstances. *Yaekle*, at 1111; *Rocky Mountain Airways*, 713 P.2d 882, 887 (Colo. 1986); *see also Compton v. Lemon Ranches, Ltd.*, 972 P.2d 1078, 1080 (Colo. App. 1999); *James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 372 (Colo. App. 1994).

The terms of the contract are seemingly unambiguous -- the parties will arrive at an agreement regarding the amount of fees to be paid and execute a motion to dismiss once completed; however, the Department, after signing the Agreement, decided to take a different view. Whether a contract is ambiguous is a question of law. *East Ridge of Fort Collins, LLC v. Larimer and Weld Irr. Co.*, 109 P.3d 969, 974 (Colo. 2005) (*citing Lake Durango Water Co.*,

Inc. v. Pub. Util. Co., 67 P.3d 12, 20 (Colo. 2003). Mere disagreement of the parties does not necessarily indicate the documents are ambiguous. *Id*. (*citing USI Properties East, Inc. v. Simpson*, 938 P.2d 168 (Colo.1997). Rather, a contract is ambiguous "if it is fairly susceptible to more than one interpretation." *Id*. (*quoting Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 912 (Colo.1996). Colorado courts do not apply a rigid "four corners" of the contract rule when determining if a contract term is ambiguous. *Id*.

In resolving whether paragraph 6 of the Agreement is ambiguous, courts must then give effect to the intention of the parties by considering "competent evidence bearing upon the construction given to the instrument by the parties themselves, by their acts and conduct in its performance." *Id*. (*quoting McPhee v. Young*, 13 Colo. 80, 21 P. 1014, 1016 (1889). Thus, when a court determines that a document is ambiguous, it may then consider parol evidence to explain or clarify the meaning of a document or the effect of its provisions. *Id*.; *In re Applications for Water Rights of the Upper Gunnison River Water Conservancy District*, 838 P.2d 840, 850 (Colo.1992); *McNichols v. City & County of Denver*, 120 Colo. 380, 209 P.2d 910 (1949).

The language of the contract itself controls the determination of whether certain extrinsic evidence is relevant. *Id*. (Internal citation omitted.) The court may consider the following in construing the meaning of the contract: (1) circumstances surrounding the transaction, including previous decrees and proceedings and oral testimony addressing related circumstances, *Farmers High Line Canal v. Golden*, 975 P.2d 189, 193 (Colo. 1999); (2) the construction placed upon it by the parties themselves; *Eastern Ridge*, 109 P.3d at 975; (3) the conduct of the parties before and after the controversy arose. *Id*.; *see also Town of Estes Park v. N. Colo. Water Conservancy District*, 677 P.2d 320, 327 (Colo. 1984) (conduct of the parties before the controversy arose is a reliable test of their interpretation of the agreement).

The Agreement coupled with the previous and subsequent actions and communications of counsel show the parties reached an enforceable contract that contemplated that the parties would attempt to reach an agreement regarding fees on or before September 27, and, if not, mediate the issue of fees and accept the mediator's determination of fees. Defense counsel engaged in acts purposefully designed to mislead and to obfuscate this process. Subsequent communications by counsel, admissible for the Court's consideration under Colo. Rev. Stat. § 13-22-307, show the Department's counsel understood the parties had agreed that if they did not reach a fee determination at mediation, they would request this Court make a final determination. *See* Williams Aff. ¶ 12 & Exhibit 6; *see also Yaekle* at 1111-12 (subsequent agreement by counsel demonstrates the intent of the parties).. Only after the Agreement was signed and the parties and the process for determining fees was determined did a new Senior Assistant Attorney General get involved, days before the October 12 mediation was to commence, to claim that Plaintiffs were not entitled to fees based on the *Buckhannon* decision. Again, defense counsel's tactics demonstrate that although the Department agreed to payment of fees, it had no intention

of paying them.

3. The Department Is Estopped From Asserting No Enforceable Agreement Exists.

To the extent the Department changed its position regarding payment of fees after the agreement was signed, it should be estopped from doing so. Under Colorado law, the elements of a promissory estoppel claim are: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected the promise would induce action or forebearance by the promisee; (3) the promisee in fact reasonably relied on the promise to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. *Marquardt v. Perry*, 200 P.3d 1129, 1129 (Colo. App. 2008). Colorado has explicitly adopted section 90 of the Restatement (Second) of Contracts definition of promissory estoppel. *Bd. of County Com'rs of Summit County v. DeLozier*, 917 P.2d 714, 716 (Colo. 1996). As part of the commentary to section 90, the following illustration appears:

> A sues B in municipal court for damages for personal injuries caused by B's negligence. After the one year statute of limitations has run, B requests A to discontinue the action and start again in the superior court where the action can be consolidated with other actions against B arising out of the same accident. A does so. B's implied promise that no harm to A will result bars B from asserting the statute of limitations as a defense.

This illustration is similar to the facts of the case at bar, in that Plaintiffs asserted a claim against the State, the State asked Plaintiffs to pursue a mediated settlement agreement (rather than pursuing the case on the merits or agreeing to a consent decree), and the State is now asserting that Plaintiffs are not entitled to fees, specifically because the parties entered into a settlement agreement. *See* Williams Aff. ¶ 16 and Exhibit 10. Implicit in the Department's request that Plaintiffs pursue a mediated settlement is the implied promise that no harm would result as the parties worked through the agreed-upon process. Now the Department is trying to use the settlement process and agreement it requested and signed to invalidate Plaintiffs' fees claims.

B. If No Contract Is Determined to Exist.

Briefly, if this Court determines there was no "meeting of the minds," then there is no contract. If that is the case, Plaintiffs respectfully request this Court order a case management conference occur, and Plaintiffs will file a notice to set.

C. The Effect of the *Buckhannon* Decision.

The Department's post-settlement view that the Supreme Court's decision in *Buckhannon*

applies to this case is incorrect. The parties either have a settlement agreement enforceable as an order of this Court or not. If so, the concerns raised in *Buckhannon* are met by compliance with Colorado law seeking enforcement of the agreement. If not, the issue of whether an award of fees is appropriate is not before this Court. This action is now a contract case governed by the DRA. *See, e.g.., Bell v. Board Of County Com'rs of Jefferson County*, 451 F.3d 1097 (10th Cir. 2006) ("our case law is well-established that a party may prevail through settlement as well as through a merits ruling"). Nothing in *Buckhannon* should prohibit or prevent a Colorado court from enforcing a settlement agreement governed by Colorado law and making it an order of the Court enforceable under the Dispute Resolution Act.

In *Buckhannon,* a 5-4 decision, a majority of the Supreme Court held that fee-shifting provisions of the Fair Housing Act and Americans with Disabilities Act require party suing in federal court to secure either a judgment on the merits or court-ordered consent decree in order to qualify as "prevailing party," abrogating nine circuit courts of appeals' previous decisions that such judicial *imprimatur* was not needed for a party to have prevailed, justifying an award of fees. *Buckhannon* 532 U.S. at 605. The case involved the question of whether the lawsuit was mooted by a change in the state's statute resulting from plaintiffs' lawsuit. In *dicta*, the Court noted that, "Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking *unless the terms of the agreement are incorporated into the order of dismissal*." *Buckhannon* at 604, n. 7 (*citing Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, (1994). In the case at bar, however, the judicial *imprimatur* discussed in the Supreme Court's footnote is met by invoking the procedure under the Dispute Resolution Act and making the parties' settlement agreement an enforceable order of this Court.

No Colorado state court of appeals decision references the *Buckhannon* opinion, perhaps because of the Dispute Resolution Act. Furthermore, numerous courts (including the Supreme Court) construing the fee-shifting language of federal and state statutes have made clear that if a statute confers the ability to award fees and costs absent the specific "prevailing party" language analyzed in *Buckhannon,* the court will award fees. *See, e.g., Hardt v. Reliance Standard Life Ins. Co*., 130 S.Ct. 2149 (2010) (difference in ERISA fee-shifting language sufficient to allow fee recovery); *see also Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co*.
511 F.3d 407, 414-15 (4th Cir. 2007) (statutes containing language other than specific "prevailing party" terms allow for recovery of fees); *Graham v. DaimlerChrysler Corp*., 101 P.3d 140, 146-48 (Cal. 2004) (holding state statute allows the recovery of fees despite *Buckhannon*); *Teeters v. Division of Youth and Family Services*, 387 N.J. Super. 423, 904 A.2d 747, 751-52 (N.J. Super. A.D. 2006) (same); *In re InPhonic, Inc*., 674 F. Supp. 2d 273, 278-80 (D.D.C. 2009) (same).

As the California Supreme Court noted in the *Graham* case, "[I]t defies common sense to

think attorneys who take meritorious public interest cases with the expectation that they will be compensated if they obtained favorable results for their clients will not be deterred from doing so if the defendant can litigate tenaciously, then avoid paying their fees by voluntarily providing relief before a court order is entered." *Graham*, 101 P.3d. at 153-54.

Ultimately, under Colorado law, even if the *Buckhannon* decision has some bearing on this case, the Dispute Resolution Act provides the vehicle by which this Court has authority to enforce the terms of the Agreement, eliminating any of the concerns raised by the *Buckhannon* majority.

D. Colorado Also Recognizes a Duty of Good Faith in Raising Claims and Defenses.

As explained, this Court should enforce the agreement reached by the parties and order the Department to pay attorneys' fees and costs. As will be explained in Plaintiffs' motion for attorneys' fees, case law is clear that time spent responding to a defendant's opposition to payment of fees is compensable. Alternatively, this Court should award fees because of Defendant's pre- and post-agreement conduct in this case pursuant to Colo. Rev. Stat. § 13-17-101, *et seq*. Under this provision:

> The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof . . . is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section. *Id.*

To address the concerns raised by the general assembly and to deter such conduct, under Colo. Rev. Stat. § 13-17-102(1), "the court may award . . . as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees" Furthermore:

> The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct . . . . As used in this article, 'lacked substantial justification' means substantially frivolous, substantially groundless, or substantially vexatious.

Colo. Rev. Stat. § 13-17-102(4).

In this case, the Assistant Attorneys General and the Legal Director for the Department along with Plaintiffs and their attorney attended three separate mediation sessions and agreed that, as part of the resolution of this case, the Department would pay fees and costs. At the Department's request, the process required Plaintiffs to provide a statement of billing and prepare a settlement statement regarding fees to the mediator; the Department would respond and, if agreement was not reached, the issue would be resolved in mediation. Each draft of the parties' agreements contained language conveying this same basic procedures. Williams Aff. ¶¶ 6-9 & Exhibits 2-5.[5]

1. Factors for Determining Whether Reasonable Fees Should Be Awarded.

Each of the factors under Colo. Rev. Stat. § 13-17-103(1) is discussed in turn.

> In determining the amount of an attorney fee award, the court shall exercise its sound discretion. When granting an award of attorney fees, the court shall specifically set forth the reasons for said award and shall consider the following factors, among others, in determining whether to assess attorney fees and the amount of attorney fees to be assessed against any offending attorney or party:
>
> (a) The extent of any effort made to determine the validity of any action or claim before said action or claim was asserted;

Defendants' counsel did not raise the theory that a private settlement agreement could not form the basis for paying fees until after the Agreement was signed.

> (b) The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid within an action;

Defendants lost their motion to dismiss, which asserted Plaintiffs were not entitled to individual advance notice of their CDASS allocation reduction. The parties engaged in extensive settlement discussions to resolve all issues in this case, including, e.g., individual advance notice and payment of fees and costs.

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[5] These agreements are not being offered to show that the Department was willing to offer a compromise of the amount of a disputed claim or to prove liability for Plaintiffs' claims, but rather to show that the Department has, throughout the parties' discussions, agreed to payment of reasonable attorneys' fees and costs. The only question to resolve was the amount of those fees and costs.

(c) The availability of facts to assist a party in determining the validity of a claim or defense;

The parties mediated this case knowing that payment of attorneys' fees and costs was a material term with respect to settlement. The *Buckhannon* decision from 2001 was not raised until after the parties signed a settlement agreement stating the Department would pay fees and have the mediator determine the amount if the parties did not reach agreement.

(d) The relative financial positions of the parties involved;

As noted, three Assistant Attorneys General participated in the litigation and each mediation session as well as Robert Douglas, Legal Director for the Department. Williams Aff. ¶ 17. Although Carrie Ann Lucas, a second attorney working for the CCDC Legal Program, entered an appearance in this case, Ms. Lucas was occupied with other matters and, with limited exceptions, did not work on this case. *Id*. Ms. Lucas is a volunteer attorney. Undersigned counsel and two legal assistants handled litigation and mediation on behalf of thirteen plaintiffs, several of whom participated directly in the September 15 mediation. *Id*. CCDC's entire Legal Program at the time of the mediation consisted of the two attorneys mentioned, one full-time legal assistant and one contract legal assistant.

Plaintiffs are Medicaid recipients who cannot afford to pay and are not paying fees and costs in this case. CCDC is a 501(c)(3) non-profit organization operating statewide. Reiskin Aff. ¶ 3. In the absence of recovery of fees and costs in resolution of civil rights cases, the Legal Program has no other regular funding sources. *Id*. ¶ 4.

(e) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith;

Counsel for the Department induced Plaintiffs and their attorney to continue through a mediation process (the last session of which was designed specifically to address attorneys' fees) when it is clear, the Department's attorneys never intended those fees be paid. Throughout the settlement process and in two mediation sessions, the Department's counsel never mentioned nor involved a person from the Risk Management Department. Clearly, the Department did not have full authority to resolve all claims during the mediation process. It was not until the very end of the September 15, 2010 mediation that Department counsel informed Plaintiffs that a determination of fees and costs could not be determined by the Assistant Attorneys General or Department Legal Director, Mr. Douglas who were all present at each mediation. Nevertheless, the Agreement provided for a mechanism for resolving the issue, and Plaintiffs proceeded in good faith, providing a statement of billing as outlined in the Agreement and scheduling a third mediation session. Despite the requirement in the Agreement to do so, the Department did not provide a response to that statement on September 27 and attempted to have this case dismissed

before the parties could finalize the fees issue. Days before the scheduled third mediation, Ms. Herron, who has never been involved in this case or entered an appearance, raised the *Buckhannon* issue, apparently, for the purpose of sabotaging the mediation regarding fees. The mediation resulted in the mediator not determining fees, apparently based on the Department's representations that it would not pay fees. The Department's Legal Director, Robert Douglas e-mailed an individual who is a CCDC member but not a named Plaintiff in the case stating that the Department withdrew any offer to pay fees at mediation. *See* Reiskin Aff. ¶ 3 & Exhibit 1.[6] Plaintiffs disagree with the characterization of events of the mediation as described in Mr. Douglas' e-mail message; however, what is clear from the e-mail message is that the Department takes the position that it withdrew any offer to pay fees and resolved that Plaintiffs must now litigate the fees issue "through the Colorado Court of Appeals."[7]

In a final good faith effort to resolve the fees issue per the parties' agreement, undersigned counsel requested the Department to agree that the parties make a final request to the mediator asking that she make a determination on fees. Williams Aff. ¶ 14 and Exhibit 8. Senior Assistant Attorney General Herron refused saying it was her position that the mediator had no authority to make a determination. Given this position, it appears the Department would not abide by the mediator's determination even if the mediator had resolved fees, which begs the question as to why the Department went through the ruse of having the parties attend the October 12 mediation session at all. *Id.*

> (f) Whether or not issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict;

The only issue of fact to be determined with respect to fees and costs is what is the reasonable amount owed.

> (g) The extent to which the party prevailed with respect to the amount of and number of claims in controversy;

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[6] Because the amount of fees and costs remains in dispute, the amounts discussed in Mr. Douglas' e-mail have been redacted.

[7] It is not clear why Mr. Douglas felt at liberty to describe his view of mediation events to anyone other than counsel in this case. As Legal Director for the Department, he is, technically, the client in this case. This disclosure directly violates the confidentiality requirements of the Dispute Resolution Act. Colo. Rev. Stat. § 13-22-207(2) (prohibiting disclosure of mediation communications and information provided to a mediator in confidence during mediation). Nevertheless, now that Mr. Douglas has done so, he is a public official, and this e-mail message is subject to public review under the Colorado Open Records Act. Again, Plaintiffs do not agree that Mr. Douglas' portrayal of the mediation session is accurate.

As explained above, the Agreement provides all CDASS clients, not just the named Plaintiffs, with the ability to object to inappropriate past allocation reductions and appropriate notice required under the law if reductions are made in the future. The Department avoided having to respond to the motion for class certification, but has agreed that all relief under the settlement will pertain to all CDASS clients making class certification unnecessary. All parties have agreed to be bound by any CMS determination regarding the inappropriate increased FMS fee paid for from CDASS clients' allocation amounts.

> (h) The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

If this Court agrees to enter the attached proposed order, all of the terms of settlement will be fulfilled, including payment of reasonable attorneys' fees and costs.

Applying these factors, this Court should award Plaintiffs' reasonable attorneys' fees. The bad faith conduct of the Department's attorneys alone justifies an award of fees for all time spent addressing the fees and costs issue.

2. Counsel for the Department violated Colo. Rev. Stat. § 13-17-102 *et seq*.

Clearly defense counsel's conduct required Plaintiffs and their counsel to spend time and resources preparing for the process of mediation of the fees question when the Department had no intention of paying those fees. In addition, defense counsel led Plaintiffs' counsel to believe the parties would request a stay of proceedings and address the fees issue with the Court if mediation failed and, instead, tried to get the case dismissed before the fees issue was resolved.

"Bad faith may include conduct that is arbitrary, vexatious, abusive, or stubbornly litigious, and it may also include conduct that is aimed at unwarranted delay or is disrespectful of truth and accuracy." *In re Estate of Becker*, 68 P.3d 567, 569 (Colo. App. 2003) (*citing Zivian v. Brooke-Hitching*, 28 P.3d 970 (Colo. App. 2001)); *Stegall v. Stegall*, 756 P.2d 384, 386 (Colo. App. 1987) ("bad faith" includes conduct resulting in undue delay or that is disrespectful of the truth); *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984) (same).

Robert Douglas is Legal Director for the Department. Joan Smith and Jennifer Weaver are Assistant Attorneys General for the Medicaid and Public Assistance Unit. Patricia Herron is Senior Assistant Attorney General for the Litigation Division. These four attorneys work for the State of Colorado and represent and defend the legal interests of the people of the State of Colorado and its sovereignty.

Although all attorneys, including the undersigned, recognize we have a duty to zealously represent our clients, that duty is tempered by our obligations of candor to the tribunal and other

parties, Colo. Rules of Prof. Conduct 3.4 & 3.5, and by our duty not to engage in conduct that is disrespectful of truth and accuracy. *See also* Williams Aff. ¶ 18 and Exhibit 11 (American Bar Association Ethical Guidelines for Settlement Negotiations (2002) at pp. 47-48 § 4.3.1 Bad Faith in the Settlement Process). According to the ABA guidelines, "An attorney may not employ the settlement process in bad faith:"

> [I]t may be impermissibly deceptive, and thus an act of bad faith, for a lawyer to obtain participation in settlement discussions or mediation or other alternative dispute resolution processes by representing that the client is genuinely interested in pursuing a settlement, when the client actually has no interest in settling the case and is interested in employing settlement discussions or alternative dispute resolution processes solely as a means of delaying proceeding

Id. at p. 48.

The conduct of these four attorneys with respect to the issue of payment of fees and costs, especially in opposing Plaintiffs who are all, by definition, disabled and low-income, has been unbecoming for attorneys representing the State of Colorado.

CONCLUSION

For all of the foregoing reasons, pursuant to the Dispute Resolution Act, Plaintiffs respectfully request this Court enter the Order attached as Exhibit A and order Defendant to pay Plaintiffs' reasonable attorneys' fees and costs as contemplated by the Agreement.

Dated: October 18, 2010

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

/s Kevin W. Williams
Kevin W. Williams
Legal Program Director

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I electronically filed the foregoing using the Lexis Nexis Court Link and served by electronic mail on the following:

Jennifer L. Weaver, Esq.
Jennifer.Weaver@state.co.us

Joan E. Smith, Esq.
Joan.Smith@state.co.us

/s/ Briana McCarten

Duly Authorized Signature on file at the Colorado Cross-Disability Coalition.