<<COURT\_NAME>>

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| <<PROVIDER\_SUITNAME>>,  a/a/o  <<INJUREDPARTY\_NAME>>    Plaintiff,    vs.    <<INSURANCECOMPANY\_SUITNAME>>    Defendant. | Case No. <<INDEXORAAA\_NUMBER>> |

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**PLAINTIFF’S MOTION TO STRIKE**

**DEFENDANT’S MOTION TO DISMISS, ALTERNATIVELY MOTION FOR SUMMARY JUDGEMENT AND INCORPORATED MEMORANDUM OF LAW**

**COMES NOW**, Plaintiff, <<PROVIDER\_SUITNAME>>, by and through the undersigned counsel, pursuant to Fla. R. Civ. P. 1.140, hereby files this Motion to Strike Defendant’s Motion to Dismiss, Alternatively Motion for Summary Judgement and Incorporated Memorandum of Law and in support thereof further states:

**UNDISPUTED FACTS**

1. On <<SERVED\_ON\_DATE>>, Plaintiff served their Complaint in this action for breach of contract for Defendant's, <<INSURANCECOMPANY\_SUITNAME>>, failure and/or refusal to pay for Plaintiff’s covered loss as required under the policy of insurance issued by <<INSURANCECOMPANY\_SUITNAME>>. Plaintiff’s also served discovery, including request for admissions, requests to produce, and interrogatories along with the Complaint.

2. To date, Defendant has not filed an answer and/or affirmative defenses in response to Plaintiff's Complaint. Nor has Defendant responded to the Plaintiff’s discovery requests.

3. Instead, Defendant has filed a motion to dismiss or in the alternative motion for summary judgment.

4. Defendant improperly attempts to argue two different burdens of proof within the same motion and hearing, severely prejudicing Plaintiff in their ability to gather evidence to properly respond.

5. Plaintiffs now request that the motions for summary judgment be stricken or at the very least be barred from being heard by the Court until discovery is completed so as to allow Plaintiff a fair opportunity to gather evidence.

**MEMORANDUM OF LAW**

Defendant’s Motion to Dismiss, Alternatively Motion for Summary Judgement and Incorporated Memorandum of Law is not proper at this time to be considered by the Court. Specifically, Defendant has filed a motion to dismiss. Clearly, this matter must be heard and determined before any motions for summary judgment are considered.

Since Defendant has failed to answer any discovery, or even respond to the Complaint, there has been insufficient development of the factual record for the Court to make a ruling on a motion for summary judgment. The entry of summary judgment is in error if there is not sufficient time to complete discovery. Moore v. Freeman, 396 So.2d. 276 (Fla. 3DCA 1981).

If a party cannot complete discovery through no fault of its own, the entry of summary judgment would be premature. Societe Euro-Suisse, S.A. v. Citizens Southern & Intern Bank, 394 So. 2d 533 (Fla 3DCA 1981). Summary judgment is in error if a deposition of a party is pending. UFF DA, Inc. v. Towne Realty, Inc., 666 So. 2d 199 (Fla. 5DCA 1995).

A motion to dismiss is not a substitute for a motion for summary judgment. Consuegra v. Lloyd's Underwriters at London, 801 So. 2d 111, 112 (Fla. 2d DCA 2001); Fla. Farm Bureau Gen. Ins. Co. v. Ins. Co. of N. Am., 763 So. 2d 429, 432 (Fla. 5th DCA 2000) (“[a] motion to dismiss should not be used ‘to determine issues of ultimate fact’ and ‘may not act as a substitute for summary judgment.”) (citing Roberts v. Children's Med. Servs., 751 So. 2d 672, 673 (Fla. 2d DCA 2000).

The Florida Rules of Civil Procedure and case law interpreting the same are clear: sufficiency of the allegations of a complaint should be determined on a motion to dismiss, not by summary judgment. [Bowman v. Davies, 586 So.2d 1332 (Fla. 1st DCA 1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991168158&pubNum=0000735&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). In *Bowman*, the defendant brought a motion to dismiss, which was denied. Later, “without any significant discovery being accomplished” the defendant brought a motion for summary judgment. The trial court granted summary judgment against the plaintiff based upon the inadequacy of the allegations of the complaint. *Id.* The district court found that the summary judgment ruling was reversible error. *Id.* The district reasoned that once the complaint survived the motion to dismiss, the alleged deficiencies in the complaint gave rise to issues of factual dispute which could not be resolved by summary judgment without any discovery. *Id.* In the instant, the same must be true. The Court here should first rule on the motion to dismiss, at a time when both parties are available. Thereafter, provided that the motion to dismiss is denied, the Defendant should answer, respond to discovery and *only then* should a motion for summary judgment be considered.

While [Florida Rule of Civil Procedure 1.510](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1005170&cite=FLSTRCPR1.510&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) permits either party to move for summary judgment even if an answer has not been filed, the burden for such a movant is extremely heavy in that the movant must demonstrate conclusively that no genuine issues of material fact can be can be pled or otherwise raised. [Greene v. Lifestyle Builders of Orlando, Inc., 985 So.2d 588 (Fla. 5th DCA 2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016212155&pubNum=0000735&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)): *See* [Getman v. Tracey Constr., Inc., 62 So.3d 1289 (Fla. 2d DCA-2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025549930&pubNum=0003926&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); *See* also Beach Higher Power Corp. v. Granados, III So.2d 563 (Fla. 3d DCA 1998). Because of this heavy burden, where plaintiffs have brought motions for summary judgment before an answer has been filed, Florida courts have found, time and time again, that it was error to rule in favor of the movant because the record had not been properly developed to as to determine whether such material issues of fact exist. [Brakefield v. CIT Group Consumer Finance, Inc., 787 So.2d 115 (Fla. 2d DCA 2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001323922&pubNum=0000735&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [Gick v. Wells Fargo Bank, N.A., 68 So.3d 989 (Fla. 5th DCA 2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026064492&pubNum=0003926&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). In Dunscombe v. Coutant, as in the instant case, the Defendant brought a motion for summary judgment without having first answered the complaint. [267 So.2d 681 (Fla. 4th DCA 1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000735&cite=267SO2D681&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), The appellate court reversed the lower court's entry of summary judgment, and in so holding, stated:

At the time the court entered the summary judgment aforesaid, defendant-appellee had not filed an answer to any of the several complaints, nor were any of the factual allegations thereof negated by affidavit, deposition, admission or other means. At this stage of pleading, and absent any basis upon which to determine that there were no genuine issues of material facts, the Defendant’s Motion to Dismiss, Alternatively Motion for Summary Judgement and Incorporated Memorandum of Law would necessarily admit (for purposes of considering the motion) the truth of the plaintiff’s allegations. Thus, the court was simply faced with the legal sufficiency of the allegations to state a basis for relief. *Id* at 682.

Here, as in Dunscombe, the Court is faced only with the sufficiency of the complaint and cannot conclusively determine whether material issues of fact exist without the Defendant having responded to discovery or having even filed an answer.

Further, Defendant cannot compress the hearing for the motions for summary judgment and the motion to dismiss into one as an attempt to use the allegations in the summary judgment motions to bolster their motion to dismiss. Only the four corners of the complaint may be considered in ruling on a motion to dismiss. [Johnson v. Jarvis., 74 So.2d 168, 1110 (Fla. 1st DCA 2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954107824&pubNum=0000735&originatingDoc=Ib01b9bd0eabf11e48cb2e12b655d7643&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

WHEREFORE, Plaintiffs respectfully request that this honorable Court strike Defendant's motions for summary judgment and grant such other further relief that is just and appropriate under the circumstances.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on ­­­­­­­­­­­­­February 19, 2022, a true and correct copy of the foregoing was filed and served on the Defendat through the Florida E-File Portal.

**Florida Insurance Law Group, LLC**

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Description automatically generated

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