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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

**FRISCO HONNEVK, and BOUALAI  
VONGPHACHANH,**

**Plaintiffs,**

**v.**

**FARMERS NEW WORLD LIFE  
INSURANCE COMPANY,**

**Defendant.**

**No. 1:11-cv-1531 AWI DLB**

**MEMORANDUM OPINION AND ORDER  
ON DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

**Doc. # 22**

In this action for breach of insurance contract, the court previously issued a Memorandum Opinion and Order on July 15, 2013, (the “July 15 Order”) granting Defendant’s motion for summary adjudication in favor of Defendant on Plaintiff’s claim for breach of covenant of good faith and fair dealing. Defendant’s motion for summary judgment on Plaintiff’s claim for breach of contract was continued to allow Plaintiff “to re-submit evidence to support the allegations set forth in Paragraph 42 [of Plaintiffs’ complaint] in accordance with Rule 56(c) of the Federal Rules of Civil Procedure.” The evidence referenced consisted of translated, unsworn written communications from persons who had discovered the body alleged to be that of decedent Somporn Phasavao (“Phasavao”) whose life was insured by a policy with Defendant Farmers

1 New World Life Insurance Company naming Plaintiffs as beneficiaries. The referenced evidence  
2 also pertained to the statements of Lao army personnel who had removed a wallet from the body  
3 which contained identification documents consistent with Plaintiffs' allegations that the body  
4 discovered in Laos was indeed that of Phasavao.

5 On August 3, 2013, Plaintiffs filed a document titled "Plaintiff Resubmits Evidence in  
6 Accordance with Rule 56(c) by Declarations under Penalty of Perjury of Those Individuals Who  
7 Found the Body and Identification as Alleged in Paragraphs 42 & 43." Doc. # 37 (hereinafter,  
8 "Plaintiffs' Resubmission"). Defendant submitted its opposition to Plaintiffs' Resubmission on  
9 August 16, 2013. Also on August 16, 2013, Plaintiffs' attorney, Timothy I. Marks, submitted a  
10 declaration (the "Marks Declaration"), apparently in response to Defendant's objections, setting  
11 forth additional information regarding the conditions under which the Declarations of the  
12 individuals from Laos were obtained. On August 19, 2013, Defendant submitted an objection to  
13 the Marks Declaration.

14 The court incorporates here by reference the factual allegations summarized in its July 15  
15 order and the court's legal standard in determining Defendant's current motion for summary  
16 judgment.

## 17 DISCUSSION

18 The cornerstone of Defendant's motion for summary judgment, insofar as Plaintiff's claim  
19 for breach of contract is concerned, is that Plaintiffs cannot produce *admissible* evidence to  
20 satisfy the requirement of "due proof" of Phasavao's death, and so cannot perfect their claim for  
21 the proceeds of the policy insuring Phasavao's life. As the court's July 15 Order noted, the  
22 emphasis is on the word "admissible" because it is Defendant's central contention that the  
23 admittedly substantial problems with the authentication and hearsay nature of the critical  
24 evidence are, in fact, insurmountable and that Plaintiffs will not be able to provide due proof of  
25 Phasavao's death by admissible evidence at trial.

26 Of significance, the court's July 15 Order made three conclusions of law that have not  
27 been contested by either party. First, the court concluded that under governing California law,  
28 there is no particular type of proof that is required to show "due proof" of death. Second, the

1 term “due proof” is a term that has no special implication as far as the level of proof is concerned.  
2 Thus, the contractual term “due proof of death” means nothing more than proof by a  
3 preponderance of the evidence of death of the insured through admissible evidence. Third, the  
4 court’s July 15 Order concluded that, absent authority to the contrary, a finder of fact could  
5 determine by a preponderance of the evidence that the identity of a dead corpse was that indicated  
6 by documents removed from the body so long as those documents would be sufficient to establish  
7 the identity of the person in possession of them for usual official purposes. See Doc. # 36 at 8:27-  
8 9:12.

9 It is also worth noting that the court’s July 15 Order made it clear that the court’s  
10 interpretation of Rule 56(c)(2) requires that a party who opposes a proffer of evidence in a Rule  
11 56 motion on the basis of its non-admissibility has the burden to show that the evidence “‘cannot  
12 be presented in a form that *would* not be admissible as evidence.’” Doc. # 36 at 8:8-10 (quoting  
13 Rule 56(c)(2) (italics added). The court noted that it routinely waives issues of hearsay and  
14 authentication for purposes of determining the existence of an issue of material fact unless the  
15 objecting party can show that the issues of hearsay and authentication cannot be overcome. The  
16 court also recognized that Rule 56(c)(4) does require that evidence of a fact be in the form of an  
17 “‘affidavit or declaration used to support or oppose a motion [. . .] [which is] made on personal  
18 knowledge, set[ting] out facts that would be admissible in evidence, and show[ing] that the affiant  
19 is competent to testify on the matters stated.’” Doc. # 36 at 9:28-10:3 (quoting Rule 56(c)(4).

20 Defendants rely extensively on Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.,  
21 896 F.2d 1542 (9th Cir, 1990), a commonly cited case that illuminates the Ninth Circuit’s  
22 approach to the kinds of evidence that are admissible to support a Rule 56 motion. That opinion  
23 held, in pertinent part:

24 It is well established that unauthenticated documents cannot be considered  
25 on a motion for summary judgment. Canada v. Blain's Helicopters, Inc.,  
26 831 F.2d 920, 925 (9th Cir.1987). To be considered by the court,  
27 “documents must be authenticated by and attached to an affidavit that  
28 meets the requirements of [Rule] 56(e) and the affiant must be a person  
through whom the exhibits could be admitted into evidence.” Id.; see also  
10A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure §  
2722 at 58–60 (2d ed. 1983). A document which lacks a proper foundation  
to authenticate it cannot be used to support a motion for summary

1 judgment. Canada, 831 F.2d at 925; Hamilton v. Keystone Tankship Corp.,  
2 539 F.2d 684, 686 (9th Cir.1976); United States v. Dibble, 429 F.2d 598,  
3 601–602 (9th Cir.1970).

4 Id. at 1550-1551.

5 However, application of the rule set forth in Hal Roach Studios is tempered by  
6 consideration of the nature of the evidence that is being asserted. In Fraser v. Goodale, 342 F.3d  
7 1032 (9th Cir. 2003) the Ninth Circuit clarified that the focus of concern in determining the  
8 admissibility of evidence in the context of a Rule 56 motion is not the form of the evidence, it is  
9 the admissibility of the evidence at trial. See id. at 1036 (“[a]t the summary judgment stage, we  
10 do not focus on the admissibility of the evidence’s form. We instead focus on the admissibility of  
11 its contents”). In Hal Roach Studios, the evidence in question was a document – an S-1  
12 Registration Statement that was purported to have been filed with the Securities and Exchange  
13 Commission – that was evidence of ownership of certain film rights. Hal Roach Studios, 896  
14 F.2d at 1551. However, the evidence being proffered here is not a document, it is the testimony  
15 of a witness.

16 Keeping in mind that the instant motion is for summary judgment and is not a motion for  
17 admissibility of evidence per se, the court finds it only needs to address the evidentiary status of  
18 one of the four proffered declarations; specifically, the declaration of Kham-Ouane Phan-Nya-  
19 Pheng (hereinafter, the “Pheng Dec.”). The Pheng Dec. makes reference to a statement made on  
20 June 22, 2009. The 2009 statement, according to the Pheng Dec., was made in Laotian “and  
21 includes a photograph of myself on page number 5.” Doc. # 37 at 4:20-21. Pheng declares that  
22 he reviewed the original written statement and declares that it is a true and correct statement and  
23 that a copy of that statement “is attached to this declaration.” Doc. # 37 at 4:23-24. Probably  
24 inadvertently, the original statements of Pheng or the other three declarants are not attached to the  
25 current declarations. Somewhat mysteriously, Plaintiffs’ attorney states in his declaration that  
26 following the court’s July 15 Order, Plaintiffs’ investigator Paul Sayvong, was dispatched to Laos  
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1 taking with him the declarants' "statements in [the] Laotian language which were previously  
2 submitted with our original response to this motion." Doc. # 40 at 5-6. The court notes that, as of  
3 this time, it has been unable to locate the referenced statements in the Laotian language or the  
4 English translations.

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6 Although the copies of the original statement in Laotian and their translations that should  
7 have been attached to the submitted declarations, but were not, and that the court should be able  
8 to find in the court's Docket Report, but cannot, may eventually be important to the successful  
9 litigation of Plaintiffs' claims; their absence is not critical to the disposition of the instant motion  
10 for summary judgment.

11 Of critical importance, the Pheng Dec. states:

12  
13 I searched the pockets of the corpse [that had been found on patrol] and  
14 found several documents in English, we covered his face and took turns  
15 watching the body. There was a total of seven documents in English found  
16 in the pockets. These documents appeared to be some form of  
17 identification and a \$100.00 bill. I sent these to the central commanding  
18 office. A copy of those documents are attached to this declaration as  
19 Exhibit 2.

20 Doc. 37 at 5:1-7. A page labeled "Exhibit 2" is attached to the Pheng Dec. and appears to consist  
21 of three identification documents including a Social Security Card and a California Drivers  
22 License. The Pheng Dec. also states that the declarant is "willing to come before this court to  
23 testify under oath what I observed and actions taken regarding this matter." Id. at 12:11-12.

24 Fundamentally, the Pheng Dec. serves to inform the court of the existence of a witness  
25 who, if called to testify, is willing to appear and to testify that he saw the corpse, he removed the  
26 identifying documents and that the photographs taken and submitted are photographs of the  
27 documents he removed from the corpse. Pursuant to Fraser, the court focuses not on the  
28 authentication problems presented by the lack of certification of translation. Rather, the focus is  
on the information that can be presented *at trial*. Presuming that Pheng testifies at trial, the  
contents of his declaration or of the statement originally made by him are irrelevant except for

1 impeachment purposes or for refreshment of recollection. There would be no problems with  
2 interpretation of Laotian writing because the testimony would be oral and interpreted by a court-  
3 certified interpreter.

4 The factual situation here is analogous to that present in Fraser. In Fraser, the  
5 admissibility of a personal diary for the truth of the statements made therein was challenged by a  
6 party moving for summary judgment. The court noted that the contents of the diary were “mere  
7 recitations of events within [the plaintiff’s] personal knowledge and, depending on the  
8 circumstances, could be admitted into evidence at trial in a variety of ways.” Fraser, 342 F.3d at  
9 1037. Here, as in Fraser, the document that Defendant is trying to exclude on foundational  
10 grounds is merely a personal account of things that can be attested to by Pheng at trial.  
11 Alternatively, Plaintiffs could cure the foundational deficits that Defendant contends exist and  
12 present the written statements as evidence upon proper authentication. With regard to the Pheng  
13 Dec. itself, Rule 56(c) requires only that “an affidavit or declaration used to support or oppose a  
14 motion must be made on personal knowledge, set out facts that would be admissible in evidence,  
15 and show that the affiant or declarant is competent to testify on the matters stated.” Id. There is  
16 no requirement that the Pheng Declaration itself be admissible as evidence or that it meet any  
17 particular foundational requirement. The purpose of a declaration such as the Pheng Dec. is  
18 merely to provide a basis upon which the court can find that a proffered fact, in this case the fact  
19 that the identifying documents to be submitted at trial were removed from the body of a dead  
20 person, can be supported at trial by testimonial or other competent evidence.

21 As noted previously, the motion before the court is a motion for summary judgment, not a  
22 motion to exclude evidence. The court finds that the Pheng Dec. has been submitted in proper  
23 form for purposes of a motion under Rule 56(c) and that it sets forth facts that may be admissible  
24 at trial. The court also finds that the facts set forth in the Pheng Dec. are sufficient to satisfy  
25 Plaintiffs’ burden under summary judgment practice to show that a genuine issue of material fact  
26 exists, Matushia Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); and that the  
27 evidence is such that might affect the outcome of the suit under governing law. Anderson v.  
28 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For this reason, Defendant’s motion for summary

1 judgment as to Plaintiffs' claim for breach of contract will be denied.

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3 THEREFORE, for the reasons discussed above, it is hereby ORDERED that Defendant's  
4 motion for summary judgment as to Plaintiffs' claim for breach of insurance contract is DENIED.

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6 IT IS SO ORDERED.

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8 Dated: December 20, 2013

  
SENIOR DISTRICT JUDGE

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