III PROFORMANCE ABANDONED ITS INSURED AND IS THEREFORE RESPONSIBLE TO PAY THE GOOD FAITH SETTLEMENT REACHED BY THE PARTIES

It is well settled that the covenant to defend is identified with the convent to pay. *Burd v. Sussex Mutual Insurance Company*, 56 N.J. 383, 389-90 (1970)**.** Essentially, the carrier's right to defend "presupposes that if the defense fails, the carrier will pay." *Merchants Indemnity Corp. of New York v. Eggleston*, 37 N.J. 114, 127 (1962). In exchange, ordinarily the insured is restricted from taking independent action which will contravene any of the essential terms of the policy, such as engage in settlement negotiations. *Griggs v. Betram*, 88 N.J. 347, 359-360 (1982). If an insured is not notified that there is a possibility the insurer will disclaimer of coverage, an insured is entitled to a "reasonable expectation of protection of its interests by the insurer." *Id*. at 362. However,

> Where an insurer wrongfully refused coverage and a defense to its insured, so that the insured is obliged to defend himself in an action later held to be covered by the policy, the insurer is liable for the amount of the judgment obtained against the insured or of the settlement made by him. The only qualifications to this rule are that the amount paid in settlement be reasonable and that payment be made in good faith.

Id. at 171-172; *citing*, *Fireman's Fund Insurance Co. v. Security Insurance Co. of Hartford*, 72 N.J. at 71, *quoting, New Jersey Manufacturers Indemnity Co. v. United States Casualty Co.,* 91 N.J. Super. 404, 407-408 (App. Div. 1966). Accordingly, where a carrier repudiates:

> Its obligation to assume and carry the defense to final judgement, and, having abandoned the case, it left the assured at liberty to take up the defenses and contest the claim to final judgment, or, if so advised to make the most favorable settlement possible.

Griggs v. Bertram, 88 N. J. 369-370 (citations omitted). Accordingly under such circumstances an insurer is then estopped from raising any defenses if it is later adjudged that it owes a defense and indemnification to its insured under the policy. *Id.*

The reasoning behind this premise is that the stipulation for defense of actions, even if groundless, would be of limited value if that obligation did not arise when a claim is stated in the pleadings, which if sustained, would be within the protection afforded by the policy. *Burd v. Sussex Mutual Insurance Company*, 56 N.J. at 390, *citing, Danek v. Hommer*, 28 N.J. Super. 68, 80 (App. Div. 1953). Where, as here, an insurer and insured's interest are adverse,

> [T]he carrier should not be permitted to assume the defense if it intends to dispute its obligation to pay a plaintiff's judgment, unless of course the insured expressly agrees to that reservation. *This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay*.

Burd v. Sussex Mutual Insurance Company, 56 N.J. at 390 (citation omitted)(emphasis added). Moreover, it is well settled that where an insurer fails to assume its duty under the policy to control the defense, it "leave[s] its insured defenseless or seriously hampered in its ability to protect itself." *Excelsior v. Pennsbury Pain Center*, 975 F. Supp. 342, 359-360 (D.N.J. 1996), *quoting, Griggs v. Bertram*,88 N.J. at 356. Therefore, the "insured torfeasor should be able to reach an agreement

relieving it of liability when its carrier wrongfully declines to defend." *Id*. This provides the abandoned insured "protection of its insurance, while the injured party obtains the potential remedy against the insurer who wrongfully removed itself from the suit." *Id*. at 370; *see e.g., New Jersey Manufacturers v. United States Casualty Co.*, 91 N.J. Super. 404, 408-409 (App. Div. 1966) ("Casualty [abandoning insurer] is not in a position to complain at this late date . . . it had washed its hands of the case when it refused to defend [the underlying personal injury suit]").

It is undisputed that the Proformance's position is, and has always been, that its insured is not entitled to coverage in this instant matter. The same obligated the insured to retain personal counsel and do what it could to protect itself from the perils of personal exposure. Personal counsel answered the Complaint, filed Cross-Claims and a Counterclaim, answered discovery and otherwise litigated this matter on behalf of the abandoned insured. (*Exhibit J, Answer, Cross-Claim, Third Party Complaint*). As set forth at length *supra*, Proformance advocated this incorrect position, even in the face of its insured advising that a *Griggs* settlement was being negotiated with plaintiff. (*Exhibit K, June 4, 2009 letters*) Proformance opted not to take part in those discussions and instead continued to deny coverage.

On July 2, 2009, the Court dispensed with the coverage issues, deciding that Proformance owed coverage to "Pat's Housekeeping Service trading as Patricia Pacheco." (*Exhibit H, Transcript of Decision, July 2, 2009 and Corresponding Orders*). Prior to the coverage issues being resolved, the insured entered into a settlement agreement with plaintiff in order to protect its interests under the policy. (*Exhibit D, Final Judgment by Consent*). The same was necessitated by the insurer's inappropriate abandonment of its insured. The insurer cannot - after its abandonment of its insured - Monday morning quarterback the actions its insured undertook to protect itself during the time it was abandoned. Much like the abandoning insurer in, *New Jersey Manufacturers v. United States Casualty Co.*, Profomance's persistent refusal deny coverage, participate in the defense of its insured, or participate in settlement negotiations, foreclosed it from controlling the defense (including asserting substantive defenses) after the fact of settlement. 91 N.J. Super at 408-409. Accordingly, the Court should enforce the *Griggs* settlement entered into by plaintiff and defendant Pat's Housekeeping Service t/a Patricia Pacheco pursuant to the Court's holding in *Griggs v. Betram*, *supra,* and its progeny.

The settlement entered into between plaintiff and the abandoned insured is reasonable and was entered in good faith. As set forth at great length above, plaintiff has sustained the burden of production as to both elements and therefore plaintiff respectfully requests that the Court approve the settlement and enter an Order compelling Proformance to pay same.