

NOTICE OF ENTRY  
(SUPREME COURT RULE 74.03)

In The 25th Judicial Circuit Court, Phelps County, Missouri

NOV 17 2010

21ST CENTURY INSURANCE V JIM ROLUFS ET AL

CASE NO : 09PH-CV01563

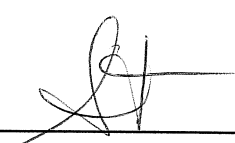
To: THOMAS GERALD MORRISSEY II  
1650 EAST BATTLEFIELD ROAD SU  
SPRINGFIELD MO 65804

YOU ARE HEREBY NOTIFIED that the court duly entered the following:

<u>Filing Date</u>	<u>Description</u>
10-Nov-2010	Order COMES NOW THE COURT AND UPON REQUEST OF ATTORNEY'S & AFTER A PHONE CONFERENCE WITH ATTYS ON 10/25/10, RESCINDS & SETS ASIDE ORDER ENTERED BY MEMO ON 9/20/10 & ENTERS THE FOLLOWING ORDER:

THE COURT FINDS THERE WAS NO ENFORCEABLE AGREEMENT TO SETTLE IN THIS MATTER. THERE WAS NO ANNOUNCED SETTLEMENT, THE LIMITED RELEASE OFFERED BY DEFENDANT ON 12/18/08 WAS PART OF A COUNTER-OFFER, & 21ST CENTURY'S ATTEMPT TO ACCEPT ON ROLUF'S TERMS ON 7/8/09 WAS LATE BY THE TERMS OF THE OFFER AND THEREFORE NOT A VALID ACCEPTANCE.

THEREFORE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED 5/5/10 IS OVERRULED. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED 4/30/10 IS GRANTED. COSTS TAXED TO PLAINTIFFS.  
SO ORDERED. /S/TRACY L. STORIE, JUDGE  
Filed By: TRACY L STORIE



Clerk of Court

CC: File  
AARON I MANDEL  
BERNARD C BRINKER  
JOHN G DOYEN  
STEVEN GRANT KAUFMAN  
THOMAS GERALD MORRISSEY II

Date Printed : 15-Nov-2010

IN THE CIRCUIT COURT OF THE COUNTY OF PHELPS  
STATE OF MISSOURI

TIMOTHY J. LONG, JR., )

Plaintiff, )

vs. )

JIM ROLUFS and LISA ROLUFS, )

Defendants. )

Cause No.: 09PH-CV01563

Division:

FILED

MAY 17 2010

SUE BROWN  
CIRCUIT CLERK  
PHELPS COUNTY, MO.

**REPLY LEGAL MEMORANDUM**  
**IN SUPPORT OF DEFENDANTS JIM AND LISA ROLUFS'**  
**MOTION FOR SUMMARY JUDGMENT**

COME NOW Defendants Jim and Lisa Rolufs, by and through their counsel of record,  
The Morrissey Law Firm, P.C., and for their Reply Legal Memorandum in Support of Defendants  
Jim and Lisa Rolufs' Motion for Summary Judgment state:

**I. POINTS RELIED ON**

- A. Plaintiff's argument about ascertaining the essential terms of the "settlement contract" is premature because plaintiff must first establish the existence of a contract before he can establish a breach of contract in that no evidence exists of the necessary element of acceptance and all of the cases relied on by plaintiff involve acknowledgment that a settlement occurred. *Pride v. Lewis*, 179 S.W.3d 375, 379 (Mo.App.W.D. 2005).**
- B. A dispute about the use of a general release versus a limited release is an essential term that was not agreed upon because Long tried to release all tortfeasors and Rolufs wanted to preserve his claims against other potential tortfeasors including a dram shop claim.**

## II. ARGUMENT

**A. Plaintiff's argument about ascertaining the essential terms of the "settlement contract" is premature because plaintiff must first establish the existence of a contract before he can establish a breach of contract in that no evidence exists of the necessary element of acceptance and the cases relied on by plaintiff involve acknowledgment that a settlement occurred. *Pride v. Lewis*, 179 S.W.3d 375, 379 (Mo.App.W.D. 2005).**

No evidence of a settlement agreement exists because the necessary element of acceptance is absent because no mirror-image acceptance ever occurred.

Plaintiff cites two cases in their response, one a Missouri state court case and the other an 8<sup>th</sup> Circuit case relying on Minnesota law, to try and support its position that the essential elements of the settlement agreement were sufficiently definite to give them meaning. These cases are based upon evidence that a settlement agreement had been affirmatively reached. The Rolufs will respond to each case in the order presented by Plaintiff in its argument.

### **Missouri Cases Cited by Plaintiff**

In *Vulgamott v. Perry*, 154 S.W.3d 182 (Mo.App.W.D. 2005) **both parties told the court just before trial that a settlement agreement had been reached.** Id at 386. (Emphasis added). The agreement was to follow a written settlement agreement that would follow the format utilized in another case called *Noland v. Welch*. Id. The parties told the court that a settlement agreement had been reached after counsel had reviewed and approved the copy of the written settlement agreement used in the other case. Id. In fact, both parties filed motions to enforce the settlement agreement. Id at 386.

In *Sheng v. Starkey Laboratories, Inc.* 117 F.3d 1081 (8<sup>th</sup> Cir. 1997) the parties agreed in a settlement conference that Shang would dismiss all of her claims against Starkey in exchange for \$73,500.00. Id at 1082. **The magistrate judge informed the district court of the**

**agreement.** Id. (Emphasis added). It is also important to note that in this 8<sup>th</sup> Circuit case all of the state case citations are from Minnesota.

These cases relied upon by Long have evidence that both parties acknowledged a settlement agreement occurred. Therefore, these cases are not applicable because we have no evidence or acknowledgment of a settlement and Long never agreed to any changes in their general release until after the last offer expired.

**B. A dispute about the use of a general release versus a limited release is an essential term that was not agreed upon because Long wanted to release all tortfeasors and Rolufs wanted to preserve his claims against other potential tortfeasors including a dram shop claim.**

Long concedes in his Motion for Summary Judgment that the essential terms of a settlement include the claims and parties to be released. (Plaintiff's Motion for Summary Judgment, ¶ 12). Furthermore, Long claims Custom Builders v. Chesebro, 825 S.W.2d 15 (Mo. App. E.D. 1992) held that there had been no agreement as to the essential terms because Custom Builders wanted a release of both material and workmanship claims and homeowners had only agreed to a release of workmanship. Long still tries to convince this court that a release of all tortfeasors versus a release of a single tortfeasor is not an essential term of a settlement agreement. Yet Long is suspiciously quiet as to the distinction between his offers with a general release versus Rolufs' offers with a limited release.

In fact, Long continues to assert in his memorandum opposing summary judgment that "All claims the Rolufs had were going to be released." (Plaintiff's Memorandum in Opposition to Defendants Jim and Lisa Rolufs' Motion for Summary Judgment, page 3). This statement is true of using a general release. However, Rolufs repeatedly insisted on a limited release preserving their claims against all tortfeasors other than Long.

Rolufs maintain that no settlement contract exists because no mirror-image acceptance ever occurred. Assuming arguendo that it could be said an agreement to settle was attempted, the essential terms of the alleged contract were not so definite to allow specific performance because Long's terms included a general release which would release all tortfeasors and Rolufs' terms included a limited release preserving his claims against other potential tortfeasors including a dram shop claim. (Joint Stipulated Facts ¶8, Exhibit E). Therefore, Chesebro is directly on point and controlling requiring this court to grant Rolufs' Motion for Summary Judgment because the parties did not agree to the essential terms of the claims and parties to be released.

### CONCLUSION

All of Long's offers required a general release while all of Rolufs' offers required a limited release. Therefore, no mirror-image acceptance was ever made and no contract exists and plaintiff's claim for breach of contract fails as a matter of law.

Long's attempt to accept an offer after it expired does not create a contract and again plaintiff's claim for breach of contract fails as a matter of law.

Finally, no settlement agreement occurred because the essential terms of what claims and parties were to be released were never agreed upon because Long tried to release all potential tortfeasors and all claims with a general release while Rolufs tried to preserve their claims against other potential tortfeasors including a dram shop claim.

**WHEREFORE**, Defendants Rolufs request this court to enter its judgment in their favor and against Plaintiff Long on Plaintiff's Petition to Enforce Settlement, award Defendants Rolufs attorney's fees incurred and costs expended herein and grant any further relief this Court deems just and proper.

Respectfully submitted,

THE MORRISSEY LAW FIRM, P.C.  
Attorney for Defendants Rolufs


By 

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**CERTIFICATE OF SERVICE**

I hereby certify the service of the foregoing to the following attorney via e-mail and the U.S. Postal Service postage pre-paid this 14<sup>th</sup> day of May 2010:

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\_\_\_\_\_  
Thomas G. Morrissey

IN THE CIRCUIT COURT OF THE COUNTY OF PHELPS  
STATE OF MISSOURI

TIMOTHY J. LONG, JR., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JIM ROLUFS and LISA ROLUFS, )  
 )  
 Defendant. )

Cause No.: 09PH-CV01563  
Division:

MAY 14 2010

**PLAINTIFF'S MEMORANDUM IN OPPOSITION OF  
DEFENDANTS JIM AND LISA ROLUFS' MOTION FOR SUMMARY JUDGMENT**

On or about April 30, 2010, Defendants filed their Motion for Summary Judgment in this matter regarding Plaintiff's First Amended Petition to Enforce Settlement. Defendants argue they are entitled to summary judgment because no contract to settle was entered into. This Court should reject Defendants' arguments and grant Plaintiffs' motion for summary judgment on the Petition to Enforce Settlement.

A contract for settlement will be enforceable as long as all essential terms are sufficiently definite to enable the court to give them exact meaning. *Vulgamott v. Perry*, 154 S.W.3d 382 (Mo.Ct.App. 2004). The contract will still be valid and enforceable even if some terms may be missing or left to be agreed upon so long as the essential terms themselves are sufficiently definite to enable the court to give them meaning. *Id.* Courts routinely enforce settlement agreements even where the precise wording of a release has not been agreed upon. See e.g. *Sheng v. Starkey Lab*, 117 F.3d. 1081 (8<sup>th</sup> Circuit 1997). Settlement agreements that do not expressly resolve ancillary issues are nevertheless enforceable even though the parties left some details for counsel to work out during later negotiations. *Id.*

In the present matter, the essential terms of the contract were agreed upon. A \$25,000 policy limit offer was faxed to counsel for the Rolufs on October 16, 2008. A release of Mr.

Long was attached to the correspondence. In response, the Rolufs' counsel attached a release which would release Mr. Long and which also called for payment of \$25,000. Throughout the correspondence and the transactions between the parties, these essential terms were always agreed to. There was never any question as to the amount to be paid or the party to be released. The only question was how this release was to be worded. As noted above, disputes regarding how a release would be worded do not affect whether the contract for settlement is effective and enforceable.

Defendants cite the Court to the case of *Tirmenstein v. Central States Basement and Foundation Repair, Inc.*, 148 S.W.3d. 849 (Mo.Ct.App. 2004) as support for the argument that no settlement was reached. *Tirmenstein*, however, is not applicable.

In *Tirmenstein*, Tirmenstein and Central States agreed to a services contract and guarantee by which Central States would provide waterproofing services in Tirmenstein's basement for a period of twenty (20) years. Central States agreed to install a system of pipes to provide waterproofing for Tirmenstein's basement in a good and workmanlike manner. Central States then agreed to service the seepage of water through the subsoil masonry wall and floor for a period of twenty (20) years from the date of the agreement without additional charge. Tirmenstein's basement continued to flood and Central States performed additional work.

Tirmenstein then filed a Petition in the Circuit Court alleging that Central States' work was not completed in a good and workmanlike manner, resulting in damage. The parties then agreed to settle Tirmenstein's claim for \$1,800. Central States prepared a release which was silent on the issue of whether Central States was relieved from the responsibility set forth in their guarantee. Tirmenstein rejected the release and submitted a modified release which specifically excluded the guarantee in the scope of the release. Central States rejected this release and Tirmenstein then filed her motion to enforce settlement. The trial court enforced the settlement



and Central States appealed.


On appeal, the Missouri Court of Appeals noted that it was clear that the parties had never agreed to the essential terms. Although it was agreed that Central States would be released from liability for workmanship, the extent of the release of Central States was not agreed to. There was no agreement as to whether the release included the guarantee or if it only included the workmanship claims. Hence, no contract had ever been entered into.

In the present case, no such dispute exists. The terms of the agreement are clear and unambiguous. The Rolufs had agreed to accept \$25,000 in exchange for the complete release of Mr. Long. The essential terms, therefore, were agreed to. The only question was how that agreement was going to be put down into writing. Unlike Tirmenstein, there are no claims against Mr. Long that were to be left open or disputes against Mr. Long that were to be left for a future date. All claims the Rolufs had were going to be released. Similarly, there is no question as to the payment. The carrier for Mr. Long agreed to pay \$25,000, its policy limits in exchange for the release. All essential terms had been agreed to and there is no dispute on that. The only dispute was how that was to be carried out.

Defendants arguments are based upon the claim that the release they proffered was not agreed to prior to an expiration date. However, the terms of the release were not one of the essential elements of the contract. Nothing in the record indicates that an essential term was the specific verbiage in the release. The cases cited by Defendants herein invariably involves situations where the parties could not agree on the specific wording of a release and the courts enforced the contract anyway finding that the specific wording was not an essential term. See e.g. Sheng, 117 F.3d. at 1083; Vulgamott, 154 S.W.3d. at 391. Indeed, parties disagreeing on the release terms are typically how these matters to enforce settlement agreements arise, but such disputes do not prevent the settlement themselves from being valid. The essential terms were

agreed upon, a settlement contract was entered into, and this Court should enforce that contract.

WHEREFORE, Plaintiff hereby requests this Court deny Defendants' motion for summary judgment, grant Plaintiff summary judgment and for any other and further relief as the Court may deem just and proper.

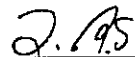


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*Attorneys for Plaintiff/ Counterclaim  
Defendant Timothy J. Long, Jr.*

#### CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was **emailed** and **mailed**, first class, postage prepaid, this 12<sup>th</sup> day of May, 2010, to:

Thomas G. Morrisey, Esq.  
1650 E. Battlefield Road, Suite 110  
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417/887-0529  
417/887-8558 (Fax)  
*Attorney for Defendants*



5/6/10  
eac

IN THE CIRCUIT COURT OF THE COUNTY OF PHELPS  
STATE OF MISSOURI

**FILED**  
APR 30 2010  
SUE BROWN, CIRCUIT CLERK  
PHELPS COUNTY, MO.

TIMOTHY J. LONG, JR., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JIM ROLUFS and LISA ROLUFS, )  
 )  
Defendants. )

Cause No.: 09PH-CV01563

Division:

**DEFENDANTS JIM AND LISA ROLUFS' LEGAL MEMORANDUM**  
**IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**  
**AS TO PLAINTIFF'S FIRST AMENDED PETITION**  
**TO ENFORCE SETTLEMENT**

**COME NOW** Defendants Jim and Lisa Rolufs, by and through their counsel of record, The Morrissey Law Firm, P.C., and for their Legal Memorandum in Support of their Motion for Summary Judgment as to Plaintiff's First Amended Petition to Enforce Settlement state:

**I. STATEMENT OF FACTS**

Plaintiff Long's Petition to Enforce Settlement was filed to resolve a dispute about whether a settlement agreement had been reached between Long and Rolufs arising out of a motor vehicle accident which occurred on or about January 27, 2007.

The following timeline of the negotiations will assist the court in determining this issue:

- 10/16/08: Long through his insurance carrier makes a policy limits offer pursuant to a general release. (Exhibit A).
- 12/19/08: Rolufs through counsel makes a policy limits counteroffer pursuant to a limited release dated October 16, 2008. (Exhibit B).
- 01/23/09: Rolufs through counsel inquire about the counteroffer pursuant to the limited release. (Exhibit C).

- 01/26/09: Long through his insurance carrier renews his first offer pursuant to a general release. (Exhibit D).
- 06/22/09: Rolufs through counsel make a policy limits counteroffer pursuant to a limited release. The offer expressly requires written acceptance and expressly expires at 5:00 p.m. on July 7, 2009.
- July 8, 2009: Long through his insurance carrier sends his first response to the June 22, 2009, counteroffer.

## **II. POINTS RELIED ON**

- A. An agreement to settle is governed by contract law which requires a definite offer and mirror image acceptance and any acceptance that includes new and variant terms from the offer amounts to a counteroffer and rejection of the offer which becomes open again only when renewed by the offeror.**  
Tirmenstein v. Cent. States Basement & Found. Repair, Inc., 148 S.W.3d 849, 851 (Mo.App.E.D. 2004); Pride v. Lewis, 179 S.W.3d 375, 379 (Mo.App.W.D. 2005); American Nat. v. Noble Communications, 936 S.W.2d 124, 132 (Mo.App.S.D. 1996).
- B. No settlement agreement was reached between the parties because Jim and Lisa Rolufs offer to settle was not pursuant to 21<sup>st</sup> Century's general release but pursuant to a limited release which included new and variant terms constituting a counteroffer and rejection of Timothy Long's original offer.**  
Tirmenstein v. Cent. States Basement & Found. Repair, Inc., 148 S.W.3d 849, 851 (Mo.App.E.D. 2004); Pride v. Lewis, 179 S.W.3d 375, 379 (Mo.App.W.D. 2005).
- C. Long's attempt to accept Roluf's offer after it expired is invalid because an offer which specifies a time for its duration terminates by lapse of the time specified in the offer, and the acceptance must take place within that time period.** I.R. Kirk Farms, Inc. v. Pointer, 897 S.W.2d 183, 186 (Mo.App.W.D. 1995).

## **III. BURDEN OF PROOF**

The party requesting specific performance of a settlement agreement has the burden of proving his or her claim for relief by clear, convincing and satisfactory evidence. Tirmenstein v.

Cent. States Basement & Found. Repair, Inc., 148 S.W.3d 849, 851 (Mo.App.E.D. 2004).

#### **IV. ARGUMENT**

**A. An agreement to settle is governed by contract law which requires a definite offer and mirror image acceptance and any acceptance that includes new and variant terms from the offer amounts to a counteroffer and rejection of the offer which becomes open again only when renewed by the offeror.**

Tirmenstein v. Cent. States Basement & Found. Repair, Inc., 148 S.W.3d 849, 851 (Mo.App.E.D. 2004); Pride v. Lewis, 179 S.W.3d 375, 379 (Mo.App.W.D. 2005); American Nat. v. Noble Communications, 936 S.W.2d 124, 132 (Mo.App.S.D. 1996).

An agreement to settle is governed by contract law. Tirmenstein v. Cent. States Basement & Found. Repair, Inc., 148 S.W.3d 849, 852 (Mo.App.E.D. 2004). A plaintiff must first establish existence of a contract before he or she can establish a breach of contract. Pride v. Lewis, 179 S.W.3d 375, 379 (Mo.App.W.D. 2005). A contract does not exist without a definite offer and mirror image acceptance. *Id.* Any acceptance that includes new and variant terms from the offer amounts to a counteroffer and rejection of the offer which becomes open again only when renewed by the offeror. Tirmenstein, 148 S.W.3d at 851; Pride, 179 S.W.3d at 379; American Nat. v. Noble Communications, 936 S.W.2d 124, 132 (Mo.App.S.D. 1996).

**B. No settlement agreement was reached between the parties because Jim and Lisa Rolufs offer to settle was not pursuant to 21<sup>st</sup> Century's general release but pursuant to a limited release which included new and variant terms constituting a counteroffer and rejection of Timothy Long's original offer.**

Tirmenstein v. Cent. States Basement & Found. Repair, Inc., 148 S.W.3d 849, 851 (Mo.App.E.D. 2004); Pride v. Lewis, 179 S.W.3d 375, 379 (Mo.App.W.D. 2005).

The trial court need look no further than Tirmenstein to determine no settlement agreement was reached between the parties.

Tirmenstein involved a dispute involving a services contract and guarantee by which Central States would provide waterproofing services in Tirmenstein's basement for a period of

20 years. *Id.* at 850. The basement flooded twice and Tirmenstein sued alleging that the work was not completed in a good and workmanlike manner. *Id.*

The parties agreed the cause of action between them could be settled for \$1800.00 and upon Central State's preparation of a "full and complete" release. *Id.* Central States' original release was silent on the issue of whether Central States was relieved of responsibility under the guarantee and was deemed to be an offer. *Id.* at 851. Tirmenstein prepared a new release that added language obligating Central States to perform under the guarantee which constituted a counteroffer which was not accepted. *Id.* Tirmenstein held that because the counteroffer was not accepted no valid agreement was reached between the parties. *Id.* at 852.

The facts are identical in this cause of action. Long, through his insurance company, offered to settle this matter with Rolufs for \$25,000.00 in exchange for a "Release of All Claims." (Joint Stipulated Facts, ¶ 3, Exhibit A). The release not only released Long but also "any and all other persons, firms and corporations." (Exhibit A). The inclusion of the language "any and all other persons, firms and corporations" made the release a general release that not only released Long but all actual or potential tortfeasors from liability. Penrod v. Branson R-IV Public School District, 916 S.W.2d 866, 868 (Mo. App. S.D. 1996). Rolufs did not agree to the general release and prepared a new "Limited Section 537.060 RSMo. Release" releasing only Long and included a representation from Long that the only liability coverage available is \$25,000.00. (Joint Stipulated Facts, ¶ 5, Exhibits B and F). This constituted a counteroffer and rejection of Long's offer because included new or variant terms from Long's offer.

Long renewed his offer on January 26, 2009, when he sent for a second time the "Release of All Claims" which was identical to his original offer. (Joint Stipulated Facts, ¶ 7, Exhibit D). Again, this constituted a counteroffer and rejection of Rolufs December 19, 2008, offer.

Since no mirror image acceptance was made to any of these offers no contract exists and plaintiff's claim for breach of contract fails as a matter of law.

**C. Long's attempt to accept Roluf's offer after it expired is invalid because an offer which specifies a time for its duration terminates by lapse of the time specified in the offer, and the acceptance must take place within that time period.** I.R. Kirk Farms, Inc. v. Pointer, 897 S.W.2d 183, 186 (Mo.App.W.D. 1995).

Rolufs made another counteroffer of June 22, 2009, that expressly provided the method of acceptance must be in writing and the offer expired at 5:00 p.m. central time on July 7, 2009. (Joint Stipulated Facts, ¶¶ 8 and 9, Exhibit E).

Long's first response to the June 22, 2009, counteroffer was one day after it expired on July 8, 2009. (Joint Stipulated Facts, ¶¶ 10 and 11, Exhibit F). An offer which specifies a time for its duration terminates by lapse of the time specified in the offer, and the acceptance must take place within that time period. I.R. Kirk Farms, Inc. v. Pointer, 897 S.W.2d 183, 186 (Mo.App.W.D. 1995).

Since no offer was available for Long to accept on July 8, 2009, no contract exists and plaintiff's claim for breach of contract fails as a matter of law.

### **CONCLUSION**

All of Long's offers required a general release while all of Rolufs' offers required a limited release. Therefore, no mirror image acceptance was ever made and no contract exists and plaintiff's claim for breach of contract fails as a matter of law.

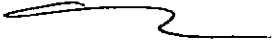
Long's attempt to accept an offer after it expired does not create a contract and again plaintiff's claim for breach of contract fails as a matter of law.

**WHEREFORE**, Defendants Rolufs request this court to enter its judgment in their favor and against Plaintiff Long on Plaintiff's Petition to Enforce Settlement, award Defendants Rolufs

attorney's fees incurred and costs expended herein and grant any further relief this Court deems just and proper.

Respectfully submitted,

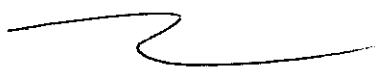
THE MORRISSEY LAW FIRM, P.C.  
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**CERTIFICATE OF SERVICE**

I hereby certify the service of the foregoing to the following attorney via the U.S. Postal Service postage pre-paid this \_\_\_\_ day of \_\_\_\_\_ 2010:

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\_\_\_\_\_  
Thomas G. Morrissey