

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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| TANYA LOWELL, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | |
| |) | |
| DRUMMOND, WOODSUM & MACMAHON EMPLOYEE MEDICAL PLAN, et al., |) | Civil No. 03-244-P-S |
| |) | |
| Defendants/ Third-Party Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| MACHIGONNE, INC., |) | |
| |) | |
| Third-Party Defendant |) | |

**MEMORANDUM DECISION ON MOTION TO STRIKE
AND RECOMMENDED DECISION ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

In the wake of this court’s ruling that defendants/third-party plaintiffs Drummond, Woodsum & MacMahon Employee Medical Plan (“Plan”) and Drummond Woodsum & MacMahon, P.A. (“DWM”) (together, “Drummond Plaintiffs”) are liable to plaintiff DWM employee Tanya Lowell on her claim for wrongful denial of requested medical-plan benefits, *see* Recommended Decision on Cross-Motions for Summary Judgment (“First S/J Decision”) (Docket No. 33); Order Accepting the Recommended Decision of the Magistrate Judge (Docket No. 34), the Drummond Plaintiffs and third-party defendant Machigonne, Inc. (“Machigonne”) cross-move for summary judgment with respect to the Drummond Plaintiffs’ bid for

indemnification from Machigonne on the Lowell claim, *see* Defendants’ Motion for Summary Judgment . . . as to Third-Party Claim Against Machigonne, Inc. (“Drummond S/J Motion”) (Docket No. 38); Third-Party Defendant Machigonne, Inc.’s Motion for Summary Judgment, etc. (“Machigonne S/J Motion”) (Docket No. 39). Incident thereto, the Drummond Plaintiffs move to strike an affidavit filed by Machigonne. *See* Defendants’ Motion To Strike Third Affidavit of Darlene Bolduc (“Motion To Strike”) (Docket No. 53). For the reasons that follow, I grant in part and deny in part the Motion To Strike and recommend that the court grant in part and deny in part Machigonne’s motion for summary judgment and deny that of the Drummond Plaintiffs.

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the

moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

“This framework is not altered by the presence of cross-motions for summary judgment.” *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 6 (1st Cir. 2003). “[T]he court must mull each motion separately, drawing inferences against each movant in turn.” *Id.* (citation omitted); *see also, e.g., Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996) (“Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se*. Cross motions simply require us to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. As always, we resolve all factual disputes and any competing, rational inferences in the light most favorable to the [nonmovant].”) (citations omitted).

B. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the

moving party's statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(e). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact.” *Id.*; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) (“We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.” (citations and internal punctuation omitted)).

II. Factual Context

A. Motion To Strike

The Drummond Plaintiffs move to strike an affidavit of Machigonne employee Darlene Bolduc. *See generally* Motion To Strike; *see also* Third Affidavit of Darlene Bolduc (“Third Bolduc Aff.”), attached to

Third-Party Defendant Machigonne, Inc.’s Reply to Third-Party Plaintiff’s Additional Statement of Material Facts (“Machigonne Reply SMF”) (Docket No. 52). While they seek to strike the entire affidavit, they offer specific arguments only with respect to paragraphs 9 through 13. *See generally* Motion To Strike. Thus, I confine my consideration to those paragraphs. *See, e.g., Perez v. Volvo Car Corp.*, 247 F.3d 303, 315 (1st Cir. 2001) (Rule 56(e) “requires a scalpel, not a butcher knife. The *nisi prius* court ordinarily must apply it to each segment of an affidavit, not to the affidavit as a whole.”). As to those paragraphs, I grant in part and deny in part the Motion To Strike as follows:

Paragraph 9: Granted. Bolduc avers that she “looked to Drummond to be told what to do with regard to approving or denying [Lowell’s] claim,” and “we at Machigonne are never the final decision makers or the plan fiduciary on claims[.]” Third Bolduc Aff. ¶ 9. The Drummond Plaintiffs assert that these statements are, *inter alia*, conclusory, *see* Motion To Strike ¶ 1, and I agree. As the First Circuit has noted, for purposes of Rule 56(e) an “affidavit, in addition to presenting admissible evidence, must be sufficiently specific to support the affiant’s position.” *Perez*, 247 F.3d at 316 (citation and internal quotation marks omitted); *see also, e.g., Rathbun v. Autozone, Inc.*, 361 F.3d 62, 66 (1st Cir. 2004) (“A properly supported motion for summary judgment cannot be defeated by relying upon improbable inferences, conclusory allegations, or rank speculation.”). The statements in issue are generalities. Tellingly, in defending their admissibility, Machigonne argues that they are supported by other specific evidence of record. *See* Machigonne, Inc.’s Opposition to Defendants’ Motion To Strike Third Affidavit of Darlene Bolduc (“Strike Opposition”) (Docket No. 54) ¶ 1. This serves only to underscore the impression that the statements are conclusory.

Paragraph 10: Denied. Although Bolduc states that “Matt Arbo of Healey & Associates, Drummond’s broker, suggested” a certain plan of action regarding Lowell’s claim, Third Bolduc Aff. ¶ 10,

that is not hearsay. The statement is offered to show that Arbo devised the plan, not for the truth of the matter of anything he said. There is no reason to believe that Bolduc, who states that she was the Machigonne account manager involved with Lowell's claim, *see id.* ¶ 1, lacked personal knowledge with respect to the matters addressed in paragraph 10.

Paragraph 11: Granted as to the phrase, “and not as a result of any desire by Drummond to change its plan[,]” *id.* ¶ 11, and otherwise denied. I agree with the Drummond Plaintiffs that Bolduc does not demonstrate personal knowledge of DWM's reasons or motivations for amending its Plan. *See* Motion To Strike ¶ 3. With respect to the balance of Paragraph 11, I am persuaded that Bolduc, as account manager for the Lowell claim and a person familiar with the procedures and practices by which Machigonne acts as a third-party administrator for self-insured employee benefit plans such as the Plan, *see* Third Bolduc Aff. ¶¶ 1-2, had personal knowledge concerning the etiology (from Machigonne's perspective) of Amendment No. 7 to the Plan.

Paragraphs 12-13: Granted as to the attachments to which Bolduc refers, and otherwise denied. I agree with the Drummond Plaintiffs, *see* Motion To Strike ¶ 2, that the attachments in question are hearsay in the sense that they are offered to prove the truth of the matters asserted (that Machigonne sent many proposed amendments to Healey & Associates (“Healey”) for a number of its clients that were similar to DWM's Amendment No. 7, *see* Third Bolduc Aff. ¶¶ 11-13. Machigonne offers no argument that the underlying documents fit an exception to the hearsay rule. *See* Strike Opposition ¶ 2. On the other hand, as Machigonne suggests, *see id.*, the attachments are essentially duplicative of Bolduc's own direct statements regarding this subject matter, *see* Third Bolduc Aff. ¶¶ 12-13, which I am satisfied, given her position at Machigonne, is made on personal knowledge.

B. Cognizable Evidence

Taking into account the foregoing disposition, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:¹

Effective January 1, 2001, DWM and Machigonne entered into an Administrative Services Agreement ("ASA") pursuant to which Machigonne, as contract administrator, was "to fulfill certain specified duties of the Employer as Plan Administrator of said Plan." Third-Party Defendant's Statement of Material Facts Not in Dispute ("Machigonne SMF") (Docket No. 42) ¶ 4; Second Amended Response of Third-Party Plaintiffs to Third-Party Defendant's Statement of Material Facts Not in Dispute ("Drummond Opposing SMF") (Docket No. 58) ¶ 4.² DWM retained the services of Machigonne primarily to handle employee claims submitted under the Plan because (i) DWM believed it was not appropriately staffed to make such benefit determinations, and (ii) DWM, for purposes of employer/employee relationships, did not want to be in the position of denying coverage under the Plan. Additional Material and Undisputed Facts in Support of Defendants'/Third-Party Plaintiffs' Opposition to Third-Party Defendant's Motion for Summary Judgment, commencing at page 10 of Drummond Opposing SMF ("Drummond Additional SMF"), ¶ 2;

¹ Inasmuch as the parties' two sets of statements of material facts are largely coextensive, I have melded the two, eliminating redundancies, for purposes of setting forth the evidence cognizable on summary judgment.

² Upon discovering that certain of the Drummond Plaintiffs' opposing statements of material facts (originally filed as Docket No. 44) did not correspond to the correct paragraphs of Machigonne's initial statement, I ordered the document refiled. *See* Order (Docket No. 55). The amended document (filed as Docket No. 56) still contained errors. I held a teleconference with counsel during which I extended the Drummond Plaintiffs' counsel the courtesy of one last chance to correct these unfortunate mistakes. *See* Docket Nos. 57, 59. This culminated in the filing of Docket No. 58, which is now the operative opposing SMF. Machigonne subsequently helpfully filed an amended reply brief to correct its references to paragraphs of the Drummond Plaintiffs' opposing SMF. *See* Third-Party Defendant Machigonne, Inc.'s Amended Reply to Third-Party Plaintiff's Opposition to Machigonne's Motion for Summary Judgment ("Machigonne S/J Reply") (Docket No. 60).

Machigonne Reply SMF ¶ 2; Affidavit of Jerrol Crouter (“Second Crouter Aff.”) (Docket No. 43) ¶ 6.³

Pursuant to the ASA, Machigonne agreed “to process claims in accordance with the Plan for all claims incurred on or after the effective date and prior to the termination date of this Agreement.”

Machigonne SMF ¶ 6; Drummond Opposing SMF ¶ 6. The effective date of the ASA was January 1, 2001, and the termination date was December 31, 2001. *Id.* The ASA also provided:

[I]t is the understanding and intention of the parties that the Employer is the Plan fiduciary and as such is fully responsible for compliance with the provisions of the Summary Plan Description (hereinafter referred to as the “Plan Document”) and for the provision of benefits to participants and/or beneficiaries under the Plan. The Employer shall also be responsible for compliance with all state and federal laws, including the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, and the Internal Revenue Code of 1986 (the “Code”), as amended. It is the further intention and understanding of the parties that responsibility of the Contract Administrator is limited to administering the Plan on behalf of the Employer in order to carry out for the Employer the details and various technical functions which are associated with operations of a Plan of this nature.

Id. ¶ 7. Machigonne agreed to “determine eligibility for benefits based upon records furnished and currently updated by the Employer.” *Id.* ¶ 8. With respect to claims processing, the ASA provided:

[Machigonne] will process eligible claims in accordance with the terms of the Plan. The Employer agrees to pay promptly all claims for benefits under the Plan approved by [Machigonne] unless it has reasonable grounds for disputing any such benefit claim. If [Machigonne] cannot satisfy a participant as to the accuracy or completeness of a claim determination, [Machigonne] shall afford the participant a reasonable opportunity to obtain a review of the determination in accordance with applicable federal and state law.

³ Machigonne purports to dispute the Drummond Plaintiffs’ second rationale for its entry into the ASA on the bases that (i) Machigonne did not promise in the ASA to interpret the Plan or make final decisions, and (ii) the Plan gave DWM authority to interpret Plan provisions. *See* Machigonne Reply SMF ¶ 2. These points fail to controvert the Drummond Plaintiffs’ statement. The ASA paragraphs cited by Machigonne contemplate that Machigonne will process claims on DWM’s behalf, *see* ASA ¶¶ 1-3, Administrative Record (“Record”), filed by Machigonne on Feb. 12, 2004 & Dec. 9, 2004, at MACH 1-3, and the fact that DWM retained discretion to interpret the Plan does not speak to the issue whether it intended to use that discretion.

Id. ¶ 9. Pursuant to the ASA, Machigonne also agreed to (i) “[m]ake reasonable efforts to advise employees about the benefits available to them under the Plan and consult with them upon request by the Employer (but no more frequently than annually, unless requested by the Employer and agreed to by [Machigonne], regarding the proper methods of submitting claims for benefits[.]” (ii) “[p]repare Plan Document and amendments thereto[.]” and (iii) “[f]ile Plan document and amendments thereto with the excess loss carrier.” Defendants’ Statement of Undisputed Material Facts (“Drummond SMF”) (Docket No. 40) ¶¶ 3(b), (e)-(f); Third-Party Defendant’s Opposing Statement of Material Facts and Additional Statement of Material Facts (“Machigonne Opposing SMF”) (Docket No. 47) ¶¶ 3(b), (e)-(f); ASA ¶ 2(b), Record at MACH-1.⁴

The ASA further provided: “[Machigonne] is not a fiduciary, an insurer, an underwriter or guarantor with respect to any benefits payable under the Plan [Machigonne] does not assume any responsibility for the adequacy of the funding of the Plan or any act or omission or breach of duty by the Employer.” Machigonne SMF ¶ 10; Drummond Opposing SMF ¶ 10. Machigonne disclaimed “any responsibility for normal variations in claims processing, except for gross negligence, willful misconduct, or lack of good faith.” *Id.* ¶ 11.

The ASA provided for indemnification by Machigonne as follows:

[Machigonne] hereby agrees to indemnify and hold the Employer, its directors, officers and employees, harmless from and against any and all costs, liabilities or expenses rising out of or in any way connected with the failure of [Machigonne] to use reasonable care in fulfilling its duties and obligations under the Agreement correctly, completely and in a timely manner.

⁴ Machigonne qualifies the Drummond Plaintiffs’ paragraph 3(b) by providing a more extensive quotation of the underlying document. *See* Machigonne Opposing SMF ¶ 3(b). My recitation of the facts reflects that qualification.

Machigonne SMF ¶ 12; ASA ¶ 9(b) (“Paragraph 9(b)”), Record at MACH-5.⁵ The ASA provided for indemnification by DWM as follows:

The Employer agrees to indemnify and hold [Machigonne], its directors, officers and employees harmless from and against any and all costs, liabilities and expenses incurred by [Machigonne] arising out of or in any way connected with the reliance by [Machigonne] on the instructions of the Employer concerning the administration of the Plan, or the failure of the Employer to meet its funding obligations under the Plan.

Machigonne SMF ¶ 13; Drummond Opposing SMF ¶ 13. The Drummond Plaintiffs admit that at the time of Lowell’s claim DWM, not Machigonne, was the Plan fiduciary. *Id.* ¶ 14.⁶

Following the December 31, 2001 “expiration” date of the ASA, DWM and Machigonne continued the same course of conduct with respect to the ASA and the handling of claims under the Plan; they conducted themselves just as they had prior to that time. Drummond SMF ¶ 4; Affidavit of Jerrol Crouter (“First Crouter Aff.”), attached to Defendants’ Reply to Plaintiff’s Response to Objections to Scheduling Order (Docket No. 17); Rule 30(b)(6) Deposition of Machigonne through its designee, Darlene Ann Bolduc (“Machigonne Dep.”), Tab 1 to Machigonne SMF, at 72-73.⁷ After December 31, 2001, Machigonne did submit to DWM two drafts of proposed new ASAs. Drummond SMF ¶ 5; Machigonne Opposing SMF ¶ 5. The parties never reached agreement as to, and never executed any revisions to, the ASA. *Id.* ¶ 6.

⁵ As the Drummond Plaintiffs point out, Machigonne misquoted this paragraph. *See* Drummond Opposing SMF ¶ 12. I have corrected the misquotation.

⁶ The Drummond Plaintiffs qualify this statement by denying that DWM is an expert in ERISA matters. *See* Drummond Opposing SMF ¶ 14; Second Crouter Aff. ¶ 5.

⁷ Machigonne qualifies this statement, asserting that Bolduc specifically testified: “No, I think we’ve always treated them the same. We’ve always done business that they are the decision maker of all claims that we handle, of any correspondence, if they want input, we – they have full ability to give input to any claims.” Machigonne Opposing SMF ¶ 4; Machigonne Dep. at 73. Machigonne elsewhere states that it assumes for purposes of this case at this time that the ASA remained in effect subsequent to its stated expiration date. *See, e.g.*, Machigonne Reply SMF ¶¶ 2, 14.

The Plan provided that DWM, as Plan Administrator, “shall have full authority to interpret this Plan, its provisions and regulations with regard to eligibility, coverage, benefit entitlement, benefit determination and general administrative matters.” Machigonne SMF ¶ 15; Drummond Opposing SMF ¶ 15. The Plan also stated: “The Plan Administrator’s decision will be binding on all Plan participants and conclusive on all questions of coverage under this Plan. . . . [DWM] reserve[s] the right to make changes to the Plan or to discontinue the Plan entirely.” *Id.* The Plan was designed by Healey and modified by DWM before it became the final Plan. *Id.* ¶ 16. The Plan defined the “Plan Administrator” and the “Plan Sponsor” as DWM and the “Contract Administrator” as Machigonne. *Id.* ¶ 17. The Plan provided, “The Contract Administrator reserves the right to determine whether a treatment was medically necessary and may consult with a medical consultant or with a review group in making this determination.” *Id.* ¶ 18.

Regarding submittal of claims for benefits, the Plan directed participants to submit claims to Machigonne within ninety days. *Id.* ¶ 20.⁸ The Plan further provided, “The Plan Administrator at its own expense shall have the right and opportunity to examine the person of any individual whose injury or illness is the basis of a claim under the Plan and to conduct an autopsy in case of death, where it is not forbidden by law.” *Id.* (emphasis deleted).

A section of the Plan covering the Utilization Management Program stated:

The purpose of the Utilization Management Program is to ensure the delivery of high quality, cost-effective and medically necessary health care. To this end, providers of medical services, treatment facilities, and the Contract Administrator work together to educate participants concerning their health care alternatives and to guide participants in their utilization of Plan benefits. However, the final authority for decisions about a participant’s health care rests with the participant and the participant’s physician.

⁸ The Drummond Plaintiffs qualify this statement, noting that the Plan directed participants to submit claims to Machigonne within ninety days after the date of service. Drummond Opposing SMF ¶ 20; Plan, Attachment No. 1 to Plaintiff’s Response to Objections to Scheduling Order (Docket No. 15), at 42.

Drummond SMF ¶ 7; Machigonne Opposing SMF ¶ 7; Plan at 6.⁹ The Plan also empowered Machigonne “to determine whether a treatment was medically necessary[.]” Drummond SMF ¶ 8; Machigonne Opposing SMF ¶ 8.

With respect to appeals, the Plan provided:

To appeal a claim denial or reduction of benefits, a written appeal must be presented to the Contract Administrator within 60 days from the date appearing on the notice of denial or reduction in benefits. The participant has the right to review the facts relating to the original decision and any additional information provided. The participant may also review this information with the Plan Administrator. The Contract Administrator will present the participant with the final written decision within 60 days after receiving the appeal.

Drummond SMF ¶ 10; Machigonne Opposing SMF ¶ 10; Plan at 40.¹⁰

Two other Plan sections are pertinent to this case – Covered Expenses and General Exclusion No. 11 (“Exclusion 11”). Drummond SMF ¶ 12; Machigonne Opposing SMF ¶ 12. To be a “covered expense,” a procedure must be “medically necessary.” *Id.* If a procedure is determined to be “medically necessary,” costs such as “charges of a surgeon,” “pre-admission testing” and “charges for a professional anesthesiologist, radiologist or pathologist” are deemed covered expenses. *Id.* ¶ 13. The General Exclusions section provides in pertinent part: “Benefits will not be provided for any service that is not medically necessary and appropriate, including [specifically excluded expenses], regardless of whether or not they are provided, performed or prescribed by a physician.” *Id.* ¶ 15. Exclusion 11 excludes coverage for “[a]ny expense for weight reduction, nutritional or dietary counseling (except to the extent provided herein); smoking clinics, sensitivity training, encounter groups, educational programs (except as provided

⁹ Machigonne qualifies the Drummond Plaintiffs’ paragraph 7 by providing a more extensive quotation of the underlying document. *See* Machigonne Opposing SMF ¶ 7. My recitation of the facts reflects that qualification.

¹⁰ Machigonne qualifies the Drummond Plaintiffs’ paragraph 10 by providing a more extensive quotation of the underlying document. *See* Machigonne Opposing SMF ¶ 10. My recitation of the facts reflects that qualification.

herein); career counseling, and activities whose primary purposes are recreational and/or social.” *Id.* (emphasis deleted).

Lowell suffers from morbid obesity. *Id.* ¶ 17. In October 2001 she initiated a claim with Machigonne for a pre-procedure determination that gastric-bypass surgery was a covered expense under the Plan. *Id.* ¶ 18. She made this claim through her doctor, P.A. Aslam, M.D. Machigonne SMF ¶ 26; Drummond Opposing SMF ¶ 26. In response, Machigonne obtained her medical records and sent them to Safeco Insurance Company (“Safeco”) for review. Drummond SMF ¶ 19; Machigonne Opposing SMF ¶ 19. Machigonne selected Safeco because Safeco insured the Plan against losses exceeding \$30,000, and Machigonne’s representative believed the costs associated with a gastric-bypass procedure would exceed that amount. *Id.* ¶ 20. As part of her pre-authorization request, Lowell saw a psychologist for a psychological evaluation to assist in determination of her mental suitability for the surgery. *Id.* ¶ 21. She also consulted with a nutritionist for “weight loss management and pre-bariatric surgery counseling.” *Id.* ¶ 22.¹¹

Safeco reviewed Lowell’s medical records and the Plan and concluded that her gastric bypass was not covered under the Plan. Machigonne SMF ¶ 28; Drummond Opposing SMF ¶ 28. Machigonne’s Medical Review Department also looked at Lowell’s claim and concluded that the gastric-bypass surgery was not medically necessary. Machigonne SMF ¶ 29; Affidavit of Darlene Bolduc (“First Bolduc Aff.”), Tab 3 to Machigonne SMF, ¶ 10. Machigonne sent Dr. Aslam a letter stating: “It has been determined that

¹¹ The parties dispute whether the Plan knowingly reimbursed the psychologist for gastric-bypass-related expenditures. *Compare* Drummond SMF ¶ 23; Affidavit of Tanya Lowell (“Lowell Aff.”), Attachment No. 2 to Plaintiff’s Statement of Material Facts (Docket No. 30), ¶¶ 2, 4 *with* Machigonne Opposing SMF ¶ 23; Second Affidavit of Darlene Bolduc (“Second Bolduc Aff.”), Tab 1 to Machigonne Opposing SMF, ¶¶ 5-7. Machigonne asserts that the psychologist (Toby Ansfield) used ICD9 codes, which indicate a diagnosis, and CPT codes, which indicate type of treatment. Machigonne Opposing SMF ¶ 23; Second Bolduc Aff. ¶ 5.

the gastric bypass is not considered medically necessary, and would not be a covered service under Ms. Lowell's medical benefit plan with Machigonne Benefit Administrators." Machigonne SMF ¶ 29; Drummond Opposing SMF ¶ 29; Letter dated Dec. 14, 2001 from Machigonne Medical Review Department to P.A. Aslam, MD, PA, Tab 1A to Machigonne Opposing SMF.¹² Lowell did not appeal the initial denial of her claim for benefits. Machigonne SMF ¶ 30; Drummond Opposing SMF ¶ 30. When Lowell first submitted her claim in 2001, Machigonne did not consult with DWM about the claim. Drummond Additional SMF ¶ 6; Machigonne Reply SMF ¶ 6. Machigonne now maintains that it mistakenly told Lowell her claim was being denied on the basis of medical necessity when it actually was being denied on the basis of the weight-loss exclusion. Drummond SMF ¶ 24 n.6; Record at MACH-62, MACH-92; Machigonne Dep. at 16, 18-19.¹³

In late February or early March 2003, Machigonne received a request from Lowell's physician, Michael Carroll, M.D., for pre-authorization for a gastric-bypass surgical procedure. Machigonne SMF ¶ 31; Drummond Opposing SMF ¶ 31. On March 6, a representative from Dr. Carroll's office inquired of Machigonne whether gastric bypass would be a covered service. Drummond SMF ¶ 27; Machigonne Opposing SMF ¶ 27. Machigonne responded that pre-authorization of gastric-bypass surgery required analysis of "BMI [Body Mass Index], history and physical, office notes for last 12 months, nutritional assessment, and psychological assessment." *Id.* ¶ 28. The same day, the same representative from Dr. Carroll's office spoke with a different Machigonne customer service representative who stated that if Machigonne received a request for predetermination of medical necessity, the information received with that

¹² The Drummond Plaintiffs qualify this statement by quoting the exact language of the letter. *See* Drummond Opposing SMF ¶ 29. My recitation of the facts reflects that qualification.

¹³ Machigonne's objection to this statement on the basis that it is not supported by the citations given, *see* Machigonne Opposing SMF ¶ 24, is overruled.

request would be reviewed along with the information received in connection with the prior 2001 request. *Id.* ¶ 29.

Also that same day, the psychological evaluation previously performed to determine Lowell's suitability for gastric-bypass surgery was updated. *Id.* ¶ 30. On March 11 Dr. Carroll saw Lowell for evaluation and treatment of morbid obesity, determined that she was an excellent candidate for laparoscopic gastric-bypass surgery and prescribed gastric-bypass surgery and preoperative pulmonary evaluation for her. *Id.* ¶ 31. Machigonne reimbursed Lowell for the expense of both the updated psychological evaluation and the evaluation by Dr. Carroll. Drummond SMF ¶ 33; Lowell Aff. ¶¶ 2-3.¹⁴

Machigonne first contacted DWM about Lowell's claim sometime in early March 2003. Drummond Additional SMF ¶ 7; Machigonne Reply SMF ¶ 7. At some point after hearing of Lowell's claim, Jerrol Crouter reviewed Exclusion 11. Drummond Additional SMF ¶ 8; Second Crouter Aff. ¶ 13.¹⁵ His opinion was that the exclusion did not apply to Lowell's claim. *Id.*¹⁶ Crouter does not practice in the area of ERISA law, nor does DWM have an ERISA-law practice group. Drummond Additional SMF ¶ 1; Machigonne Reply SMF ¶ 1. DWM was relying upon Machigonne, as benefits administrator with experience in interpreting this type of exclusion, to advise DWM as to whether the Lowell procedure was covered by the Plan. Drummond Additional SMF ¶ 8; Second Crouter Aff. ¶ 13. Because Crouter was not comfortable with Machigonne's interpretation of the exclusion, DWM requested that Machigonne

¹⁴ Machigonne qualifies this statement, asserting that with regard to Drs. Carroll and Ansfield, its records demonstrate that both used ICD9 and CPT codes indicating diagnoses and treatment, and the Plan does not exclude office visits and consultation to treat the effects of obesity. Machigonne Opposing SMF ¶ 33; Second Bolduc Aff. ¶¶ 5-8.

¹⁵ Crouter was DWM's managing partner. *See* Machigonne SMF ¶ 45; Rule 30(b)(6) Deposition of Drummond Plaintiffs through their designee, Jerrol A. Crouter ("Drummond Dep."), Tab 2 to Machigonne SMF, at 21.

¹⁶ Specifically, Crouter told Cathy Liston, DWM's chief operating officer, *see* Machigonne SMF ¶ 32; Drummond Opposing SMF ¶ 32, that he read the exclusion as not applying to Lowell's gastric bypass; he said "that it appeared to me that that [Exclusion 11] was for weight watchers, what I would describe in the traditional insurance sense as a cosmetic procedure, and that this [Lowell's gastric bypass] was a procedure for treatment of hypertension, where – where the
(continued on next page)

submit Lowell's claim for an independent medical review to determine whether her gastric bypass was medically necessary and whether the procedure was covered under the Plan. *Id.* Machigonne decided to use Medial Review Institute of America, Inc. ("MRI") to perform the review. *Id.* DWM told Machigonne that it expected Machigonne to evaluate the Plan and determine whether the surgery was covered. Drummond Additional SMF ¶ 9; Second Crouter Aff. ¶ 14.¹⁷

On March 7 Liston asked Darlene Bolduc, Machigonne's account manager, to have Lowell's new request undergo a "UR" process. Machigonne SMF ¶ 32; Drummond Opposing SMF ¶ 32. "UR" stands for "utilization review," the purpose of which is to determine the medical necessity of a particular procedure.

Id. Liston wrote further:

I have spoken with the firm's managing partner regarding our conversation, and we would definitely like to go forward with the U/R review on this pre-authorization. We will abide by Machigonne and Avemco's [Avemco Insurance Company's] decisions as to the

weight loss was for treatment of a serious hypertension problem[.]" Machigonne SMF ¶ 78; Drummond Dep. at 53-54.
¹⁷ Machigonne's objection to this statement on the basis of lack of an affirmative demonstration of personal knowledge on Crouter's part, *see* Machigonne Reply SMF ¶ 9; Machigonne S/J Reply at 4-5, is overruled. Rule 56(e) requires, *inter alia*, that affidavits "shall be made on personal knowledge . . . and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Thus, the requirement of an "affirmative" showing pertains to competence to testify, not to personal knowledge. In any event, Crouter notes in his affidavit that he was president of DWM and became personally involved in Lowell's 2003 claims process. *See* Second Crouter Aff. ¶¶ 1, 11. Against that backdrop, he avers: "The information contained herein is based upon my own personal knowledge as well as my review of business records relating to Tanya's claim." *Id.* ¶ 4. In an effort to demonstrate Crouter's lack of personal knowledge of Machigonne-DWM communications, Machigonne cites to pages of Crouter's deposition in which he testified that (i) two other DWM employees (Cathy Liston and Celeste Daly) relayed information to him regarding communications with Machigonne, (ii) he was not copied on a certain set of e-mails regarding Lowell's claim, and (iii) he was not certain whether he participated in a conference call regarding denial of Lowell's appeal. *See* Machigonne Reply SMF ¶ 9; Drummond Dep. at 6, 21, 55-58. Nonetheless, Crouter did not testify in the cited pages that his knowledge of communications with Machigonne derived solely from conversations with DWM employees, and he did testify that he remembered participating in "one or two" conference calls concerning Lowell's claim. *See* Drummond Dep. at 56. Apart from this, review of documents by a corporate president such as Crouter is an acceptable fashion in which to acquire "personal knowledge." *See, e.g., Baker v. Veneman*, 256 F. Supp.2d 999, 1005 (E.D. Mo. 2003) ("It appears to the Court that Mr. Arnold based his Declaration upon his review of the loan files and his experience as a Farm Loan Manager. His statements are therefore based upon his personal knowledge and are not inadmissible hearsay."); *In re Brooks Fashion Stores, Inc.*, No. 92 Civ. 1571 (KTD), 1994 WL 132280, at *4 n.3 (S.D.N.Y. Apr. 14, 1994) ("Berk's [sic] contends that granting summary judgment was improper because the affidavit of Kenneth Slivken ('Slivken'), Vice President of Human Resources, is non-probative. This argument is without merit. Although Slivken's affidavit is not based upon his physical presence at key events, his status as Vice President of Human Resources and his review of the relevant records, satisfies the personal knowledge requirement of Rule 56(e)[.]").

medical necessity of this procedure. Thanks for your time and insight – I appreciate being able to make an informed decision. I don't want any decision by Machigonne conveyed to the employee until we have Avemco's decision as well.

Darlene – please proceed with the U/R process. Tanya indicated she's already requested that the past 12 months['] records be sent to you for your review and if there is anything needed, please be sure to let her know as soon as possible.

Id. ¶ 33.¹⁸

On or about March 18 Machigonne denied Lowell's claim on the basis that expenses for weight reduction were excluded by the Plan. Drummond SMF ¶ 34; Machigonne Opposing SMF ¶ 34. On March 24, a Machigonne account manager communicated to a colleague that "one major problem with [Lowell's claim] is that we originally denied as not medically necessary." *Id.* ¶ 35. On March 31 MRI completed its review of Lowell's medical records and certain Plan documents. *Id.* ¶ 36. The MRI reviewing physician concluded that Lowell met the National Institutes of Health's criteria for gastric-bypass surgery and that her procedure was medically necessary but that it was not covered under the terms of the Plan based on the language of Exclusion 11. Machigonne SMF ¶ 36; Drummond Opposing SMF ¶ 36.

On April 1 Bolduc informed Liston that the review indicated that the procedure would not be covered under the Plan even if it were medically necessary but that the procedure could be considered medically necessary. *Id.* ¶ 37.¹⁹ Prior to April 1 Liston had asked Bolduc to determine whether Avemco would consider Lowell's gastric bypass to be covered under the Plan. *Id.* ¶ 38.²⁰ Avemco was at that time

¹⁸ The parties dispute whether, at that time in early March, Liston told Bolduc that DWM might pay for Lowell's surgery if it was determined to be medically necessary. Compare Machigonne SMF ¶ 34; First Bolduc Aff. ¶ 13 with Drummond Opposing SMF ¶ 34; Second Crouter Aff. ¶ 20. Machigonne's objection to the Drummond Plaintiffs' opposing statement on the ground of lack of personal knowledge on Crouter's part, see Machigonne S/J Reply at 4-5, is overruled for the reasons discussed in footnote 17, above.

¹⁹ Although the Drummond Plaintiffs state that they cannot confirm or deny the timing of this communication, see Drummond Opposing SMF ¶ 37, the citation provided by Machigonne supports the date given, see First Bolduc Aff. ¶ 16.

²⁰ Although the Drummond Plaintiffs state that they cannot confirm or deny the timing of this communication, see Drummond Opposing SMF ¶ 37, the citation provided by Machigonne supports the date given, see First Bolduc Aff. ¶ 17.

DWM's excess loss insurance carrier. *Id.* ¶ 39. Under the 2003 stop-loss contract with Avemco, DWM had a deductible of \$35,000, which meant that DWM would have to pay the first \$35,000 toward Lowell's medical expenses if Lowell's claim for benefits for her gastric bypass were approved. *Id.* ¶ 40. Unlike Safeco, Avemco would not provide an opinion as to coverage in advance, and throughout maintained the position that it would only make a decision after DWM submitted a claim to it, which would occur only after Lowell's claim was approved and her medical expenses exceeded DWM's \$35,000 deductible. Machigonne SMF ¶ 41; First Bolduc Aff. ¶ 18.²¹

On April 1 Bolduc informed Liston that Avemco advised Machigonne that Avemco would only approve the gastric bypass if it was covered under the Plan. Machigonne SMF ¶ 42; Drummond Opposing SMF ¶ 42.²² Specifically, Bolduc e-mailed Liston and reported: "Avemco advised us that they would only approve the gastric bypass if it is approved under the plan. Since the plan would not cover, you would not have stop loss coverage if you decide to cover this procedure." Drummond SMF ¶ 37; Machigonne Opposing SMF ¶ 37; Record at MACH-167.²³

On April 2 a conference call was held with Bolduc, Liston, Celeste Daly, the head of DWM's human resources department, and Matt Arbo and Joan Cotsifas of Healey, which was DWM's broker. Machigonne SMF ¶ 43; Drummond Opposing SMF ¶ 43.²⁴ During that conference call, Bolduc related the outcome of the medical review. *Id.* ¶ 47. No decision was made to deny Lowell's claim at that time. *Id.*²⁵

²¹ The Drummond Plaintiffs' attempted denial of this statement is disregarded inasmuch as it is unsupported by a record citation. *See* Drummond Opposing SMF ¶ 41.

²² Although the Drummond Plaintiffs state that they cannot confirm or deny the timing of this communication, *see* Drummond Opposing SMF ¶ 42, the citation provided by Machigonne supports the date given, *see* First Bolduc Aff. ¶ 18.

²³ Machigonne complains that the Drummond Plaintiffs misquoted the Bolduc e-mail. *See* Machigonne Opposing SMF ¶ 7. I agree, and have set forth the pertinent text of the e-mail as it appears in the Record.

²⁴ Although the Drummond Plaintiffs state that they cannot confirm or deny the timing of this communication, *see* Drummond Opposing SMF ¶ 43, the citation provided by Machigonne supports the date given, *see* First Bolduc Aff. ¶ 19.

²⁵ The parties dispute whether, during that conference call, the decision whether to cover the claim was left to DWM. (*continued on next page*)

However, a decision was made to send all of Lowell's medical information to Avemco to determine if the insurance company would cover the claim if it exceeded DWM's deductible. *Id.* ¶ 48.²⁶ After the conference call Liston wrote to Bolduc, informed her that Liston and Daly had told Lowell the Plan would not cover her claim and directed her to follow up with a written denial letter. *Id.* ¶ 49. Specifically, Liston wrote:

After our conference call and following further discussion with the firm's managing partner, Celeste and I communicated to Tanya that the Plan will not cover the procedure she was requesting and that the reinsurer would not cover the excess because of that. I told her that she, of course, had the option to appeal this through MBA [Machigonne], but as the firm's benefit administrator, we were abiding by MBA's decision. In terms of next steps, here [sic] my understanding of what needs to occur:

1. Please follow up with the appropriate written denial letter as soon as possible including the appeal procedures and blind copy Celeste on the letter.
2. It is imperative that when Tanya speaks with anyone from MBA, they do not say that the firm could have amended the plan but chose not to – while Tanya may perceive this already, we made it clear to her that amending the plan was not viewed as an option by the firm because of the financial risk exposure that could present to the firm and the potential impact to all employees' further rates.
3. Also, if she does appeal, as I suspect she will, I strongly request that the contract language be reviewed by one of MBA's in-house legal counsel prior to issuing the appeal decision and that any appeal be handled on a rush priority basis.
4. Joan and Matt, in conjunction with next year's renewal, we need to update the contract with the most current plan language so as to hopefully avoid this type of situation in the future. The fact that the clearer language now exists on this exact issue concerns me as to what other weak spots we may have in the current language (realizing we will never anticipate them all . . .).

Compare Machigonne SMF ¶ 47; First Bolduc Aff. ¶ 19 *with* Drummond Opposing SMF ¶ 47; Second Crouter Aff. ¶¶ 13-14, 20-22. Machigonne's objection to the Drummond Plaintiffs' opposing statement on the ground of lack of personal knowledge on Crouter's part, *see* Machigonne S/J Reply at 4-5, is overruled for the reasons discussed in footnote 17, above.

²⁶ Although the Drummond Plaintiffs state that they cannot confirm or deny whether this decision was made during the April 2 conference call, *see* Drummond Opposing SMF ¶ 48, the citation provided by Machigonne supports the date given, *see* First Bolduc Aff. ¶ 19.

Thanks for all of your collective help on this unfortunate situation.

Id. As of April 4, the Plan decided to “go with [Machigonne’s] determination” of Lowell’s claims and not to “go[] outside of the plan guidelines” as interpreted by Machigonne. Drummond SMF ¶ 38; Record at MACH-78. On April 8, Machigonne informed Lowell’s doctor that the preauthorization request was denied based on the determination that the gastric bypass was not a covered service under the Plan. Machigonne SMF ¶ 50; Drummond Opposing SMF ¶ 50. On April 11, Lowell appealed the denial through her attorney, Christopher Taintor. *Id.* ¶ 51.

In May 2003 DWM inquired as to whether it could amend the Plan to allow for Lowell’s gastric-bypass surgery. Drummond Additional SMF ¶ 12; Machigonne Reply SMF ¶ 12. Based on Machigonne’s representations to DWM that Lowell’s claim was precluded by Exclusion 11, DWM believed it was necessary to amend the Plan if Lowell’s surgery was to be covered. *Id.* Machigonne drafted an Amendment No. 7 at DWM’s request. Machigonne SMF ¶ 23; Drummond Opposing SMF ¶ 23. The proposed Amendment No. 7 would have amended the Plan to provide coverage for “[c]harges for services related to gastric bypass surgery when performed to treat morbid obesity, when medically necessary for the treatment of related medical conditions including but not limited to high blood pressure, diabetes, etc. Benefits are limited to ob [sic] gastric bypass surgery per lifetime. Excludes coverage for cosmetic surgery or elective gastric reversal surgery.” *Id.* ¶ 24.

On May 8, a representative of Machigonne spoke with a representative of Avemco who informed it that Avemco would “go with [Machigonne’s] determination.” Drummond SMF ¶ 40; Record at MACH-212.²⁷ That is, because Machigonne had denied the claim, Avemco likely would as well. *Id.*

DWM decided not to amend the Plan to cover gastric-bypass surgery. Machigonne SMF ¶ 25; Drummond Opposing SMF ¶ 25. The proposed Amendment No. 7 was never adopted and was withdrawn. *Id.* DWM decided not to amend the Plan because it understood that Avemco would base its coverage determination upon Machigonne’s decision and would not cover the excess loss if the Plan was amended during the policy year. Drummond Additional SMF ¶ 12; Second Crouter Aff. ¶ 17.²⁸ Someone at Healey, either Arbo or Cotsifas, told DWM that Avemco would not honor the amendment to provide coverage for a gastric bypass. Machigonne SMF ¶ 54; Drummond Opposing SMF ¶ 54. DWM believed that Lowell’s surgery would very likely cost, at a minimum, more than \$35,000 and therefore would require excess loss coverage. Drummond Additional SMF ¶ 13; Machigonne Reply SMF ¶ 13. DWM also was informed that surgical complications could result in a total cost of as much as \$500,000. *Id.*²⁹

Because DWM remained concerned about Machigonne’s position after independent medical review, it asked Machigonne to have its attorneys review the case. Drummond Additional SMF ¶ 14;

²⁷ Machigonne’s hearsay objection to this statement, *see* Machigonne Opposing SMF ¶ 40, is overruled. Avemco’s statement is not offered for the truth of whether it would abide by Machigonne’s determination.

²⁸ Machigonne’s objection to this statement on the ground of conflict between Crouter’s deposition testimony and his affidavit, *see* Machigonne Reply SMF ¶ 12; Machigonne S/J Reply at 5, is overruled. The portion of Crouter’s affidavit that Machigonne identifies as contradicting his deposition testimony is not relied upon by the Drummond Plaintiffs in their statement of material facts, *compare id. with* Drummond Additional SMF ¶ 12; hence, the Drummond Plaintiffs are not seeking to resist summary judgment on the basis of clearly contradictory testimony, *see, e.g., Net 2 Press, Inc. v. 58 Dix Ave. Corp.*, 266 F. Supp.2d 146, 153 (D. Me. 2003) (“When an interested witness has given clear answers to unambiguous questions [at deposition], he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.”) (citation and internal quotation marks omitted).

²⁹ Machigonne’s hearsay objection to this statement, *see* Machigonne Reply SMF ¶ 13, is overruled. The statement bears not on the “truth of the matter asserted,” Fed. R. Evid. 801(c) – whether in fact the surgery would have cost that much – but on DWM’s understanding at the time of the risk to which it was exposed.

Machigonne Reply SMF ¶ 14. After discussing the case with Machigonne’s in-house counsel, Lendall Smith, Bolduc reported to DWM that Smith said the case could go either way and that his “suggestion would be for [DWM] to just pay the claim – and then firm up the Plan document to make sure they didn’t have future issues.” Machigonne SMF ¶ 55; Machigonne Dep. at 57-59.³⁰ Bolduc also cautioned Liston that Smith said DWM could lose a lawsuit if it proceeded to court based only on the interpretation of Exclusion 11. Machigonne SMF ¶ 56; First Bolduc Aff. ¶ 25.³¹

On May 30, Liston informed Arbo and Bolduc that DWM had decided to uphold the initial denial of Lowell’s claim. Machigonne SMF ¶ 57; Drummond Opposing SMF ¶ 57.³² With a carbon copy to Cotsifas and Daly, Liston wrote:

Matt has indicated that Avemco will not reinsure a claim for gastric bypass under the existing terms of our current policy with them, therefore, in the absence of this reinsurance

³⁰ The Drummond Plaintiffs purport to dispute Machigonne’s statement that Bolduc reported Smith’s suggestion that DWM just pay the claim and firm up the Plan document later. See Machigonne Opposing SMF ¶ 55. However, Machigonne objects – and I agree – that the Drummond Plaintiffs rely on a portion of the Crouter affidavit that clearly contradicts his prior deposition testimony. See Machigonne S/J Reply at 5. At deposition, Crouter testified that Smith’s opinion was not communicated to him or, so far as he knew, anyone else at DWM. See Drummond Dep. at 62. Yet, in his affidavit, he states: “Ms. Bolduc explained [to DWM] that the legal department had expressed concerns about the clarity of the language in the Plan, and believed Tanya’s claim ‘could go either way,’ but Machigonne continued to interpret the Plan language to mean that the claim was not covered.” Second Crouter Aff. ¶ 19. Inasmuch as the Crouter affidavit provides no explanation for Crouter’s recall that the substance of Smith’s opinion was conveyed to DWM, I agree with Machigonne that the Drummond Plaintiffs cannot rely upon it to deny Bolduc’s version of what was communicated to DWM regarding that opinion. See, e.g., *Net 2 Press*, 266 F. Supp.2d at 153 (“When an interested witness has given clear answers to unambiguous questions [at deposition], he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.”) (citation and internal quotation marks omitted).

³¹ The Drummond Plaintiffs’ response to this statement, see Drummond Opposing SMF ¶ 56, does not effectively controvert it.

³² The parties dispute whether Bolduc (i) told DWM that, after review by the legal department, Machigonne had decided to deny the appeal and (ii) suggested to DWM that if it wanted to cover the procedure despite Machigonne’s conclusion, it should amend the Plan to clearly cover it and then re-amend it to clearly exclude it – a suggestion that Crouter avers frustrated him because, *inter alia*, it would have set a bad precedent for handling employee claim and DWM would not have had excess coverage for the Lowell claim. Compare Drummond Additional SMF ¶ 14; Second Crouter Aff. ¶ 19 with Machigonne Reply SMF ¶ 14; Third Bolduc Aff. ¶ 10; Record at MACH-220. Machigonne’s objection to these statements by the Drummond Plaintiffs on the ground of Crouter’s lack of personal knowledge of Machigonne-DWM communications, see Machigonne Reply SMF ¶ 14; Machigonne S/J Reply at 4-5, is overruled for the reasons discussed in footnote 17, above.

protection over \$35,000, the firm will let stand Machigonne's conclusion that the procedure is not covered under our plan as written.

Additionally, Matt has learned from HRL³³ that there have been at least three prior claims in the past for this procedure and individual under plans the firm had which were reinsured by Safeco. According to HRL, two of these claims were in 2000 and 2001, which would mean that Machigonne would have administered the plan at that time and arrived at similar conclusions, the other was in 1991.

Darlene, can you please review any history of prior claims for Tanya on this condition that were administered by MBA to confirm what HRL is telling us? Presuming that MBA's documentation supports this history of prior denials reflecting the plan's intent over an extended period of time, and given Avemco's decision not to reinsure the claim subject to the existing terms of our policy, we must abide by MBA's conclusion and uphold the original denial.

Darlene, assuming that MBA's documentation agrees with HRL, a denial letter will need to be sent to Tanya and her attorney in response to Tanya's appeal. Please send me a draft of this letter before it is sent out.

Thank you all for your efforts on this situation.

Id. ¶ 57.

On June 4, Bolduc forwarded a draft of the letter denying Lowell's appeal to Liston, Daley, Cotsifas and Arbo. *Id.* ¶ 58. Liston wrote back to Bolduc and stated: "The letter provides info on the appeal procedure, but hasn't she already exercised her option to appeal? I thought the original request had been denied and this phase was her actual appeal. Is there an additional appeal phase she could go through, and if so, how does it differ from this most recent review?" *Id.* ¶ 59. In response, Bolduc wrote to Liston that she was "correct that there wouldn't really be any difference from this appeal to any future appeals because we are not disputing the medical necessity," made Liston's changes, sent the revised letter back to Liston and asked her to review it. *Id.* ¶ 60.

³³ The parties' summary-judgment papers do not disclose the identity of "HRL."

On June 6, Liston wrote to Bolduc and stated, “OK to send this letter. I’ve informed Tanya to expect it.” *Id.* ¶ 61. Before sending out the final denial letter, Bolduc wrote to Arbo and Cotsifas on June 5, stating:

I want to discuss concerns about addressing prior denials. We only have one prior denial here. I’m not sure where you have prior denial information. I don’t know how we would relate prior denials to this one appropriately. I think we should allow this predetermination to stand on its own. If the attorney and patient decide to sue Drummond, we would have the prior denial to show the history.

My other concern would be that I want to make sure the client understands that our legal staff feels they could very well lose in court based on the current wording in their plan document.

If they are going to add this benefit down the road, what are they looking to gain by denying this claim now? I just want to make sure we aren’t losing sight of the client’s intent. I have removed Amendment # 7 at this time until I hear when they actually want it effective.

Id. ¶¶ 62-63.

Arbo responded that “Drummond decided to hold off on the prior history disclosure in the letter. The firm does not intend to offer the benefit on an ongoing basis, so if the denial stands and the employee does not proceed any further, we will clarify the firm’s intent at the renewal.” *Id.* ¶ 64. After receiving the okay from Liston, Bolduc directed that the letter be mailed, and it was sent out on June 9. *Id.* ¶ 65.

At no time during the claim process did anyone from Machigonne or Healey complain about Machigonne’s processing of Lowell’s claim or about any of the work Machigonne did in relation to Lowell’s claim. *Id.* ¶ 66.³⁴ At no time did anyone from DWM or Healey tell Liston or anyone else that

³⁴ The Drummond Plaintiffs state that they are not in a position to admit or deny whether Healey complained to Machigonne, *see* Drummond Opposing SMF ¶ 66; however, Machigonne’s statement is supported by the citation given, *see* First Bolduc Aff. ¶ 31.

DWM believed that the Plan's Exclusion 11 should not be applied to Lowell's claim. *Id.* ¶ 67.³⁵ In fact, Liston thanked Bolduc for her assistance several times. *Id.* ¶ 68.

Machigonne would not have sent out the final letter denying Lowell's claim if DWM had told Machigonne that it believed the Plan covered Lowell's claim and that DWM wanted to pay the claim. Machigonne SMF ¶ 69; First Bolduc Aff. ¶ 33.³⁶ Machigonne relied on DWM to tell it to communicate a denial of Lowell's claim to her. Machigonne SMF ¶ 70; First Bolduc Aff. ¶ 33.³⁷ Machigonne would have proceeded with a denial or approval depending on the way DWM wanted to interpret the Plan. Machigonne SMF ¶ 71; Machigonne Dep. at 56, 67.³⁸ Within the context of Machigonne's work as a third-party administrator, many initial decisions are reversed on appeal when one of Machigonne's clients tells Machigonne it wants its plan documents interpreted differently than Machigonne has interpreted them. Machigonne SMF ¶ 72; Machigonne Dep. at 56-57.³⁹

DWM never directed Machigonne to reverse a benefits determination that Machigonne had made. Drummond Additional SMF ¶ 5; Machigonne Reply SMF ¶ 5.⁴⁰ At no time during the processing of

³⁵ The Drummond Plaintiffs state that they are not in a position to admit or deny what Healey represented to Machigonne, *see* Drummond Opposing SMF ¶ 67; however, Machigonne's statement is supported by the citation given, *see* First Bolduc Aff. ¶ 32.

³⁶ The Drummond Plaintiffs in effect qualify this statement, asserting that Machigonne never represented to DWM that it would not deny Lowell's claim if DWM believed the Plan covered the claim. Drummond Opposing SMF ¶ 69; Second Crouter Aff. ¶ 21. Machigonne's objection to this opposing statement on the ground of lack of personal knowledge on Crouter's part, *see* Machigonne S/J Reply at 4-5, is overruled for the reasons stated in footnote 17, above.

³⁷ The Drummond Plaintiffs in effect qualify this statement, asserting that Machigonne never indicated to DWM that it would proceed with a denial or approval depending on the way DWM wanted to interpret the Plan, but rather indicated that it was waiting to see whether DWM was going to amend the Plan. Drummond Opposing SMF ¶ 70; Second Crouter Aff. ¶ 21. Machigonne's objection to this opposing statement on the ground of lack of personal knowledge on Crouter's part, *see* Machigonne S/J Reply at 4-5, is overruled for the reasons stated in footnote 17, above.

³⁸ The Drummond Plaintiffs offer the same qualification discussed in footnote 36, above. Drummond Opposing SMF ¶ 71.

³⁹ The Drummond Plaintiffs in effect qualify this statement, denying that DWM has ever reversed one of Machigonne's decisions. Drummond Opposing SMF ¶ 72; Second Crouter Aff. ¶ 9. Its further qualifying statements are unsupported by record citations and hence are disregarded.

⁴⁰ Machigonne objects to the Drummond Plaintiffs' further statement that DWM "relied upon Machigonne to make benefits determinations," Drummond Additional SMF ¶ 4, on the ground that it is conclusory and vague, *see* Machigonne Reply SMF ¶ 4. The objection is sustained.

Lowell's claim did Machigonne represent to DWM that it would not deny Lowell's claim if DWM believed the Plan covered the claim. Drummond Additional SMF ¶ 15; Second Crouter Aff. ¶ 20.⁴¹ DWM never told Machigonne that it agreed with Machigonne's interpretation of the Plan. *Id.*⁴²

The Drummond Plaintiffs believe that "the reading of that [weight loss] exception as a matter of Maine insurance interpretation law was incorrect, and that the manner in which Machigonne decided that this wasn't a covered benefit was simply inconsistent with the Plan document." Machigonne SMF ¶ 73; Drummond Opposing SMF ¶ 73. Testifying for the Drummond Plaintiffs, DWM managing partner Crouter stated that "coming to a decision that this [gastric bypass] was an excluded benefit, under the language that's set forth in the Plan, appears to me, on reading the Plan, to be not defensible." *Id.* ¶ 74. The Drummond Plaintiffs also indicated that they believed the decision to deny Lowell's claim for benefits was incorrect. *Id.* ¶ 75. They came to this conclusion before Lowell's claim was denied. Machigonne SMF ¶ 76; Drummond Dep. at 53.⁴³

The Drummond Plaintiffs admit, "If the weight loss exclusion wasn't in there [the Plan], there would be absolutely no question that it [the gastric bypass] would be a covered procedure." Machigonne SMF ¶ 79; Drummond Opposing SMF ¶ 79. At some point within days after the final denial of Lowell's claim, Crouter became aware that Lowell "was considering pursuing her claim beyond the appeal process," and he

⁴¹ Machigonne's objection to this statement on the ground of Crouter's lack of personal knowledge, *see* Machigonne Reply SMF ¶ 15; Machigonne S/J Reply at 4-5, is overruled for the reasons discussed in footnote 17, above.

⁴² The parties dispute whether DWM told Machigonne that it was relying on Machigonne to make the decision regarding Lowell's claim. *Compare* Drummond Additional SMF ¶ 15; Second Crouter Aff. ¶ 20 *with* Machigonne Reply SMF ¶ 15; Third Bolduc Aff. ¶¶ 6-7. Machigonne's objection to this statement on the ground of Crouter's lack of personal knowledge, *see* Machigonne Reply SMF ¶ 15; Machigonne S/J Reply at 4-5, is overruled for the reasons discussed in footnote 17, above.

⁴³ The Drummond Plaintiffs in effect deny that they arrived at this conclusion, asserting that this was the opinion only of Crouter personally. *See* Drummond Opposing SMF ¶ 76. However, as Machigonne points out, *see* Machigonne S/J Reply at 3 n.1, Crouter was testifying as a Rule 30(b)(6) deponent; therefore, his statements properly are attributed to the Drummond Plaintiffs.

talked to her because she had questions about whether DWM could represent her in her claim for benefits. *Id.* ¶ 80. Crouter explained to Lowell that she was adverse to DWM and that he could not discuss her case with her. *Id.* ¶ 81. He did explain to her, however, that she would be eligible for DWM’s employee benefit that provides \$1,000 toward an employee’s legal expenses. *Id.*

DWM relied on Machigonne in part to make the final decision in Lowell’s case because it did not want to be in a position of being able to reverse or reversing Machigonne’s decision. Drummond Additional SMF ¶ 17; Second Crouter Aff. ¶ 22. In July 2003 DWM adopted Amendment No. 7, which was intended to give DWM full discretionary authority to interpret the Plan. *Id.* Amendment No. 7, which became effective January 1, 2003, provides, “The administration of the Plan and interpretation of all Plan provisions is the responsibility of the Plan Administrator. The Plan Administrator has contracted with the Contract Administrator (Machigonne Benefit Administrators) to perform many of the administrative duties connected with the Plan.” Machigonne SMF ¶ 22; Drummond Opposing SMF ¶ 22. Amendment No. 7 further provides under the heading “Proof of Loss”: “If this [benefit] determination requires discretionary interpretation of Plan provisions, the matter will be referred to the Plan Administrator.” *Id.*⁴⁴

On or about October 10, 2003 Lowell sued the Drummond Plaintiffs pursuant to ERISA. *Id.* ¶ 82. By letter dated October 30, 2003 counsel for the Drummond Plaintiffs notified Machigonne of Lowell’s suit and demanded that Machigonne defend them. *Id.* The Drummond Plaintiffs rely on Paragraph 9(b) for their contention that Machigonne had a duty to defend them against Lowell’s claim. *Id.* ¶ 83. They admit

⁴⁴ The parties dispute the reason why Amendment No. 7 was adopted. The Drummond Plaintiffs contend that it was adopted as a result of Machigonne’s conduct in processing the Lowell claim – in particular its decision to deny a claim despite its legal department’s reservations – which convinced Crouter that DWM needed to reserve for itself the power to interpret the Plan. *See* Drummond Additional SMF ¶ 17; Second Crouter Aff. ¶ 22. Machigonne asserts that it transmitted Amendment No. 7 to Healey for distribution to all of Healey’s clients in response to new Department of Labor regulations. *See* Machigonne Reply SMF ¶ 17; Third Bolduc Aff. ¶¶ 11-12.

that the words “to defend” do not appear anywhere in Paragraph 9(b). *Id.* They claim that Machigonne failed to use reasonable care because it was Machigonne’s job to interpret the Plan, the interpretation of the Plan was “not defensible” and it was found to be unreasonable by this court. *Id.* ¶ 85. With respect to the processing of Lowell’s claim, DWM asserts that Machigonne failed to use reasonable care inasmuch as Machigonne allegedly made the decision to deny Lowell’s claim despite the fact that its in-house counsel was concerned about the ability to prevail if the matter went to litigation. Machigonne SMF ¶ 86; Drummond Dep. at 21-22, 27.⁴⁵ The Drummond Plaintiffs contend that Machigonne had the authority to make the final benefits decision on Lowell’s claim for benefits. Machigonne SMF ¶ 87; Drummond Dep. at 15, 27-28.⁴⁶ They admit that paragraph 3 of the ASA allowed DWM to override Machigonne’s decision that a claim should be paid. Machigonne SMF ¶ 94; Drummond Dep. at 42-43.⁴⁷

The Drummond Plaintiffs claim as damages attorney fees paid to Peabody & Arnold to defend them against Lowell’s claim, costs related to Lowell’s litigation, the deductible under The Travelers’ policy, which provides coverage for Lowell’s action, and \$1,000 paid to Taintor as an employee benefit. Machigonne SMF ¶ 92; Drummond Opposing SMF ¶ 92. They do not claim any damages related to or associated with the expenses of Lowell’s gastric-bypass procedure. *Id.* ¶ 95.

In ruling in favor of Lowell in the context of Lowell’s and the Drummond Plaintiffs’ cross-motions for summary judgment, the court observed that “to employ a strained interpretation of the plain language of Exclusion 11 to arrive at an outcome that does not comport with its stated purpose simply is not a

⁴⁵ The response of the Drummond Plaintiffs to this statement – that it is not a factual allegation but rather a conclusion of law to which no response is required, *see* Drummond Opposing SMF ¶ 86 – does not effectively either lodge objection to or controvert the underlying statement.

⁴⁶ The response of the Drummond Plaintiffs to this statement – that it is not a factual allegation but rather a conclusion of law to which no response is required, *see* Drummond Opposing SMF ¶ 87 – does not effectively either lodge objection to or controvert the underlying statement.

reasonable exercise of plan-interpretation discretion.” Drummond SMF ¶ 50; Machigonne Opposing SMF ¶ 50. The court found that the determination that the plaintiff’s gastric- bypass expenditures were for weight reduction was “unsupported by any (let alone ‘substantial’) evidence of record.” *Id.* ¶ 51. The court also cited inconsistent interpretation of the Plan as the “hallmark of arbitrariness.” *Id.* ¶ 52. The court stated:

The record in this case betrays behind-the-scenes confusion as to whether [the plaintiff’s] proposed surgery was or was not excluded from coverage under the Plan. Her initial request in 2001 was denied not on the basis of exclusion but on the basis of lack of medical necessity. When a representative of Dr. Carroll’s office pointedly inquired in 2003 whether gastric bypass surgery was a covered service, he was lead to believe it was (provided the hurdle of medical necessity could be overcome). Indeed, tellingly, the Plan reimbursed certain of Lowell’s expenditures in both 2001 and 2003 in connection with the requested surgery – expenses that logically should not have been paid had it considered the procedure either not to have been a covered service or to have been foreclosed from coverage by operation of Exclusion 11.

Id. ¶ 52 n.7.

III. Analysis

The Drummond Plaintiffs move for summary judgment on the basis that (i) although the ASA purportedly expired in December 2001, it undeniably applies and defines Machigonne’s obligations and duties at all relevant times, and (ii) inasmuch as this court found Machigonne’s denial of the claim arbitrary and capricious, it follows that the denial was unreasonable and negligent for purposes of the indemnification provision of the ASA. *See generally* Drummond S/J Motion.

For its part, Machigonne makes eight arguments for summary judgment in its favor: that (i) it was not the final decision-maker with respect to the Lowell claim, (ii) the Drummond Plaintiffs are equitably estopped from complaining about Machigonne’s actions because DWM misled Machigonne about its true

⁴⁷ The Drummond Plaintiffs purport to deny this statement, *see* Drummond Opposing SMF ¶ 94; however, their denial is unsupported by a record citation and hence is not cognizable.

belief that Lowell's claim should be paid, (iii) Machigonne did not proximately cause the Drummond Plaintiffs' damages, (iv) DWM assumed the risk that it would incur legal expenses when it pressed an argument that it did not believe had merit, (v) the Drummond Plaintiffs were required, and have failed, to provide evidence establishing gross negligence, willful misconduct or lack of good faith by Machigonne in the administration of Lowell's claim for benefits, (vi) the Drummond Plaintiffs failed to designate an expert or advance any expert testimony to establish the standard of care under which Machigonne's actions must be evaluated, (vii) DWM was equally or more negligent than Machigonne, and (viii) Machigonne had no duty to defend the Drummond Plaintiffs against Lowell's lawsuit. *See generally* Machigonne S/J Motion. Four of these arguments are either repeated or incorporated by reference in Machigonne's opposition to the Drummond Plaintiffs' motion: Points 1, 3, 5 and 6. *See* Third-Party Defendant Machigonne, Inc.'s Opposition to the Defendants' Motion for Summary Judgment ("Machigonne S/J Opposition") (Docket No. 46) at 2, 5, 5 n.4 & 6 n.6.

I conclude that five of Machigonne's eight points have no merit but that genuine issues of material fact preclude summary judgment in favor of either Machigonne or the Drummond Plaintiffs with respect to Points 3, 4 and 7.

A. Drummond Plaintiffs' Summary-Judgment Claims

I turn first to the Drummond Plaintiffs' motion. As a threshold matter, Machigonne does not contest the proposition that the ASA (and, in particular, its indemnification clauses) *de facto* remained in effect subsequent to December 2001, including during relevant times in 2003. *See generally* Machigonne S/J Opposition; *see also, e.g.*, Machigonne Reply SMF ¶¶ 2, 14. In any event, as the Drummond Plaintiffs point out, the parties' course of dealing subsequent to the ASA's purported termination date indicates that both sides continued to do business in accordance with that agreement. *See* Drummond S/J Motion at 11;

see also, e.g., Maine Surgical Supply Co. v. Intermedics Orthopedics, Inc., 756 F. Supp. 597, 603-04 (D. Me. 1991) (reasonable person could conclude that parties' course of dealing demonstrated intention to be bound to oral distributorship contract).

1. Point 1 (DWM Was Final Decision-Maker)

Machigonne instead relies heavily on what I have termed its Point 1, arguing that the Drummond Plaintiffs' "case depends on their assertion that Machigonne made the final decision to deny the claim for benefits under the Plan." *See* Machigonne S/J Opposition 2. That assertion, Machigonne observes, is unsupported by the evidence, the law or the court's prior rulings in this case. *See id.* at 2, 5-6; *see also* Machigonne S/J Motion at 3-10.

Machigonne's point, insofar as it goes, is well-taken. The Drummond Plaintiffs do indeed claim that the court "ruled that *Machigonne's* determination that Lowell's gastric bypass surgery was excluded under the Plan was arbitrary and capricious." Drummond S/J Motion at 14 (emphasis added). That characterization is indeed wrong. Prior to addressing Lowell's and the Drummond Plaintiffs' cross-motions for summary judgment, the court wrestled with the question whether, for ERISA purposes, Machigonne or DWM made the final decision from which Lowell appealed. *See* Memorandum Decision and Order on Defendants' Motions To Amend Scheduling Order ("Scheduling Order Ruling") (Docket No. 20). The court stated:

The Record makes clear that (i) Machigonne looked to DWM for approval of the content of the June 4, 2003 denial letter, (ii) Liston, on behalf of DWM, reviewed one or more draft letters, raising questions and suggesting revisions, and (iii) Liston ultimately okayed Machigonne's transmission of the final version of the letter to Lowell. This action was consistent with Plan language directing participants to file appeals with the Contract Administrator (Machigonne), which would "present the participant with the final written decision," but reserving to the Plan Administrator (DWM) "full authority to interpret this

Plan, its provisions and regulations with regard to eligibility, coverage, benefit entitlement, benefit determination and general administrative matters.” Inasmuch as DWM (rather than Machigonne) made the final decision from which Lowell appeals, and Lowell has conceded that DWM possessed discretion to construe Plan terms, her complaint implicates the “abuse of discretion,” rather than the *de novo*, standard of review.

Id. at 3 (citations and footnote omitted). Subsequently, on Lowell’s and the Drummond Plaintiffs’ cross-motions for summary judgment, the court found the Drummond Plaintiffs – not Machigonne – liable to Lowell. *See* First S/J Decision at 1. It added: “For simplicity’s sake I ascribe the challenged interpretation to ‘the Defendants’ [the Drummond Plaintiffs]. In so doing I express no opinion as to whether Machigonne is or is not liable to the Defendants on their third-party claim.” *Id.* at 11 n.10.

Nonetheless, although the Drummond Plaintiffs mischaracterize the court’s rulings, I am unpersuaded that Machigonne correctly characterizes their case. The Drummond Plaintiffs adduce – and discuss – evidence concerning Machigonne’s handling of Lowell’s claim from 2001 forward, not only the “final” decision to deny benefits. *See, e.g.*, Drummond S/J Motion at 14 (“The Administrative Record is replete with Machigonne’s missteps and mishandling of Lowell’s claim. Those missteps and mishandling as a matter of law constitute negligence.”); Third-Party Plaintiffs’ Reply to Third-Party Defendant’s Opposition to Third-Party Plaintiffs’ Motion for Summary Judgment (“Drummond S/J Reply”) (Docket No. 48) at 5 (“At every step of the process Machigonne mishandled Lowell’s claim. . . . It is not clear why Machigonne processed Lowell’s claim in the manner it did. What is clear is that Drummond relied on Machigonne for its supposed expertise in claims handling and as a result has been compelled to defend and justify Machigonne’s actions. The fact that Drummond acceded to Machigonne’s management of the claim does not, however, relieve Machigonne from liability for its gaffes.”).⁴⁸

⁴⁸ The court focused on the question whether DWM or Machigonne was the “final” decision-maker for purposes of (*continued on next page*)

Further, while the court did not rule that *Machigonne's* handling of Lowell's claim was arbitrary and capricious, it did take into consideration the entire history of the handling of Lowell's two related claims (with respect to which Machigonne was a major player) in reaching its decision. *See generally* First S/J Decision. Thus, that decision is highly relevant to the Drummond Plaintiffs' claim that Machigonne failed to use reasonable care in fulfilling its duties under the ASA correctly, completely and in a timely manner.⁴⁹

2. Point 5 (Disclaimer for Normal Variations in Claims Processing)

Machigonne fares no better in opposing the Drummond Plaintiffs' motion on the bases of its Points 5 and 6. Machigonne relies for Point 5 on the fact that, in the indemnification section of the ASA, it disclaimed responsibility "for normal variations in claims processing, except for gross negligence, willful misconduct, or lack of good faith." Machigonne S/J Opposition at 5 (quoting ASA); *see also* Machigonne S/J Motion at 16-17. It observes that, in ascertaining the intention of parties to a contract, "[a]ll parts and clauses must be considered together that it may be seen if and how far one clause is explained, modified, limited or controlled by the others." Machigonne S/J Opposition at 5 (quoting *Maine Drilling & Blasting, Inc. v. Insurance Co. of N. Am.*, 665 A.2d 671, 675 (Me. 1995) (citation and internal quotation marks

determining the standard of review applicable to Lowell's ERISA claim. *See* Scheduling Order Ruling at 3-4n.1. However, that concept has no relevance to the Drummond Plaintiffs' contractual claim for indemnification.

⁴⁹ The parties devote considerable energy to arguing whether (i) Machigonne mishandled Lowell's 2001 claim, (ii) the 2001 claim was "inextricably" tied to the 2003 claim, and (iii) the Drummond Plaintiffs caused confusion during the prior round of summary-judgment motions by omitting evidence that Machigonne approved expenditures for gastric-bypass-related consultations based on ICD9 and CPT codes. *See* Drummond S/J Motion at 12; Machigonne S/J Opposition at 2-4, 6-8; *see generally* Drummond S/J Reply. I see no need to wade through these arguments. The Drummond Plaintiffs emphasized the first two points in support of their assertion that the ASA applied at all relevant times, *see* Drummond S/J Motion at 10-12 – a contention that evidently is undisputed (and that, in any event, I have suggested be resolved on other grounds in favor of the Drummond Plaintiffs). Nothing much turns on the third point. Even had the court seen the ICD9 and CPT evidence and concluded that the Plan payments in question were not inconsistent with the Plan's interpretation of Exclusion 11, that would not have affected its ultimate finding of arbitrariness and capriciousness. The seeming inconsistency between the reimbursements and the application of Exclusion 11 was not central to the court's ruling. *See* First S/J Decision at 13-16.

omitted). It reasons that “[c]learly, when read as a whole, the ASA provides indemnification only for ‘gross negligence, willful misconduct, or lack of good faith’ and not mere negligence.” *Id.*

The Drummond Plaintiffs counter, and I agree, that “[a] better interpretation that gives effect to both provisions [the disclaimer on which Machigonne relies and Paragraph 9(b)] is that a showing of gross negligence, willful misconduct, or lack of good faith will only be required where there is normal variation in claims processing.” Defendants/Third-Party Plaintiffs’ Opposition to Third-Party Defendant’s Motion for Summary Judgment, etc. (“Drummond S/J Opposition”) (Docket No. 45) at 7 (emphasis in original). As the Drummond Plaintiffs argue, *see id.*, the handling of Lowell’s claims was not a “normal variation” in claims processing. There is no evidence that Machigonne had ever handled a request for preauthorization for gastric-bypass surgery for anyone other than Lowell or had ever been called upon to consider the possible applicability of Exclusion 11 to any other such request. Insofar as appears from the cognizable evidence, Machigonne and the Drummond Plaintiffs were struggling to come to grips with a novel situation. The court has already declared that application of Exclusion 11 to Lowell’s claim was arbitrary and capricious. That is not a “normal variation” in claims processing, rendering the clause in question inapposite.

3. Point 6 (Lack of Expert Testimony)

I turn to what I have labeled “Point 6”: that the court should deny the Drummond Plaintiffs’ motion for summary judgment on the basis of their failure to provide expert testimony to establish a standard of care by which to measure Machigonne’s actions. *See* Machigonne S/J Opposition at 5 n.4; *see also* Machigonne S/J Motion at 17-18. Machigonne’s argument is as follows:

1. To the extent that mere negligence is the appropriate standard by which to judge Machigonne’s actions, the Drummond Plaintiffs must establish that Machigonne was “under a duty to

conform to a certain standard of conduct and that a breach of that duty proximately caused an injury[.]”
Machigonne S/J Motion at 17 (quoting *Rowe v. Bennett*, 514 A.2d 802, 804 (Me. 1986)).⁵⁰

2. ““One who undertakes to render services in the practice of a profession owes a duty to exercise that degree of skill, care and diligence exercised by members of that same profession.”” *Id.* (quoting *Rowe*, 514 A.2d at 804).

3. “Under Maine law, establishing a standard of care ‘ordinarily requires expert testimony’ except when the negligence and harmful results are ‘sufficiently obvious as to lie within common knowledge.’” *Id.* at 18 (quoting *Searles v. Trustees of St. Joseph’s Coll.*, 695 A.2d 1206, 1210 (Me. 1997) (citation and internal quotation marks omitted)).

4. Machigonne’s role as a claims administrator required special skill, expertise and knowledge of insurance laws and medical issues that is peculiar to its industry and is not a matter of common knowledge or understanding; hence, the Drummond Plaintiffs’ case implodes for lack of expert testimony. *See id.*

The Drummond Plaintiffs rejoin that, in this case, the court has already found – without aid of expert testimony – that the decision to deny benefits to Lowell was arbitrary and capricious. *See Drummond S/J Opposition* at 8-9. They posit: “Drummond is entitled to indemnification for the expenses associated with defending Lowell’s claim because Lowell’s claim was premised on Machigonne’s established failure – as established by this Court’s ruling – properly to fulfill its duties under the Agreement. Regardless whether Drummond in some sense was the ERISA decision maker, Machigonne was the decision maker in fact, and Drummond relied on Machigonne.” *Id.* at 8.

⁵⁰ The “mere negligence” standard apparently derives from language in Paragraph 9(b) pursuant to which Machigonne
(continued on next page)

I agree that there is no need of expert testimony to establish the standard of care in this case. The court already has ruled that the decision to deny Lowell benefits was arbitrary and capricious, in part on the basis of the history of the handling of her two claims. Machigonne was a major player with respect to both of those claims. The court's prior ruling is highly relevant to the question whether Machigonne failed to exercise "reasonable care" in handling the Lowell claims.

4. Point 3 (Lack of Proximate Causation)

While Machigonne's Point 6 focused on the standard-of-care aspect of a claim of "mere negligence," its Point 3 addresses the aspect of proximate causation. *See* Machigonne S/J Opposition at 6 n.6; *see also* Machigonne S/J Motion at 12-14. The Drummond Plaintiffs do not contest that, for purposes of obtaining indemnification pursuant to Paragraph 9(b), they must show proximate cause. *See* Drummond S/J Opposition at 6. Rather, they argue that Machigonne did proximately cause their damages as a matter of law. *See id.*

The Law Court has defined the concept of proximate cause as follows:

Proximate cause requires a showing that the evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence played a substantial part in bringing about or actually causing injury or damage and that the injury or damage was either a direct result or a reasonably foreseeable consequence of the negligence. Proximate cause is cause that is unbroken by an efficient intervening cause.

Johnson v. Carleton, 765 A.2d 571, 575 (Me. 2001) (citations and internal quotation marks omitted). Of further relevance, the Law Court has held:

The question of whether a defendant's acts or omissions were the proximate cause of a plaintiff's injuries is generally a question of fact, and a judgment as a matter of law is improper if any reasonable view of the evidence could sustain a finding of proximate cause.

agreed to indemnify the Drummond Plaintiffs with respect to "*failure . . . to use reasonable care* in fulfilling its duties and obligations under the Agreement correctly, completely and in a timely manner." Paragraph 9(b) (emphasis added).

Nevertheless, if the evidence produced by the plaintiff in opposition to a motion for summary judgment would, if produced at trial, entitle the defendant to a judgment as a matter of law, the defendant is entitled to a summary judgment. A defendant is entitled to a summary judgment if there is so little evidence tending to show that the defendant's acts or omissions were the proximate cause of the plaintiff's injuries that the jury would have to engage in conjecture or speculation in order to return a verdict for the plaintiff.

Houde v. Millett, 787 A.2d 757, 759 (Me. 2001) (citations omitted).

As Machigonne points out, *see* Machigonne S/J Motion at 12, the Drummond Plaintiffs seek indemnification with respect only to litigation expenses incurred as a result of the denial of Lowell's claim and defense of her ERISA lawsuit, not recovery of her medical expenses. Machigonne posits that the Drummond Plaintiffs caused their own damages by pressing their defense of Lowell's lawsuit even though they believed she was right. *See id.* In Machigonne's view:

Drummond intervened and caused Machigonne to deny Lowell's claim in April after Crouter consulted with Liston. Later, Drummond intervened and caused Machigonne to deny Lowell's appeal. Drummond failed to admit that the denial of Lowell's claim was incorrect and not defensible and caused Lowell's case to become a lawsuit even though Drummond came to its conclusion before Lowell's appeal was denied in June 2003.

Crouter, Drummond's managing partner, spoke to Lowell after the appeal process and when he knew she was preparing to file a lawsuit. Rather than telling her that the decision to deny the claim was wrong, he told her that Drummond's benefit policy of funding the first \$1,000 of an employee's attorney's fees would apply to her. Then after Lowell filed her lawsuit, rather than conceding that Lowell was right as Drummond believed she was, Drummond's attorneys defended Lowell's lawsuit before this Court by pressing the argument that the decision to deny her claim was reasonable and that the interpretation of the Plan, and Exclusion 11 specifically, was reasonable.

In short, this incredible waste of time, money, and effort, not to mention the health and safety of its own employee, is a direct result of Drummond's crass resolve to avoid paying for Lowell's surgery even though Drummond believed that the Plan covered her surgery.

Id. at 13-14.

Not surprisingly, the Drummond Plaintiffs argue that the evidence paints quite a different picture:

Machigonne denied the claim on the basis of the information that Machigonne gathered and processed from Lowell and her physicians, as well as Machigonne's own interpretation of the Plan. By the time Machigonne consulted with Drummond it already had a substantial history of denying Lowell's claim on the basis of medical necessity and Exclusion No. 11. Throughout the consultations with Drummond, Machigonne continued to represent to Drummond that Lowell's claim should be denied. At no time did Machigonne advise Drummond that it believed Lowell's claim was covered. At most, Drummond simply affirmed Machigonne's prior decisions. The legal expenses and costs that have been incurred by Drummond are a direct result of Drummond's reliance on Machigonne's services.

Drummond S/J Opposition at 6 (emphasis in original) (footnote omitted).

For purposes of the Drummond Plaintiffs' motion, I consider whether, construing the facts and drawing all reasonable inference in favor of Machigonne, it has adduced sufficient evidence to forestall summary judgment in the Drummond Plaintiffs' favor. I conclude that it has. I note, as a threshold matter, that I do not find the fact that the Drummond Plaintiffs chose to defend this lawsuit (despite their internal misgivings about the applicability of Exclusion 11) in itself dispositive of the point. As I will discuss in more detail below, a fact-finder viewing the cognizable evidence in the light most favorable to the Drummond Plaintiffs could conclude that their decision to defend was a natural outgrowth of Machigonne's negligence, rather than a supervening cause of their damages.

Nonetheless, Machigonne proffers evidence that (i) prior to denial of Lowell's 2003 claim, Crouter, DWM's managing partner and the Drummond Plaintiffs' Rule 30(b)(6) deponent, formed the opinion that Exclusion 11 did not apply to Lowell's claim, (ii) during the conference call of April 2, 2003, the decision whether to cover Lowell's claim was left to DWM (a fact that the Drummond Plaintiffs dispute), (iii) Machigonne told DWM that Machigonne's in-house counsel advised that DWM just pay Lowell's claim and firm up its Plan language later, and that there was a risk DWM would lose in court if it denied the claim (a fact that the Drummond Plaintiffs attempt, but fail, to controvert), (iv) Machigonne relied on DWM to tell

it to communicate a denial of Lowell's claim to her and would not have sent out the final denial letter if it had been told DWM believed the Plan covered it, and (v) the Drummond Plaintiffs admit that DWM possessed the authority, pursuant to the ASA, to override Machigonne's decision that a claim should be paid.

A trier of fact crediting Machigonne's version of the disputed evidence (that is, that during the conference call of April 2 the decision whether to cover Lowell's claim was left to DWM) and focusing on the other evidence I have highlighted could conclude that Machigonne's negligence did not play a "substantial part" in bringing about, and hence was not the proximate cause of, the Drummond Plaintiffs' damages. On this view of the evidence, the Drummond Plaintiffs were the author of their own misery: Despite (i) possessing the power to override Machigonne's claims decisions, (ii) being put on notice that the Lowell coverage decision was up to them, (iii) forming their own opinion that Exclusion 11 did not apply and (iv) receiving Machigonne's in-house counsel's warnings, they nonetheless effectively instructed Machigonne to apply Exclusion 11. They then compounded the problem by mounting an active defense against Lowell's claim after the instant lawsuit was filed.

That conclusion prevents summary judgment in the Drummond Plaintiffs' favor. However, it does not necessarily entitle Machigonne to summary judgment. To the extent that a reasonable fact-finder viewing the facts in the manner most favorable to the Drummond Plaintiffs could find in their favor, neither side wins on summary judgment. I find that to be the case.

The Drummond Plaintiffs deny that, at the April 2 conference call, the decision whether to cover the Lowell claim was left to them. Beyond this, they adduce evidence (some of which is disputed by Machigonne) that:

1. Crouter is not an ERISA practitioner, and DWM has no ERISA practice.

2. DWM hired Machigonne both because of its expertise in claims management and because DWM wanted to avoid being put in the position of denying its employees' benefits claims.

3. Consistent with this, DWM never directed Machigonne to reverse a benefits determination that Machigonne had made.

4. DWM was relying upon Machigonne, as a benefits administrator with experience in interpreting exclusions, to advise it as to whether the Lowell procedure was covered by the Plan.

5. Avemco indicated it would deny stop-loss coverage based on Machigonne's claims determination.

6. Although DWM's Liston wrote that she appreciated "being able to make an informed decision[,]” reviewed drafts of denial letters and okayed transmission of the final denial to Lowell, some of her contemporaneous writings also can be construed as conveying DWM's intent to rely on the coverage decision of its "expert," Machigonne. For example, Liston wrote: "I told [Lowell] that she, of course, had the option to appeal this through MBA, but as the firm's benefit administrator, we were abiding by MBA's decision[,]” and "In the absence of this reinsurance protection over \$35,000, the firm will let stand Machigonne's conclusion that the procedure is not covered under our plan as written.”

7. While DWM never told Machigonne it questioned its application of Exclusion 11 to Lowell's claim, it never told Machigonne it agreed with that application.

8. Despite its in-house counsel's advice, Machigonne itself persisted in interpreting Exclusion 11 as applying to Lowell's claim, going so far, per the Drummond Plaintiffs' version of events, as to suggest to DWM that if it wanted to cover the procedure despite Machigonne's conclusion, it should amend the Plan to clearly cover it and then re-amend it to clearly exclude it.

Viewing the evidence from this perspective, a reasonable fact-finder could conclude that, despite their internal misgivings about the application of Exclusion 11 to Lowell's case, the Drummond Plaintiffs simply followed their then-practice of deferring to Machigonne's claims decisions. A reasonable fact-finder further could conclude that, given the wording of some of Liston's e-mails, that reliance should have been reasonably apparent to Machigonne. In this light, the Drummond Plaintiffs' decision to defend Lowell's claim reasonably could be seen as an outgrowth of the DWM-Machigonne relationship rather than as an intervening cause of their damages: In other words, faced with Lowell's lawsuit, the Drummond Plaintiffs continued to rely on (and defend) their hired expert's (Machigonne's) Plan interpretation, despite their internal misgivings regarding the defensibility of the claim.

To sum up, Machigonne asserts – and the Drummond Plaintiffs do not dispute – that they must demonstrate that Machigonne's negligence proximately caused their damages. Inasmuch as there is a triable issue whether that is the case, the Drummond Plaintiffs fail to demonstrate entitlement to summary judgment in their favor.

B. Machigonne's Summary-Judgment Claims

For reasons discussed above, Machigonne falls short of demonstrating entitlement to summary judgment in its favor on the basis of its Points 1, 3, 5 and 6. For the reasons that follow, it also fails to make the requisite showing with respect to its remaining four points:

Point 2 (equitable estoppel): Machigonne contends that the Drummond Plaintiffs should be equitably estopped from seeking indemnification inasmuch as DWM misled Machigonne by endorsing its interpretation of Exclusion 11 and directing it to deny Lowell's claim despite DWM's own belief that Exclusion 11 did not apply. *See Machigonne S/J Motion at 11.*

As Machigonne notes, “[t]he doctrine of equitable estoppel bars the assertion of the truth by one whose misleading conduct has induced another to act to his detriment in reliance on what is untrue.” *Id.* (quoting *Stickney v. City of Saco*, 770 A.2d 592, 608 (Me. 2001) (citation and internal quotation marks omitted)). “Thus, the doctrine of equitable estoppel, when properly invoked, operates to preclude absolutely a party from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy.” *Id.* (quoting *Chrysler Credit Corp. v. Bert Cote’s L/A Auto Sales, Inc.*, 707 A.2d 1311, 1318 (Me. 1998) (citation and internal quotation marks omitted)).

As the Drummond Plaintiffs point out, equitable estoppel must be “carefully and sparingly applied.” Drummond S/J Opposition at 5 (quoting *Littlefield v. Adler*, 676 A.2d 940, 942 (Me. 1996) (citation and internal quotation marks omitted)). They posit that this is not one of the rare cases in which its application is appropriate inasmuch as, *inter alia*, Crouter’s (or their) belief that Exclusion 11 did not apply was simply an opinion – not a fact – concerning a subject matter with respect to which Machigonne, by virtue of its purported expertise, possessed superior knowledge. *See id.* They are right: One must be “guilty of a misrepresentation of existing fact” for the doctrine to be invoked. *Sturtevant v. Town of Winthrop*, 732 A.2d 264, 269 (Me. 1999); *see also, e.g., Memorial Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 12 P.3d 431, 436 (N.M. 2000) (“As a general rule, statements of opinion on a matter of law raise no estoppel where the facts are equally well known to both parties.”) (citation and internal quotation marks omitted); *Chrysler*, 707 A.2d at 1318-19 (“The doctrine of equitable estoppel, as distinguished from the doctrine of promissory estoppel, ordinarily is used defensively and requires a misrepresentation as to a past or present fact.”).

The doctrine of equitable estoppel accordingly is inapposite in this case.

Point 4 (contractual assumption of the risk): Machigonne also argues for summary judgment in its favor on the basis that (i) Maine recognizes the doctrine of contractual assumption of the risk and (ii) the ASA in several respects allocated the risk of incurring legal expenses for a claims denial in violation of ERISA to DWM. *See* Machigonne S/J Motion at 14-15. Specifically, Machigonne asserts, (i) the ASA allocated to DWM full responsibility for compliance with provisions of the Plan and the law, including ERISA, (ii) the ASA provided that Machigonne would only assist DWM in carrying out details of administration of the Plan, (iii) the parties agreed that Machigonne would not be responsible for “any act or omission or breach of duty by” DWM, and (iv) DWM agreed to hold Machigonne harmless from all costs incurred by Machigonne as a result of its reliance on instructions of DWM “concerning the administration of the Plan[.]” *Id.* at 15.⁵¹

The Drummond Plaintiffs concede that the doctrine of contractual assumption of the risk is recognized in Maine. *See* Drummond S/J Opposition at 7. However, they assert that they did not contractually assume the risk of the instant legal expenditures in view of (i) the language of Paragraph 9(b) and (ii) the fact that Machigonne never advised DWM that it should pay the claim or risk losing in court, but rather advised it to deny the claim and amend the Plan if it wished to cover Lowell’s surgery. *See id.*

General language in the ASA and the Plan making DWM responsible for Plan and ERISA compliance and naming DWM as the Plan fiduciary does not trump Machigonne’s specific agreement, in the broadly worded Paragraph 9(b), to indemnify and hold DWM harmless from “any and all costs, liabilities or

⁵¹ Machigonne argues, in addition, that DWM clearly assumed the risk that it would incur legal expenses in this case when it chose to defend against Lowell’s lawsuit despite its belief, formed prior to denial of her administrative appeal, that she was entitled to coverage and the decision to deny her claim was “not defensible.” *See* Machigonne S/J Motion at 15. Machigonne posits: “[J]ust as the gambler that bets on a lame nag at 100 to 1 cannot blame the jockey for his loss, neither can Drummond avoid its own responsibility for blowing its money on risky legal expenses.” *Id.* at 16. Colorful as this secondary argument is, Machigonne fails to identify any respect in which it ties into the underlying concept of *(continued on next page)*

expenses rising out of or in any way connected with the failure of [Machigonne] to use reasonable care in fulfilling its duties and obligations under the Agreement correctly, completely and in a timely manner.”

Nonetheless, DWM contractually assumed the instant risks to the extent its conduct implicated the cross-indemnification provision in favor of Machigonne. Pursuant to that provision, DWM agreed, in relevant part, to indemnify and hold Machigonne harmless “from and against any and all costs, liabilities and expenses incurred by [Machigonne] arising out of or in any way connected with the reliance by [Machigonne] on the instructions of the Employer concerning the administration of the Plan[.]”

Whether Machigonne relied on DWM’s instructions “concerning administration of the Plan” is an issue with respect to which the evidence is in sharp dispute. There is no question that DWM was the “final” decision-maker for ERISA purposes, worked with Machigonne regarding Lowell’s 2003 claim and okayed transmission of the final denial letter. Nonetheless, those facts do not, standing alone, show that it transmitted instructions concerning “administration of the Plan” on which Machigonne relied. As discussed above in the context of Machigonne’s Point 3, a reasonable fact-finder crediting the Drummond Plaintiffs’ evidence could conclude that (i) DWM hired Machigonne for its expertise in claims management, (ii) Machigonne persisted in recommending denial of Lowell’s claim pursuant to Exclusion 11 despite its own in-house counsel’s concerns, and (iii) whatever its internal misgivings, DWM chose to “let Machigonne’s decision stand” – in other words, was relying on Machigonne’s Plan interpretation. Under that scenario, DWM would not have assumed the contractual risk reflected in its agreement to indemnify Machigonne.

Genuine issues of material fact accordingly preclude summary judgment in Machigonne’s favor with respect to this point.

contractual assumption of the risk.

Point 7 (comparative negligence): Machigonne’s and the Drummond Plaintiffs’ comparative-negligence arguments parallel those made with respect to Point 3 (proximate cause). *Compare* Machigonne S/J Motion at 12-14; Drummond S/J Opposition at 6 *with* Machigonne S/J Motion at 19; Drummond S/J Opposition at 9-10. Not surprisingly, the outcome is the same: Genuine issues of material fact preclude summary judgment in Machigonne’s favor.

As Machigonne observes, pursuant to Maine’s comparative-negligence statute, a plaintiff may not recover damages if its fault is equal to or greater than that of the defendant. *See* Machigonne S/J Motion at 19; 14 M.R.S.A. § 156; *see also, e.g., Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961, 971 n.7 (Me. 2000) (“In the standard comparative negligence instruction, the jury is told that if they find that the plaintiff was negligent and the plaintiff’s negligence was a legal cause of her damage, the jury should apportion the relative degree of fault by comparing the fault of each. The jury is further instructed that if the parties are equally at fault or the plaintiff is more at fault than the defendant, they are to return a verdict for the defendant, but if the defendant was more at fault than the plaintiff they reduce the total amount of damages that the plaintiff would be entitled to by a just and equitable amount.”) (citations omitted).

The Drummond Plaintiffs do not contest the applicability of the comparative-negligence statute in this context. *See* Drummond S/J Opposition at 9-10. Rather, the parties join issue with respect to the substantive question whether DWM was equally or more negligent than Machigonne. *Compare* Machigonne S/J Motion at 19 *with* Drummond S/J Opposition at 9-10. In Machigonne’s view, “even assuming that Machigonne’s recommendation that Exclusion 11 applied to Lowell’s surgery was unreasonable and negligent, Drummond’s adoption of that recommendation despite its complete disagreement with the recommendation is at least equally negligent as any act by Machigonne.” Machigonne S/J Motion at 19. In the Drummond Plaintiffs’ view, DWM, which did not have the expertise to process

medical benefits claims, reasonably relied on Machigonne's advice and thus could not have been equally or more negligent than Machigonne. *See* Drummond S/J Opposition at 9-10.

A reasonable fact-finder construing the evidence in the light most favorable to the Drummond Plaintiffs could resolve this question in their favor, determining that DWM, which hired Machigonne for its claims-management expertise, relied on Machigonne's persistent advice to deny Lowell's claim based on Exclusion 11 despite its internal misgivings.

Accordingly, genuine issues of material fact preclude issuance of summary judgment in Machigonne's favor.

Point 8 (lack of duty to defend): Machigonne finally argues for summary judgment in its favor to the extent that the Drummond Plaintiffs claim breach of a duty to defend. *See* Machigonne S/J Motion at 20. They point out that the duty to indemnify and hold an entity harmless is not the same thing as the duty to defend, and that Paragraph 9(b) contains no promise "to defend" the Drummond Plaintiffs. *See id.*

While the Drummond Plaintiffs' third-party complaint does allege that "Machigonne is contractually obligated *to defend*, indemnify, and hold harmless the Third-Party Plaintiffs[,]" Defendants' Third-Party Complaint Against Machigonne, Inc. (Docket No. 4) ¶ 13 (emphasis added), I construe their response on summary judgment as a concession that they no longer proceed on the basis of breach of an alleged duty to defend. *See* Drummond S/J Opposition at 10. As the Drummond Plaintiffs point out, Paragraph 9(b) provides indemnification for "any and all costs, liabilities or expenses rising out of or in any way connected with" Machigonne's failure to use reasonable care. *See id.* (quoting Paragraph 9(b)). Thus, to the extent the indemnification duty is triggered, Machigonne clearly must reimburse the Drummond Plaintiffs for their litigation expenses and costs incurred in defending against Lowell's ERISA lawsuit regardless whether

Machigonne also had a duty to defend. Machigonne accordingly is entitled to summary judgment with respect to the claim asserted in the Drummond Plaintiffs' complaint that it breached a duty to defend them.

IV. Conclusion

For the foregoing reasons, I **GRANT** in part and **DENY** in part the Drummond Plaintiffs' motion to strike and recommend that the court **GRANT** Machigonne's motion for summary judgment with respect to any claimed breach of a duty to defend and otherwise **DENY** that motion, and **DENY** the Drummond Plaintiffs' cross-motion for summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of January, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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