FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

ARTHUR ARGUEDAS, BARBARA ARGUEDAS, and HELEN BRANSFORD,

Plaintiffs,

v. No. D-101-CV-2013-012393

GARRETT SEAWRIGHT, et al,

Defendants.

AMENDED MEMORANDUM IN SUPPORT OF DEFENDANT GARRETT SEAWRIGHT'S MOTION TO DISMISS AMENDED CLASS COMPLAINT

Plaintiffs allege that when they purchased automobile insurance from State Farm Mutual Automobile Insurance Company ("State Farm"), through its agent Garrett Seawright, they did not select uninsured and unknown motorist ("UM") coverage limits equal to the liability coverage limits. Nevertheless, Plaintiffs' policies were retroactively reformed (at no additional cost to them) to provide UM coverage limits equal to the liability coverage limits by operation of *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶¶ 2, 29, 149 N.M. 162 ("*Jordan*") and *Progressive Northwestern Ins. Co. v. Weed Warrior Servs.*, 2010-NMSC-050, ¶ 15, 149 N.M. 157 ("*Weed Warrior*"). Thus, Plaintiffs paid less for the coverage that they received than they would have paid had they selected equal limits coverage.

Moreover, Plaintiffs allege that they had no accident involving an uninsured motorist and admit that they have suffered no injury or actual damages whatsoever. They nonetheless request class-wide statutory damages by this action under the New Mexico Unfair Trade Practices Act ("UPA"), despite the UPA's explicit preclusion of statutory class damages. Plaintiffs also seek injunctive relief, contending that without Court supervision of every future UM sales transaction prospective insureds will not receive the information necessary to make an informed, knowing, and intelligent decision concerning UM coverage, even though three courts (including this Court,

Judge Campbell, and the federal district court) have expressly rejected similar challenges and even though Plaintiffs fail to allege that they have or will suffer any irreparable harm. Plaintiffs' claims are entirely without merit.

In October 2010, the New Mexico Supreme Court issued a pair of landmark decisions concerning UM coverage. *See Jordan*, 2010-NMSC-051; *Weed Warrior*, 2010-NMSC-050. Specifically, the court held that insurers must offer prospective insureds a menu of UM coverage options (including offering UM coverage limits equal to the liability coverage limits), along with corresponding premium amounts. *Jordan*, 2010-NMSC-051, ¶ 21; *Weed Warrior*, 2010-NMSC-050, ¶ 15. Further, an insured's selection of UM coverage limits less than the liability coverage limits would be treated like a rejection of UM coverage. *Weed Warrior*, 2010-NMSC-050, ¶ 15.[1]

The consequence of an insurer's failure to do any of the things that *Jordan* and *Weed Warrior* required concerning UM coverage was that the insured's policy would be reformed as a matter of law to provide UM coverage limits equal to the liability limits, without the charge of any additional premium to the insured. *See Jordan*, 2010-NMSC-051, ¶ 2 ("If an insurer fails to obtain a valid rejection, the policy will be reformed to provide UM/UIM coverage equal to the limits of liability."). The New Mexico Supreme Court specifically held that its decision would apply retroactively, clarifying in 2014 that the retroactivity period extends back to May 20, 2004. *Id.* ¶¶ 25-29; *see Whelan v. State Farm Mut. Auto. Ins. Co.*, 2014-NMSC-021, ¶ 28.[2]

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[1] Moreover, since the Administrative Code requires that any UM coverage rejection "be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance" (13.12.3.9 NMAC), *Jordan*'s practical effect was that evidence of an insured's decision to select UM limits *less* than the liability limits also had to be made part of the insurance policy, since that selection operated as a rejection as a matter of law.

[2] In *Montano v. Allstate Indem. Co.*, 2004-NMSC-020, 135 N.M. 681 ("*Montano*"), issued on May 20, 2004, the Court considered the adequacy of insurers' attempts to enforce anti-stacking provisions. It held that an insurer must obtain a written rejection of stacking in order to limit its liability based on an anti-stacking provision. *Id.* ¶ 19. The Court illustrated its holding through a hypothetical in which an insurer charged different premiums for UM coverage for each of three vehicles, noting that

Accordingly, Plaintiffs' own policies were reformed as a result of *Jordan* to provide equal limits UM coverage without any cost to them, giving them more coverage than they asked for, and certainly more than they paid for.

Plaintiffs did not file this lawsuit because they were in an accident with an uninsured or unknown motorist pre-*Jordan*, or because their claim was adjusted to provide less than equal limits UM coverage (as they had contemporaneously selected). Instead, according to Plaintiffs, *Jordan* supposedly made every sales transaction for automobile coverage back to *Montano* and forward to 2011 (when State Farm adopted new UM selection/rejection forms) retroactively deceptive and misleading. Plaintiffs filed this case as a purported class action seeking $100 in statutory damages ($300 for willful violations) under the UPA. They seek to represent a class of those who suffered no actual damages.

Even though Plaintiffs' policies were reformed by operation of *Jordan* to provide UM coverage for which they never paid (equal limits UM coverage), Plaintiffs seek upwards of $10 million from their agent (and the other defendants with whom they have no privity) [3] on the strained theory that they were somehow retroactively deprived of a "choice" to select coverage that they actually rejected, for which they never paid a dime, but which they have in fact actually received. Plaintiffs' Complaint does not explain what they would have done *had* they received pre-*Jordan* the UM coverage menu options that *Jordan* required, but they clearly would have been worse off than they are today. Either they would have accepted equal limits UM coverage

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insureds should have the option in that circumstance of selecting all, some, or none of the coverages. *Id.* ¶ 20. Finding that its holding was "new, and not easily foreshadowed," the court gave the holding in *Montano* "purely prospective" application only. *Id.* ¶ 22. *Whelan* held that the *Montano* decision served as the outer bound of *Jordan*'s retroactivity because, "[p]rior to *Montano*, no case could have signaled insurers that premium disclosure was required for a UM/UIM rejection to be effective." *Whelan*, 2014-NMSC-021, ¶ 28.

[3] Plaintiffs' allegation that all 478 newly named defendants are State Farm agents is clearly inaccurate (many are their staff), but is accepted as true for purposes of this motion.

or more coverage than they had selected before, both of which would have required an additional premium. Or, they would have rejected equal limits UM coverage, in which case they would not have had the benefit of the equal limits coverage. Here, post-*Jordan*, they received the equal limits UM coverage without paying for that level of coverage, but they nonetheless seek more than $10 million in statutory damages on behalf of a putative class that has suffered no actual damages

As discussed below, Plaintiffs do not state a claim, for there can be no retroactively-applied claim for deception here (based on a subsequent change in the law) under the UPA, which explicitly requires "knowing" conduct. Further, the UPA specifically prohibits a class from recovering statutory damages. Even Plaintiffs' individual UPA statutory damages claim is legally infirm because, far from causing any injury at all, the alleged deception here resulted in an affirmative benefit to Plaintiffs.

When they filed their Original Complaint, Plaintiffs named only their own individual State Farm agent, Mr. Seawright, as a defendant. They sued him both individually and as the purported representative of an implausible, involuntary Defendant Class of every State Farm agent in New Mexico. In their amended complaint, Plaintiffs dropped their Defendant Class allegations and instead individually sued the *478* additional individuals (with Mr. Seawright, these 478 persons earlier comprised the proposed Defendant Class). None of the new defendants has yet been served, nor should they be. For the reasons stated in Mr. Seawright's contemporaneously filed emergency motion to stay issuance of summonses, it will serve the ends of judicial efficiency and economy for the Court to decide Mr. Seawright's motion to dismiss this insupportable action before any summonses issue.

Because Plaintiffs allege no relation to any defendant beyond Mr. Seawright, they allege conclusorily that he engaged in a far-flung, multi-year civil conspiracy with every other alleged

State Farm agent in New Mexico to violate the UPA, leading them to seek millions of dollars jointly and severally against him.[4] The conclusory conspiracy allegations fail as a matter of law.

Moreover, Plaintiffs want the Court to inject itself affirmatively into every future State Farm automobile insurance policy transaction in New Mexico by granting mandatory injunctive relief concerning how those transactions are conducted and what State Farm's independent New Mexico agents may and may not say during them. Specifically, Plaintiffs contend that without the injunctive relief they seek, every UM sales transaction violates the UPA. For myriad reasons discussed herein, Plaintiffs cannot maintain a claim for injunctive relief.

In any event, Plaintiffs' claims for monetary damages and injunctive relief both fail because they seek to hold Mr. Seawright liable for allegedly violating New Mexico laws with which he had no duty to comply. As an independent agent of State Farm, he did not have authority to modify State Farm's policies and it was not his personal responsibility to ensure compliance with New Mexico's UM statues and regulations or with *Jordan*. He therefore cannot be held liable for any alleged violations of these laws.

When our Supreme Court decided *Jordan*, it certainly could not have anticipated — and its decision in no way supports — a retroactive UPA claim for class-wide statutory damages that has no basis in New Mexico law, the mandatory injunctive claim asserted here, or a conclusory civil conspiracy claim. The Court should dismiss Plaintiffs' claims with prejudice.

PLAINTIFFS' ALLEGATIONS

The Parties

Plaintiffs are New Mexico citizens and current State Farm policyholders (Arthur and Barbara Arguedas) or asserted insureds (Helen Bransford) who purchased automobile insurance policies issued by State Farm during the asserted relevant time period of May 20, 2004 through

[4] Plaintiffs' connection with the staff of such agents is even more attenuated.

June 12, 2011. Amended Complaint ("AC"). ¶¶ 4, 8-9, 67.

Plaintiffs assert that "every UM sales transaction conducted by [Mr. Seawright] between May 20, 2004 and June 12, 2011 . . . resulted in a total rejection of UM coverage or the purchase of less than equal limits UM coverage."[5] *Id.*,¶ 72. Plaintiffs admit, however, that they have not been involved in any accident with an uninsured or underinsured driver that might give rise to a claim *for* UM benefits; have not suffered any losses or damages due to such accident; and are accordingly ineligible to assert a UM claim. *Id.*, ¶¶ 73-75.

Defendant Garrett Seawright is an individual State Farm insurance agent. Plaintiffs allege that he "was duly appointed and authorized by State Farm . . . to act as an insurance sales agent with the authority to solicit, offer and sell State Farm insurance products," including (among others) State Farm automobile insurance policies in New Mexico. *See id.*, ¶ 12. Plaintiffs claim Mr. Seawright supposedly violated the UPA in connection with every UM sales transaction during the relevant time period by failing to "affirmatively state or disclose to Plaintiffs all of the material facts basic to every New Mexico UM sales transaction," and that they are entitled to statutory damages for "each and every" alleged violation. *Id.*, ¶¶ 72, 76.

Plaintiffs' Class Allegations

Plaintiffs purport to represent a putative class of other New Mexico citizens (1) with State Farm automobile insurance policies issued or reissued during the Relevant Time Period; (2) who participated in a New Mexico UM sales transaction, during which one of the defendants either (a) "failed to affirmatively state or otherwise disclose . . . in some manner reasonably intelligible or understandable . . . the material facts basic to every New Mexico UM sales transaction" *and/or* (b) "preselected the limits of UM coverage on an otherwise 'blank' UM

[5] Plaintiffs allege that the policies they purchased during the relevant period included State Farm Policy Number 192 3492-B01-31L, State Farm Policy Number 045 0232-B01-31C, and State Farm Policy Number 064 7270-E10-31B. *Id.*, ¶ 67, and Exs. 10-A to 10-E.

Selection/Rejection Form without the Plaintiff Class Member's prior knowledge or fully informed consent" *and/or* "instructed the Plaintiff Class Member to simply 'sign' that previously filled-out UM Selection/Rejection Form without any explanation as to the significance or meaning of the [Form];" and (3) who, like Plaintiffs, have not suffered any accident, losses, or damages, and so, are ineligible to assert a claim for UM benefits. AC, ¶¶ 7, 139. In addition, Plaintiffs purport to represent a subclass ("Subclass A") that includes putative class members who are also current MFRA[6] State Farm policyholders. *Id.*, ¶¶ 5, 8, 139.

Plaintiffs also assert claims against 478 other defendants, alleging that each and every one, in each and every UM sales transaction in New Mexico "since at least May 20, 2004," (1) failed to present Plaintiff Class Members with a UM Selection/Rejection Form that "was 'blank' — meaning without the limits of UM coverage already pre-selected on the form itself;" (2) failed to give them "a listing" of all of the UM coverage options that were available "together with the corresponding premiums for those specific limits of UM coverage, where that listing was complete or else was reasonably intelligible;" and (3) failed to "orally explain[] . . . what limits of UM coverage were available under his or her policy together with an explanation of the comparative premium prices for those same limits of UM coverage[.]" AC, ¶¶ 11, 100-01. Plaintiffs further allege that all of the 479 individual named defendants have supposedly engaged in a civil conspiracy to achieve lower MFRA loss ratios by "by knowingly/willfully making incomplete statements of material facts tending to deceive or mislead or by knowingly taking unconscionable advantage of the ignorance of the Plaintiff Class Members to a grossly unfair degree while conducting New Mexico UM sales transactions." *Id.*, ¶¶ 80, 82.

[6] "MFRA" stands for New Mexico's Mandatory Financial Responsibility Act, which relates to automobile insurance.

The Relief Sought

As noted, Plaintiffs seek monetary damages and injunctive relief. AC, Prayer for Relief at ¶¶ 2-3. They claim that every alleged plaintiff class member is entitled to statutory damages under the UPA in the sum of $100 to $300 "for each and every instance" where Mr. Seawright or any other of the 478 defendants "knowingly or willfully committed an unfair, deceptive or unconscionable trade practice in connection with any of the relevant UM sales transactions he conducted with them between May 20, 2004 and June 12, 2011," as well as "an award of reasonable attorney fees incurred in the successful prosecution of this case." *Id.*,¶¶ 76-77, 82.

Concerning their request for injunctive relief, Plaintiffs contend that every named defendant uniformly engages in conduct that misleads every member of the Plaintiff class. *Id.*, ¶¶ 100-01. They seek an injunction "commanding" Mr. Seawright (and all 478 defendants) "to refrain from . . . failing to affirmatively disclose to the Plaintiff Class Members," in an "intelligible or understandable" manner "all the material facts basic to every New Mexico UM sales transaction," including "each limit of statutorily available UM coverage . . . together with the corresponding premium prices" and to not "tak[e] unconscionable advantage" of Plaintiff Class Members in respect of such UM sales transactions." *See id.*, Prayer for Relief, ¶ 3.

ARGUMENT

The Court should end this case at the pleadings stage.[7] Dismissal is proper under Rule 1-

[7] While this case is still at the pleadings stage, this is the second time it is before this Court. Plaintiffs filed their Complaint with this Court on May 10, 2013. On June 17, 2013, State Farm filed a motion to intervene and later that day removed the case to federal court as an intervening defendant. *See Arguedas v. Seawright*, No. 1:13-cv-00565-MCA-LFG (D.N.M.), Doc. 1. After the completion of briefing on several motions, including a motion to remand by Plaintiffs (*id.*, Doc. 10), a motion to dismiss by Mr. Seawright (*id.*, Doc. 16), and an amended motion to intervene by State Farm (*id.*, Doc. 18), the federal district court granted the motion to remand without reaching any of the other pending motions (*id.*, Doc. 63). On July 21, 2015, the United States Court of Appeals for the Tenth Circuit denied State Farm and Mr. Seawright's request for permission to appeal under 28 U.S.C. § 1453. On August 7, 2015, State Farm withdrew its motions to intervene. On August 11, 2015, Plaintiffs filed their amended complaint, adding 478 additional defendants.

012(B)(6) NMRA when "the law does not support the claim under any set of facts subject to proof." *Derringer v. State*, 2003-NMCA-073, ¶ 5, 133 N.M. 721. Rather, to survive dismissal, the "pleadings must tell a story" from which "the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred." *Id.* (internal quotations omitted). Plaintiffs' Complaint fails to satisfy this standard. *See Nass-Romero v. Visa U.S.A. Inc.*, 2012-NMCA-058, ¶ 7 ("Dismissals under Rule 1–012(B)(6) are proper when the claim asserted is legally deficient." (internal quotations omitted)).

As discussed in Section I, Plaintiffs have no UPA claim because there is no such thing as "retroactive deception," the predicate for their claim. Moreover, Plaintiffs have no claim for class-wide statutory damages, as the UPA makes explicit and as several courts have held. Plaintiffs in any event have no individual claims for statutory damages because, instead of suffering any injury, Plaintiffs received an affirmative *benefit*. As discussed in Section II, Plaintiffs' conspiracy claim fails because the allegations are wholly conclusory. As discussed in Section III, Plaintiffs' claim for injunctive relief fails for multiple reasons, including a failure to plead irreparable harm. And as discussed in Section IV, all of Plaintiffs' claims fail because Mr. Seawright, as an independent insurance agent, had no duty to comply with New Mexico law governing the issuance of UM coverage.

I. Plaintiffs' Statutory Damages Claims Should Be Dismissed.

A. There Is No "Retroactive Deception" Under the UPA.

The entire premise of Plaintiffs' case is that *Jordan* not only reformed every New Mexico automobile insurance policy to provide equal limits UM coverage to the extent of its (as of that time undetermined) retroactive reach, but that the New Mexico Supreme Court intended to recast each and every individual pre-*Jordan* UM sales transaction in which insureds selected less than equal limits UM coverage as a misleading or deceptive transaction under the UPA. Neither

Jordan nor the Complaint remotely supports the proposition that a party may recover statutory damages for past transactions based on a later change in the law. Indeed, the UPA *precludes* such recovery by requiring on its face that a false or misleading statement be "knowingly made." NMSA 1978, § 57-12-2(D) (2009).

Under the UPA, an "unfair or deceptive trade practice"

> means an act specifically declared unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind *knowingly made* in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person . . . .

Id. (emphasis added).

To state a claim under the UPA, a complaint must allege that: (1) the defendant made an "oral or written statement, a visual description or other representation that was either false or misleading"; (2) the false or misleading representation was "*knowingly made* in connection with the sale, lease, rental, or loan of goods or services" in the "regular course" of the defendant's business; and (3) the representation was "of the type that may, tends to, or does deceive or mislead any person." *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶ 13, 112 N.M. 97 (emphasis added; internal quotations omitted).

In seeking statutory damages based on *Jordan*, Plaintiffs confuse retroactivity with knowledge. The New Mexico Supreme Court held that *Jordan* would apply retroactively because it was "based on settled *principles* articulated in twenty years of UM/UIM jurisprudence." *Jordan*, 2010-NMSC-051, ¶ 27 (emphasis added). But the Court expressly acknowledged that its decision detailed "for the first time the technical requirements for a valid rejection of UM/UIM coverage in an amount equal to liability limits." *Id.* ¶ 25. Our Legislature certainly did not design the UPA to punish a defendant for lack of foresight. Before *Jordan*, none of the transactions about which Plaintiffs now complain as being non-compliant with

Jordan's technical requirements could even have been "knowingly" deceptive because those requirements did not exist.[8]

In an instructive decision regarding UM coverage applying a sister-state's law, the Tenth Circuit recognized that a retroactive change in the law cannot be the basis for a claim that requires knowledge or willfulness. *See Anderson v. State Farm Mut. Auto. Ins. Co.*, 416 F.3d 1143 (10th Cir. 2005). There the court affirmed the dismissal of the plaintiff-insured's claims of bad faith and violations of the state's consumer protection act based on an alleged failure to comply with a state court decision that retroactively changed UM coverage laws, where the insurer had issued the plaintiff's policies *before* the decision was announced. *Id.* at 1144-46. The court stated that, "[a] decision to award coverage benefits pursuant to retroactive application of a judicial decision does not mean that the prior disclosures and representations of the insurer based on the previously-understood state of the law constitute bad faith." *Id.* at 1148. And it held that the insurer's acts prior to the change in the law could not have been knowingly made, explaining that, "[b]ecause State Farm's prior explanations of UM/UIM coverage reflected a reasonable interpretation of the existing case law, it did not either make any representations which it knew or should have known to be false or act with reckless disregard." *Id.* at 1149.

This same reasoning applies directly to Plaintiffs' UPA claims here. *Mens rea* is an express limitation on liability and an essential element of a claim under the UPA — a statutory tort. Because, as a matter of law, Mr. Seawright could not have known before *Jordan* what our Supreme Court stated "for the first time" in *Jordan*, the UPA claims must be dismissed.

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[8] *See Stevenson*, 1991-NMSC-051, ¶ 18 (trial court erred when it refused to grant directed verdict to defendant on plaintiff's UPA claim as a matter of law because plaintiff could not establish knowledge); *Nanodetex Corp. v. Sandia Corp.*, No. 05-1041 BB/LAM, 2007 WL 4356154, at *5 (D.N.M. July 26, 2007) (plaintiff's UPA claim failed when alleged misrepresentations were not knowingly made).

B. There Is No Claim for Statutory Class Damages Under the UPA.

As a matter of law, there is no claim for statutory damages under the UPA on behalf of the asserted plaintiff class. Indeed, Section 10(E) of the UPA expressly limits the damages that can be awarded in a class action to actual damages:

> In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class *such actual damages* as were suffered by each member of the class as a result of the unlawful method, act or practice.

NMSA 1978, § 57-12-10(E) (emphasis added). New Mexico courts have enforced Section 10(E)'s explicit and clear limit on class-wide relief. *See Brooks v. Norwest Corp.*, 2004-NMCA-134, ¶ 45, 136 N.M. 599 (under the UPA, "any relief realized by class members is limited to actual damages; they are *barred* from collecting statutory or treble damages" (emphasis added)); *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 621 (D.N.M. 2007) ("While named plaintiffs may be awarded statutory damages upon proof of a violation and can also recover treble damages, members of a class are limited to the recovery of actual damages . . . ."); *see also Pedroza v. Lomas Auto Mall, Inc.*, 663 F. Supp. 2d 1123, 1133-34 (D.N.M. 2009) (recognizing Section 10(E)'s statutory limitation on class-wide relief).

In *Stanforth v. Farmers*, a federal district court underscored Section 10(E)'s limit on class-wide recovery in response to a motion brought by the same attorneys who represent Plaintiffs here. *See Stanforth v. Farmers*, No. CIV 09-1146 RB/RHS (D.N.M. Jan. 10, 2014), Doc. 146 ("*Stanforth* Order").[9] Plaintiffs in the *Stanforth* case sought relief for insureds who had less than equal-limits UM coverage pre-*Jordan* and *did* claim actual damages because they were in an accident with an underinsured or uninsured motorist. The *Stanforth* court preliminarily approved a class settlement that also released claims in a separate class action filed by Plaintiffs'

[9] A copy of the *Stanforth* Order is attached for the Court's convenience as Ex. 1 hereto.

counsel, which was based on the same operative facts as *Stanforth*, but which sought statutory damages under the UPA for plaintiffs without actual damages (as is the case here). *See Fulgenzi v. Smith*, CIV12-1261 RB/RHS (D.N.M.). The *Stanforth* settlement provided no monetary relief to those who had not suffered actual damages. Plaintiffs' counsel here moved to vacate the approval of the *Stanforth* class settlement because those class members without actual damages (e.g., the *Fulgenzi* class members) purportedly had viable UPA claims.[10] *Stanforth* Order at 5. Relying on Section 10(E) of the UPA, the trial court rejected Plaintiffs' counsel's position without hesitation: "In that the putative Fulgenzi class members suffered no actual damages, they have no viable claim for damages under the NMUPA." *Id.* at 12.

In their Complaint, Plaintiffs are unequivocal that neither they nor any members of the proposed class have suffered any actual damages under Section 10(E). AC, ¶ 75 ("Plaintiffs have not suffered, nor will they be able to offer evidence in this case proving, any actual loss of money or property resulting from [alleged] violations of the UPA"). Indeed, they have defined the purported class as consisting exclusively of those individuals who were *not* damaged. AC, ¶ 139. Accordingly, Plaintiffs' claims for class-wide statutory damages must be dismissed. *See Derringer*, 2003-NMCA-073, ¶ 15 (affirming dismissal of plaintiff's claim for statutory damages where relief sought was not available to plaintiff under statute's plain language).

C. Plaintiffs Fail to State a Claim for Individual UPA Statutory Damages Because They Received a Benefit from the Alleged Deception.

Finally, Plaintiffs cannot bring a claim under the UPA because not only have they not been injured by the alleged deception (indeed, they concede they have suffered no actual damages), but they instead have received an affirmative *benefit*. *See* AC, ¶ 75. The UPA

[10] The *Stanforth* court ultimately granted final approval to the settlement, and Plaintiffs' counsel appealed to the Tenth Circuit Court of Appeals. Plaintiffs' counsel also appealed the subsequent dismissal of the *Fulgenzi* case. The two appeals have been fully briefed and are scheduled for argument in September 2015.

provides three distinct remedies available to an individual plaintiff for a UPA violation: (1) injunctive relief; (2) actual damages; and (3) statutory damages:

> A. A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required. Relief granted for the copying of an article shall be limited as to the prevention of confusion or misunderstanding as to source.
>
> B. Any person *who suffers any loss of money or property*, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the practice.
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> NMSA 1978, § 57-12-10(A), (B) (emphasis added).[11]

Plaintiffs claim no actual damages here, only statutory damages. But nothing in the statute or in any other authority even hints that a plaintiff who received an affirmative benefit from the alleged deception is entitled to recover statutory damages under the UPA. Make no mistake, to the extent of *Jordan*'s retroactive reach, Plaintiffs' State Farm policies were reformed by operation of law to provide equal limits UM coverage at no additional cost to the insured. Had Plaintiffs contemporaneously *selected* the UM coverage those policies now contain, there is no doubt that they would have had to pay an additional premium. In other words, this is not a

[11] As the emphasized language indicates, the statute appears expressly to limit standing to assert damages claims just to those who have "suffer[ed] a loss of money or property." NMSA 1978, § 57-12-10(B); *see Pedroza*, 663 F. Supp. at 1131 (noting that the statutory language would suggest that proof of loss would be a prerequisite to statutory damages). That said, Mr. Seawright recognizes that some New Mexico cases have held that individual statutory damages are available under the UPA even in the absence of actual injury. Mr. Seawright anticipates that Plaintiffs will contend that under *Page & Wirtz Constr. Co.*, 1990-NMSC-063, they may recover statutory damages even absent actual injury. However, while it is one thing to contend that a plaintiff may have difficulty proving damages and may still recover statutory damages of $100, Plaintiffs here do not contend any difficulty in proof. Instead, they claim entitlement to statutory damages for a purely inchoate injury occasioning no loss, which would vastly and improperly expand UPA liability. On Plaintiffs' theory, a person could seek $100 simply because they saw (and were therefore "misled" by) a false advertisement, but never bought a product.

case where an alleged deception caused a plaintiff to pay *more* for a benefit that she did not want. This is a case where, because of *Jordan*, Plaintiffs paid *nothing* for additional coverage. However far the UPA may reach to those who cannot prove actual damages, it cannot extend to those who have benefitted from the supposedly misleading or deceptive practice as Plaintiffs have here; that result would plainly be inequitable.

II. Plaintiffs Have Failed to State a Civil Conspiracy Claim.

Plaintiffs allege that Mr. Scawright and every one of the newly named 478 defendants conspired to violate the UPA and they seek to impose joint and several liability on each of the Defendants for $10 – $30 million in statutory damages. For two separate reasons, Plaintiffs have failed to state a claim for civil conspiracy.

First, civil conspiracy is not actionable on its own; it requires an underlying tort. The conspiracy claim therefore falls along with their UPA claim. *See Vigil v. Public Serv. Co. of N.M.*, 2004-NMCA-085, ¶ 20, 136 N.M. 70 ("[A] conspiracy claim fails as a matter of law when no actionable civil case exists against the defendants.").

Second, the conspiracy claim would fail even if there were a plausible UPA claim (which there is not) because Plaintiffs have not adequately pleaded the additional elements required to proceed under a conspiracy theory. Under New Mexico law, civil conspiracy requires proof "(1) that a conspiracy between two or more individuals existed; (2) that specific wrongful acts were carried out by the defendants pursuant to the conspiracy; and (3) that the plaintiff was damaged as a result of such acts." *Ettenson v. Burke*, 2001-NMCA-003, ¶ 12, 130 N.M. 67. For a conspiracy to exist, "there must be a common design or a mutually implied understanding; *an agreement*." *Morris v. Dodge Country, Inc.*, 1973-NMCA-100, ¶ 5, 85 N.M. 491 (emphasis added).

Plaintiffs have completely failed to allege facts satisfying the elements of a conspiracy. To be sure, the Amended Complaint repeatedly chants the mantra "conspiracy," but despite its 66 pages and 165 paragraphs, Plaintiffs nowhere explain how, when, or why Mr. Seawright and the other 478 defendants conspired, much less that Plaintiffs were damaged. These conclusory statements of a conspiracy are insufficient to survive a motion to dismiss under Rule 1-012(B)(6). *See Saylor v. Valles*, 2003-NMCA-037, ¶ 25, 133 N.M. 432. Specifically, Plaintiffs fail to allege any facts showing an agreement among any of the 479 defendants. The Complaint alleges no meetings, no phone calls, no emails, and no wonder: the entire claim is based on a conspiracy supposedly to mislead insureds concerning the requirements that *Jordan* itself detailed "for the first time." *Jordan*, 2010-NMSC-051, ¶ 25. On Plaintiffs' theory, all of the defendants not only had to have known the unknowable, they must have agreed affirmatively to mislead their policyholders about what they did not know. *See Saylor*, 2003-NMCA-037, ¶ 25 (dismissing conspiracy count because plaintiff failed to plead facts from which the court could "conclude that Defendants agreed to do wrongful acts").

Plaintiffs plead that the "common objective of the civil conspiracy was to achieve lower MFRA loss ratios for undisclosed personal gain by knowingly/willfully making incomplete statements of material facts tending to deceive or mislead or by knowingly taking unconscionable advantage of the ignorance of the Plaintiff Class Members to a grossly unfair degree while conducting New Mexico UM sales transactions[.]" *See* AC, ¶ 80. But a post-hoc rationalization of a supposed objective without proof of an agreement does not amount to a conspiracy. Moreover, the asserted conspiracy is utterly implausible. The Complaint provides no explanation why any individual agent would desire to lower the *overall* MFRA loss ratios for

State Farm or for other State Farm agents, or why the agents would collectively agree to do so.[12] Nor do Plaintiffs allege that the purported conspiracy damaged them. Again, they effectively concede no damage. *Id*, ¶ 139. That is fatal to the claim — New Mexico courts have made clear that a claim based on a civil conspiracy theory *cannot survive* without an allegation of damages. *See Armijo v. Nat'l Surety Corp.*, 1954-NMSC-024, ¶ 30, 58 N.M. 166 ("*[I]n civil cases the gist of the action is not the conspiracy*, but the damages resulting from it[.]" (emphasis in original) (internal citations omitted)); *Silva v. Town of Springer*, 1996-NMCA-022, ¶ 25, 121 N.M. 428 ("In a civil conspiracy, the basis for relief [arises] from any damages which are shown to have resulted from the acts committed pursuant to the conspiracy.").

For all of these reasons, the conspiracy claim should be dismissed.

III. Plaintiffs Are Not Entitled to Injunctive Relief.

Injunctive relief is not a claim, but a request for relief. Accordingly, without an underlying claim against Mr. Seawright, Plaintiffs are not entitled to injunctive relief. Because the UPA claims fail, so too does the request for injunctive relief. But Plaintiffs' injunctive relief request independently fails because (1) they have failed to allege irreparable harm and (2) the type of relief they seek (affirmative injunctive relief) is unreasonably burdensome.

A. No Irreparable Harm.

It is well settled that an injunction under the UPA requires proof of irreparable harm. *See Valdez v. Metro. Prop. & Cas. Ins. Co.*, No. CIV 11-0507 JB/KBM, 2012 WL 1132414, at *27 (D.N.M. Mar. 31, 2012) (dismissing Plaintiffs' UPA claims for injunctive relief for failure to adequately plead irreparable harm); *see also State v. City of Sunland Park*, 2000-NMCA-044, ¶ 18, 129 N.M. 151 ("[I]njunctions are harsh and drastic remedies which should issue only . . .

[12] As noted, many of the new defendants are *not* in fact State Farm agents (they are their staff); for this motion, Mr. Seawright accepts as true that all 479 defendants are agents.

where there is a showing of irreparable injury for which there is no adequate and complete remedy at law." (internal citations omitted)). To be "irreparable," an injury must be "actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm." *Id.* ¶ 19 (internal citations omitted). An injury is not irreparable under New Mexico law if there is an adequate remedy at law. *Id.*

Plaintiffs could not possibly show irreparable harm here as a matter of law. They expressly deny that they have suffered any actual harm, and they have failed to allege that there is a substantial prospect that they will. For Plaintiffs to suffer any injury, Mr. Seawright would have to conduct a UM sales transaction in a manner that violates the UPA; they would have to reject equal limits UM coverage; they would have to be involved in an accident with an uninsured motorist; and State Farm would then have to reject a claim for equal limits UM coverage. This prospect of injury is too speculative to rise above the level of a "mere possibility" of harm. *See Valdez*, 2012 WL 1132414, at *24 (applying New Mexico law, any damages were not actual and substantial when "any given class member would both have to be involved in an accident with an uninsured motorist and [the insurer] would have to reject a claim for equal limits coverage for the class member to be injured").

In any event, even if the Court were to presume that the attenuated and hypothetical events that Plaintiffs alleged transpired to support a claim of harm, then Plaintiffs *would* plainly have a clear and adequate remedy at law. The New Mexico courts are well-equipped to consider UM claims and award damages accordingly. Any coverage deficiency would be quantifiable based on Plaintiffs' liability limits and the value of their claimed damages from the underlying accident. The Amended Complaint contains no allegations of injury for which monetary damages could not adequately compensate them. The injunctive relief claim should accordingly be denied as a matter of law. *See Sunland Park*, 2000-NMCA-044, ¶ 19 ("[A]n 'irreparable

injury' is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard." (internal quotations omitted)).

Moreover, Plaintiffs claim for injunctive relief is predicated on a series of misguided allegations that Mr. Seawright misled them during their UM sales transactions. *See* AC, ¶¶ 100-01. For example, Plaintiffs allege that

> [a]t *no* time since at least May 20, 2004 has *any* Defendant Agent *ever* provided *any* Plaintiff Class Member with *any* UM Selection/Rejection Form during, or prior to, any New Mexico UM sales transaction, where . . . the Defendant Agent gave the Plaintiff Class Member *a listing of all,* and only, those limits of UM coverage actually available for the Plaintiff Class Member to choose from, together *with the corresponding premiums* for those specific limits of UM coverage, where that listing was complete or else was reasonably intelligible to an average, hypothetical and unsophisticated New Mexico insured so that the insured could make a realistically informed, knowing and intelligent decision about how much of the UM coverage being offered he or she should accept or reject.

Id., ¶ 100 (emphases added). Plaintiffs' allegation is baseless and utterly implausible on its face. Just a few months ago, this Court expressly held that State Farm's 2011 UM Selection/Rejection Sales Forms — the form that is provided during UM sales transactions — "comply with all requirements of New Mexico law." *Lang v. State Farm*, No. D-101-CV-2014-02205, Order Regarding State Farm's Second MSJ (Dist. Ct. June 5, 2015).[13] And a federal court in New Mexico likewise confirmed that there is nothing confusing about the disclosures used in UM sales transactions. *Quintana v. State Farm Mut. Auto. Ins. Co.*, No. 1:14-cv-00105-WJ-KK (D.N.M.), Doc. 43 ("*Quintana* Order").[14] Just like Plaintiffs' allegation here that no Plaintiff Class member was ever provided with a listing of UM coverage limits and corresponding premiums "that was complete or else was reasonably intelligible" (AC, ¶ 100), the plaintiff in

[13] A copy of the Court's decision in *Lang* is attached hereto as Ex. 2. *See also McCullough v. State Farm*, No. D-202-CV-2014-03179 (Aug. 12, 2015) (same). A copy of the *McCullough* decision is attached hereto as Ex. 3.

[14] A copy of the district court's order in *Quintana* is attached hereto as Ex. 4.

Quintana alleged that the 2011 UM Selection/Rejection Sales Form violated New Mexico law because it was difficult for insureds to understand. After carefully assessing the form, the district court rejected the argument:

> Plaintiff also claims that even if page 2 of the rejection form meets the requirements of *Jordan*, it is confusing to the insured. . . . The form is a table of available coverage with corresponding premiums. . . . *There is nothing confusing about the form.* In fact, it can be grasped more easily by viewing it rather than by reading the Court's description of the form.

Quintana Order at 9 (emphasis added). That language is equally applicable here.

B. Plaintiffs Seek Unreasonably Burdensome Injunctive Relief.

This Court should also dismiss Plaintiffs' claim for mandatory injunctive relief because Plaintiffs' circumstances are not sufficiently compelling to require such an extraordinary remedy. As the New Mexico Supreme Court has recognized, "[i]njunctions are harsh and drastic remedies which should issue only in extreme cases of pressing necessity." *Hill v. Cmty. of Damien of Molokai*, 1996-NMSC-008, ¶ 51, 121 N.M. 353 (quoting *Padilla v. Lawrence*, 1984-NMCA-064, ¶ 22, 101 N.M. 556). Plaintiffs' Amended Complaint is devoid of any compelling or extraordinary circumstances that could justify an exercise of judicial discretion to entertain the injunctive relief sought in this case.

Indeed, the injunction is breathtaking in both its breadth and its vagueness. In their Original Complaint, Plaintiffs sought an affirmative injunction to force Mr. Seawright to highlight the selection/rejection forms, to advise insureds to review and consider their UM coverage options, and to refrain from preparing any 2011 UM Selection/Rejection Sales Form in advance of any UM sales transactions. Original Compl., ¶ 221. In the Amended Complaint, Plaintiffs request that the Court "command each Defendant Agent *to refrain from a) failing to affirmatively disclose* . . . or knowingly omitting all material facts basic to every New Mexico UM sales transaction . . . *including, but not limited to*" a series of specific disclosures *and/or* "b)

taking unconscionable advantage of the ignorance or lack of knowledge of the Subclass A Members to a grossly unfair degree," with a series of further examples. AC, p. 62-63, Prayer for Relief at ¶ 3 (emphases added). It is a basic tenet of equity that the person enjoined must be able to understand the conduct that the Court is prohibiting or requiring. The requested injunction is unconstitutionally incomprehensible. *See PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (injunction must be precise, self-contained, so that person subject to it who reads it and nothing else should have sufficiently clear, exact knowledge of the duties imposed).

Moreover, the requested injunction would involve extraordinary supervision by this Court. An injunction may be inappropriate where it requires constant supervision.[15] To the extent the Court and Mr. Seawright could even grasp the scope of the conduct that Plaintiffs seek to enjoin, Plaintiffs allege that the 479 defendants historically conduct many *thousands* of separate UM sales transactions a year. *See* AC, ¶ 111. There is no practical means for the Court to monitor each and every one of those transactions for compliance with the mandatory injunction that Plaintiffs have proposed.

IV. The Relief that Plaintiffs Seek is Not Within Mr. Seawright's Control.

Finally, this Court should dismiss Plaintiffs' Complaint because it alleges violations of New Mexico laws that impose no duties on Mr. Seawright, and it seeks relief from Mr. Seawright that he has no authority to provide as an independent agent of State Farm. Specifically, Plaintiffs claim that Mr. Seawright acted improperly by engaging in UM sales transactions that allegedly violated the New Mexico UM statute, NMSA 1978, § 66-5-301; New Mexico Regulation 13.12.3.9 NMAC; and the New Mexico Supreme Court's decision in *Jordan*.

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[15] *See G&C Entm't, LLC v. Headstart Enters. Ltd.*, No. D-202-CV-200803605, 2009 WL 10253390, at *8 (N.M. Dist. Dec. 9, 2009) (denying injunction because of the "high probability that the Court will be burdened with the task of supervising any injunctive relief entered"); *see also Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 6, 128 N.M. 611 (identifying "the practicability of granting and enforcing the order" as factor to consider in determining whether to grant injunction).

Plaintiffs cannot state a claim because each of these authorities is directed at insurance companies, not at insurance agents.

Section 66-5-301 requires motor vehicle policies to include UM coverage, unless the insured rejects such coverage. Regulation 13.12.3.9 NMAC specifies that any rejection of UM coverage be in writing and made a part of the policy. *Jordan* clarifies that these provisions apply to "a rejection of UM/UIM coverage equal to the liability limits," and that "to honor these requirements effectively *insurers* must provide the insured with the premium charges." 2010-NMSC-051, ¶ 2 (emphasis supplied). Plaintiffs allege that Mr. Seawright violated the UPA by not complying with these requirements. *See, e.g.*, AC, ¶¶ 3, 40, 84, 102-03. As a State Farm agent, however, Mr. Seawright had no authority to write State Farm's policy forms, modify the policy language, or change the policies in any respect. Rather, there is no dispute that State Farm created the UM selection/rejection forms and decided how those forms were to be incorporated into its insureds' policies. Mr. Seawright himself had no duty to comply with Section 66-5-301, 13.12.3.9 NMAC, or *Jordan*. Accordingly, Mr. Seawright cannot be held liable for Plaintiffs' claims as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiffs' Amended Complaint should be dismissed with prejudice.

Dated: August 25, 2015

Respectfully submitted,

By *__/s/ Rudolph A. Lucero__*

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I HEREBY CERTIFY that on the 25th day of August, 2015, I filed the foregoing Memorandum in Support of Motion to Dismiss Amended Complaint electronically through the State of New Mexico's Odyssey File & Serve system, requesting that the following counsel be served by electronic means:

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By *__/s/ Rudolph A. Lucero__*
Rudolph A. Lucero

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RICHARD STANFORTH, for himself and all others similarly situated and HELEN LUCERO, for herself and all others similarly situated,

Plaintiffs,

v. **Case No. CIV 09-1146 RB/RHS**

FARMERS INSURANCE COMPANY OF ARIZONA, FARMERS GROUP INC., MID-CENTURY INSURANCE COMPANY, FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE, BRISTOL WEST INSURANCE COMPANY, 21ST CENTURY ADVANTAGE INSURANCE COMPANY, 21ST CENTURY ASSURANCE COMPANY, 21ST CENTURY CASUALTY COMPANY, 21ST CENTURY CENTENNIAL INSURANCE COMPANY, 21ST CENTURY INSURANCE COMPANY OF THE SOUTHWEST, 21ST CENTURY NATIONAL INSURANCE COMPANY, 21ST CENTURY NORTH AMERICA INSURANCE COMPANY, 21ST CENTURY PREMIER INSURANCE COMPANY, FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN, FOREMOST PROPERTY & CASUALTY INSURANCE COMPANY, FOREMOST SIGNATURE INSURANCE COMPANY, and MARYLAND CASUALTY COMPANY, WILLIAM B. TOBIN, DAVID ARAGON, and JOHN AND JANE DOES 1 THROUGH 250,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Fulgenzi Class Members' [sic] [1] Motion for Withdrawal of Preliminary Approval of Stanforth Class Settlement. (Doc. 142). Briefing is complete. Jurisdiction arises under 28 U.S.C. § 1332(d). Having considered the submissions

[1] No class has been certified in *Fulgenzi v. Smith, et al.*, CIV 12-1261 RB/RHS.

of counsel, and being otherwise fully advised, the Court denies this Motion.

I. Background

On July 29, 2009, Richard Stanforth and Helen Lucero ("Plaintiffs") filed this class action suit in the Second Judicial District Court, State of New Mexico, seeking damages against Farmers Insurance Company of Arizona, Farmers Group, Inc., their individual insurance agents, and 250 "John/Jane Doe" insurance agents ("Defendants"), for alleged breach of statutory, common law, and contractual duties. (Doc. 1-1). Plaintiffs are automobile insurance policyholders who alleged that Defendants induced them into rejecting uninsured/underinsured motorist coverage ("UM/UIM coverage"), failed to advise Plaintiffs that the rejection would reduce their total amount of UM/UIM coverage, and failed to provide them with a valid notice of rejection of UM/UIM coverage. (*Id.*) Plaintiffs are represented by Geoffrey R. Romero, Joseph Goldberg, David A. Freedman, David P. Garcia, Matthew L. Garcia, Ray M. Vargas, II, Erin B. O'Connell, Sara Berger, and Vincent J. Ward ("Plaintiffs' Counsel"). Emily Cates, Steve Hulsman, Peter Mason, and Josh Lichtman represent Defendants.

On May 11, 2011, David J. Berardinelli, Daniel J. O'Friel, and Pierre Levy ("Attorney Claimants") filed an entry of appearance as co-counsel on behalf of Plaintiffs. (Docs. 73). On May 16, 2011, United States Magistrate Judge Robert H. Scott granted Defendants' joint motion to stay until August 16, 2011, as the parties were in settlement negotiations. (Doc. 74). On July 5, 2012, Attorney Claimants filed an Unopposed Motion to Withdraw "on the grounds of irreconcilable conflict of interest with Plaintiff co-counsel and

their clients, and lack of any enforceable co-counsel agreement." (Doc. 90). Mr. Berardinelli and Mr. O'Friel signed the Unopposed Motion to Withdraw. (*Id.*) Judge Scott granted the Attorney Claimants' Motion to Withdraw on July 9, 2012. (Doc. 91).

On October 29, 2012, Attorney Claimants filed a Notice of Attorney's Lien. (Doc. 98). On February 27, 2013, Attorney Claimants filed a Motion to Enforce Attorney's Lien and a Corrected Motion to Enforce Attorney's Lien, seeking to enforce the terms of an alleged fee-splitting agreement with Plaintiffs' Counsel whereby the Attorney Claimants would receive one-third of the attorney's fees and Plaintiffs' Counsel would receive the other two-thirds, and attached the Affidavit of Mr. Berardinelli. (Docs. 106 & 107). On March 19, 2013, Plaintiffs' Counsel filed a Motion to Strike the Notice of Lien. (Doc. 109). On June 26, 2013, the Court denied Attorney Claimants' Motion to Enforce Attorney's Lien and granted Plaintiffs' Motion to Strike the Notice of Lien. (Doc. 119).

Two days after filing the Notice of Attorney's Lien, Mr. Berardinelli and Mr. O'Friel ("Fulgenzi Attorneys") filed a class action lawsuit in the First Judicial District Court, State of New Mexico, which is now pending in this Court as *Fulgenzi v. Smith, et al.*, CIV 12-1261 RB/RHS (Fulgenzi suit). (Fulgenzi Doc. 1). The Fulgenzi suit is based on the same operative facts as the instant matter and seeks damages under the New Mexico Unfair Practices Act (NMUPA). (*Id.*) Therein, Garon Fulgenzi alleges that Defendant Farmers promulgated uninsured and underinsured motorist coverage selection or rejection forms that are invalid under New Mexico law because the forms do not provide the necessary information to allow policyholders to decide whether to reject UM coverage as required by New Mexico law. (*Id.*)

The Fulgenzi Complaint alleges that Defendant Smith and a proposed Defendant Class of insurance agents used the forms to sell Farmers automobile insurance to Mr. Fulgenzi and the proposed Plaintiff Class. (*Id.*) The Fulgenzi suit seeks $100 in statutory damages under the NMUPA for each of the alleged 75,000-100,000 proposed Plaintiff Class Members, a declaration that the UM Selection/Rejection Forms are unenforceable, and an award of damages under the NMUPA for each of the proposed Plaintiff Class Members who received the forms and selected UM coverage in an amount less than the maximum allowable. (*Id.*)

On December 5, 2012, Defendants removed the Fulgenzi suit to this court pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). (Fulgenzi, Doc.1). The Fulgenzi Attorneys filed a motion to remand, arguing that CAFA's home-state exception bars jurisdiction. 28 U.S.C. § 1332(d)(4)(B). (Fulgenzi, Doc. 24). On July 2, 2013, the Court denied the motion to remand. (Fulgenzi, Doc. 31). The Fulgenzi Attorneys have taken no steps to litigate the Fulgenzi suit since March 5, 2013. (Fulgenzi, Doc. 29). No discovery has occurred and no deadlines have been set. Because no class has been certified, Mr. Fulgenzi is the lone plaintiff.

From May 2011 through October 2013, the Stanforth parties worked toward a settlement. On October 1, 2013, the Stanforth parties amended the Stanforth complaint and class definition in order to more precisely define the class and to properly identify additional defendants in the settlement. (Doc. 130). The Stanforth Amended Complaint covers claims regarding UM/UIM Coverage available to Plaintiffs and similarly situated persons based on the alleged failure of Defendants to extend such UM/UIM Coverage to their insureds in

accordance with the requirements of applicable New Mexico law, and the alleged denial of claims for benefits for that UM/UIM Coverage by Defendants. (*Id.*)

On October 14, 2013, Plaintiffs filed an Unopposed Motion for Preliminary Approval of Settlement ("Stanforth Settlement"). (Doc. 134). In the Stanforth settlement, Defendants agree to retroactively reform all policies that did not or do not contain equal limits UM Coverage and were issued, renewed, or effective in New Mexico from January 1, 1995, through the applicable Reformation Ending Dates, so that those policies now provide such coverage. (Doc. 134-1). While all settlement class members will receive this relief, those individuals who were in a UM accident after January 1, 1995 ("Subclass A") may also submit claims for UM benefits based on the retroactively reformed policy limits. (*Id.*) Stanforth class members such as Mr. Fulgenzi, who did not have accidents, are not entitled to UM benefits, and suffered no actual damages ("Subclass B"), will be entitled to notice and retroactive reformation. (*Id.*) On November 1, 2013, the Court granted the parties' Motion for Preliminary Approval of the Settlement and conditionally certified a settlement class. (Doc. 139).

The Fulgenzi Attorneys move to withdraw the Court's preliminary approval on the grounds that the original Stanforth Complaint did not state a plausible claim on behalf of the potential Fulgenzi class, the Stanforth Plaintiffs should have timely moved to amend their complaint if they intended to include the potential Fulgenzi class and NMUPA claims in the settlement, Defendants should have filed a motion to dismiss the Fulgenzi suit, and the Court must protect the potential Fulgenzi class members and their NMUPA claims. (Doc. 142).

Plaintiffs respond that the Fulgenzi claims are subsumed by the Stanforth action and the proposed Fulgenzi class has no viable claim for damages under the NMUPA. (Doc. 143). Defendants respond the Stanforth and Fulgenzi cases arise from the same core set of facts, the settlement protects all putative class members, and there are no viable Fulgenzi class claims for UPA statutory damages. (Doc. 144).

II. Standard

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S.___, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). "In order to justify a departure from that rule, 'a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *Id.* (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). "Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. *Id.* "The Rule's four requirements - numerosity, commonality, typicality, and adequate representation –'effectively limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *Id.* (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)).

The settlement of a class action requires court approval, which may issue "only after a hearing and on finding that [the settlement] is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). Preliminary approval is the first of a two-step process. *See* Herbert B. Newberg, *Newberg on Class Actions*, § 11.25. In the first step, the court determines whether the

proposed settlement falls within the range of possible approval and whether it is reasonable to issue notification to settlement class members of the settlement's terms. *See id.* In the second step, after notice to the class and an opportunity for absent settlement class members to object or otherwise be heard, the court will determine whether to grant final approval of the settlement as fair and reasonable. *See id.* District courts have broad discretion when deciding whether to certify a putative class. *Dukes*, ___ U .S.___, 131 S.Ct. at 2551; *Shook v. El Paso Cnty.*, 386 F.3d 963, 967 (10th Cir. 2004). A proposed settlement of a class action should be preliminarily approved where it appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to class representatives. *See In re Motor Fuel Temperature Sales Practices Litig.*, 286 F.R.D. 488, 492 (D. Kan. 2012).

III. Discussion

A. The Stanforth Complaint was properly amended.

The Fulgenzi Attorneys do not contend that preliminary approval was improper under Rule 23. Rather, they assert that the approval should be withdrawn because the original Stanforth Complaint did not encompass the allegations of the Fulgenzi Complaint. This assertion is not legally relevant to the issues at hand. In class action settlements, it is typical for plaintiffs to amend the complaint to broaden the claims, the class definition, the time period or the defendants from what was described in the initial class action complaint. *See Newberg*, § 12:15, p. 312 and fn. 8; *Weinberger v. Kendrick*, 698 F.2d 61, 77 (2d Cir. 1982) (stating that there is "no rigid rule against addition of new claims shortly before submission

of proposed settlement provided that proper notice and opportunity for opting out are afforded . . .and that the settlement fairly and adequately provides for the new claims") (citations omitted). Indeed, the Fulgenzi Attorneys filed an amended complaint in a similar unrelated class action shortly before they settled that case. (*See Jordan v. Allstate Ins. Co.*, No. D-0101-CV-2007-00309, First Judicial District, County of Santa Fe, State of New Mexico (Doc. 144-1)). The amended complaint in *Jordan v. Allstate* expanded the time period, added defendants, and added claims for NMUPA and NMUIPA violations and bad faith. (Docs. 144-1, 144-2, 144-3, 144-4). It is disingenuous for the Fulgenzi Attorneys to argue that a similar amendment to the complaint in this case is inappropriate when they successfully advocated for the same course of action in the *Jordan* case. In any event, the Fulgenzi Attorneys' concerns related to the original complaint were rendered moot by the properly-filed amended complaint. Nonetheless, the Court will address the Fulgenzi Attorneys' claims related to the original complaint.

B. The Fulgenzi Attorneys misconstrue the original Stanforth Complaint.

The Fulgenzi Attorneys improperly construe the term "denied coverage" in the original Stanforth Complaint to include only those insureds who made claims. A fair reading of this language indicates that the class definition in the original Stanforth Complaint included all insureds who had UM/UIM coverage that was less than liability limits without regard to whether an insured had made a claim for UM/UIM payments based on that coverage. It is material that Defendants' policies denied equal limits coverage to all insureds whether or not an insured submitted a claim for payment. Moreover, the Fulgenzi Attorneys'

interpretation of the term "denied coverage" is illogical because not every UM/UIM claim would reach the liability policy limits. For these reasons, the Fulgenzi Attorneys misinterpret the term "denied coverage" as used in the original Stanforth Complaint and their argument fails having been based on a flawed premise.

C. The Stanforth settlement covers the Fulgenzi suit.

It is well-established that "a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action." *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982). As a result, a class action settlement may include all claims arising from the same "factual predicate" as the claims alleged in a competing class action complaint. *Wal-Mart Stores, Inc. v. Visa, Inc.*, 396 F.3d 96, 107 (2d Cir. 2005); *Nottingham v. Trans-Lux*, 925 F.2d 29, 33 (1st Cir. 1991) (holding that a class action settlement may include all claims with a "common gravamen" or that "arose out of the same transaction" as the facts alleged in the complaint). Undeterred when their attempt to obtain a share of the Stanforth fees failed, the Fulgenzi Attorneys attempted to carve out a piece of the Stanforth matter by filing the Fulgenzi Complaint. While the claims raised in the Fulgenzi Complaint overlap with the claims raised in the original Stanforth Complaint, it is not necessary to parse the language of the two documents to determine whether the claims arose from the same factual predicate. Rather, a class action settlement may be "framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts." *Nat'l Super Spuds, Inc. v. N.Y. Mercantile*

Exch., 660 F.2d 9, 18 n. 7 (2d Cir. 1981). The Fulgenzi suit alleges that Defendants promulgated uninsured and underinsured motorist coverage selection or rejection forms that are legally invalid because the forms do not provide the necessary information to allow policyholders to decide whether to reject UM/UIM coverage as required by New Mexico law. The Stanforth suit alleges that Defendants failed to extend UM/UIM Coverage to their insureds in accordance with the requirements of New Mexico law. There can be no doubt that Fulgenzi and Stanforth are based on the same factual predicate. Given that the claims raised in the Fulgenzi suit arose from the same set of facts as the claims in Stanforth, the claims in the Fulgenzi suit are subsumed by the Stanforth settlement.

D. The Stanforth settlement protects Mr. Fulgenzi.

Mr. Fulgenzi is the only plaintiff in the Fulgenzi suit. The settlement in Stanforth protects Mr. Fulgenzi because he will receive retroactive equalized coverage under the settlement or, if he so chooses, he may opt out of the settlement and bring a claim for $100 in statutory damages against Defendants under the NMUPA. Similarly, policyholders who did not have a loss caused by an uninsured/underinsured motorist will receive equalized coverage under the settlement or they will have the opportunity to opt out of the settlement and assert their $100 statutory damage claims against Defendant under the NMUPA. *See Grilli v. Metro. Life Ins. Co., Inc.*, 78 F.3d 1533, 1536-38 (11th Cir. 1996) (holding that the district court did not abuse its discretion in denying a motion to intervene based on the court's conclusion that proposed intervenors could protect their interest either by opting out of the class and litigating separately, or by remaining in the case and objecting to the

proposed settlement if they thought it was unfair). Because it does not preclude his ability to prosecute his individual claims against Defendants, the Stanforth settlement protects Mr. Fulgenzi.

E. The NMUPA limits class members to actual damages.

The Fulgenzi Attorneys rely on yet another flawed premise when they argue that the NMUPA permits unnamed class members to recover statutory damages even when they incurred no actual damages. The fallacy of this argument becomes apparent through a review of the NMUPA. Notably, the NMUPA distinguishes between named plaintiffs and unnamed class members in terms of recoveries available to each group.

Section 57-12-10(B) of the NMUPA provides that named plaintiffs may recover statutory damages. *See* NMSA 1978, § 57-12-10(B) ("Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater."). The New Mexico Supreme Court has interpreted Subsection 57-12-10(B) to mean that individuals may recover statutory damages in the absence of actual damages. *Page & Wirtz Const. Co. v. Solomon*, 110 N.M. 206, 212, 794 P.2d 349, 355 (1990); *see also Jones v. Gen. Motors Corp.*, 124 N.M. 606, 611, 953 P.2d 1104, 1109 (Ct. App. 1998); *Lohman v. Daimler-Chrysler Corp.* 142 N.M. 437, 446, 166 P.3d 1091, 1100 (Ct. App. 2007). Undoubtedly, Mr. Fulgenzi and any individual within the putative Fulgenzi class may opt out of the settlement and bring a claim for statutory damages against Defendants.

Section 57-12-10(E) sets out a different rule for unnamed class members. NMSA 1978, § 57-12-10(E). Specifically, Subsection 57-12-10(E) of the NMUPA allows named plaintiffs to recover statutory damages but explicitly limits the recovery of class members to their actual damages:

> In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice.

NMSA 1978, § 57-12-10(E). In that the putative Fulgenzi class members suffered no actual damages, they have no viable claim for damages under the NMUPA.

The Fulgenzi Attorneys rely on *Page & Wirtz Const. Co.*, *Jones*, and *Lohman* in support of their contention that unnamed class members may recover statutory damages under the NMUPA in the absence of actual damages. (Doc. 142 at 20-21). However, these cases do not support this contention. *See Page & Wirtz Const. Co.*, 110 N.M. at 211-12, 794 P.2d at 354-55; *Jones*, 124 N.M.at 611, 953 P.2d at 1109; *Lohman*, 142 N.M. at 446, 166 P.3d at 1100. All three cases hold that individuals may recover statutory damages in the absence of actual damages under § 57-12-10(B). *Id.* None of these cases address Section 57-12-10(E). *Id.* Additionally, *Page & Wirtz* and *Jones* were not class actions. *See Page & Wirtz Const. Co.*, 110 N.M. at 211-12, 794 P.2d at 354-55; *Jones*, 124 N.M.at 611, 953 P.2d at 1109. While *Lohman* was a putative class action, it held that a named class member may recover statutory damages under Section 57-12-10(B); it did not address Section 57-12-10(E). *See Lohman*, 142 N.M. at 446, 166 P.3d at 1100. None of these cases alter the rule set

out in Section 57-12-10(E) that limits unnamed class members to actual damages. *See Page & Wirtz Const. Co.*, 110 N.M. at 211-12, 794 P.2d at 354-55; *Jones*, 124 N.M. at 611, 953 P.2d at 1109; *Lohman*, 142 N.M. at 446, 166 P.3d at 1100. Simply put, the Fulgenzi Attorneys' reliance on these cases is misplaced. In sum, the putative Fulgenzi class members do not have viable claims for damages under the NMUPA.

THEREFORE,

IT IS ORDERED that Fulgenzi Class Members' Motion for Withdrawal of Preliminary Approval of Stanforth Class Settlement (Doc. 142) is **DENIED.**

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2014-02205

EDMUND J. LANG, on his own behalf and as Personal Representative of EMILY V. MARES-LANG, Deceased, CHARLOTTE ROSE MARIE TOWNSEND and MARY ANN CANO,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM AGENT ABE DISPENNETTE, STATE FARM AGENT LOU SANTORO INSURANCE AGENCY, INC.,

Defendants.

ORDER REGARDING STATE FARM'S SECOND MSJ

THIS MATTER having come before the Court upon Defendant State Farm's Second Motion for Partial Summary Judgment on the issues whether: (1) the State Farm Rejection Form complies with all requirements of New Mexico law and (2) whether the Rejection Form was properly incorporated into the policy in compliance with all requirements of New Mexico law, the matter being fully briefed and hearing having been held on May 28, 2015, the Court finds that the Motion is well-taken, there are no material issues of fact and State Farm is entitled to judgment as a matter of law on these issues.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the State Farm Rejection Forms at issue in this case comply with all requirements of New Mexico law and those

EXHIBIT 2

rejections were properly incorporated into the policies at issue in compliance with all requirements of New Mexico law.

THE HONORABLE SARAH SINGLETON

APPROVED AS TO FORM:

MILLER STRATVERT P.A.

By: */s/ Rudolph A. Lucero*

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STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

TONYA MCCULLOUGH, STEPHEN MCCULLOUGH, Individually and as parents and next friends of RYAN MCCULLOUGH and JEFFREY MCCULLOUGH, minor children, and JACOB MCCULLOUGH,

Plaintiffs,

v. No. D-202-CV-2014-03179

SCOTT KNOWLES, individually, USAA CASUALTY INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and PATRICIA JONES PERKINS,

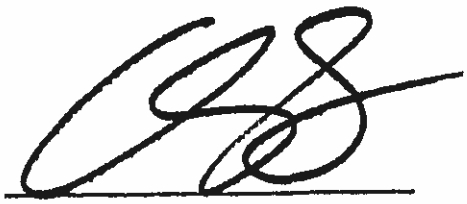
Defendants.

ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER having come before the Court upon cross-motions for summary judgment by Plaintiffs and Defendant State Farm Mutual Automobile Insurance Company ("State Farm"), the matters having been fully briefed and hearing held on August 4, 2015, the Court finds that there are no material issues of fact and that State Farm is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion for Summary Judgment is denied, that the five automobile policies issued by State Farm and in force on the date of loss are not subject to reformation and the Court does hereby declare that the rejections of uninsured motorists coverage on all five policies comply in all respects with all requirements of New Mexico law and were properly incorporated into the respective policies in compliance with New Mexico law and, therefore, the total stacked uninsured coverage provided

by State Farm to Plaintiffs for this loss is $75,000 each person/$150,000 each accident subject to liability offsets which will arise when Plaintiffs settle or resolve their liability claims against Defendants Scott Knowles and USAA.



Clay Campbell
District Court Judge

APPROVED AS TO FORM:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NATHAN QUINTANA,

Plaintiff,

v. No. 14CV00105 WJ/GBW

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
and
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on cross-motions for summary judgment:

(1) Defendant's Motion for Summary Judgment, filed October 10, 2014 **(Doc. 32)**; and

(2) Plaintiff's Motion for Summary Judgment to Provide Coverage, filed October 10, 2014 **(Doc. 33)**.

Having reviewed the parties' briefs and applicable law, the Court finds Defendant has established that it is entitled to summary judgment. Accordingly, Plaintiff's motion is denied and Defendant's motion is granted.

BACKGROUND

This is an auto collision case concerning underinsured motorist ("UM") coverage. The accident occurred on June 28, 2013 in Espanola, New Mexico, when Plaintiff was operating a 2003 Harley Davidson motorcycle owned by him and insured by Defendant ("State Farm"). The accident was caused by the negligence of an automobile driver Haripurkh Khalsa. State Farm denied coverage claiming that Plaintiff had rejected UM coverage in accordance with New

Mexico law. Plaintiff contends that the rejections were not in conformance with New Mexico law and seeks to reform the policies to provide UM coverage. In the alternative, Plaintiff claims that the State Farm agent made negligent and material misrepresentations during the purchase of the UM policies.

Plaintiff filed the complaint, styled as a Petition for Declaratory Judgment, in the First Judicial District Court, County of Santa Fe, State of New Mexico, on December 17, 2013. Defendant removed the case to federal court on February 7, 2014. The Court recently allowed Plaintiff to amend the complaint, but denied Plaintiff's request to remand the case. Doc. 21.

DISCUSSION

This case turns on whether the insurer complied with New Mexico law and whether misrepresentations were made to Plaintiff in the issuance of the policies at issue. In order to avoid repetition in addressing both motions, the Court sets out the undisputed facts common to these motions as well as the law governing the issues.

At the time of the accident, Ms. Khalsa, the tortfeasor, was insured by GEICO under a policy which provided $100,000 of liability coverage. Also at the time of the accident, Plaintiff owned seven other vehicles in addition to the Harley Davidson, all of them insured under separate policies issued by State Farm to either Plaintiff or Plaintiff and his wife Yvonne: a 2005 Chevrolet Corvette; a 2012 Nissan Versa; a 2003 Dodge Ram pickup; a 201 Yukon Sports Wagon; a 1996 Honda Prelude; a 2009 BMW 328XI; and a 1999 Acura. It is undisputed that the Acura policy was in full force and effect at the time of the accident, and included uninsured motorist ("UM") coverage with limits of $100,000 each person/$300,000 each accident.

State Farm presents details and supporting evidence for facts which essentially state that except for the Acura, Plaintiff was offered UM coverage with limits equal to his liability

coverage, but he signed State Farm rejection of UM coverage form ("rejection form") for all seven vehicles. *See* Deft's Statement of Undisputed Facts and Husser Aff. (Doc. 31). Plaintiff does not dispute that he actually signed each one of these rejection forms, but rather claims that these rejections were not valid.

I. Legal Standard

Both parties have filed motions for summary judgments, seeking relief on the same issue.

A. Summary Judgment Standard

The standard for cross motions is the same as for individual motions for summary judgment. *Clark v. Assoc. Commercial*, 877 F.Supp.1439, 1441 (D.Kan.1994) (citing *Arnold Pontiac-GMC. Inc. v. General Motors Corp.*, 700 F.Supp. 838, 840 (W.D. Pa. 1988)). Summary judgment is appropriate when there are no genuinely disputed issues of material fact and, viewing the record in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law. *Bruner v. Baker*, 506 F.3d 1021, 1025 (10th Cir. 2007); *Boling v. Romer*, 101 F.3d 1336, 1338 (10th Cir. 1996). Once the party moving for summary judgment properly supports its motion, it is incumbent on the non-moving party to respond with some showing of an issue of genuine material fact. *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978 (10th Cir. 1991), *overruled on other grounds by Kendrick v. Penske Transp. Svcs.*, 220 F.3d 1220, 1228 (10th Cir. 2000). The non-moving party may not rest on averments in its pleadings, but instead must establish specific triable issues. *Gonzales v. Miller Cas. Ins. Co. of Texas*, 923 F.2d 1417 (10th Cir. 1991). The mere existence of some alleged, immaterial factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

When parties file cross motions for summary judgment as they have done here, the Court is entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts. *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138 (10th Cir. 2000). The Court will consider evidence from both motions when referenced by the parties, although the Court will address Defendant's motion for summary judgment first since the facts that are set out in that motion are more comprehensive.

B. Relevant Law

In *Jordan v. Allstate Insurance Company,* the New Mexico Supreme Court has set forth the requirements that must be met for a proper rejection of UM coverage: (1) an offer to the insured to purchase UM/UIM coverage in an amount equal to the policy's liability limits; (2) information regarding corresponding premium charges for each available UM/UIM coverage choice; (3) the insured's "written rejection of UM/UIM coverage equal to the liability limits"; and (4) incorporation of that rejection into the policy such that the insured may fairly reconsider his decision. 149 N.M. 162, 169 (2010). If an insurer fails to obtain a valid rejection, the policy will be reformed to provide UM/UIM coverage equal to the limits of liability.

II. Defendant's Motion for Summary Judgment

Defendant's thirty-eight Statements of Undisputed Facts ("SOF") set out the details each of the seven automobile policies relating to Plaintiff's waiver of UM coverage. For each of these policies (except for the Acura), Plaintiff signed a rejection form for UM coverage, which was then processed by State Farm underwriting and mailed to Plaintiff as a new Declaration after processing the rejection form on these dates:

VEHICLE	REJECTION SIGNED	DECLARATION MAILED TO PLAINTIFF
Harley Davidson	10/11/11; Doc. 31, Ex. A.	5/2/2012: Declaration mailed after processing rejection form. Doc. 31, Ex. B.
BMW	2/1/2013; Doc. 31, Ex. C	2/6/2013: Declaration mailed after processing rejection form. Doc. 31, Ex. D.
Honda Prelude	10/11/2011; Doc. 31, Ex. E	10/13/2011: Declaration mailed after processing rejection form. 5/16/2012: new Declaration mailed as "cautionary measure" in light of *Jordan* decision.[1] Doc. 31, Exs. F & G.
Nissan Versa	10/11/2011; Doc. 31, Ex. H	10/18/2011: Declaration mailed after processing rejection form. 5/16/2012: new Declaration mailed as "cautionary measure" in light of *Jordan* decision. Doc. 31, Ex.I & J.
Corvette	10/11/2011; Doc. 31, Ex. K	10/18/2011: Declaration mailed after processing rejection form. 2/15/2012 : new Declaration mailed as "cautionary measure" in light of *Jordan* decision. Doc. 31, Exs. L & M.
Dodge Ram pickup	10/23/2011; Doc. 31, Ex. N	12/1/2011: Declaration mailed after processing rejection form. 5/16/2012: new Declaration mailed as "cautionary measure" in light of *Jordan* decision. Doc. 31, Exs. O & P.
GMC Yukon	10/11/2011; Doc. 31, Ex. Q	5/17/2012: Declaration mailed after processing rejection form. 2/13/2013: new lienholder added. 5/8/2013: another lienholder added. Doc. 31, Exs. R, S & T.

For each of the above policies, the policy number changed in the new Declarations mailed out by adding or changing a letter at the end of the denominated policy number. For example, at the time the rejection policy was signed, the Harley Davidson policy was denominated #073 3740-0E02-31. After the rejection form was processed by State Farm underwriting, the letter "A" was added to the policy number for the Declaration mailed out to Plaintiff, which then became #073 3740-0E02-31A.

[1] For the Honda, Nissan, Corvette, Dodge Ram and GMC Yukon, subsequent declarations also mailed out "as a cautionary measure" to ensure compliance with the Jordan decision for the policies underwriting insurance for the Honda Prelude, the Nissan Versa, the Corvette, and the Dodge Ram. See, e.g., Doc. 31 (Husser Aff., ¶¶ 23, 32 & 46). Defendant does not explain why these Declarations were sent out, when their position is that the first Declarations sent out after processing the rejection forms complied with the *Jordan* decision. However, these subsequent Declarations hold no independent significance for purposes of the Court's analysis here, since the validity of the rejection forms signed by Mr. Quintana rides on whether there was a policy change between the date the rejection was signed and the date of the accident.

Plaintiff does not dispute the above information, but does dispute Defendant's SOF 5, 10, 15, 20, 25, 30 and 35 collectively, inasmuch as those facts imply that the signed rejection forms constituted valid rejections of UM coverage. Plaintiff also disputes SOF 7, 8, 12, 13, 17, 18, 22, 23, 27, 28, 32, 33, 27 and 38 collectively, and with no explanation as to his reason. The latter group of facts, as presented by Defendant, all state that the rejection forms described in those facts for the various vehicles constitute a valid rejection of UM coverage under New Mexico law, and also that no changes in those policies occurred from the signing of the rejection forms to the day of the accident. Defendant is correct that Plaintiff offers no evidence to create a material factual dispute to those SOF listed, but in all fairness, Defendant's SOF themselves set forth legal conclusions rather than facts. Thus, Defendant's SOF do not call for responsive facts but raise questions about the legal significance of those facts.

Plaintiff contends that Defendant's motion for summary judgment should be denied based on three arguments: (1) page two of the rejection form was not present when Mr. Quintana signed the forms; (2) the menu of coverage options is confusing; and (3) State Farm failed to obtain new rejections when the change code at the end of the policy number evolved.

A. Whether Page Two of Rejection Form Was Presented to Plaintiff

Some context is helpful here. Prior to the *Jordan* decision, State Farm used a single-page document for the rejection form. Because of the additional requirement imposed by *Jordan* that, at point of sale, an insurer must provide the insured with a menu of premiums for UM coverage, State Farm revised both its rejection form and its declarations pages to include such a menu. That menu of coverage options is "page 2" of the State Farm rejection form. *See* Doc. 31 (page 2 of Exs. A, C, E, H, K, N, and Q).

Plaintiff contends that State Farm did not comply with New Mexico law by not providing him with this menu of coverage options and corresponding premium costs for each available level of stacked coverage, as required under *Jordan*. He claims that State Farm cannot satisfy its burden of proving that it complied with this requirement, because he does not recall seeing Page 2 of State Farm's two-page rejection form when he signed it. As evidence of this asserted deficiency, Plaintiff offers the deposition testimony of State Farm agent Michelle Herrera, who was present when Mr. Quintana signed Page 1 of State Farm's rejection form, and purportedly testified that she did not remember and could not say with certainty that Plaintiff was actually shown Page 2 when he signed Page 1 in 2011. Doc. 36-1 (Herrera Dep. at 12-13:12-4).

However, as Defendant points out, this is not an accurate representation of Ms. Herrera's testimony. What Ms. Herrera said was that if State Farm had implemented the use of Page 2 of its rejection form at the time Plaintiff signed the rejections, then Page 2 would have been present, although she could not remember the exact date on which State Farm converted to the two-page form:

Q: So as we sit here today, you cannot say that Mr. Quintana had page 2, which is 2c, in front of him whenever he was signing page 2b; is that correct?

A: If it—if it did exist at the time, he would have had to have seen it, if it was there. Like I say, I can't remember when this page itself came out.

Herrera Deposition at 12:14-21. Thus, Ms. Herrera's testimony cannot be characterized as simply saying that page 2 may have been missing when Plaintiff signed the rejection form, but rather, if the form *did* exist at the time, Mr. Quintana would have seen it. In addition to misrepresenting the point of Ms. Herrera's testimony, Plaintiff also fails to include in the deposition exhibit a copy of Ms. Herrera's Correction Page in which she clarified her line of testimony by stating: "[i]f we were using the new forms at that time, the second page would have

been there." Reply, Ex. 1. Plaintiff also fails to acknowledge the deposition testimony of Nelson Husser, State Farm's Underwriting Team Manager in New Mexico and 30(b)(6) designee. Mr. Husser testified that "off the top of my head," the switch to the two-page form occurred on July 25, 2011, and that after this implementation, the New Mexico agents no longer had access to the old forms. After July 25, 2011, the computer would automatically print out only the two-page form. Reply, Ex. 2 at 51-53. Following his deposition, Mr. Husser checked company records and confirmed that the official implementation date was July 24, 2011, which fell on a Sunday, making July 25 the first business day after implementation. Doc. 40, Suppl. Husser Aff.

A party can obtain judgment as a matter of law in its favor "only if the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion." *Gillogly vs. GE Capital Assurance*, 430 F.3d 1284 (10th Cir. 2005) (quoting *Conoco Inc. v. ONEOK, Inc.*, 91 F.3d 1405, 1407 (10th Cir. 1996)). In this case, the evidentiary record conclusively establishes that the menu of coverage options, page 2, was present and shown to Plaintiff when he rejected UM coverage. As depicted in dates listed in the table above (none of which are disputed by Plaintiff), all of the rejection forms were signed by Mr. Quintana well after the time State Farm started using the 2-page forms which were implemented to come into full compliance with *Jordan*. Other than claiming a lack of recall which is insufficient to establish a material dispute of fact, Plaintiff offers no evidence to challenge the evidence presented by Defendant that page 2 of the rejection form *was* presented to Plaintiff at the time it was signed.

B. Whether the Menu of Coverage Options is Confusing

Plaintiff also claims that even if page 2 of the rejection form meets the requirements of *Jordan*, it is confusing to the insured. However, Plaintiff does not point to specific portions of the forms that are confusing, or otherwise explain what is confusing. The menu of UM coverage options is included in Exhibits A, C, E, H, K, N, and Q to the Husser Affidavit, Doc. 31. The form is a table of available coverage with corresponding premiums. The amount of the premium for UM coverage depends on where the insured's car is garaged, and the insured's choice of collision coverage. The six columns (three choices of coverage under each of two territory choices) show the premium charges for every available limit of UM coverage depending on those two factors. The State Farm agent pre-checks the appropriate box corresponding to the column which shows the insured's selection of collision coverage and the territory where the vehicle is garaged. The only thing left for the insured to do is look down the one column that has been pre-checked to see the premium charge for every level of UM coverage offered by State Farm. There is nothing confusing about the form. In fact, it can be grasped more easily by viewing it rather than by reading the Court's description of the form. Plaintiff's claim of generic confusion is not specific enough to raise any dispute of fact regarding whether the form is in accordance with New Mexico law.

C. Whether Changes Occurred in Policies That Required New Rejection Forms

The *Jordan* decision requires that the insurer incorporate an insured's rejection of UM coverage into the policy such that the insured may fairly reconsider his decision. 149 N.M. at 169. As mentioned previously, the policy numbers at issue were modified by the addition of a letter at the end of the number when each new Declaration was mailed out to the insured. For the Honda Prelude, the Nissan Versa, Corvette and Dodge Ram, the change code occurred as a result of the processing of Plaintiff's rejection form. For example, at the time Mr. Quintana

signed the rejection form for the Honda Prelude, the policy number was denominated as 064 4057 E18-31A. The rejection form was processed by State Farm underwriting two days later, which caused the change code at the end of the policy number to evolve from A to B: 064 4057 E18-31B. Several months later, when State Farm underwriting processed a new Declaration for the Honda Prelude, with no changes to the policy itself, the change code evolved from B to C: 064 4057 E18-31B. See Doc. 31, Exs. E, F & G. The policies for the Nissan Versa, Corvette and Dodge Ram followed suit.[2]

Plaintiff argues that changes to the policy number, specifically the change code at the end of the policy, created a new policy which required State Farm to obtain new rejections of UM coverage. He points to New Mexico law which states that a rejection only remains valid for *renewal* of a policy, relying on NMSA 66-5-301(C) which provides that UM coverage "need not be provided in or supplemental to a *renewal policy* where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer" (emphasis added). Thus, Plaintiff is arguing that between the time he signed the rejection form and the time of the accident, the policies in question were not renewed, but had changed and that change required a new rejection form to be signed.

New Mexico law employs a fact-based inquiry to determine whether a material change occurred to a policy which would require the insurer to obtain a new rejection of UM coverage. In *Vigil v. Rio Grande Ins. of Santa Fe,* plaintiffs (relying on the same New Mexico statute as is Plaintiff in this case) asserted that the automobile policy at issue became a "new" policy rather than a renewal policy each time they added vehicles or made changes affecting the premiums to

[2] As Defendant notes, this issue does not apply to the BMW policy. In early 2013, the Quintanas applied for a new policy for their BMW, and signed a rejection of UM coverage as part of the application process. The policy that was issued incorporated this rejection, and was denominated as 085 3074-A25-31. This denomination remained the same until the accident. *See* Doc. 31, ¶¶ 14-18 (and supporting exhibits).

be paid on the policy. 124 N.M. 324, 329 (Ct.App. 1997). The New Mexico Court of Appeals rejected that argument, and held that changes to a policy must be material enough to require new rejection of UM coverage, and that "the addition of vehicles or changes made which may affect the premiums owed under an insurance policy do not constitute changes such that a new policy is created." 124 N.M. at 330.[3] The court in *Vigil* considered that these changes did not create a new contract, but "merely amounted to a continuation of the original policy." *Id.*

Here, six of the seven policies had no changes whatsoever between the date the rejection was signed and the date of the subject accident. Plaintiff does not dispute this. The only policy which had any changes at all between the execution of the rejection form and the date of the accident was the Yukon policy. Between the time the rejection was signed and the accident, there were two changes of lienholder which were processed by State Farm. Husser Aff., Doc. 40, ¶ 53. Under New Mexico law, this does not come close to a change that would create a new policy, or cause a change in the policy requiring a new rejection form. Plaintiff merely stands on ceremony, insisting that the policies in place at the time of the accidents were *replacements* and not *renewals* of previous policies, but offers no evidence or law which would suggest that the policies which existed at the time of the accident were anything other than renewals or continuations of the previous policies.

Plaintiff also contends that changes to the policy number, specifically the change code at the end of the number, created a new policy requiring State Farm to obtain new rejections of UM

[3] As Defendant notes, other jurisdictions also follow a fact-based or materialiaty test." *See Iverson v. State Farm Mut. Ins. Co.*, 256 P.3d 222 (S.Ct. Utah 2011) (new policy exists "when the insurer and the insured enter into a new contractual relationship, or if changes are made to the terms of an existing insurance contract that materially alter the levels of risk contained in the contract); *Koop v. Safeway Stores, Inc.*, 831 P.2d 777 (Ct.App.Wash.1992) (changes to policy must be sufficiently material to support conclusion that a new, as opposed to a renewal, policy was issued).

coverage. According to Plaintiff, Mr. Husser's deposition statements support this contention.[4] Defendant concedes that State Farm mailed out a "new policy" to Plaintiff with a new change code, referring to a new physical document that was created. However, the creation of a new physical document for the same policy does not have the same meaning as "new policy" under New Mexico insurance law. It is undisputed that the policy numbers were modified by change codes at the end of the numbers, but it is also undisputed that no changes were made to the policies in question which rendered them new policies under New Mexico law. In fact, Mr. Husser also testified that changes in the change code at the end of the policy number "do not result in a new policy, but rather show that a change to the policy has occurred and/or that a new Declarations was printed." Husser Aff., Doc. 31, ¶ 8. Ms. Herrera, the State Farm agent who handled the Quintana account, also testified that whenever there is a change to the policy, the change code goes up a letter:

> a change could be a name change, an address change, "anytime a change is done and they require a [UM] form, it goes up a letter. It's the same policy, no different policy number. It just goes up a letter.

Herrera Dep., Doc. 35 at 15.[5] Thus, none of the changes that occurred which caused the change code at the end of the policy number (such as the processing of Plaintiff's rejection form or the addition of new lienholders) caused a new policy to be issued that would require new rejection forms under applicable New Mexico law.

Plaintiff offers no factual dispute to challenge Defendant's facts concerning the changes that occurred to the policies, to rebut Defendant's evidence that Mr. Quintana received information regarding corresponding premium charges for each level of UM coverage, as

[4] Plaintiff cites to Mr. Husser's deposition at page 16, line 5-9, *see* Doc. 36 at 7, but did not attach Mr. Husser's deposition as an exhibit to the response. They are also not included in Plaintiff's briefs underlying his own motion for summary judgment; Mr. Husser's deposition excerpts in that motion are from pages 70-73, and 30-33.

[5] This portion of Ms. Herrera's deposition is attached to State Farm's response to Plaintiff's motion for summary judgment.

required under Jordan. Plaintiff also offers no factual dispute which would suggest that the rejection forms he signed were terminated or were no longer valid because he has not shown any changes were made to the policies at issue that would require new rejection forms. Thus, Defendant is entitled to summary judgment. Summary judgment may properly be granted when the facts themselves are not in dispute, but only the legal effects of the facts presented for determination. *See Rummel v. Lexington Ins. Co.*, 123 N.M. 752, 758 (1997). In this case, the legal significance of the undisputed facts supports Defendant's position in that the change codes that occurred to the policies at issue do not require new rejection forms to be signed by the insured. Additionally, as a matter of law, the processing of the policies to include Plaintiff's rejection forms and the change in lienholders for the Yukon, do not result in new policies requiring new rejections. Therefore, Defendant is entitled to summary judgment.

III. Plaintiff's Motion for Summary Judgment

The relevant facts have already been presented through the Court's analysis of Defendant's motion for summary judgment. Plaintiff moves for summary judgment on two grounds: (1) State Farm did not inform Plaintiff about UM premium costs on any of his policies in a meaningful way that it met the requirements of *Jordan* and (2) even assuming the initial rejections are sufficient, those rejections terminated and new rejections were required when the subsequent policies *replaced* the original policies that were in effect when the rejection forms were signed.

Defendant does not dispute Plaintiff's SOF 1, 2, 4 and 5. SOF No. 1 states that when State Farm uses the words "renewal" and "replaced," they have different meanings. SOF No. 2 states that Defendant agrees that a "renewal" is simply a continuation of insurance for another period of time. SOF No. 4 states that the letter at the end of a State Farm auto policy does not

change simply because the policy was renewed. Plaintiff's SOF No. 5 states that where a Policy B replaces a Policy A, State Farm agrees that Policy B is not a renewal of Policy A. These facts, however, turn out to be irrelevant to the central question here, which is whether State Farm was required to obtain new rejection forms from Plaintiff when the code changes occurred.

Defendant does dispute Plaintiff's SOF 3 and 6. SOF 3 states that the change of the letter at the end of a State Farm auto policy number "indicates a change to the original policy resulting in the issuance of a new policy," based on the State Farm Policy Number Guide (Ex. 3). SOF No. 6 states that "[a]ll of Plaintiff's policies with State Farm at the time of the subject crash were different policies than those policies on which Plaintiff had purportedly rejected UM [coverage]." However, the evidence presented by Plaintiff for SOF No. 6 does not state that any of these policies were different policies; Plaintiff refers to the set of stipulations by the parties on the policy numbers for each of the vehicles. Mere reference to the policy numbers has no bearing on whether the policies that existed at the time of the accident are different policies from the original polices on which the rejection forms were signed. Thus, SOF No. 6 is immaterial and irrelevant.

It should be clear where the Court's analysis is going, given the Court's previous analysis on these issues in the context of Defendant's summary judgment motion. The same facts are in play and the same law governs. Plaintiff's motion relies entirely on mischaracterization of the testimony and evidence, and seeks to prevail on technicalities for which there is no support—namely, the definitions of "replacement policies" and "new policies."

I. Whether State Farm's Rejection Forms Comply With *Jordan* Requirements

Plaintiff first argues that State Farm did not inform him about UM premium costs on any of his policies in a meaningful way that met the requirements of *Jordan*. Plaintiff does not state

exactly what was missing in an explanation of the UM premium costs, but instead states that "[e]ven the State Farm agent that had Plaintiff sign the purported rejections stated that insureds are routinely confused by the premium page State Farm uses on its rejection forms." Doc. 34 at 6. This is not much to go on. First, there is no deposition testimony to support this statement. Second, it would probably be safe to say that insureds are routinely confused by most insurance contract documents, but this does not necessarily mean that documents which may be confusing are in violation of New Mexico law. Third, in the discussion included in Defendant's summary judgment motion, the Court has already dispensed with the notion that the menu of coverage options presented to the Quintanas was confusing. Plaintiff offers no argument or evidence that would entitle it to summary judgment on this issue.

II. Whether New Rejection Forms Were Required

Plaintiff contends that the initial rejections terminated and new rejections were required when the subsequent policies *replaced* the original policies that were in effect when the rejection forms were signed, based on the fact that the change code at the end of the policy changed between the time Plaintiff signed the rejection form and the date of the accident.

Plaintiff contends that rejection remains valid only when policy is renewed, pursuant to NMSA §66-5-301(C), which provides that UM coverage need not be provided in a renewal policy where the named insured has rejected such coverage. While this statement is true, it is not dispositive because it overlooks the obvious. State Farm does not argue that the policies that existed at the time of the accident were "renewed," but rather they were the *same* policies that existed when Mr. Quintana first signed the rejections forms. Also, State Farm does not dispute that use of the words "renewal" and "replacement" have different meanings, but does dispute that issuance of a "replacement" policy means that new rejections are required. The best

Plaintiff can do on this issue is his SOF No. 3, which refers to the State Farm Policy Number Guide:

> In the sample, change code A indicates changes to the original policy have resulted in issuance of a new policy. If a second such change occurs, change code B is assigned.

Ex. 3. However, as noted previously in the Court's discussion on Defendant's motion for summary judgment, State Farm defines "new policy" in that context as a *new physical document* that was mailed to the insured. *See* Deft's Reply to Deft's Mot. for Sum. J, Doc. 41 at 7, n.3. Moreover, State Farm's use of the term "new policy" when referring to a new physical document that is issued when a change code occurs on the policy does not lead to the conclusion that the policy contains new contractual duties and obligations, as defined under New Mexico law. Thus, Plaintiff's SOF No. 3 would not entitle Plaintiff to summary judgment, even if it were undisputed. Plaintiff's SOF No. 4 states that the letter at the end of a State Farm auto policy "does not change simply because the policy was renewed." This statement is undisputed but it is not material or relevant to the central question here because it does not explain what a change code *does* mean or whether a change code in a policy number *does* require a new rejection under New Mexico law.

In presenting evidence and arguments, Plaintiff attributes to Defendant statements or facts which were not made or adopted by State Farm. Because State Farm uses the terms "replacement policy" or "new policy" instead of "renewal policy" to refer to the Declarations that were mailed out with new change codes, Plaintiff contends that Defendant has therefore conceded that the policies existing at the time of the accident were different policies requiring new rejections under NM law. This contention grossly mischaracterizes the actual evidence and testimony. For example, Plaintiff cites to the testimony of Mr. Husser, State Farm's 30(b)(6)

employee, in which Mr. Husser agreed that when State Farm uses the word "renewal," and when State Farm uses the word "replaced," they always have a different meaning. Pltff's SOF No. 1 (undisputed). Plaintiff would have the Court infer from this statement that if a policy is "replaced" and not "renewed," then it must be a "new policy" which requires a new rejection. However, Mr. Husser expressly disagreed that a new rejection form is always required when a policy replaces a prior policy. Doc. 34-1, Ex. 1 at 78:23-25, Ex. 2 at 30-31:21-1.

Plaintiff also ignores Mr. Husser's explanation of "replacement policy." Mr. Husser stated that a replacement policy could be issued in situations where new rejection forms were not necessary, for example, where a dormant policy was reinstated even though it may have a new basic policy number. Ex. 1 at 31:10-22. Mr. Husser also stated that a "replacement policy" can just as easily "mean something as simple as reprinting a DEC ("Declarations") page, or it could mean a change of the vehicle." Ex. 2 at 31-32:24-10. None of these examples would require new rejection forms.

The salient facts are undisputed in this case: the only changes to the policies at issue were to the change codes in the policy numbers upon processing Plaintiff's rejection of UM coverage form and the processing of new lienholders for the Yukon. To suggest that these changes transformed the polices into new contracts which required new rejections (which is exactly what Plaintiff is arguing here) is not only a specious argument, but flies in the face of New Mexico law on this issue. As a matter of law, and based on the undisputed facts, none of these changes require new rejections because there was no change in the contractual relationship between the parties. The policies that were in effect at the time of the accident were the same policies for which Plaintiff had rejected UM coverage on the rejection form.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment to Provide Coverage **(Doc. 33)** is hereby DENIED;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment **(Doc. 32)** is hereby GRANTED.

A Final Judgment shall be entered separately.

UNITED STATES DISTRICT JUDGE