<<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 RESPONSE IN OPPOSITION TO DEFENDANT’S**

**MOTION TO STRIKE ATTORNEY FEES**

**COMES NOW**, Plaintiff, <<PROVIDER\_SUITNAME>> files this Response in Opposition to Defendant’s Motion to Strike Attorney Fees, and in support thereof further states:

1. This lawsuit arises from a claim for damages to real property located at <<INJUREDPARTY\_FULL\_ADDRESS>> (hereinafter the “Property”) in connection with a single storm event that occurred on <<ACCIDENT\_DATE>> (hereinafter the “Loss”).
2. Defendant issued an “all-risk” homeowners insurance policy to <<INJUREDPARTY\_NAME>> (hereinafter the “Insured”) bearing policy number <<POLICY\_NUMBER>> which was in full force and effect at the time of the loss.
3. During the subject policy period and prior to the filing of the instant lawsuit the Insured reported to the Defendant the loss that occurred on <<ACCIDENT\_DATE>> at the insured property.
4. On <<DOS\_START>>, the Insureds executed an assignment of benefits to <<PROVIDER\_SUITNAME>> in exchange for engineering services.
5. As a result of Defendant’s failure to timely pay for the services rendered, Plaintiff filed the instant lawsuit <<SERVED\_ON\_DATE>> for breach of contract for Defendant’s failure to pay for reasonable and necessary services in a covered loss.
6. Defendant has filed a Motion to Strike Attorney Fees.
7. Defendant, citing to Florida Statute 627.7152, states in their Motion to Strike Attorney Fees that Plaintiff is not entitled to recover attorney fees in the instant action.
8. On May 23, 2019, Governor Ron DeSantis executed CS/CS/HB 7065, 2019 ("AOB Act") and created Fla. Stat. § 627.7152, which fundamentally and substantively changed the framework for litigating first-party property insurance disputes concerning assignment agreements. Not only did Section 6 of the AOB Act expressly identify an effective date of July 1, 2019, but also Fla. Stat § 627.7152(13), as created by the AOB Act, expressly stated "[t]his section applies to an assignment agreement executed on or after July 1, 2019."
9. On May 24, 2019, Governor Ron DeSantis executed CS/CS/HB 337, 2019(“Jurisdictional Act"); which specifically accelerated, on the date of signing, **only** subsection ten (10) of Fla. Stat. § 627.7152, as created by the AOB Act, pertaining to an assignee's entitlement to attorney's fees. In other words, Fla. Stat. § 627.7152 (10) became effective on May 24, 2019, while the remaining provisions (subsections one, two, three, four, five, six, seven, eight, nine, eleven, twelve, and thirteen) applied only to AOB's entered into, on, or after July 1, 2019.
10. Notwithstanding the <<ACCIDENT\_DATE>> date of loss, and the existence of the <<DOS\_START>> assignment agreement, Defendant argues that Plaintiff is not entitled to recover attorney's fees under Fla. Stat§ 627.4287, the former framework changed by AOB Act, because the actual lawsuit was not filed until after the May 24, 2019, retroactive date.
11. Further, Defendant contends that the fee entitlement framework under subsection ten (10) of Fla. Stat § 627.7152 governs this matter so Plaintiff's request for attorney's fees under Fla. Stat. § 627.428 are immaterial, impertinent and scandalous', and as such must be stricken pursuant to Fla. R. Civ. P. l.140(f).
12. However, Defendant's arguments not only misapply Florida Law but also disregard the material facts of this case and should result in Defendant's Motion to Strike Attorney Fees being denied.

**OVERVIEW OF ARGUMENTS**

1. Defendant's failure to analyze the date of loss and Policy effective date both of which pre-date the execution of the Jurisdictional Act, results in a substantively defective Motion that is as nonsensical, as it is incomplete. Furthermore, by pigeonholing the Motion to the date of the lawsuits filing, Defendant fails to provide this Court support for defying existing law.
2. Assuming arguendo, that Fla. Stat.§ 627.7152(10)’s effective date was May 24, 2019, then Defendant failed to plead compliance with the statutes conditions precedent, such as, *inter alia,* a pre-suit settlement offer. Rather, Defendant expects indemnity for its own non-compliance of the law, while using the same law as a sword and a shield to Plaintiff’s detriment. However, Defendant's non-compliance with the act disqualifies it from invoking other portions of the same act against this Plaintiff - especially where Fla. Stat § 627.7152(10), which cannot exist independent of subsection nine (9), could only be enforced after its effective date of July 1, 2019.
3. Until the Plaintiff prevails against the insurer for the underlying dispute, both entitlement to attorney's fees and the amount of same are not ascertainable. Accordingly, the issue of entitlement to attorney's fees is not ripe at this stage in the litigation.
4. Plaintiff's claim for attorney's fees under Fla. Stat. § 627.428 is not wholly irrelevant, as the facts demonstrate a date of loss, Policy effective date, and claims process that pre-dated the Jurisdictional Act and the AOB Act. At the very least, Plaintiff’s claim for attorney's fees under Fla. Stat. § 627.428 creates a question of fact regarding entitlement, which, cannot be decided without weighing evidence, committing reversible error, or contravening the purpose of a motion to strike under Fla. R. Civ. P. I.40(1). Thus, Defendant’s Motion must be denied.

**MEMORANDUM OF LAW**

1. **Substantive obligations and burdens imposed by Fla. Stat. § 627.7152 and Jurisdictional Act (HB 337) are substantive in nature, therefore the statutes cannot be applied retroactively**

“[A] substantive law prescribes legal duties and rights and, once those rights and duties are vested, due process prevents the Legislature from retroactively abolishing or curtailing them."). *Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1272 (Fla. 2013). The Florida Supreme Court has determined that the statutory right to attorney's fees is a substantive right. *See Menendez v. Progressive Express Ins. Co.,* 35 So. 3d 873, 878 (Fla. 2010) (*citing Moser v. Barron Chase Secs., Inc.,* 783 So. 2d 231. 236 (Fla. 2001)).

Furthermore, district courts have concluded that statutory provisions which impose limitations on the right to recover attorney's fees are substantive in nature. *See, Menendez,* 35 So. 3d 873, 879 (*citing Stolzer v. Magic Tilt Trailer, Inc.*, 878 So. 2d 437, 438 (Fla. 1st DCA 2004) (holding that a statutory amendment allowing an employer or carrier thirty, rather than fourteen. days to provide workers compensation benefits before availing itself to pay the employees' attorney's fees was a substantive change in the statute)).

The Florida Supreme Court applies a two--pronged test to determine whether a stature applies retroactively. First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. If the legislative intent is clearly expressed, then the second prong tasks the Court with determining whether retroactive application violates any constitutional principles. *See Menendez*, 35 So. 3d at 877-80. [E]ven where the Legislature has expressly stated that a statute will have retroactive application, [the] Supreme Court will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty." *Id.*

In the *Menendez* case, the State of Florida made statutory changes where, similarly to the case at bar, it amended the framework for insureds seeking to recover PIP benefits under their insurance policies, namely by placing additional requirements on insureds (known as the "Statutory Pre-suit Provision”) to be complied with prior to filing suit against their insurance carrier. *Id*.

The insured in the *Menendez* case was successful in securing a judgment at trial against the

defendant, Progressive Express, for overdue benefits. On appeal, the Third District Court of Appeal overturned the judgement citing the insured's failure to comply with the 200l statute as enacted and holding, *inter alia,* "that the statutory pre-suit notice provision could be applied retroactively to the insured's claim because it was ‘merely procedural' and did not unconstitutionally alter any existing rights." *Id*.

In 2010, the Florida Supreme Court overturned the appellate court, holding that "[b]ecause

we conclude that the 200l amendment creating the statutory pre-suit notice provisions constitutes a substantive change to the statute, we hold that it cannot be retroactively applied to insurance policies issued before the effective date of the amendment." *Id*.

In the present case, as in *Menendez* retroactive application of the amendments under Fla. Stat.§ 627.7152 and the subsequent Jurisdictional Act (HB 337). would constitute substantive changes and, therefore, cannot be retroactive1y applied to Plaintiffs contract/AOB that was in place and in effect prior to the change in the law, irrespective of the Legislature's intent.

However, in distinction from the *Menendez* case, the present case deals with a much more

antagonistic statutory legislative action. In the instant matter, the legislature not only amended an

already existing statute (as was the case with *Menendez*) which would have affected the Plaintiff, but the Legislature went so far as to entirely eliminate Plaintiff’s rights under one statute, only to then pass an entirely new statute in disregard of the legal constitutional requirements to retroactively take away Plaintiff’s vested contractual rights.

Retroactive application of Fla. Stat. § 627.7152 is tantamount to unconstitutionally altering

Plaintiff's existing vested contractual rights under the contract/AOB. Doing so would impair Plaintiff’s vested rights, create new obligations for Plaintiff, and impose several new penalties on

Plaintiff. First, the rights assigned to Plaintiff under the AOB are vested rights that would be taken

away or changed by retroactive application of the statute. Second, retroactive application of the statute creates new obligations for Plaintiff to follow in that it imposes a new heightened requirement for collecting attorney’s fees, while also simultaneously enforcing several new penalties (such as paying for Defendant’s attorney's fees) for failing to meet the newly set retroactive burden that the parties were unaware of at the time of entering into the contract/ AOB. Third, retroactive applicability would, again, impose several new penalties on Plaintiff through the enforcement of a significantly more aggressive and overreaching attorney fee framework as previously discussed.

As such, retroactive application of Fla. Stat. § 627. 7152 to the instant case would impair the obligations of the contract/AOB in violation of the Florida Constitution. Defendant's baseless

construction of law within their Motion not only misinterprets Fla. Stat.§ 627.71.52 and the subsequent Jurisdictional Act (HB 337), but also misapplies the facts of the instant case in defiance of existing case law. Most importantly, Defendant fails to cite any case law in support of its position. For the forgoing reasons, Defendant's motion must be denied.

1. **Subsection ten (10) of Fla. Stat. § 627.7152, cannot be enforced without subsection nine (9) of the Statute, which only became effective on July 1, 2019, after this lawsuit was filed**

Jurisdictional Act (HB 337) only made Fla. Stat.§ 627.7152(10) effective on May 24, 2019. while all other provisions of Fla. Stat. § 627.7152, as created by the AOB Act remained ineffective until the original effective date of July 1, 2019. The inherent irony of the Jurisdictional Act, or specifically Fla, St.at. § 627.7152(10), is its failure to make Fla. Stat.§ 627.7152(1-9) or Fla. Stat.§ 627.7152(11-13) effective on May 24, 2019. This unfortunate defect renders the statute ambiguous, vague, and unenforceable, especially where the enforcement of subsection ten (10) necessarily requires a "pre-suit settlement offer", that is not codified, except pursuant to subsection nine (9), in order to determine whether any party is entitled to an award of attorney's fees.

If no provision other than subsection ten (10) was in effect on May 24, 2019, and subsection ten (10) depends on subsection nine (9), which did not become effective on July l, 2019, it follows

that subsection ten (10) could not reasonably be applied until July 1, 2019. This conclusion is justified despite legislative intent, because an award of attorney's fees under subsection ten (10) necessarily requires a pre-suit settlement offer to be made pursuant to subsection nine (9) and without such an offer, subsection ten (10) would be impossible to enforce or for Plaintiff to comply with.

Since subsection ten (10) cannot apply to the instant case, Defendant's Motion must be

denied.

1. **Defendant fails to meet its burden under Fla. R. Civ. P. 1.140(1)**

It is axiomatic that a party may move to strike or the court may strike” redundant, immaterial, impertinent or scandalous" matters from any pleading at any time. Fla. R. Civ. P. 1.140(f). *See Pentecostal Holiness Church. Inc. v. Mauney,* 270 So. 2d 762, 769 (Fla. 4th DCA 1972). Nevertheless, “a motion to strike a matter as redundant, immaterial, or scandalous should only be granted if the material is: 1) wholly irrelevant, 2) can have no bearing on the equities, and 3) has no influence on the decision." *McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss,* 704 So. 2d 214, 216 (Fla. 2nd DCA 1998) (*quoting Pentecostal Holiness Church, Inc. v. Mauney,* 270 So. 2d 762, 769 (Fla. 4th DCA 1972)).

Even if this Court retroactively applies the Jurisdictional Act and AOB Act to a time after the Date of Loss, after the assignment agreement was entered, but before the lawsuit, then the only way the Court can strike the matter is by weighing evidence, which is inappropriate at this time. Since the Motion to Strike Attorney Fees completely disregards the timeline of facts for this matter, Defendant has not shown that entitlement to fees under Fla. Stat. § 627.428 are l) wholly irrelevant, 2) have no bearing on the equities, and 3) have no influence on the decision. Accordingly, Defendant's Motion to Strike Attorney Fees fails to deliver any evidence for the Court to grant it.

1. **Without a rendition of Judgment or decree against Defendant, insurer deciding entitlement to attorney’s fees is premature and not ripe**

Despite Defendant's misrepresentations to the Court, the issue of entitlement to fees is not ripe at this stage in the litigation. Fla. Stat § 627.428 in pertinent part follows:

**627.428. Attorney's fee.**

(1)Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

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(3) When so awarded, compensation or fees of the attorney shall be

included in the judgment or decree rendered in the case. Fla. Stat. §627.428. (2019).

Since a claim for attorneys’ fees under Fla. Stat § 627.428 is contingent upon the Court

rendering a judgment or decree against an insurer, the procedural requirement necessitates the defendant be liable to Plaintiff. Absent the rendition of liability, a claim under the statute is not ripe until a judgment is entered. *See Id*.

The present case is in the early stages of litigation and no Judgement or decree has yet been rendered. In which case, there remains the possibility that Plaintiff may prevail against the insurer and invoke its right to assert Plaintiff’s entitlement to attorney's fees pursuant to Fla. Stat. § 627.428. Under these circumstances, the Court should not permit Defendant to proceed on a motion to strike where the issues presented are not yet ripe for consideration by this Court.

Furthermore, a motion to strike attorney fees under Rule 1.140(f) is required to be done in an evidentiary hearing. *Berlin b. State of Florida Department of Transportation, 287 So. 3d 631 (Fla. 4th DCA 2020).*

Therefore, because there is no legal basis to strike Plaintiff’s claim for attorney's fees, Defendant’s Motion is defective, and should be denied.

**CONCLUSION**

Plaintiffs Complaint sufficiently alleges an entitlement to attorney's fees outside of the purview of the AOB Act and Jurisdictional Act. At best, Defendant's arguments request this Court to weigh evidence and eliminate issues which are not yet ripe for consideration by this Court. For all the reasons stated herein, and the prejudice Plaintiff would incur on an order for Defendant, Plaintiff requests this Court DENY Defendant's Motion.

WHEREFORE, Plaintiff, <<PROVIDER\_SUITNAME>> a/a/o <<INJUREDPARTY\_NAME>>, requests this Honorable Court to enter an Order Denying Defendant’s Motion to Strike Attorney Fees, and grant such other further relief that is just and appropriate under the circumstances.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on ­­­­­­­­­­­­­February 20, 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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