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*.	
Attorney or Party Without Attorney: Kevin W. Williams Carrie Ann Lucas Andrew Montoya Colorado Cross-Disability Coalition 655 Broadway, Suite 775 Denver, CO 80203 Phone Number: 303.839.1775 Fax Number: 303.839.1782 E-mail: kwilliams@ccdconline.org E-mail: clucas@ccdconline.org E-mail: amontoya@ccdconline.org Atty. Reg. #: 28117 Atty. Reg. #: 36620 Atty Reg. #: 42471	▲ COURT USE ONLY ▲ Case Number: 2009 CV 11761 Ctrm.: 3

PLAINTIFFS' REPLY TO STATE DEPARTMENT'S RESPONSE TO PLAINTIFFS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND REQUEST FOR IMMEDIATE DISMISSAL

Plaintiffs, by and through undersigned counsel, hereby submit their Reply Brief in support of their Motion to Enforce Settlement Agreement and Request for Issuance of Order ("the Motion").

REPLY TO INTRODUCTION AND SUMMARY BACKGROUND

The Colorado Department of Health Care Policy and Financing ("Department") makes many factual assertions in its Response that have no basis in fact and are not supported by any reference to documents or sworn statements. Plaintiffs simply deny the Department's characterization of the facts of this litigation and the chronology of events, Plaintiffs' "positions" or abandonment of positions during settlement negotiations, and when or why the Department may have taken or refused to take certain actions in litigation or as part of settlement discussions.[1] Plaintiffs specifically disagree that the Department has "fully performed each and every aspect of the negotiated Settlement Agreement." Many of the "facts" alleged are irrelevant to the present motion, which requests this court enforce the agreement reached by the parties. Finally, the Department's discussion regarding the basis of a fee award under federal civil rights statutes has no bearing on this motion, which is brought pursuant to Colorado's Dispute Resolution Act. *See* Colo. Rev. Stat. § 13-22-301 *et seq*.

It appears, although it is not entirely clear, the Department agrees that the parties entered into an agreement, which this Court may make an enforceable order under the Dispute Resolution Act. Colo. Rev. Stat. § 13-22-308(1). If so, the only remaining question is whether

---

[1] For example, the lawsuit was filed December 22, 2009, and, as is alleged in the complaint, was brought for violations of plaintiffs' due process rights, including inadequate notice and inaccurate Medicaid benefit reductions. No efforts were made by the Department to "rectify" incorrect benefit calculations until the very earliest February of 2010. *See* Department's Motion to Dismiss, filed February 18, 2010, at 10, n. 3 (the Department claims to have discovered errors and was "in the process" of making corrections.) Plaintiffs dispute efforts were made even then, but what is clear is Plaintiffs did not receive any notice of the correction of such miscalculations until July of 2010. *See* Reiskin Aff. ¶ 3 (filed with this Reply) & Exhibit 1. In addition, it is clear from merely looking at the schedule in this case that the Department waited until its response to the motion for class certification was due to arrive at a settlement agreement.

the Department is required to pay reasonable fees and costs under the agreement and/or for engaging in bad faith, which is sanctionable under Colo. Rev. Stat. § 13-17-101, *et seq*. If there was no contract, then this Court should order the parties attend a case management conference.

The Department references a communication occurring on August 18, 2010, during which counsel for Plaintiffs "were notified . . . that attorney fees would not be paid." Response at 3. The communication received on August 18, 2010 from Assistant Attorney General Joan Smith is Exhibit 4 to the Williams Affidavit attached to Plaintiffs' Motion. It was the Department's proposal regarding attorneys' fees, which is similar to the language of the final agreement. *See* Exhibit 4 ¶ 8:

> By September 15, 2010, Plaintiffs' counsel will provide itemized billing records reflecting time spent in the representation. The Department will respond by October 1, 2010. If the parties cannot agree on an award of attorney fees Plaintiffs may submit the issue to the Court for resolution.

This provision clearly does not indicate the Department's refusal to pay fees.

REPLY TO ARGUMENT

Again, Defendant's references to historic and court-determined mechanisms for awarding fees has no bearing on the instant motion except to the extent that it re-emphasizes the bad faith conduct of the Department that led the parties to where they are now. *See* Motion at 5-6 (at last minute of mediation, Department agreed to payment of attorneys' fees but claimed it did not have full settlement authority, followed by the involvement of new counsel from AG's office claiming no entitlement to fees). Furthermore, whether Plaintiffs are "prevailing parties" is not relevant to enforcement of the Agreement.

At the very least, paragraph 6 of the Agreement is ambiguous, necessitating the need for parol evidence. Despite the integration clause, under Colorado law, parol evidence remains admissible when there is a patent ambiguity on the face of the contract or a latent ambiguity as to its meaning. *See Ad Two, Inc. v. City and County of Denver*, 9 P.3d 373, 376 (Colo. 2000) (Hobbs, J. dissenting) (explaining under Colorado law, the court should employ a "flexible" approach and may consider extrinsic evidence bearing on the meaning of the written terms such as evidence of the circumstances surrounding the making of the contract). *See also Lazy Dog Ranch v. Telluray Ranch Corp*., 965 P.2d 1229, 1235 (Colo. 1998); *Fire Ins. Exch. v. Rael*, 895 P.2d 1139, 1143 (Colo. App.1995) (holding that extrinsic evidence may be introduced to determine whether the term in an insurance policy is ambiguous). In this case, the parties negotiated over a period of months and reached agreement on other terms; there never was any question that the Department would pay fees and costs. The only question was the amount. This changed only after the Department announced it did not have final settlement authority at the mediation in September, assigned new counsel to the case who raised the *Buckhannon* argument for the first time days before the final scheduled mediation to determine fees.

Also, the Department's argument that the parties "agreed to attempt to agree" regarding fees is ludicrous on its face and under the circumstances of the parties' negotiations. There is no reason why the parties would have returned to mediation on October 12 only to determine the amount of fees if the offer was nothing. *See* Motion at 16 and Reiskin Aff. ¶ 5 (attached to original Motion) & Exhibit 1 (the Department withdrew any offer to pay fees at mediation). Clearly, given the parties' ongoing negotiations, either the parties had a very different

understanding of the purpose of the final mediation session with Judge Barr or Department's counsel was engaged in some very time-consuming hoodwinking.

WHEREFORE, for the reasons set forth in Plaintiffs' Motion, Plaintiffs respectfully request this Court enforce the Agreement and issue the proposed order attached hereto.[2]

Dated: December 21, 2010

Respectfully submitted,

COLORADO CROSS-DISABILITY COALITION
LEGAL PROGRAM

/s/ Kevin W. Williams
Kevin W. Williams

[2] The dates in the original proposed order have passed. Therefore, Plaintiffs request this Court issue the attached order instead.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 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.