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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

TIDYMAN'S MANAGEMENT SERVICES INC., a Washington Corporation; LENORA DAVIS BATEMAN, *et al.*, Plaintiffs, vs. MICHAEL A. DAVIS; *et al.*, Defendants.	Dept. 4 Cause No. DV-10-695 ORDER

I. PROCEDURAL HISTORY

This case was remanded for a hearing focused on the reasonableness of a stipulated settlement. The Factual and Procedural Background of the case is provided in *TMSI v. Maxwell and Davis*, 2014 MT 205, ¶ ¶ 3-12. On appeal, the Montana Supreme Court affirmed this Court's determination that Montana law applied to the case, that National Union Fire Insurance ("NUFI") unjustifiably breached its duty to defend its insureds, Michael A. Davis and John Maxwell, and that there was no evidence of collusion in the stipulated settlement. *TMSI*, ¶¶ 20; 33 and 47. The parameters of the hearing and whether and to what extent further

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discovery was necessary prior to the hearing was to be set by the District Court. The burden of establishing the unreasonableness of the stipulated judgment rested with NUFI. *TMSI*, ¶ 44.

II. PARAMETERS OF HEARING

The District Court entered a *Scheduling Order for Reasonableness Hearing* (Doc. No. 313) on October 15, 2014 after the parties appeared on October 6 for a status conference on discovery matters following remand. In that Order, the District Court found that additional but substantially limited discovery was necessary prior to a hearing on reasonableness. Accordingly, the Court opened discovery for the narrow purpose of obtaining information regarding the reasonableness of the underlying judgment and established the deadlines and parameters. The parameters on discovery included:

a. Defendants are not permitted to conduct discovery on matters that are related to mediations, offers of settlement or settlement agreements;

b. Defendants are not permitted to conduct discovery into matters that are protected by attorney-client privilege or attorney-client work product.

c. Defendants are not permitted to conduct discovery of information aimed at the merits of the underlying case;

d. Defendants may not conduct discovery on the issue of collusion;

e. Defendants may not conduct discovery on coverage related issues, liability, or the reasonableness of the underlying claims;

f. Defendants may not be allowed to retake depositions that were previously taken;

g. Each party shall be limited to 5 depositions each;

h. Depositions of the individual plaintiffs or lay witnesses shall be limited to 3 hours for each deposition;

i. If the parties believe that additional depositions are necessary, they shall seek leave of the Court.

The reasonableness hearing was set for three days, January 28, 29 and 30, 2015. On November 3, NUFI filed a motion for a jury trial, which was opposed by Plaintiffs. On November 21, the Court issued an order denying NUFI's motion. Doc. No. 330. The Court said that the Montana Supreme Court had been clear that a reasonableness determination was a matter for the District Court and not a jury. Further, the Court concluded "NUFI is still attempting to relitigate issues, raise various defenses and essentially go back to the beginning and try the case on its merits. They have lost that right by their failure to defend their insured and the Montana Supreme Court has affirmed this Court's determination to that effect. What is left is a determination for this Court to make on the reasonableness of the settlement amount." Doc. No. 330, *Order*, Nov. 21, 2014, Page 3, 1-6.

The Court reiterated the scope of the hearing in an order dated December 11, 2014 (Doc. No. 341) on NUFI's motion for depositions of Maxwell, Davis, Newsome and Working. The Court allowed limited depositions for Working and Newsome on the issue of whether or not at the time that they prepared their work for the Zachary Scott report any other buyer had been identified. The Court noted that the Supreme Court opinion stated clearly that the stipulated settlement was presumed reasonable and that the stipulated settlement was not the result of collusion. Because there was no collusion, there was no need for depositions of Maxwell and Davis. The Court noted further that three matters bearing on reasonableness were identified in the Supreme Court opinion that had not been addressed. "Those matters are: 1) NUFI's objection that this Court's reliance on the Tim Sather report is based on "unsworn opinions of experts never questioned by NUFI's counsel"; 2) Sather did not offer an opinion as to the amount of damages the ESOP and the corporation suffered as a result of the approval of the joint venture; 3) that no buyer had been identified at the price that Zachary Scott suggested that the corporation might bring if sold to another chain." Doc. No. 341, *Order*, December 11, 2104, Page 3.

Prior to the hearing, NUFI propounded discovery to Randall & Hurley, the successor to Phenneger & Morgan Inc., Tidyman's ESOP administrator and sought to subpoena documents. Plaintiffs opposed. In a motion to enforce its subpoena,

NUFI maintained it needed these documents in order to be able to demonstrate the amounts that were paid out to ESOP participants after the SuperValu transaction in order to avoid double dipping. NUFI maintained that the Court was required to consider the damages the ESOP or the corporation suffered as a result of the joint venture and that a reasonable settlement must account for amounts actually received. The Court declined to issue an order enforcing the subpoena. In its order, the Court said it recognized that the amount of the stipulated settlement could arguably be reduced by amounts previously paid to Plaintiffs. However, the Court said it would first address the issue of whether then stipulated judgment of $29 million is reasonable before moving onto the question of what deductions, if any, should be allowed. Doc. No. 377.

III. STANDARD OF REVIEW

The parties do not agree on what standard the Court should apply in considering reasonableness. NUFI proposes the Court consider what a reasonably prudent person in the position of the insured would have settled on for the merits of the Plaintiffs claim. This standard would include considering numerous factors such as the Plaintiffs' damages, the strength of the insured's defense theory, the strengths of the Plaintiffs' liability theory and the risks of establishing liability and damages. The Court has reviewed the cases cited by NUFI. The standard of review proposed by NUFI lacks sufficient grounding in applicable Montana law. When an

insurer breaches the duty to defend and leaves an insurer on its own to challenge liability, the insured should not be able to reach back and interject itself into a controversy it has sidestepped in order to eliminate personal liability. *State Farm v. Freyer*, 2013 MT 301, ¶ 35. The standard proposed by NUFI asks the Court to reach back and interject possible defenses to conclude the Plaintiffs' case was weak, the defenses were strong and damages were minimal. If the Court were to adopt this standard, the insured would be effectively restored to its pre-breach position. Thus, the Court does not rely on this standard.

Plaintiffs urge the Court to focus its inquiry on whether a jury could have awarded the amount of the stipulated judgment. Such a focus would apply a standard similar to the "any credible evidence" standards in motions for directed verdict or judgment notwithstanding the verdict. This test was adopted by the Honorable Ed McLean in *Carolina Casualty v. Keller Transport* (Fourth Judicial District, Cause No. DV-2010-1133). In *Carolina Casualty*, the plaintiffs filed a motion asking the Court to find the stipulated settlement was reasonable. Judge McLean held a hearing but did not accept testimony or exhibits. He relied on the record in the underlying action and considered whether the amount of confessed judgment was within a range that a jury could have awarded based on the evidence presented by the proponent of the judgment. Order and Discussion, *Carolina Casualty*, Pg. 48.

The Court agrees that one way to look at reasonableness might be to consider whether the amount of a confessed judgment was within a range a jury could have awarded based on evidence presented by the proponent of the judgment as Judge McLean did in the *Carolina Casualty* case. However, as the Montana Supreme Court did not include that direction on remand, the Court has relied on its discretion to set the parameters and has allowed limited discovery and a hearing including witnesses and exhibits. To determine whether the stipulated settlement is within the range of reasonableness, the Court has considered reasonableness from the perspective of the insured at the time of the stipulation, whether the information relied upon possessed sufficient indicia of reliability and whether the damages represented might naturally have been expected to result from the breach of the duty to defend.

The reasonableness hearing was held on January 28-January 30, 2015. John Amsden and Justin Stalpes appeared on behalf of the individual Plaintiffs; Michael Black appeared on behalf of Tidyman's Management Services; Greg Munro, Patrick Hagestad and Perry Schneider appeared on behalf of all Plaintiffs. Tim MacDonald, Robert James, Nate Hake and Mary Jaraczeski appeared for NUFI. Plaintiff Lenora Bateman attended as did Martha Keen, corporate representative for NUFI. The Court split the available time equally between the two parties and the minutes used by each party were tracked by the Court to ensure parity.

Witnesses testified for each party, exhibits were received and certain deposition evidence was received. The Court, having heard and considered the testimony of witnesses who were called to testify at trial, the excerpts of deposition testimony admitted into evidence, all exhibits that were admitted into evidence at trial, and any offers of proof, hereby makes the following:

IV. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

1. With respect to Defendants Davis and Maxwell, the First Amended Complaint alleges Davis and Maxwell were officers or directors of Tidyman's Inc.; that in that capacity they owed fiduciary duties to Plaintiffs and that they breached their duties. The breaches of duty included entering into the SuperValu deal against the advice of financial experts, pushing the SuperValu deal through with misleading and false documents and by changing the voting rules; using future earnings calculations they knew, or should have known were unrealistic and based upon unsupported assumptions; and failing to advise the Board and shareholder employees of all relevant information. Plaintiffs sought compensation for their damages including punitive damages. Doc. No. 10.
2. Defendants Maxwell and Davis stipulated to a $29 million judgment in 2010. Davis' stipulation was filed on November 5, 2010. Doc. No. 22. Maxwell's stipulation was filed on November 29, 2010. Doc. No. 33. The stipulated

settlements were supported by a number of exhibits including the Sather Report dated June 26, 2008, which related to the amount of damages.

3. The June 26, 2008 Sather Report is an addendum to Tim Sather's expert witness disclosure in the *Nagrone* [1] case dated May 7, 2008. The May 7, 2008 report provided a summary of Mr. Sather's opinion that the projected sales for Tidyman's LLC used in the financial model on which Tidyman's Inc. based its decision to merge with SuperValu was not realistic based on past history; the forecast profits were not realistic; the operating results for the first two quarters after the merger should have caused Tidyman's to reassess the merger and the combined budget for 1999 presented to the Board of Directors showed a reduction of 41% in net income before taxes from the financial model amount of $7,917,000 to $4,631,000 and was too optimistic compared to the actual audited results for 1999 of $(424,000). The June 26, 2008 Sather Report addressed information contained in a letter dated April 3, 1998 from Mark Working of Zachary Scott to the Tidyman's board of directors. In addition, the report provided a schedule of Tidyman's value as determined by the ESOP valuation consultants for the years June 30, 1996 to December 31, 2000.

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[1] In 2007, Plaintiffs filed a complaint in federal court entitled *Nagrone v. Davis* alleging violations of the Employee Retirement Income Security Act. The complaint was later amended to include allegations against the officers and directors of TMSI for breach of corporate fiduciary duties. The ERISA claims settled as did the claims against officers and directors of TMSI, except for those claims against Maxwell and Davis. The federal district court then dismissed the federal court action after declining to exercise supplemental jurisdiction over the state law claims pursuant

4. NUFI contends the $29 million stipulated judgment is unreasonable as follows:

a. There was no viable buyer for Tidyman's in 1998. If there was no viable buyer, Plaintiffs did not lose $29 million.

b. The six appraisals used by Plaintiffs to establish the value at $29 million had limiting conditions and were intended to be used only for ESOP planning. The appraisals were flawed because they ignored critical negative trends and assumed that Tidyman's would grow; used inappropriate market comparables and optimistic assumptions about Tidyman's cost of capital.

c. If the appraisals are used, they show that the transaction did not hurt Tidyman's or its ESOP participants. The transaction did not result in a loss but increased the value of TMSI.

d. Substantial payments were made to the ESOP participants and to TMSI after the merger with SuperValu that would not have been made if the transaction hadn't occurred. Certain assets and liabilities were retained by TMSI. The $29 million judgment fails to offset the amounts actually received or retained by TMSI. Those amounts should be deducted.

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to 28 U.S.C. § 1367. See *Nagrone v. Davis*, No. CV-07-04-M-DWM-RKS.

e. The demise of TMSI did not result from the SuperValu transaction but from competition from Walmart, from the payment of the *Hemmings*[2] judgment and ESOP repurchase obligations.

f. The actual value of Tidyman's in 1998 was closer to $10 to $14 million dollars.

g. Plaintiffs' claims were weak and Maxwell and Davis had strong defenses. The settlement amount of $29 million ignores any risk for Plaintiffs.

h. Evidence of settlement amounts for Custer, Odegard and Schnug in *Nagrone* should be admitted because it reflects on reasonableness. The settlement amounts for other defendants were much less in *Nagrone*. Evidence of offers to settle with Davis and Maxwell should be considered because they were much less than the stipulated judgment.

i. The stipulated settlement was not negotiated and reflected 100% of what Plaintiffs were seeking.

j. Plaintiffs' recissory damages theory is wrong.

NUFI'S opening statement, Tr. 8:19-20:6.

5. NUFI began its case with testimony from Kenneth Nachbar, a partner at the law firm of Morris, Nichols, Arsht and Tunnell, LLP in Wilmington, Delaware. Tr.

[2] The *Hemmings* judgement refers to *Hemmings v. Tidyman's Inc.*, No. CV-97-00068-WFN, a case brought by a former's Tidyman's employee alleging sex discrimination which resulted in a

31:15-18. Mr. Nachbar has been a member of the American College of Trial Lawyers since 2008 and has been listed in Chambers and Best Lawyers in America. Tr. 37:24-25; Tr. 38:5-7. His standard hourly rate is a little over $800 an hour although he was charging a little bit less in this case. Tr. 39:1-2.

6. Mr. Nachbar's practice is 80% litigation and 20% mergers and acquisition advisory work, basically structuring transactions. Tr. 32: 17-20. He typically advises directors and officers and most of his litigation work involves claims of breach of fiduciary duty. Tr. 33: 10-13.

7. Mr. Nachbar estimated he has been involved in hundreds of cases alleging breach of fiduciary duty. Tr. 34:15. In every case, it was necessary to analyze damages associated with the alleged breach. Tr. 34:18. He has litigated cases involving statute of limitations defenses and asserted a business judgment rule defense in almost every breach of duty case. Tr. 35:11; Tr. 36:1-3. He has litigated the breach of duty cases involving claims of recissory damages. Tr.36:11.

8. Mr. Nachbar testified that he had settled over a hundred cases involving claims for breach of fiduciary duty. Tr. 36:18. He has advised clients hundreds of times regarding the reasonableness of settlement amounts. Tr. 36:23. In so doing, he looks at the nature of the claims, the strength of the claims, the nature

judgment in the amount of $5.8 million.

of the defenses, the strength of the defenses and the possible damage exposure that the defendant is facing should the plaintiff prevail on liability. Tr. 37:4-8.

9. Mr. Nachbar's methodology for evaluating the reasonableness of the $29 million dollar stipulation was "the same as I would do in any case, which is to look at the nature of the claims, the strength of the claims, the nature of the defenses, the strength of the defenses and also to look at damages and what liability the defendants were facing, if in the event that liability was established." Tr. 59:1-4.

10. Mr. Nachbar's opinion was the case against Maxwell and Davis was weak as follows.

   a. Davis and Maxwell had a very strong statute of limitations defense. Tr. 66:17-67:7. The statute of limitations would not have been tolled because of the Zachary Scott disclosures in the proxy statement and because plan participants could have requested relevant financial information. Tr. 68:6-69:5. He opined the strength of a statute of limitations defense should be taken into account in assessing reasonableness and that it was not reasonable to settle a case with a strong statute of limitations defense for the same amount as a case with a weak statute of limitations defense because the claims were different. Tr. 71:20-25; 71:1-5.

b. Davis and Maxwell also had a strong defense under the business judgment rule that would have barred Plaintiffs' claims unless they could have proved that the transaction was done out of self-interest. The business judgment rule defense was not as strong as the statute of limitations defense but was still a very strong defense. Tr.73:3-5. There were significant obstacles to Plaintiffs getting a full recovery and a reasonable settlement would take those defenses and those obstacles into account. Tr. 74:20-23.

c. Plaintiffs' case was weak because the advice of Zachary Scott was disclosed in the proxy statement which would have made it difficult to prove breach of duty. Tr. 76:10-21. Also, to the extent Plaintiffs made claims against Davis and Maxwell as directors and officers of the LLC, those claims would not have been viable because the SuperValu transaction was an arm's length transaction between unrelated parties. The transaction could not have been unwound because their fiduciary duties ran to Tidyman's LLC not TMSI and there were statute of limitations problems. Tr. 79:5-20; Tr. 80:1-5.

11. Mr. Nachbar opined that in reviewing the reasonableness of a settlement amount, the damages Plaintiffs could obtain if they overcame all obstacles was a critical element in assessing reasonableness. Tr. 81:4-5. Mr. Nachbar identified

the following problems in Plaintiffs' evaluation of the damages flowing from the alleged breach:

a. Plaintiffs relied on the report of Mr. Sather, which in turn relied on some contemporaneous appraisals in support of their view the company could have been sold for $29 million. Tr. 82:13-15. Therefore, the presence of a buyer at $29 million is critical to their analysis. Tr. 83:10-12. Since there was no buyer at $29 million, Plaintiffs recissory damage theory "goes away" because instead of having the SuperValu transaction, there would have been a standalone TMSI with 12 stores. All the problems that caused Tidyman's LLC to fail would have caused TMSI to fail and failure probably would have occurred sooner than 2006. Tr. 84:11-19.

b. The appraisals do not support that harm occurred to the company due to the SuperValu transaction because the company was worth more after the transaction. Tr.87:8-10; 88:6-8. If using the Zachary Scott $25 million number, the total value lost by TMSI as a result of the joint venture would be no more than $4 million – the difference between the 28.8 million appraised value before the transaction and the lowest figure of the value for TMSI after the transaction. Tr. 88:8-10.

c. The damages flowing from the breach of fiduciary duty have to be offset by negative trends in the market (the Walmart effect), the money paid to ESOP participants and the money paid to satisfy the Hemmings judgment. Tr. 90: 11-13. Further, 5.9 million of cash distributions from the LLC to TMSI would also have to be deducted from damages. Tr. 90: 23-24.

12. Mr. Nachbar testified it was relevant to his opinion that the case was brought by 35 individual plaintiffs out of 1200 ESOP participants and not as a class action. No reasonable defendant would pay 35 plaintiffs $29 million while leaving the other 1165 people free to sue. Tr. 91: 8-13.

13. Mr. Nachbar testified that the settlement was unreasonable because there were no negotiations over the amount. Tr. 93:3-8. A reasonable settlement would try to prod and get the lowest price available. Tr. 93: 17-18. Mr. Nachbar testified that Defendants Maxwell and Davis had "great leverage" during negotiations because they had something of value to give, which was an assignment of their rights against NUFI. Tr. 119: 16-20. The negotiations were over the scope of the release and assets that would be protected, "things that Mr. Maxwell cared about" but there was no counteroffer. Tr. 95: 3-8.

14. The Court did not allow testimony regarding settlement demands and negotiations based on Rule 408 M.R.E.

15. On rebuttal, Mr. Nachbar testified that in his opinion, the SuperValu transaction was neither void nor voidable. Tr. 689:16. Under Delaware law, in a similar case, *Arnold v. Society for Bank Corp*, the Delaware Supreme Court ruled that if the statutory formalities were observed in obtaining a necessary vote, the transaction was valid and lawful and rejected the contention that the transaction was void ab initio. In certain circumstances, there could be a damages claim against directors if they breached their fiduciary duties but the transaction could not be called into question as a result of a misleading proxy statement. Tr. 690:4-16.

16. On rebuttal, Mr. Nachbar testified that he understands that there is a Montana statute addressing punitive damages and it says such damages are the lesser of two numbers, either $10 million or 3% of the defendant's net worth. It has been alleged that Maxwell and Davis lacked the resources to defend themselves during the period that NUFI did not provide a defense and therefore, if that is true, they cannot have been high net worth individuals. If their net worth was assumed to be a million dollars, the maximum punitive damages would be "$30,000, not material in connection with what is claimed in this lawsuit." Tr. 691:4-18. Mr. Nachbar did not opine on what Plaintiffs knew regarding the net worth of Davis and Maxwell at the time of the stipulated settlement.

17. Mr. Nachbar acknowledged that a value of $30 million was assigned to Tidyman's contribution to the LLC in an arm's length transaction in 1998. Tr. 142:7-142:22; 145:6-18.

18. Mr. Nachbar acknowledged that settlement negotiations took place although he was critical of Defendant Maxwell's greater interest in matters important to him at the expense of his leverage to minimize the settlement amount.

19. Mr. Nachbar is a highly experienced and exceptionally competent attorney and expert witness. However, his testimony was not properly focused. The testimony offered by Mr. Nachbar went to an analysis of the merits of the underlying claim, which he considered to be weak, to establish the pre-breach value of the claim. In his view, the stipulated settlement was not reasonable because it exceeded his assessment of the pre-breach valuation. This perspective fails to account for the measure of damages for the breach of the duty to defend. Where an insurer has left its insured on its own to challenge liability, the insurer should not be able to reach back and interject itself in a controversy it has sidestepped to void a deal the insured has entered into to eliminate personal liability. *Freyer*, 2013 MT 301, ¶ 35.

20. Mr. Nachbar identified various offsets or deductions that should be made. In Mr. Nachbar's view, it was necessary to understand the manifestations of other problems experienced by TMSI after the merger that caused TMSI to fail. He

opined the manifestations of the other problems, including competition, the payment of the *Hemmings* judgment and the payments made to ESOP participants after the merger should be deducted in order to measure damages. Mr. Nachbar's assertions as to necessary deductions or offsets were premised on and indivisible from his deconstruction of the merits of the case as they existed at the time of NUFI's failure to act.

21. If the Court were to make the deductions proposed by Mr. Nachbar for the reasons offered by Mr. Nachbar, it would be reaching back into the case to restore the benefits of NUFI's lost opportunity to defend.

22. The Court has previously determined that NUFI breached its duty to defend and the Montana Supreme Court has affirmed. *Tidyman's*, ¶ 33. The value of the case as it might have been assessed if the duty to defend was performed does not rebut the presumption that the settlement amount reached by Plaintiffs and Defendants Maxwell and Davis was reasonable.

23. The Montana Supreme Court has found there was no collusion in the stipulated settlement. The Court disagrees that Maxwell and Davis had "great leverage" during negotiations as they were undefended by NUFI and faced financial ruin.

24. Mr. Nachbar relied on assets not available to Defendants Maxwell and Davis to formulate his opinion. At the time the stipulated settlement was entered into, Defendants Maxwell and Davis lacked the benefit of the expertise and resources

needed to challenge the claims or to arrive at the analysis and valuation proposed by Mr. Nachbar. The stipulated settlement reflects a compromise of perspectives regarding risk to bring finality to a dispute based on information known to the parties at the time.

25. Mr. Nachbar's opinion as to reasonableness of the stipulated settlement does not overcome the presumption that the stipulated settlement is reasonable.

26. NUFI's second witness was Dick Hensley. Mr. Hensley is retired. Prior to his retirement he worked for Buttrey Food Stores from 1960-1978 in various capacities including manager of data processing; director of grocery merchandising for 22 Buttrey stores in 6 states; vice president of merchandising of Hussman Refrigeration from 1980 until 1983; and for SuperValu from 1983 until he retired in 1996. He worked in various capacities for SuperValu, including executive vice president of the Alabama division and then president of several divisions where he directly supervised and indirectly supervised from a dozen to 500 stores. After retirement, Mr. Hensley began to work as a volunteer executive with the International Executive Service Corps and the Citizens Democracy Corps to assist in providing expertise to emerging companies in emerging economies. He accepted 18 assignments in 8 years and completed his last assignment in 2004. Tr. 170-185. During this time, he spent approximately half his time abroad. Tr. 190:1.

27. While Mr. Hensley worked for SuperValu, he was involved in approximately 15-20 decisions to merge or acquire other stores. Tr. 185:7-13.

28. Mr. Hensley was asked to determine whether the $29 million stipulated judgment was reasonable and whether there was a viable buyer for Tidyman's in 1998. Tr. 186:14-20.

29. Mr. Hensley opined that $29 million was an unreasonable settlement because there was no viable buyer for Tidyman's for $29 million in 1998. Tr. 204:1-10.

30. Mr. Hensley's opined that the ESOP valuations were out of line with reality and the value of the corporation as a standalone entity was closer to $11 million as Zachary Scott opined. Tr. 191:22-25; 192:1. He considered the valuation of $28-38 million to be hypothetical. Tr. 193:2.

31. He explained when he developed his opinion as to the value of Tidyman's, it was a "realistic value-based analysis of what a potential buyer would look at in determining if they wanted to buy it and what it might be worth rather than having somebody come to me and say I'll sell you my stores for 29 million dollars". He looked at the actual value of the assets on the balance sheets and the performance data on the stores to identify Tidyman's value. Tr.195:14-15.

32. In response to questions from the Court, Mr. Hensley explained that what he had done in forming his opinion was conduct "a kind of due diligence, if you will, on the Tidyman's stores and the Tidyman's stores only. And made a

determination of what they may have been worth in '98." Tr. 196:3-6. He concluded that if he were going to buy Tidyman's, he would not have paid $29 million. Tr. 196:7-10.

33. Mr. Hensley described his due diligence methodology. A due diligence investigation would include a thorough evaluation of the organization including examining financial statements, looking at physical assets involved, determining the structure of the organization to be acquired and how it would fit for the acquiring organization, the level of quality of the people within the acquired organization, identifying any liabilities, lawsuits or other negative events; analyzing net revenues per year, same store sales, average store sales, ESOP appraisals and federal tax forms, visiting the stores, visiting the competition, visiting or interviewing management and reviewing analyses by other experts. Tr. 204:20-207:4.

34. Mr. Hensley's view of Tidyman's was bleak. He considered their sales trends "awful" and "very concerning" and that the stores were in a "death spiral" (Tr. 215:5-6) with average store sales declining from 1994 until 1998. Tr. 220:8-14. He did not think there was a buyer for Tidyman's because of their negative trends and the conditions of some of the stores as "old and tired." Tr.221:18-19; 221:23.

35. Mr. Hensley considered whether there were other viable buyers including Brown and Cole, Rosauer's and URM, Buttreys, Albertson, Safeway, Haggen Markets, Waremart and QFC. He did not believe any of them were viable. Tr. 221:20-22. However, Mr. Hensley did not talk to any of the entities that he opined would not have wanted to purchase Tidyman's assets. Tr. 222:16-25; 223:1.

36. Mr. Hensley was not familiar with controlled auctions and expressed skepticism about the ethics of a controlled auction with only one bidder. Tr.287:19-21; 288:13-14.

37. Mr. Hensley believed the SuperValu transaction was beneficial. Tr. 240:17-24; 241:3. SuperValu transferred a lot of assets with no debt and Tidyman's had a lot of short and long term liabilities thus driving up the net equity value of Tidyman's after the merger. Tr:241:7-12.

38. Mr. Hensley opined that Tidyman's failed for multiple factors including the change in the competitive environment, the ESOP requirements; the condition of the stores and the *Hemmings* lawsuit. Tr. 191:15-18; Tr. 253:5-6.

39. Mr. Hensley's testimony as to whether he read the appraisals was contradictory. He testified he considered them in determining reasonableness and that he did not read them. Tr. 247:22-25, Tr. 251:3-12; 275:1-276:1. It was not material to him whether there was an active market in grocery store chains in 1998. Tr.

274:25-275:9. He was not familiar with instances in which other grocery chains experiencing negative sales growth in the same time frame were acquired for up to 12 times their EBITDA[3] , including Delchamps, Giant Foods, Western Beef and Vonns. Tr. 273:18-274; 279:10-14; 25:10-16; 279:12-14; 280:22-281:21; 279:12-14; 281:13-22; 282:18-22; 282:8-284:1.

40. Mr. Hensley's opinion relied on a methodology that was incomplete. The due diligence inquiry he described required a detailed analysis of the organization to be acquired in order to determine not only its financial soundness but also whether and how it would fit with the acquiring organization. As he explained, in addition to an understanding of the financial picture of the organization to be acquired, due diligence would require a thorough understanding of the condition and needs of an acquiring organization in order to assess the wisdom of a purchase. In the absence of the latter, the ability to determine value is impaired. Mr. Hensley did not have all the information he needed to conduct a due diligence analysis. His opinion that there was no viable buyer for $29 million also lacked foundation.

41. NUFI called Terry Lloyd. Mr. Lloyd is a managing director with Finance Scholars Group, a consulting firm of financial analysts. He is a certified public accountant and a chartered financial analyst. He has been employed by various

[3] "EBITDA" refers to a calculation of earnings before interest, taxes, depreciation and amortization.

accounting firms, including Ernst & Young; Peat Marwick Mitchell, BDO Seidman and Heron Consultant Group. The focus of his practice is the valuation of shares of closely held or privately owned businesses. He has worked in a variety of industries and spends about 25% of his time as an expert witness. He has worked with grocery stores of various sizes over the past 12 or 13 years. He has worked as an arbitrator and has experience as a damages expert. Tr. 322-334.

42. Mr. Lloyd was asked to provide an opinion on the reasonableness of the $29 million dollar stipulated settlement. Tr.333:13-16.

43. Mr. Lloyd's opinion was that the $29 million stipulated settlement was not reasonable. Tr. 337:17-20.

44. In formulating his opinion, Mr. Lloyd relied on several thousand pages of documents, including Tidyman's financial statements, work done by Food Partners, reports and depositions in the *Nagrone* case, contemporaneous information from TMSI and Tidyman's, including the financial statements of the ESOP; and did independent research by looking at the dynamics of the industry in the late 1990s.

45. Mr. Lloyd opined that in reviewing reasonableness "it mattered very much" whether there was a viable buyer for Tidyman's in 1998. Tr. 343:5.

46. In his opinion, the value of a thing is worth what someone will pay for it. If there's nobody who will pay at a certain price, it's not worth that price unless and until we determine what price someone will pay for it. The absence of a buyer at a certain price makes the price "hypothetical, theoretical, a fantasy, speculative to simply assign a price that was used for another purpose, not for this purpose." Tr. 343: 11-14.

47. Mr. Lloyd opined there was no evidence of a buyer in the market in 1998. Tr. 344:22-23. Regional chains like Tidyman's were being bankrupted by Walmart. Mr. Maxwell was not able to find interested buyers. Zachary Scott did not identify potential buyers. Tr. 3445:10-11; 347:14.

48. Mr. Lloyd testified there were no barriers to other companies approaching Tidyman's if other companies had been interested in acquiring Tidyman's. Tr.346:12.

49. Mr. Lloyd opined that the $29 million value assigned to the ESOP appraisals was not realistic as to what the companies could be sold for. Tr. 349:4-6.

50. Mr. Lloyd reviewed the ESOP appraisals that formed the basis of the $29 million stipulated settlement. The ESOP holds the shares for the benefit of the employees during their employment. There is a guaranteed buyer for those shares and the discount for their marketability is low. Tr. 349:11-15. An ESOP

must be appraised annually and follow a fairly "cookie cutter" approach and are good only for that particular time. Tr. 350:10-19.

51. The Ernst & Young and Columbia Financial appraisals contain extensive limiting conditions that are standard. Tr.352:2; Tr. 354:10-16. It is wholly inappropriate to rely on the ESOP appraisals and the appraised value set forth in the appraisals in light of the limiting conditions. Tr. 354. The same is true for the Columbia Financial appraisals. Tr. 354.

52. Mr. Lloyd considered the ESOP appraisals a flawed yardstick that did not represent the true value of Tidyman's. Tr. 358:22-23. Even if accepted as a consistently flawed yardstick, they tell us that after the merger, value actually went up a little bit or stayed relatively constant and there was no value lost following the merger. Tr. 358:22:25; Tr. 359:1-9. The merger might have added value or kept Tidyman's alive a little bit longer but it certainly did not detract or diminish value. Tr. 359:8-10.

53. Mr. Lloyd analyzed whether TMSI and plan participants received payments after the SuperValu transaction to determine net harm suffered after accounting for offsets or other compensation the harmed party has received. Tr. 360:15:25.

54. Mr. Lloyd testified that Form 5500s show payments were made to ESOP participants over time after 1998 through 2005 in the amount of $7 million. Tr. 371:5.

55. A Form 5500 is an annual reporting form required to satisfy annual reporting requirements under ERISA and the Internal Revenue Code. According to the U.S. Department of Labor's website, the form is "part of ERISA's overall reporting and disclosure framework, which is intended to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators are provided or have access to sufficient information to protect the rights and benefits of participants and beneficiaries under employee benefit plans."

56. Mr. Lloyd opined that monies received by the plan participants must be subtracted from any gross claim of damages to arrive at a net harm suffered, typically "offsets" or "mitigation." If there is no offset, there is a double dip or double count, some people have recovered twice for the same thing. Tr. 372:10-15. Offsets should include:

a. $7.5 million paid to plan participants from 1998 to 2005. Tr. 372:22;

b. $5.9 million distributions made by the LLC to TMSI in 2002. Def. 314, Tr. 372:17-21:25; 373:1-16;

c. Tidyman's LLC paid $222,626,000 to reimburse TMSI under a leasing arrangement for leasing employees. Tr. 374:22-25; 376:14. This reimbursement included a 5.5 % fee that went to the ESOP and a .5 %

fee for TMSI to use at its discretion, which totaled $6,783,802. Tr. 375:6-10, 18-20; Def. Exh. 312;

d. Another offset should include $500,000 for the value of Defendant Davis shares in the ESOP. Tr. 377:13; Tr. 378:7-9.

57. Mr. Lloyd reviewed an expert report prepared by Mr. David Schoeder, an investment banker with Food Partners, specializing in food retailers and an expert witness in *Nagrone*. Tr. 391:24-25; Tr. 392:1-4; 395:20-21. Mr. Lloyd agreed with Mr. Schroeder's opinion that the value of Tidyman's prior to the merger was $10-14 million. Tr.396:3-5. Mr. Lloyd also reviewed the Zachary Scott opinion that Tidyman's was worth $11 million as a stand-alone. Tr. 396:19-20. If the value of the company was $10-14 million or $11, then a $29 million dollar settlement is unreasonable because it is two and half or three times what the company was worth. Tr. 396:25-Tr. 397:1-3.

58. Mr. Lloyd opined that the S corporation election in 1998 was a $10 million dollar benefit and adding that to the $11 million standalone value and the gain of $4 million in value by the merger with SuperValu totaled a $25 million dollar value of TMSI. Tr. 414:1-8.

59. Mr. Lloyd's opinion was that the *Hemmings* judgment drained cash in 2003 that was desperately needed for expansion, improvement and remodeling. Tr. 417:21-24.

60. Mr. Lloyd opined that the SuperValu transaction added value or was neutral on the overall impact and may have given a couple of extra years of life to Tidyman's. Tr. 428:4-6.

61. Mr. Lloyd's testimony was focused similarly to Mr. Nachbar's. That is, he assessed reasonableness of the stipulated settlement without reference to the breach of duty to defend.

62. Mr. Lloyd's testimony included extensive criticism of the use of ESOP appraisals to determine damages due to their limiting conditions. He also regarded them as containing errors because of flawed assumptions which were carried over year to year. Mr. Lloyd did not identify anything in the ESOP appraisals that would have made it clear to Maxwell and Davis that the ESOP appraisals were unreliable or should be off limits as they assessed their exposure to liability in the fall of 2010.

63. The Court does not concur that limiting conditions are as rigid as Mr. Lloyd maintains. The ESOP appraisals were prepared by two well-known professional public accounting firms, were required to meet stringent standards and were routinely used by Tidyman's in the operation of the business, including meeting legal obligations to plan participants and for planning for the future of the company. The ESOP appraisals were available to the Plaintiffs and Maxwell and Davis in the fall of 2010 to form the basis of the stipulated settlement.

64. Mr. Lloyd proposed various deductions be made from the stipulated settlement in order to account for the possibility of double recovery by some plan participants. The Court has previously heard similar testimony from Mr. Nachbar. Although Mr. Lloyd's foundation for his opinion is based on different expertise, his conclusion is similar. Mr. Lloyd's testimony likewise fails to account for the measure of damages for the breach of the duty to defend. Where an insurer has left its insured on its own to challenge liability, the insurer should not be able to reach back and interject itself into a controversy it has sidestepped to void a deal the insured has entered into to eliminate personal liability. *Freyer*, 2013 MT 301, ¶ 35. If the Court were to make the deductions proposed by Mr. Lloyd, it would be reaching back into the case to restore the benefits of the lost opportunity to defend. Plaintiffs bear the responsibility for determining how to apportion recovery of a stipulated settlement deemed to be reasonable.

65. The analysis Mr. Lloyd offers regarding flaws in appraisals and assessment of the value of the company was not available to Defendants Maxwell and Davis in the fall of 2010 as a result of NUFI's breach. The stipulated settlement reflects a compromise of perspectives regarding risk to bring finality to a dispute based on information known to the parties at the time.

66. NUFI also designated deposition testimony of the following persons. The depositions listed in a-f were taken in 2008 connection with the *Nagrone* litigation. The remaining depositions were taken in 2015.

a. Joe Custer
b. Michael Davis
c. John Maxwell
d. Michael Newsome
e. Richard Odegard
f. Chris Schnug
g. Mark Working
h. Kathryn Aschwald
i. Michael Newsome
j. Mark Working

67. Plaintiffs designated portions of depositions of the following persons. The depositions in a-c were taken in the *Nagrone* case. The remaining depositions were taken in 2015.

a. John Maxwell
b. Michael Newsome
c. Mark Working
d. Kathryn Aschwald
e. Michael Newsome
f. Mark Working

68. Plaintiffs called Lenora Bateman. Ms. Bateman is presently employed as a pharmacy technician for Safeway. Tr.449:18-19. Previously, she worked for Tidyman's from September 1987 until July 2005 when the store closed. Tr. 455:12. Ms. Bateman worked at Tidyman's in various capacities, starting as a

part time checker. Tr. 451:11. Later she worked in other jobs, including as a full time checker, an assistant front end manager, in the bakery, unloading milk deliveries, as a night manager and as a pharmacy technician. Tr. 453:21-25. She became vested in the ESOP after seven years of employment. Tr.453:9.

69. Ms. Bateman currently serves as a member of the administrative committee for the ESOP and is on the Board of Directors. Tr.460:20-21. She was appointed to this position in 2008 by a federal judge. Tr. 461:6.

70. Ms. Bateman was on the Board of Directors of TMSI when the decision was made to enter into the stipulated settlement with Maxwell and Davis. She understood the $29 million settlement amount to be based on several things. It was based on the 1998 summary annual report showing the value of the company was $29 million prepared by Ernst & Young and Columbia Financial, "independent, unbiased experienced analysts." She saw a Form 5500 for 1998 that said the value of the company was $29 million, signed by Mike Davis, the CEO at the time. The Department of Labor audited after Tidyman's closed and "never at any time was figure of 29 million dollars challenged, amended, changed or altered in any way." Tr. 475:24-25; Tr. 476:1-25. She believed the minimum amount that the case could have been settlement for was $29 million, "nothing less." Tr. 477:1-2; 4-14. Ms. Bateman did not consider that punitive damages were included in that amount. Tr.479:7-15.

71. Ms. Bateman testified as to receiving the annual summary report stating how many shares she owned and what the shares were worth and using the reports to make plans about her future. Receiving the reports each year was important, discussed by employees, a "big deal." Tr. 456:22; 457:6. She kept track of the plan assets. Tr. 456:22-25. She and her husband used the reports to make plans about how long she would need to work and what she might be able to depend on for retirement, all kinds of plans and decisions that were very important to our future based on what we could see." Tr. 460:8-14. The information from management led her to believe that she could depend on the summary annual reports because management had a fiduciary duty that they would look out for employees' best interest, which meant disclosing pertinent information. Tr. 373: 7-12. Management also emphasized that the stock is valued annually by an outside independent evaluator. Tr. 473:21-22.

72. When she received the "thank you letter" informing her that the value of her ESOP shares was zero, she experienced shock and disbelief, despair, fear for her future and she felt betrayed. Total loss of her share value meant she would have start from scratch at age 50 to create a retirement plan and would have to work a lot longer. Tr. 479:25; 480:1-25; 481:1-16; 282:1-19.

73. Ms. Bateman was an articulate and credible witness as to the dedication of Tidyman's employees and as to the devastating effect the total loss of the value

of her ESOP shares had upon her, her family and her future. Significant portions of Ms. Bateman's testimony went to the merits of the case. The Court has not relied on her testimony to assess the merits of the case but observes Plaintiffs possessed a strong counterpoint to the merits argued by NUFI.

74. Ms. Bateman provided credible testimony as to the rationale for the stipulated settlement amount.

75. Plaintiffs called Thomas Copley. Mr. Copley is a CPA with Wipfli, a public accounting firm. Tr. 499:11. He was previously employed by Galusha, Higgins and Galusha, for 36 years, which had merged recently with Wipfli. Tr. 500: 9-19. During his career, he has worked as a staff accountant, a senior manager, partner, office manager of the Missoula office and CEO of the firm for 8 years. Tr. 501: 18-25; 502:1-6. He has performed between 80-120 business valuations in the last 8 years. Tr. 507:18-21.

76. Mr. Copley was engaged to determine if the stipulated settlement of $29 million was reasonable. In making that determination, he relied on his professional background and experience. He considered valuations from valuators of TMSI and the 5500s filed by TMSI, the fair market valuation prepared by Ernst & Young as of June 29, 1998 and the fair market valuation prepared by Columbia Financial, prepared three months after the merger. Tr. 533:17-19; 21-23; 534:1-23. He considered it appropriate to rely on those materials because they were

proximate to the date of the merger. Tr. 534:22-24; 534:2-6. He also relied upon the report of Anthony Crawford; Mark Working's letter to the Board of Directors as of April 13, 1998; Mr. Sather's expert witness report and his June 2008 affidavit. Tr.536:4-6; 12-18.

77. Mr. Copley opined that the $29 million stipulated judgment is a reasonable amount and supported by competent evidence because the valuation reports were competently prepared and relevant and followed Revenue Ruling 5960 standards and the general standards of accepted valuation process. Tr. 537:6-12.

78. Mr. Copley concluded the 1998 Ernst & Young appraisal and the 1998 and 1999 Columbia Financial appraisals were prepared in accordance with the tenets of Revenue Ruling 5960 and reflected professional judgment that was appropriate and they were prepared in accordance with general valuation standards. Tr. 535:16-20.

79. Revenue 5960 is a ruling issued by the IRS in 1959 that provided guidance to the valuation process associated with private businesses. Tr. 511:13-18. The valuator must have an understanding of the company, its history and the industry, must account for the general economic environment it operates in and the economic environment of the industry, the financial position and balance sheet of the company, earning capacity and good will. Tr. 512:8-25.

80. The purpose of valuation studies of businesses is to determine the value of the business, meaning the fair market value. Fair market value is the price that a willing buyer and a willing seller would be willing to agree upon, both having knowledge of the relevant facts.

81. Mr. Copley opined that an actual buyer is not required in order to complete a valid valuation of a business. There are numerous situations where there is not an actual buyer nor is one contemplated when a valuation is prepared. Tr. 517:12-17.

82. Mr. Copley prepared Exhibit 224(a)(1) which compared the values derived from various sources and compared them to the stipulated judgment. Tr. 538:5-8. The exhibit identified various organizations or governmental entities or individuals which used the valuation data; the actual valuation account and a notation as to whether those amounts are close to the stipulated judgment. Tr. 538. The valuations are as follows:

Ernst & Young (6/98)	28.8 million
BDO Seidman (6/98)	28.3 million
BDO Seidman (12/98)	28.4 million
SuperValu LLC	30.0 million
SuperValu SEC	30.0 million
SuperValu IRS	36.1-39.1 million
Tidyman's IRS	36.1 – 39.1 million
Maxwell/Davis – DOL	28.3 – 28.9 million
Maxwell/Davis - IRS	28.3 – 28.9 million
Maxwell/Davis – Plan Participants	28.3 – 28.9 million
Columbia Financial – 1998	28.8 million

Columbia Financial – 1999	28.88 million
Zachary Scott	28.8 – 38.0 million
Schoeder Personal Opinion	11.0 – 38.0 million

83. He selected these sources because there were numerous appraisers and users of the valuation information they contained. The information reflects what the company thought. Tr.550:3-12. Mr. Copley included the audited financial statements of BDO Seidman because audited financial statements have highly credible financial information. Tr.549:13-17.

84. Mr. Copley was asked to analyze potential economic damages in conjunction with his analysis of whether the stipulated judgment was reasonable. Tr. 554. He identified the net potential judgment facing Maxwell and Davis as amounts that include the highest intermediate value plus interest minus some distributions and offsets for the ERISA and outside director's settlement to arrive at the net amount. Tr. 562:11-2; Pl. Exh. 307(a).

85. Mr. Copley calculated the net potential judgment facing Maxwell and Davis, not including attorney's fees, costs and punitive damages. His calculation for potential damages including plan distributions only was $41,367,968. Potential damages if the calculation included plan contributions and distributions was $34,916,594. P. Exh. 307(a).

86. Mr. Copley did not express an opinion as to whether there was a viable buyer for TMSI in 1998. Tr. 593:15-18.

87. Mr. Copley testified that he considered the use of the Ernst & Young valuations, which contained conditions including limiting their use for planning purposes, to be appropriate for use by the administrative committee of the ESOP in valuing the stipulated settlement as the reports were addressed to the administrative committee. He believed the reports were relevant and within the purview of the administrative committee to use for that purpose. Tr. 598: 15-20. He testified that limiting conditions were typically inserted in order to protect the writer of the report. Tr. 599:11-14.

88. The Court finds the stipulated settlement is supported by reliable information of the estimated value at the time of merger including:

   a. Valuation reports prepared by Ernst & Young and Columbia Financial Advisors;
   b. Zachary Scott's 1998 Valuation;
   c. Valuation of TMSI contribution in September 1998;
   d. 1998 Form 5500 of $28.3 million; and
   e. BDO Seidman's 1998 Independent Audit Report – Plan Assets at $29.9 million.

89. With respect to the issues identified in *TMSI v. Maxwell and Davis* as to NUFI's arguments tending to bear upon the reasonableness of the settlement, the Court

makes the following findings after considering all testimony and evidence presented.

90. NUFI's objection to the Court's reliance on the opinions of unsworn experts not subject to cross-examination is resolved by the process attendant to the reasonableness hearing. NUFI conducted discovery prior to the hearing. NUFI's counsel represented to the Court that it had received 58,000 pages of discovery. Doc No. 317, *Defendant National Union's Motion for Continuance and Supporting Brief,* Page 2. NUFI also conducted additional depositions. NUFI presented three expert witnesses and was able to cross-examine Plaintiffs' witnesses.

91. NUFI contended that Plaintiffs misconstrued the Sather Report. The Court disagrees. The amount of damages was based on Mr. Sather's analysis of six valuations prepared by Ernst & Young and Columbia Financial Advisors. His report listed ESOP values from 1996 through 2000 in Schedule 1. The values ranged from $25,995,277 in 1998 to $29,366,880 in December 1999. To the extent that NUFI objects to the sufficiency of Mr. Sather's report as support for the calculation of damages reflected in the stipulated settlement, NUFI has had the opportunity to conduct discovery and present testimony and evidence to rebut his opinions.

92. NUFI urges the Court to find there was no viable buyer willing to purchase TMSI for $29 million dollars based on the testimony and evidence presented. The Court does not agree that a buyer needed to be identified in order for the Plaintiffs to define the measure of their damages as to the estimated value of the company at the time of the merger and for Defendants Davis and Maxwell. The First Amended Complaint alleged that in July 1997, shares of Tidyman's were trading at $157 per share for a total value of approximately $28.8 million. Tidyman's sales were declining and it faced significant ESOP repurchase liabilities of between $2-4 million per year. Tidyman's hired Zachary Scott in July 1997 to advise it regarding its options. Zachary Scott identified three options and identified the option of a sale to a strategic buyer as having the highest value for shareholders and to be the least risky course of action. However, it is alleged that Defendants Maxwell and Davis ignored Zachary Scott's advice in order to pursue the merger with SuperValu, even after Zachary Scott warned them of problems with the SuperValu transaction. It would not have necessary for Plaintiffs to prove an actual buyer existed to maintain their allegations that Defendants Maxwell and Davis breached their duties as corporate officers to follow qualified advice. At best, the evidence and testimony presented shows that the grocery industry was in turmoil throughout the 1990s but conditions were not so dire as to foreclose strategic sales of

grocery businesses entirely. Further, the evidence and testimony presented by Mr. Nachbar, Mr. Hensley and Mr. Lloyd regarding the absence of a viable buyer was developed well after the critical time when a decision was required from Defendants Maxwell and Davis. In the fall of 2010, what Maxwell and Davis had to rely on was their own knowledge of their conduct related to the sale of Tidyman's and the appraisals and financial reports prepared in the late 1990's which they used to fulfill reporting requirements and to run their business, including making plans about its future.

Based on the foregoing Findings of Fact and good cause appearing, the Court makes the following **CONCLUSIONS OF LAW:**

1. NUFI's liability was established by its breach of duty to defend. Where an insurer refuses to defend a claim and does so unjustifiably, the insurer is estopped from denying coverage and becomes liable for defense costs and for judgments and settlements. *Abbey\Land LLC v. Interstate Mechanical,* 2015 MT 77 ¶ 12; *TMSI,* ¶ 23.
2. An insured's settlement in such a situation must be reasonable. *TMSI* ¶ 40; § 27-1-302 MCA.
3. Where an insured has declined involvement, judicial review of a stipulated settlement serves to assure that the settlement represents a proper calculation of actual damages. *TMSI* ¶ 40; *Freyer*, ¶ 36.

4. The district court must engage in a meaningful analysis of the reasonableness of the insured's settlement. *Abbey/Land LLC v. Interstate Mechanical, Inc.*, 2015 MT 77, ¶ 13; *TMSI,* ¶ 43.

5. So as to inform reasonableness, the District Court may set parameters of the hearing and determine in its discretion whether and to what extent any further discovery is necessary prior to the hearing. *TMSI,* ¶ 41.

6. The stipulated settlement is presumed reasonable and the burden is on the insured to rebut the presumption of reasonableness. *TMSI* ¶ 41.

7. Where upon appeal, the Supreme Court in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. *State v. Gilder*, 2001 MT 121 ¶ 12.

8. The duty to defend arises when a complaint against an insured alleges facts which, if proved, would result in coverage. *Farmers Union Mutual Ins. Co. v. Staples*, 2004 MT 108, ¶ 21. When a non-defending insurer has left its insured on its own to challenge liability, the insured should not be able to reach back and interject itself into a controversy it has sidestepped to void a deal the insured has entered into to eliminate personal liability. *Freyer*, 2013 MT 302, ¶ 35.

9. The settlement amount is supported by the appraisals and reports prepared

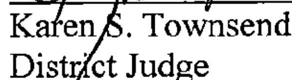
contemporaneously with the Tidyman's merger with SuperValu. The materials were prepared by competent, independent professionals for Tidyman's and were used by Tidyman's for fulfilling various reporting requirements and for making decisions about the future of the company. The materials relied up by Plaintiffs and Maxwell and Davis possess sufficient indicia of reliability for use in defining a reasonable settlement in 2010.

10. The settlement amount is within a range of reasonableness. Defendants Maxwell and Davis were justified in settling for the amount of $29 million based their knowledge of Plaintiffs' claims and their exposure to financial ruin created by NUFI's failure to defend. The stipulated settlement resolved all disputed claims, including punitive damages.

11. NUFI has not overcome the presumption of reasonableness.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court having found that NUFI has not overcome the presumption of reasonableness has not been overcome, hereby **ORDERS** entry of judgment against NUFI in the amount of $29 million.

DATED this 12th day of May, 2015.



Karen S. Townsend
District Judge

cc: Michael Black
John L. Amsden/Justin P. Staples

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G. Patrick Hagestad
James B. King
Kathleen L. DeSoto
James A. McPhee
Dean A. Hoistad
Greg S. Munro
W. William Leaphart
Allan H. Baris
Robert F. James/Mary K. Jaraczeski
Timothy R. MacDonald/Nathaniel J. Hake