

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

**HENRY KUEHN and
JUNE P. KUEHN**

PLAINTIFFS

VS.

CAUSE NUMBER:1:08CV577-LTS-RHW

**STATE FARM FIRE AND CASUALTY
COMPANY and JOHN DOES 1 THROUGH 10**

DEFENDANTS

**DEFENDANT, STATE FARM FIRE AND CASUALTY COMPANY'S,
RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION TO ENFORCE SETTLEMENT**

COMES NOW the Defendant, **STATE FARM FIRE AND CASUALTY COMPANY** (hereinafter "State Farm"), by and through its attorneys of record, and files this its Response in Opposition to Plaintiffs' Motion to Enforce Settlement, and would show unto the Court as follows:

I.

After months of continued negotiations, State Farm made its final offer to the Plaintiffs to resolve this case on May 13, 2010. In response to State Farm's offer, counsel for the Plaintiffs responded in writing on May 17, 2010, accepting the monetary figure offered by State Farm, but added an additional condition that confidentiality language would not be included in the release. *See Exhibit A*, May 17, 2010, letter from Earl Denham [monetary figure redacted]. Contrary to the representations in Plaintiffs' motion, State Farm is not "adding new conditions to an agreement", but rather Plaintiffs are adding a condition to their acceptance of State Farm's offer to settle the case resulting in a counteroffer to State Farm.

II.

In a diversity suit, state law controls whether a contract of settlement is made and whether it should be enforced. *Terrain Enterprises, Inc. v. Western Casualty and Surety Co.*, 774 F.2d 1320

(5th Cir. 1985). Settlements are a contract and the party claiming the benefit must prove that there was a meeting of the minds. *Hastings v. Guillot*, 825 So.2d 20 (Miss. 2002). The Restatement (Second) of Contracts §59 states that “A reply to an offer which purports to accept it but is conditional on the offeror’s assent to terms additional to or different from those offered is not an acceptance but is a counteroffer.” (emphasis added) Here, the Plaintiffs agreed to the monetary value offered by State Farm, but added an additional condition that confidentiality language not be included as part of the release which amounts to a counter-offer.

III.

Further, settling a case without confidentiality is contrary to the course of dealing under which State Farm and the Denham Law Firm have been operating under for years since Hurricane Katrina. In their motion, Plaintiffs state that State Farm’s position is in reliance on “the last Hurricane Katrina case” that Bryan, Nelson, Schroeder, Castigliola & Banahan settled with the Denham Law Firm. However, not only did the last Hurricane Katrina case that State Farm settled with the Denham Law Firm contain confidentiality language, but each and every one of the thirty-four (34) Hurricane Katrina cases settled with the Denham Law Firm has included confidentiality language. Attached as Exhibit B is a list of each plaintiff represented by the Denham Law Firm who have settled a Hurricane Katrina case with State Farm Fire and Casualty Company. Every single release related to the resolution of each of the plaintiffs listed in Exhibit B included confidentiality language. In fact, a substantially identical release was used in each and every one of those cases. It is clear that the Kuehns, through their attorneys, should in fact have known that confidentiality was to be a condition of settlement. Further, while the Kuehns are not obligated to settle on the same terms as other plaintiffs, there must be a meeting of the minds for a settlement contract to be reached.

In this case, there was no meeting of the minds as to the confidentiality provision, and therefore a settlement has not been reached.

IV.

In conclusion, the Plaintiffs' response to State Farm's offer on May 17, 2010, constituted a counter-offer rather than acceptance. In addition, State Farm is able to rely on the course of dealing with the Denham Law Firm in thirty-four (34) prior Hurricane Katrina settlements, and the Plaintiffs' motion should be denied.

WHEREFORE, PREMISES CONSIDERED, State Farm Fire and Casualty Company respectfully requests that the Court deny the Plaintiffs' Motion to Enforce Settlement.

Dated: May 24, 2010.

Respectfully submitted,

BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
Attorneys for Defendant
**STATE FARM FIRE AND CASUALTY
COMPANY**

BY: /s/ H. Benjamin Mullen
H. BENJAMIN MULLEN (9077)

CERTIFICATE OF SERVICE

I, **H. BENJAMIN MULLEN**, one of the attorneys for the Defendant, **STATE FARM FIRE AND CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing pleading with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

Dated: May 24, 2010.

/s/ H. Benjamin Mullen

H. BENJAMIN MULLEN

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(1 page)

May 17, 2010

John A. Banahan, Esquire
Bryan, Nelson, Schroeder, Castigliola & Banahan
Post Office Drawer 1529
Pascagoula, MS 39568-1529

Re: Hurricane Katrina (State Farm) BAD FAITH CLAIM
Henry Kuehn and June P. Kuehn v.
State Farm Fire and Casualty Company
Civil Action Number: 1:08cv577-LTS-RHW
Our File No. 10618-001

Dear John:

My folks have considered your offer over the weekend and are willing to accept \$REDACTED to settle their claim against State Farm.

The release language should simply be standard language without any reference to confidentiality, as that has not been any part of our discussion.

Sincerely,
DENHAM LAW FIRM, PLLC



EARL L. DENHAM

ELD/tlf

cc: Henry Kuehn
June P. Kuehn

EXHIBIT B
HURRICANE KATRINA CASES SETTLED WITH DENHAM LAW FIRM

1. Rosemary and Kerri Murray vs. State Farm Fire and Casualty Co.
2. Lauramarie G. Backlund vs. State Farm Fire and Casualty Co.
3. Robert Davis and Jane C. Hickson vs. State Farm Fire and Casualty Co.
4. Dennis Larry and Annette P. Breland vs. State Farm Fire and Casualty Co.
5. Carrol and Veronica Fischer vs. State Farm Fire and Casualty Co.
6. James Rish vs. State Farm Fire and Casualty Co.
7. Mary Simpson vs. State Farm Fire and Casualty Co.
8. James Slade vs. State Farm Fire and Casualty Co.
9. Jeff Hutchison vs. State Farm Fire and Casualty Co.
10. Robert Hickson vs. State Farm Fire and Casualty Co.
11. Velda Pipkins vs. State Farm Fire and Casualty Co.
12. Royce Garrison vs. State Farm Fire and Casualty Co.
13. Randall Prince vs. State Farm Fire and Casualty Co.
14. Cynthia Robertson-Holloway vs. State Farm Fire and Casualty Co.
15. Shirley Powell vs. State Farm Fire and Casualty Co.
16. Lula Tillman-Catchings vs. State Farm Fire and Casualty Co.
17. Mary Ludwig vs. State Farm Fire and Casualty Co.
18. Laura Marie Backlund vs. State Farm Fire and Casualty Co.
19. Timothy Blair vs. State Farm Fire and Casualty Co.
20. Katherine O'Bryant vs. State Farm Fire and Casualty Co.

21. Ricardo Merlos vs. State Farm Fire and Casualty Co.
22. William Grubbs vs. State Farm Fire and Casualty Co.
23. Larry and Cynthia Abney vs. State Farm Fire and Casualty Co.
24. Eldridge Boyd vs. State Farm Fire and Casualty Co.
25. Phillip Pecoraro vs. State Farm Fire and Casualty Co.
26. Rachael Fleuriet Holloman vs. State Farm Fire and Casualty Co.
27. Bill A. Myers and Linda H. Myers vs. State Farm Fire and Casualty Co.
28. John D. And Gayle S. Oakes vs. State Farm Fire and Casualty Co.
29. Tommy W. Thornhill and Johnnie J. Seal, Jr. vs. State Farm Fire and Casualty Co.
30. Webster Lee vs. State Farm Fire and Casualty Co.
31. Antoinette Carlos v. State Farm Fire and Casualty Co.
32. Mary S. Stickell v. State Farm Fire and Casualty Co.
33. Jeff Pazderski v. State Farm Fire and Casualty Co.
34. Sebastien and Cynthia Fontana v. State Farm Fire and Casualty Co.