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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LOUIS VIGNOLA, individually and as
guardian ad litem on behalf of CAROLYN
VIGNOLA AND GABRIEL VIGNOLA,
and TAMARA HARLESS, Special
Administrator on behalf of ESTATE OF
NANCY MARIE OUELLET,

Plaintiffs,

v.

CHARLES ALFRED GILMAN, JR.;
AUTO-OWNERS INSURANCE
COMPANY; AND MUTUAL OF
ENUMCLAW INSURANCE COMPANY,

Defendants.

2:10-CV-02099-PMP-GWF

ORDER

Presently before the Court is Plaintiffs' Motion for Summary Judgment (Doc. #95), filed on May 8, 2012. Plaintiffs filed an Errata (Doc. #100) on May 23, 2012. Defendant Auto-Owners Insurance Company filed an Opposition (Doc. #105) on June 1, 2012. Plaintiffs filed a Reply (Doc. #111) on June 15, 2012.

Also before the Court is Plaintiffs' Motion for Leave to File an Amended Complaint (Doc. #97), filed on May 9, 2012. Defendant Charles Gilman, Jr. filed an Opposition (Doc. #101) on May 29, 2012. Defendant Auto-Owners Insurance Company filed an Opposition (Doc. #102) on May 29, 2012. Plaintiffs filed Replies (Doc. #107, #108) on June 7, 2012.

Also before the Court is Defendant Auto-Owners Insurance Company's Cross-Motion for Summary Judgment (Doc. #98), filed on May 10, 2012. Plaintiffs filed an Opposition (Doc. #103) on June 1, 2012. Defendant Auto-Owners Insurance Company

1 filed a Reply (Doc. #110) on June 14, 2012.

2 Also before the Court is Plaintiffs' Motion to Certify Question to the Supreme
3 Court of Colorado (Doc. #109), filed on June 12, 2012. Defendant Auto-Owners Insurance
4 Company filed an Opposition (Doc. #113) on June 27, 2012. Plaintiffs filed a Reply (Doc.
5 #117) on July 6, 2012.

6 Also before the Court is Defendant Auto-Owners Insurance Company's Request
7 for Hearing (Doc. #114), filed on June 28, 2012. Plaintiffs filed an Opposition (Doc. #115)
8 on July 6, 2012. Defendant Auto-Owners Insurance Company filed a Reply (Doc. #118) on
9 July 16, 2012.

10 **I. BACKGROUND**

11 This case arises out of a June 22, 2010 automobile accident caused by Defendant
12 Charles Gilman ("Gilman"), which resulted in the death of Nancy Ouellet ("Ouellet") and
13 the destruction of the motorcycle she was riding. (Def. Auto-Owners' Cross-Mot. Summ. J.
14 (Doc. #98), Ex. A ["Hart Aff.,"] at 2; Stip. of Liability (Doc. #76).) Plaintiffs are Ouellet's
15 heirs and estate representative. (Pet. for Removal (Doc. #1), Ex. A; Hart Aff., Ex. A-1.)

16 At the time of the accident, Ouellet was insured by Defendant Auto-Owners
17 Insurance Company ("Auto-Owners"). (Hart Aff. at 2.) Ouellet's policy with Auto-Owners
18 provided underinsured motorist ("UIM") coverage with limits of \$500,000. (Id.)

19 On August 9, 2010, Plaintiffs' counsel sent Auto-Owners a letter advising that
20 the law firm was representing Ouellet's heirs and estate, and offering to settle for the UIM
21 policy limits. (Hart Aff., Ex. A-1.) The letter acknowledged a prior offer by Auto-Owners
22 to settle the property damage to Ouellet's motorcycle for \$2,500, but Plaintiffs' counsel
23 requested Auto-Owners confirm the policy limits for property damage, as Ouellet's
24 motorcycle was worth substantially more than \$2,500. (Id.)

25 On August 20, 2010, Auto-Owners responded by providing the declarations page
26 from Ouellet's policy showing \$500,000 UIM and \$2,500 property damage limits. (Hart

1 Aff., Ex. A-2.) Auto-Owners declined to tender UIM policy limits, indicating that Auto-
2 Owners needed additional information, such as documentation establishing that Plaintiff
3 Louis Vignola was the representative of Ouellet's estate; that Gilman was responsible for
4 the accident; the limits of Gilman's liability insurance; whether Louis Vignola was still
5 married to Ouellet at the time of her death; the age of Ouellet's children, Plaintiffs Carolyn
6 and Gabriel Vignola; and Ouellet's wage information. (Id.) Auto-Owners indicated it was
7 seeking to obtain Ouellet's application for insurance to verify the \$2,500 property damage
8 limits. (Id.)

9 On September 7, 2010, Plaintiffs' counsel sent Auto-Owners a letter which
10 included an attachment showing Gilman's limits of liability were \$100,000 and a marriage
11 certificate for Louis Vignola and Ouellet. (Hart Aff., Ex. A-3.) The letter also provided the
12 birth dates for Carolyn and Gabriel Vignola. (Id.) Plaintiffs' counsel stated that payment of
13 the UIM benefits was "overdue." (Id.) On September 14 and 23, 2010, Plaintiffs' counsel
14 sent Auto-Owners two more letters claiming payment was overdue. (Hart Aff., Exs. A-4,
15 A-5.)

16 On September 27, 2010, Gilman's insurer offered to settle Plaintiffs' claim
17 against Gilman for the \$100,000 policy limits for wrongful death under Gilman's policy.
18 (Hart Aff., Ex. A-6.) Gilman's insurer also offered to pay \$16,388.64 for property damage
19 to the destroyed motorcycle. (Id.) Plaintiffs did not accept this offer. (Def. Auto-Owners'
20 Cross-Mot. Summ. J., Ex. B.)

21 On September 29, 2010, Auto-Owners responded to Plaintiffs' counsels' prior
22 letters demanding payment of the UIM benefits. (Hart Aff., Ex. A-7.) Auto-Owners
23 acknowledged receiving proof of Gilman's limits of liability and confirmed that Ouellet's
24 policy insured only \$2,500 in property damage. (Id.) Auto-Owners thus offered to settle
25 the property damage claim for \$2,500. (Id.)

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1 Auto-Owners also indicated that it needed to determine who was entitled to
2 payments of any coverage under Ouellet's policy once UIM benefits were triggered. (Id.)
3 However, Auto-Owners denied it delayed payment in this matter, stating that UIM benefits
4 had not yet been triggered because Gilman's liability limits had not been exhausted by
5 judgment or settlement. (Id.) Auto-Owners cited to section 2.e of Ouellet's policy, which
6 reads as follows:

7 With regard to an underinsured automobile, there is no coverage under
8 this endorsement until the limits of liability of all bodily injury liability
9 bonds and insurance policies applying to the underinsured automobile
and its operator have been exhausted by payment of judgments or
settlements.

10 (Id. (emphasis omitted).)

11 Auto-Owners also reiterated that it needed to determine who had authority to act
12 on behalf of Ouellet's estate and her children to ensure payment to the proper parties once
13 the UIM benefits were triggered. (Id.) Auto-Owners indicated it could not rely on a
14 Canadian Automatic Oath Statement designating Louis Vignola as the representative of
15 Ouellet's estate because Auto-Owners could not be sure of the statement's authenticity or
16 its applicability in the United States. (Id.) Auto-Owners thus requested proof as to the
17 court-appointed personal representative of Ouellet's estate and court approval of any
18 guardian or settlement authority for Ouellet's children. (Id.) Auto-Owners also requested
19 clarification as to whether Ouellet and Louis Vignola were still married at the time of the
20 accident, as Louis Vignola had described himself as Ouellet's ex-husband and the death
21 certificate indicated Ouellet was divorced. (Id.) Auto-Owners also asked for confirmation
22 of Ouellet's wages. (Id.)

23 On October 5, 2010, Plaintiffs' counsel responded and requested a copy of the
24 entire policy, rather than excerpted provisions. (Hart Aff., Ex. A-8.) Counsel also indicated
25 they already had provided the marriage certificate, death certificate, and Automatic Oath
26 Statement. (Id.) Counsel contended this information was sufficient to evaluate the claim,

1 but requested further direction if more information was needed. (Id.)

2 Auto-Owners responded on October 13, 2010, indicating that if Ouellet was
3 making approximately \$120,000 as Plaintiffs' counsel previously had represented, then the
4 UIM policy limits would be implicated. (Id.) Auto-Owners thus requested documentation
5 of Ouellet's wages. (Id.) Auto-Owners again asserted that UIM benefits were not triggered
6 under Ouellet's policy unless and until Gilman's liability limits were exhausted through
7 judgment or settlement. (Id.) Auto-Owners indicated that the only issue that would remain
8 once UIM coverage was triggered was to whom benefits should be paid, an issue that was
9 unclear given uncertainty about Ouellet's marital status, who was the estate's personal
10 representative, and who had settlement authority for the children. (Id.)

11 The parties thereafter exchanged a series of letters in which they disputed the
12 promptness of Auto-Owners' response and the completeness of information provided by
13 Plaintiffs' counsel. (Id.) Auto-Owners ultimately paid the \$500,000 UIM policy limits to
14 Carolyn and Gabriel Vignola on January 23, 2012. (Hart Aff. at 3.) At the time the
15 summary judgment motions were filed, Plaintiffs had not reached a settlement or obtained a
16 judgment against Gilman, although the parties stipulated as to Gilman's liability, and only
17 the question of damages remains as to Defendant Gilman. (Def. Auto-Owners' Cross-Mot.
18 Summ. J., Ex. B; Stip. of Liability.)

19 Plaintiffs now move to amend their Complaint to add Colorado statutory claims
20 following this Court's ruling that Colorado law applies in this action. Plaintiffs also move
21 to add a claim against Gilman for enforcement of a purported settlement of the property
22 damage claim. Plaintiffs move for summary judgment on their claims against Auto-
23 Owners, contending Auto-Owners breached the policy and acted in bad faith by failing to
24 promptly pay UIM benefits.

25 Defendant Gilman opposes amendment, arguing amendment is untimely and the
26 Court already has resolved the issue regarding the purported settlement of the property

1 damage claim. Defendant Auto-Owners also opposes both of Plaintiffs’ motions and cross-
2 moves for summary judgment. Auto-Owners contends that amendment is untimely and
3 would be futile. Auto-Owners also argues it is entitled to summary judgment because under
4 section 2.e of Ouellet’s policy, UIM benefits were not triggered until Gilman’s limits of
5 liability were exhausted by judgment or settlement, a condition which still has not been
6 satisfied.

7 **II. PLAINTIFFS’ MOTION TO AMEND COMPLAINT (Doc. #97)**

8 Where a party seeks to amend a pleading after the pretrial scheduling order’s
9 deadline for amending the pleadings has expired, the moving party must satisfy the stringent
10 “good cause” standard under Federal Rule of Civil Procedure 16, not the more liberal
11 standard under Rule 15(a). AmerisourceBergen Corp. v. Dialysist W., Inc., 465 F.3d 946,
12 952 (9th Cir. 2006); see also Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-08
13 (9th Cir. 1992) (noting once a district court files a pretrial scheduling order under Rule 16
14 establishing a timetable for amending pleadings, that rule’s standards control). Unlike Rule
15 15(a)’s liberal amendment policy, which focuses on undue delay and prejudice to the other
16 party, Rule 16(b)’s “good cause” standard centers on the moving party’s diligence.

17 Johnson, 975 F.2d at 609. A “district court may modify the pretrial schedule ‘if it cannot
18 reasonably be met despite the diligence of the party seeking the extension.’” Id. (quoting
19 Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment)). “[C]arelessness is not
20 compatible with a finding of diligence and offers no reason for a grant of relief” under Rule
21 16. Id.

22 If the moving party satisfies the good cause standard under Rule 16, then the
23 Court will examine whether the amendment is proper under Rule 15(a). Id. at 607-08.
24 Under Rule 15(a), a plaintiff generally may amend his or her complaint once “as a matter of
25 course” within twenty-one days after serving it, or twenty-one days after service of a
26 responsive pleading or motion. In all other cases, a party may amend its pleading only by

1 leave of court or by written consent of the adverse party. Fed. R. Civ. P. 15(a)(2). “The
2 court should freely give leave when justice so requires.” Id.; see also Foman v. Davis, 371
3 U.S. 178, 182 (1962) (“Rule 15(a) declares that leave to amend ‘shall be freely given when
4 justice so requires’; this mandate is to be heeded.”).

5 The Court considers five factors in deciding whether to grant leave to amend
6 under Rule 15(a): “(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4)
7 futility of amendment, and (5) whether plaintiff has previously amended his complaint.”
8 Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). Delay alone does not
9 suffice to deny amendment, but it is a relevant factor to consider, particularly where the
10 party moving to amend provides no explanation for the delay. Lockheed Martin Corp. v.
11 Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999). The futility analysis considers
12 whether the proposed amendment would survive a challenge of legal insufficiency under
13 Federal Rule of Civil Procedure 12(b)(6). Miller v. Rykoff–Sexton, Inc., 845 F.2d 209, 214
14 (9th Cir. 1988). Whether to grant leave to amend lies within the Court’s discretion, and the
15 Court “does not err in denying leave to amend where the amendment would be futile.”
16 Gardner v. Martino, 563 F.3d 981, 990 (9th Cir. 2009).

17 In this case, the last day to amend the pleadings was ninety days prior to the close
18 of discovery. (Order (Doc. #34) at 2.) The last date to complete discovery was May 9,
19 2012. (Order (Doc. #81) at 2.) Plaintiffs filed the present Motion to Amend on May 9,
20 2012. Plaintiffs’ Motion therefore is untimely under the Scheduling Order, and Plaintiffs
21 must satisfy Rule 16’s good cause standard as well as Rule 15(a)’s more liberal standard for
22 the Court to grant leave to amend as to any particular claim.¹

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25 ¹ On April 26, 2012, the Magistrate Judge stayed discovery in this matter pending resolution
26 of anticipated summary judgment motions. (Order (Doc. #93).) However, by that point, the deadline
to amend pleadings already had expired.

1 **A. Amendments as to Auto-Owners**

2 Defendant Auto-Owners argues the Court should deny leave to amend because
3 the proposed amended complaint contains claims under Nevada law which would be futile
4 given the Court’s prior ruling that Colorado law applies. Auto-Owners also argues
5 Plaintiffs’ proposed Colorado statutory claims would be futile because Auto-Owners would
6 be entitled to judgment as a matter of law on those claims. Auto-Owners further contends
7 any allegations regarding stacking benefits under Ouellet’s policy would be futile because
8 Plaintiffs are not entitled to stacking under Colorado law or the policy. Auto-Owners
9 argues amendment to add allegations regarding UIM coverage under Ouellet’s umbrella
10 policy would be futile because the umbrella policy does not provide for UIM coverage.
11 Finally, Auto-Owners argues Plaintiffs unduly delayed moving for amendment and Auto-
12 Owners will be prejudiced because discovery will have to be reopened and Auto-Owners
13 will have to incur additional expense to defend against these newly asserted claims.

14 Plaintiffs respond they have reasserted the Nevada state law claims to preserve
15 those claims for appeal. Plaintiffs also argue that their Colorado statutory claims are not
16 futile and they did not unduly delay, as the Court held Colorado law applied shortly before
17 Plaintiffs moved to amend. Plaintiffs assert they are entitled to stack benefits because
18 Ouellet paid separate premiums for each vehicle under her policy. Finally, Plaintiffs
19 contend the umbrella policy is ambiguous as to whether it covers UIM benefits, and it
20 would be premature to preclude such a claim.

21 1. Nevada Claims

22 In the proposed second amended complaint, Plaintiffs refer to violations of
23 Nevada state law. (Proposed Second Am. Compl. at 8-9.) Plaintiffs have clarified that they
24 do not seek to resurrect Nevada state law claims following this Court’s Order (Doc. #90)
25 that Colorado law applies to this action. Rather, Plaintiffs contend they are preserving the
26 Nevada law claims and the claims against previously-dismissed Defendant Mutual of

1 Enumclaw Insurance Company for appeal. With this understanding, the Court will not deny
2 amendment on this basis.

3 2. Colorado Revised Statutes § 10-3-1115 Claim

4 In the proposed second amended complaint, Plaintiffs seek to add allegations that
5 Defendant Auto-Owners violated Colorado Revised Statutes § 10-3-1115. (Pls.’ Mot. for
6 Leave to Am. Compl. (Doc. #97), Ex. 1 [“Proposed Second Am. Compl.”] at 11.) As
7 discussed below, Plaintiffs’ Colorado statutory claim is not futile. Additionally, Plaintiffs
8 have good cause for failing to meet the scheduling order deadline and did not unduly delay
9 in moving to amend to add this claim. The Court entered an Order (Doc. #90) determining
10 that Colorado law applied on April 13, 2012, after the deadline to amend pleadings already
11 had expired. Plaintiffs moved to amend to add claims under Colorado law less than a
12 month later. Defendant Auto-Owners will not be prejudiced because the Colorado statutory
13 claim relies on the same factual predicate and similar legal theories as the breach of contract
14 and bad faith claims. Auto-Owners has not identified any new discovery it would need to
15 conduct to address this claim. The Court therefore will grant leave to amend to add the
16 Colorado statutory claim under § 10-3-1115.

17 3. Colorado Consumer Protection Act Claim

18 In the proposed second amended complaint, Plaintiffs allege a claim under the
19 Colorado Consumer Protection Act (“CCPA”). (Proposed Second Am. Compl. at 12.)
20 Specifically, Plaintiffs allege Auto-Owners’ “unreasonable conduct in investigating and
21 delaying payment on the Vignola Plaintiffs’ claims is a deceptive trade practice . . . in
22 violation of C.R.S. § 6-1-105,” entitling Plaintiffs to three times damages plus attorney’s
23 fees and costs under Colorado Revised Statutes § 6-1-113. (Id.)

24 In its Opposition to Plaintiffs’ Motion to Amend and Cross-Motion for Summary
25 Judgment, Defendant Auto-Owners contends amendment would be futile because it is
26 entitled to judgment as a matter of law on this claim as it did not engage in any deceptive

1 practices, the proposed second amended complaint fails to allege a public impact, and the
2 proposed second amended complaint fails to allege a specific violation of § 6-1-105.
3 Plaintiffs respond by incorporating arguments made in Plaintiffs’ Motion for Summary
4 Judgment. In their Motion, Plaintiffs argue the CCPA applies to insurance companies who
5 engage in deceptive practices. Additionally, as to the public impact, Plaintiffs assert that
6 “[i]t is reasonable to assume that [Auto-Owners’ reliance on section 2.e of the policy] will
7 expose future customers to these same unfair practices.” (Pls.’ Mot. Summ. J. (Doc. #95) at
8 30.) In their Opposition to Auto-Owners’ Cross-Motion, Plaintiffs also argue Auto-Owners
9 cites inapplicable law to contend that Plaintiffs must allege a specific violation of § 6-1-
10 105.

11 As with Plaintiffs’ other Colorado statutory claim, Plaintiffs have demonstrated
12 good cause to for failing to meet the scheduling order deadline and did not unduly delay in
13 moving to amend. However, the Court will deny amendment as futile. Colorado Revised
14 Statutes § 6-1-105 makes unlawful certain deceptive trade practices. Section 6-1-113(1)(a)
15 provides for a private right of action for consumers injured as a result of the defendant’s
16 deceptive practices. To establish a CCPA claim, a plaintiff must show:

- 17 (1) that the defendant engaged in an unfair or deceptive trade practice;
- 18 (2) that the challenged practice occurred in the course of defendant’s
business, vocation, or occupation;
- 19 (3) that it significantly impacts the public as actual or potential
consumers of the defendant’s goods, services, or property;
- 20 (4) that the plaintiff suffered injury in fact to a legally protected
interest; and
- 21 (5) that the challenged practice caused the plaintiff’s injury.

22 Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc., 62 P.3d 142, 146-47
23 (Colo. 2003) (en banc) (quotation omitted).

24 Under the third element, private wrongs which do not affect the public cannot
25 support an actionable CCPA claim. Brodeur v. Am. Home Assur. Co., 169 P.3d 139, 155
26 (Colo. 2007) (en banc). Considerations affecting whether a challenged practice has a public

1 impact include “(1) the number of consumers directly affected by the challenged practice;
2 (2) the relative sophistication and bargaining power of the consumers affected by the
3 challenged practice; and (3) evidence that the challenged practice has previously impacted
4 other consumers or has significant potential to do so in the future.” Id. “[I]t is not enough
5 that the defendant’s industry affects the public interest.” Id. Rather, “the challenged
6 practice must significantly impact the public.” Id. at 156 (emphasis omitted).

7 Here, Plaintiffs have alleged no facts in the proposed second amended complaint
8 supporting the public impact element of a CCPA claim. Plaintiffs do not include
9 allegations regarding the number of consumers directly affected by the challenged practice,
10 the relative sophistication and bargaining power of the affected consumers affected, or that
11 the challenged practice previously impacted other consumers or has significant potential to
12 do so in the future. Plaintiffs do not cite to any factual allegation in the proposed second
13 amended complaint from which a reasonable inference of public impact could be drawn.

14 Moreover, Plaintiffs moved for summary judgment on this claim yet presented no
15 evidence, admissible or otherwise, which would raise an issue of fact on this element.
16 Discovery in this action is closed, Plaintiffs have not moved to reopen discovery, and
17 Plaintiffs presumably would have included any evidence they had to support this claim in
18 their Motion for Summary Judgment or their Opposition to Auto-Owners’ Cross-Motion for
19 Summary Judgment. Plaintiffs have presented nothing beyond an unsupported statement in
20 their Motion for Summary Judgment that “[i]t is reasonable to assume” a public impact.
21 (Pls.’ Mot. Summ. J. (Doc. #95) at 30.) However, the fact that Plaintiffs and Auto-Owners
22 dispute the law and its impact on Ouellet’s policy “does not necessarily mean that other
23 members of the public are or have been affected by the insurer’s practices. The practice
24 complained of by the insured may be an individualized response to that insured’s claim.”
25 Brodeur, 169 P.3d at 156. Accordingly, the Court will deny amendment to add these
26 allegations, as Plaintiffs’ proposed CCPA claim would be futile.

1 policy's anti-stacking provision, nor is that policy provision contrary to Colorado law. The
2 Court will deny amendment to add these allegations, as Plaintiffs failed to show good cause
3 to amend the scheduling order and any claim for stacking of benefits would be futile.

4 5. Umbrella Policy Claim

5 In the proposed second amended complaint, Plaintiffs seek to add allegations that
6 Ouellet purchased an umbrella insurance policy from Auto-Owners which included UIM
7 coverage. (Proposed Second Am. Compl. at 8.) Plaintiffs argue the umbrella policy
8 language is ambiguous as to whether UIM coverage is available. Auto-Owners denies that
9 any UIM coverage existed under the umbrella policy.

10 Plaintiffs have offered no explanation as to why they did not move to amend to
11 add a claim under the umbrella policy earlier. Plaintiffs therefore have not shown good
12 cause to amend the scheduling order to allow this late amendment. Moreover, it appears the
13 claim likely is futile. Neither Plaintiffs nor Auto-Owners provide the Court with the
14 umbrella policy. However, in Auto-Owners' Opposition to Plaintiffs' Motion for Summary
15 Judgment, Auto-Owners presents sworn testimony from two of its employees that the
16 umbrella policy Auto-Owners issued to Ouellet did not include UIM coverage. (Second
17 Hart Aff. at ¶¶ 12-13; Def. Auto-Owners' Ins. Co.'s Opp'n to Pls.' Mot. Summ. J. (Doc.
18 #105), Ex. E.) Plaintiffs have not presented any evidence in support of their Motion for
19 Summary Judgment, Opposition to Auto-Owners' Cross-Motion for Summary Judgment, or
20 Motion to Amend to rebut these assertions. Further, Colorado law does not require
21 umbrella policies to include UIM coverage. See Apodaca v. Allstate Ins. Co., 232 P.3d
22 253, 258-59 (Colo. App. 2009). The Court therefore will deny amendment to assert a claim
23 for UIM benefits under the umbrella policy as Plaintiffs failed to show good cause to amend
24 the scheduling order and any claim for umbrella policy coverage would be futile.

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1 **B. Amendment as to Gilman**

2 In the proposed second amended complaint, Plaintiffs seek to add a claim for
3 enforcement of a purported property settlement agreement between Defendant Gilman and
4 Plaintiffs. Defendant Gilman opposes amendment, arguing this Court already denied
5 Plaintiffs' prior motion to enforce settlement, and in any event, the deadline to amend
6 pleadings has passed. Plaintiffs respond that the Court did not resolve the factual issues as
7 to whether the parties had entered into a separate settlement regarding Ouellet's property
8 damage, as opposed to her wrongful death damages. Rather, Plaintiffs contend the Court
9 declined to summarily rule in Plaintiffs' favor by enforcing the alleged separate property
10 settlement. Plaintiffs argue they did not unduly delay moving to amend to add this claim
11 because the Court did not decide Plaintiffs' motion to enforce the settlement until March
12 14, 2012, and Plaintiffs reasonably decided to wait until after the Court also resolved the
13 choice of law issue so as to amend only once.

14 On December 30, 2011, Defendant Gilman's insurer sent a letter to Plaintiffs'
15 counsel offering to settle the wrongful death claims against Gilman for policy limits of
16 \$100,000 and to settle Plaintiffs' property damage claim for \$25,000. (Def. Gilman's
17 Opp'n to Pls.' Mot. to Am. Compl. (Doc. #101), Ex. H.) Plaintiffs allege in the proposed
18 second amended complaint that Plaintiffs accepted the property damage portion of this offer
19 on January 17, 2012. (Proposed Second Am. Compl. at 5; see also Pls.' Mot. for Recons.,
20 to Enforce Property Damage Settlement, & to Extend Disc. Deadlines (Doc. #67), Ex. 2.)

21 Plaintiffs previously moved to enforce the purported settlement of the property
22 damage claim. (Pls.' Mot. for Recons., to Enforce Property Damage Settlement, & to
23 Extend Disc. Deadlines (Doc. #67).) Defendant Gilman opposed, contending that the
24 \$25,000 property damage settlement offer was part of a larger offer to settle the entire
25 dispute between Gilman and Plaintiffs. (Def. Charles Alfred Gilman's Limited Opp'n to
26 Pls.' Mot. for Recons., to Enforce Property Damage Settlement, & to Extend Disc.

1 Deadlines (Doc. #73).) The Court summarily denied Plaintiffs' request to enforce the
2 purported settlement on March 14, 2012. (Order (Doc. #81) at 2.)

3 Plaintiffs could have moved to amend to add this claim before the deadline to
4 amend pleadings expired under the scheduling order. Instead, Plaintiffs chose to file a
5 motion to enforce the settlement. Plaintiffs have not shown good cause to amend the
6 scheduling order. Moreover, it appears this claim likely is futile. Plaintiffs allege in the
7 proposed second amended complaint that Gilman offered to settle the property damage
8 claim for \$25,000 on December 30, 2011. (Proposed Second Am. Compl. at ¶ 21.) The
9 December 30, 2011 letter³ from Gilman's insurer to Plaintiffs unambiguously offers a
10 global settlement of the wrongful death and property damage claims, not separate
11 settlements, particularly when viewed in the context of prior letters where Gilman's insurer
12 raises the settlement amount on the property damage claim in an effort to reach a global
13 settlement on all claims. (Def. Gilman's Opp'n to Mot. to Amend Compl. (Doc. #101),
14 Exs. A-G.) The Court therefore will deny amendment to add this claim.

15 C. Summary

16 The Court will grant Plaintiffs' Motion to Amend to add a claim pursuant to
17 Colorado Revised Statutes § 10-3-1115. Additionally, the Court will allow the amendment
18 to include claims based on Nevada law with the understanding that amendment merely
19 preserves these claims for appeal, and the claims are not hereby resurrected. The Court
20 denies leave to amend to add a CCPA claim, a stacking claim, a claim under Ouellet's
21 umbrella policy, or a claim to enforce a purported property settlement with Gilman.

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24 ³ The Court may consider the December 30, 2011 letter in determining futility, as it is a
25 document which forms the basis of Plaintiffs' proposed claim and Plaintiffs do not dispute its
26 authenticity. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); Van Buskirk v. Cable
News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002).

1 **III. MOTIONS FOR SUMMARY JUDGMENT**

2 Summary judgment is appropriate if the pleadings, the discovery and disclosure
3 materials on file, and any affidavits show that “there is no genuine dispute as to any
4 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
5 56(a), (c). A fact is “material” if it might affect the outcome of a suit, as determined by the
6 governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An
7 issue is “genuine” if sufficient evidence exists such that a reasonable fact finder could find
8 for the non-moving party. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th
9 Cir. 2002). Initially, the moving party bears the burden of proving there is no genuine issue
10 of material fact. Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002). After the
11 moving party meets its burden, the burden shifts to the non-moving party to produce
12 evidence that a genuine issue of material fact remains for trial. Id. The Court views all
13 evidence in the light most favorable to the non-moving party. Id. The Court considers only
14 admissible evidence in ruling on a summary judgment motion, and “[a]uthentication is a
15 condition precedent to admissibility.” Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773
16 (9th Cir. 2002) (quotation omitted); Fed. R. Civ. P. 56(c).

17 **A. Plaintiffs’ Motion for Summary Judgment (Doc. #95)**

18 Plaintiffs move for summary judgment on their original breach of contract and
19 bad faith claims, as well as their proposed Colorado statutory and CCPA claims. Defendant
20 Auto-Owners argues Plaintiffs’ Motion is not supported by admissible evidence, as
21 Plaintiffs have failed to authenticate any exhibits supporting their Motion. (Def. Auto-
22 Owners’ Opp’n to Pls.’ Mot. Summ. J. (Doc. #105) at 22.) Plaintiffs did not respond to this
23 argument in their Reply, and they made no effort to authenticate the exhibits attached to
24 their original Motion or the exhibits attached to their Reply.

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1 Plaintiffs have failed to meet their initial burden under Rule 56 because they have
2 failed to respond to this argument,⁴ and they failed to submit any admissible evidence in
3 support of their Motion. Despite Defendant Auto-Owners putting Plaintiffs on notice that
4 Plaintiffs' exhibits were not authenticated, Plaintiffs failed to respond to the argument and
5 took no measures to authenticate their exhibits. The Court therefore will deny Plaintiffs'
6 Motion for Summary Judgment. The Court also will deny Auto-Owners' request for
7 attorney's fees contained in its Opposition to Plaintiffs' Motion for Summary Judgment.
8 Auto-Owners presents no legal authority in support of its request.

9 **B. Auto-Owners' Cross-Motion for Summary Judgment (Doc. #98)**

10 Defendant Auto-Owners moves for summary judgment on both the claims for
11 breach of contract and bad faith brought in Plaintiffs' original Complaint, as well as the
12 claim for violation of the Colorado claims practices statute which Plaintiffs seek to add in
13 the proposed amended complaint. Auto-Owners argues that under Colorado law and the
14 policy, no UIM coverage existed under the policy because Gilman's liability limits were
15 never exhausted through judgment or settlement. Auto-Owners thus argues it did not
16 breach the contract, act in bad faith, or violate the Colorado statute. Auto-Owners further
17 contends that its reliance on prior Colorado case law is at least fairly debatable and
18 reasonable, and thus it could not have acted in bad faith or unreasonably denied coverage as
19 a matter of law.

20 Plaintiffs respond that Auto-Owners relies on outdated Colorado law, as
21 Colorado amended its UIM statute and prior case law is no longer applicable. According to
22 Plaintiffs, Colorado law now determines UIM benefits based on determining the limits of
23 liability for the tortfeasor's insurance and the damages suffered by the insured. If damages
24 exceed the limits of liability, that amount is the UIM benefit due to the insured. Plaintiffs

25
26 ⁴ See LR 7-2(d).

1 contend that waiting for the insured to obtain a judgment or settlement against the tortfeasor
2 no longer is required and is against Colorado public policy based on the change in the
3 statute. Plaintiffs argue Auto-Owners' position is not fairly debatable, and even if it was,
4 that defense would apply only to Plaintiffs' common law bad faith claim. Plaintiffs further
5 contend Auto-Owners has taken inconsistent positions in this case by arguing UIM benefits
6 were never owed yet Auto-Owners paid the Vignola children the UIM benefit policy limits,
7 and the Court should judicially estop Auto-Owners from denying coverage exists.

8 Claims for breach of an insurance contract may arise where an insurer delays or
9 refuses to make payment owed directly to its insured under a first-party insurance policy.
10 Sanderson v. Am. Family Mut. Ins. Co., 251 P.3d 1213, 1217 (Colo. App. 2010); Goodson
11 v. Am. Standard Ins. Co. of Wis., 89 P.3d 409, 414 (Colo. 2004). Colorado also provides a
12 separate statutory claim against an insurer who unreasonably delays or denies payment of a
13 claim. Colo. Rev. Stat. §§ 10-3-1115(1)(a), 10-3-1116(1); Vaccaro v. Am. Family Ins.
14 Grp., 275 P.3d 750, 756 (Colo. App. 2012). Colorado law implies a covenant of good faith
15 and fair dealing into every insurance contract. Sanderson, 251 P.3d at 1217. "This duty of
16 good faith and fair dealing continues unabated during the life of an insurer-insured
17 relationship, including through a lawsuit or arbitration between the insured and the insurer,
18 although the adversarial nature of such proceedings may suspend the insurer's obligation to
19 negotiate as a reflection of good faith." Id.

20 An insurer's denial of a valid claim constitutes bad faith if the plaintiff can show
21 the insurer's conduct is unreasonable under the circumstances and the insurer knew or
22 recklessly disregarded the fact that its conduct was unreasonable. Herod v. Colo. Farm
23 Bureau Mut. Ins. Co., 928 P.2d 834, 835-36 (Colo. App. 1996). An insurer is not obligated
24 to negotiate a settlement where the insurer genuinely and reasonably disputes the amount
25 due under the policy's terms. Vaccaro, 275 P.3d at 759. Further, "it is reasonable for an
26 insurer to challenge claims that are fairly debatable." Id. (quotation omitted). An insurer's

1 position is not fairly debatable if it is contrary to the policy’s plain language or “controlling
2 rules of law.” Geiger v. Am. Standard Ins. Co. of Wis., 192 P.3d 480, 483-84 (Colo. App.
3 2008).

4 If a reasonable jury could find the insurer’s position was fairly debatable, “this
5 weighs against a finding that the insurer acted unreasonably.” Vaccaro, 275 P.3d at 759.
6 However, a finding that the insurer’s position was fairly debatable standing alone does not
7 entitle the insurer to judgment as a matter of law on a bad faith claim. Sanderson, 251 P.3d
8 at 1217-18. Rather, “fair debatability is a necessary condition to avoid a claim of bad faith,
9 [but] it is not always a sufficient condition.” Id. at 1219 (quotation omitted).

10 The reasonableness inquiry is objective. Id. at 1217. “Thus, when an insurer
11 maintains a mistaken belief that a claim is not compensable, it may still be within the scope
12 of permissible challenge, even if the insurer’s belief turns out to be incorrect.” Id.
13 However, “[t]he fact that an insurer eventually pays an insured’s claim will not foreclose a
14 lawsuit based on the insurer’s conduct prior to payment.” Id.

15 In Colorado, insurance contracts must comply with statutory requirements
16 regarding UIM coverage and with Colorado’s public policy. Radil v. Nat’l Union Fire Ins.
17 Co. of Pittsburgh, Pa., 207 P.3d 849, 852 (Colo. App. 2008) (“Terms contrary to statutory
18 provisions or in violation of public policy are void.”). Colorado previously defined by
19 statute the parameters of UIM benefits as follows:

20 The maximum liability of the insurer under the uninsured motorist
21 coverage provided shall be the lesser of:

- 22 (a) The difference between the limit of uninsured
23 motorist coverage and the amount paid to the insured by
24 or for any person or organization who may be held
25 legally liable for the bodily injury; or
- 26 (b) The amount of damages sustained, but not recovered.

24 Colo. Rev. Stat. § 10-4-609(5) (2007). Based on this statutory language, Colorado courts
25 previously have held that “until a recovery is made from the at-fault party, the actual
26 amount of coverage to which an insured is entitled under an UIM policy cannot be known,”

1 and insurer therefore “may require judgment or settlement from the underinsured driver as a
2 precondition to a claim for UIM benefits without diluting, conditioning, or unduly limiting
3 statutorily mandated UIM coverage.” Freeman v. State Farm Mut. Auto. Ins. Co., 946 P.2d
4 584, 585-86 (Colo. App. 1997); see also Sanderson, 251 P.3d at 1220; Cork v. Sentry Ins.,
5 194 P.3d 422, 428 (Colo. App. 2008). For that reason, prior case law holds that a policy
6 requiring the insured to “recover first from the underinsured tortfeasor does not violate
7 public policy.” Freeman, 946 P.2d at 586.

8 However, in 2007, Colorado amended its UIM statute and deleted § 10-4-609(5).
9 See 2007 Colo. Sess. Laws Ch. 413, § 2. Colorado statutory law now provides that:

10 [UIM coverage] shall be in addition to any legal liability coverage and
11 shall cover the difference, if any, between the amount of the limits of
12 any legal liability coverage and the amount of the damages sustained,
13 excluding exemplary damages, up to the maximum amount of the
14 coverage obtained pursuant to this section. . . . The amount of the
coverage available pursuant to this section shall not be reduced by a
setoff from any other coverage, including, but not limited to, legal
liability insurance, medical payments coverage, health insurance, or
other uninsured or underinsured motor vehicle insurance.

15 Colo. Rev. Stat. § 10-4-609(1)(c) (2013). The amendments “apply to policies issued or
16 renewed on or after” January 1, 2008. 2007 Colo. Sess. Laws Ch. 413, § 4.

17 Ouellet’s policy was issued on June 21, 2010. (Def. Auto-Owners’ Cross-Mot.
18 Summ. J., Ex. A at 2.) Consequently, the amendments undisputably apply to her policy.
19 However, the parties dispute the enforceability of the policy provision in section 2.e that the
20 insured first must obtain judgment or settle with the underinsured motorist before the UIM
21 benefit is triggered. Auto-Owners contends that Freeman and related cases are still good
22 law and that the rationale supporting Freeman still exists under the amendments. Auto-
23 Owners thus contends it did not breach the contract or act in bad faith as a matter of law.
24 Auto-Owners further contends that even if it is incorrect on the law, its position is fairly
25 debatable and thus it did not act in bad faith as a matter of law. Plaintiffs contend the
26 statutory language unambiguously provides that UIM coverage is determined by the

1 difference between the limits of the tortfeasor’s liability and the amount of damages, and
2 thus once these two items are known, any further restriction on coverage is void as contrary
3 to the statute and against Colorado public policy. According to Plaintiffs, Auto-Owners’
4 position that Plaintiffs must settle or obtain a judgment against Gilman breached the
5 contract and constitutes bad faith.

6 Although several orders and opinions out of Colorado courts post-dating the
7 amendments have followed Freeman, none of those cases involved policies to which the
8 2007 amendments applied. See Sanderson, 251 P.3d at 1215 (accident in 2003); Cork, 194
9 P.3d at 424 (accident occurred some time before August 2003); see also Zbegner v. Allied
10 Prop. & Cas. Ins. Co., 455 Fed. Appx. 820, 821 (10th Cir. 2011) (accident in 2007);
11 Alarcon v. Am. Family Ins. Group, No. 08-CV-01171-MSK-MJW, 2010 WL 2541131, at
12 *1 (D. Colo. June 18, 2010) (unpublished) (accident in 2003); Gosman v. State Farm Mut.
13 Auto. Ins. Co., No. 06-CV-00688-WDM-CBS, 2008 WL 239571, at *1 (D. Colo. Jan 25,
14 2008) (unpublished) (accident in 2001). Neither the Colorado Supreme Court nor any other
15 Colorado court has addressed whether Freeman and its progeny remain good law with
16 respect to an insurance policy to which the amendments apply. The Court therefore must
17 predict what Colorado would do.⁵ Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865,
18 872 (9th Cir. 2007).

19 The amended statutory language is plain and unambiguous. Thyssenkrupp
20 Safway, Inc. v. Hyland Hills Parks & Recreation Dist., 271 P.3d 587, 590 (Colo. App.
21 2011) (stating Colorado courts give effect to the plain and unambiguous language of a
22 statute as written, “unless doing so leads to an absurd result”). Under the amended statutory

23
24 ⁵ Plaintiffs request the Court certify questions to the Colorado Supreme Court. Although this
25 case raises novel issues of Colorado law, the Court declines to certify questions to the Colorado
26 Supreme Court because the Court concludes the statute’s plain and unambiguous language provides
sufficient guidance to resolve the issues presented. The Court therefore will deny Plaintiffs’ Motion
to Certify Question to the Colorado Supreme Court (Doc. #109).

1 language, the UIM benefit is determined by the difference between the amount of the limits
2 of the underinsured driver's liability coverage and the amount of the damages sustained.
3 Additionally, the insurer is not entitled to set off any amount recovered from another
4 source, including any recovery from the tortfeasor or the tortfeasor's insurer. Thus, unlike
5 the prior Colorado statute, it is irrelevant whether and in what amount the insured recovers
6 from the underinsured motorist for policies subject to the 2007 amendments. Under the
7 prior law, the amount of UIM coverage could not be determined until judgment against or
8 settlement with the underinsured motorist because the statute expressly "limit[ed] the
9 insurer's liability to providing UIM coverage to an amount equal to the gap between the
10 amount an insured receives from an underinsured driver and the insured's UIM policy
11 limits." Freeman, 946 P.2d at 585. Now, however, the relevant gap in coverage is between
12 the underinsured driver's limits of liability and damages sustained. An insured need not
13 obtain judgment or settlement to establish the underinsured driver's limits of liability and
14 the insurer is not entitled to set off any amount obtained from the underinsured driver or his
15 insurer. Consequently, the rationale supporting Freeman no longer applies and the Court
16 concludes the Colorado Supreme Court would hold Freeman and its progeny are not
17 controlling authority with respect to insurance policies to which the 2007 amendments
18 apply.

19 Moreover, the Court predicts that based on the plain and unambiguous statutory
20 language, the Colorado Supreme Court would declare as void and unenforceable an
21 insurance policy provision conditioning UIM coverage on judgment or settlement with the
22 underinsured driver if the policy is subject to the 2007 amendments. Such a policy
23 provision is contrary to the statute's plain and unambiguous language and it "attempts to
24 dilute, condition, or unduly limit statutorily mandated coverage." Freeman, 946 P.2d at
25 585.

26 ///

1 Because Auto-Owners relies on an unenforceable policy provision to contend it
2 did not breach the policy, Auto-Owners has failed to meet its initial burden of establishing it
3 is entitled to judgment as a matter of law. The Court therefore will deny Auto-Owners'
4 Cross-Motion for Summary Judgment on Plaintiffs' breach of contract claim.

5 Further, even if a reasonable jury could find Auto-Owners' position was fairly
6 debatable, that would only raise an issue of fact in Auto-Owners' favor to avoid summary
7 judgment against it on Plaintiffs' bad faith claim. Given the plain and unambiguous
8 statutory language, Auto-Owners has not met its initial burden of establishing no issue of
9 fact remains as to whether its conduct was unreasonable under the circumstances and it
10 knew or recklessly disregarded the fact that its conduct was unreasonable. The Court
11 therefore will deny Auto-Owners' Cross-Motion for Summary Judgment on Plaintiffs' bad
12 faith claim. Finally, because Auto-Owners relies on the same theory to support its argument
13 that it acted reasonably and therefore did not violate Colorado Revised Statutes § 10-3-
14 1115(1)(a), the Court also will deny Auto-Owners' Cross-Motion for Summary Judgment
15 on Plaintiffs' Colorado statutory claim.

16 **IV. CONCLUSION**

17 IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment
18 (Doc. #95) is hereby DENIED.

19 IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File an
20 Amended Complaint (Doc. #97) is hereby GRANTED in part and DENIED in part as
21 further explained in this Order.

22 IT IS FURTHER ORDERED that Plaintiffs shall detach and file separately the
23 Second Amended Complaint on or before February 15, 2013.

24 IT IS FURTHER ORDERED that in filing their answers to the Second Amended
25 Complaint, Defendants need not respond to the allegations regarding claims under Nevada
26 law, the Colorado Consumer Protection Act, stacking, an umbrella policy, or enforcement

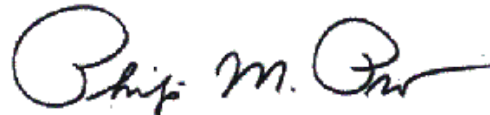
1 of a separate property settlement.

2 IT IS FURTHER ORDERED that Defendant Auto-Owners Insurance Company's
3 Cross-Motion for Summary Judgment (Doc. #98) is hereby DENIED.

4 IT IS FURTHER ORDERED that Plaintiffs' Motion to Certify Question to the
5 Supreme Court of Colorado (Doc. #109) is hereby DENIED.

6 IT IS FURTHER ORDERED that Defendant Auto-Owners Insurance Company's
7 Request for Hearing (Doc. #114) is hereby DENIED as moot.

8
9 DATED: February 8, 2013



10
11 PHILIP M. PRO
United States District Judge