

**EXHIBIT G**



vs.

BEN BEARD, DAVID BAILEY, AND  
DAN PETROSKY

Counter Defendants

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**PLAINTIFFS' FIFTH AMENDED ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their Fifth Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and in support thereof would respectfully present the following:

**PARTIES**

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in Bryan, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer.

**VENUE**

2. Plaintiffs' action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

**FACTS**

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James

Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707". Defendant Scherr entered into an agreement with Defendant Gage, Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the plaintiffs, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various plaintiffs therein, defendants paid over to William LaRock and Joseph Superville a share greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707 Defendants paid to themselves legal fees in the amount of \$42,667.75, a sum in excess of that authorized by the contingent fee contract executed between James Franklin Scherr and the Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs here Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amount of \$75,000.00 and in the amount \$95,000.00 the pretext for which is a claim for expenses which defendants have failed to validate document in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiffs -- LaRock and Superville -- in Cause No. 88-7707.

#### BREACH OF FIDUCIARY DUTY

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly deliver collected settlement proceeds;
- (3) in failing to provide plaintiffs with an accurate account of claimed expenses;
- (4) in failing to provide plaintiffs with accurate information concerning one or more settlement negotiations; and
- (5) in favoring one client to the detriment of and against the interests of plaintiffs.
- (6) in violating the contingency fee contract by taking more in attorneys fees than allowed.
- (7) in placing the interests of Cause No. 88-7707 Co-Plaintiffs' Dr. LaRock and Dr. Superville ahead of the interests of Plaintiffs and other members of the class.
- (8) in placing the their own interests ahead of the interests of Plaintiffs and other members of the class.

As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

## ACTUAL AND CONSTRUCTIVE FRAUD

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees than those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr.

8. Defendants knowingly made false representations as to material facts to Plaintiffs with the intent of inducing Plaintiffs to enter the contingency fee contract and to participate in Cause No. 88-7707. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause No. 88-7707, instead of the sole benefit of Dr. LaRock and Dr. Superville, two Co-Plaintiffs in 88-7707;

2. That any proceeds from Cause No. 88-7707 would be divided by the Court in Cause No. 88-7707 and would be divided equally amongst the Plaintiffs.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the

misrepresentations to their substantial injury and damage.

10. By reason of Plaintiffs reliance upon Defendants' representations, Plaintiffs have been damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations were false when they made them and thus the representations were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action. Accordingly, Plaintiffs request the award of exemplary damages against defendants.

#### CONVERSION

14. Defendants have appropriated and/or are attempting to appropriate as expenses substantial sums of money collected on behalf of plaintiffs -- more specifically the sums of \$86,500.00, \$50,000.00, \$75,000.00 and \$95,000.00 all received in separate settlements in Cause No. 88-7707 -- expenses for which there is no accounting in the case of Defendant Gage and his law firm and/or inadequate or no accounting in the case of Defendant Scherr. All Defendants have wrongfully converted all sums they claim as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.

## ACTION TO VOID CONTRACT

15. Because of the various acts of misconduct and/or negligence previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State, and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

### EXEMPLARY DAMAGES

16. Defendants' conduct as described above was intentional, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that the Court assess punitive damages against Defendants.

### PREJUDGMENT INTEREST

Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the total sum of \$2,303,900.00 and further,

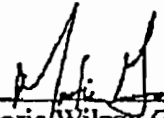
1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;
2. Pre and post judgment interest as allowed by law;
3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

Jones & Georges  
303 TEXAS AVE., Ste. 800




El Paso, TX 79901  
(915)534-0040  
FAX: 534-0055

By:   
Marjorie Wilcox Georges  
State Bar No. 21453075  
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to James Franklin Scherr at 109 N. Oregon, 8th Floor, El Paso, Texas 79901, fax number 532-1759, Noel Gage at 6044 Gateway E., Ste. 800, El Paso, Texas 79905 fax number 532-2423; Teresa Ford and Phillip Werner at 1300 Post Oak Blvd., Ste. 700, Houston, Texas 77056, fax number (713)961-3542 and Donald M. Hudgins, 24 Greenway Plaza, Suite 1007, Houston, Texas 77046, fax number (713) 623-2793 and Don Wilhelm at 713-4391178 on this, the 2th day of June, 1995.

- regular mail
- certified mail
- hand delivery
- telecopier transmission

  
Martie Georges

**EXHIBIT H**



vs.

BEN BEARD, DAVID BAILEY, AND  
DAN PETROSKY

Counter Defendants

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**PLAINTIFFS' SIXTH AMENDED ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their Sixth Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and in support thereof would respectfully present the following:

**PARTIES**

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in Bryan, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer.

**VENUE**

2. Plaintiffs' action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

**FACTS**

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James

Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707". Defendant Scherr entered into an agreement with Defendant Gage, Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the plaintiffs, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated, for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various plaintiffs therein, defendants paid over to William LaRock and Joseph Superville a share greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707, Defendants paid to themselves legal fees in the amount of \$42,667.75, a sum in excess of that authorized by the contingent fee contract executed between James Franklin Scherr and the Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs herein, Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amount of \$75,000.00 and in the amount of \$95,000.00 the pretext for which is a claim for expenses which defendants have failed to validate or document in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiffs -- LaRock and Superville -- in Cause No. 88-7707.

#### BREACH OF FIDUCIARY DUTY

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly deliver collected settlement proceeds;
- (3) in failing to provide plaintiffs with an accurate account of claimed expenses;
- (4) in failing to provide plaintiffs with accurate information concerning one or more settlement negotiations; and
- (5) in favoring one client to the detriment of and against the interests of plaintiffs.
- (6) in violating the contingency fee contract by taking more in attorneys fees than allowed.
- (7) in placing the interests of Cause No. 88-7707 Co-Plaintiffs' Dr. LaRock and Dr. Superville ahead of the interests of Plaintiffs and other members of the class.

In response to Defendant Gage, and Gage, Beach & Ager's Special Exceptions to this paragraph, Plaintiffs assert the following specific acts of conduct. Defendants Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Plaintiffs that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic, that he was engaged in extensive litigation involving Coronado Chiropractic including defense of a suit by the

Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville, that he was representing the clinic in at least a dozen other causes of action both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid charges claimed by Coronado Chiropractic; that he had a contingency fee agreement which would permit him to claim a portion of the amounts collected; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

(8) *in placing the their own interests ahead of the interests of Plaintiffs and other members of the class.*

In response to the special exceptions of Gage and Gage, Beach & Ager, Plaintiffs assert Defendants were more concerned with filling thier own pockets with money by settling with the individual insurance companies than with protecting the interests of thier clients and the unnamed class members.

As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

In connection with the allegations of negligence contained in this paragraph, Plaintiffs specifically plead the following acts of negligence:

- (1) Defendants Scherr and Gage were negligent in their representation of the putative class in that they assigned the principal responsibility for the management of the class to an attorney who admitted under oath that she had no experience in this type of litigation;
- (2) Defendants Scherr and Gage were negligent in their representation of the named members of the class in that they failed to keep them adequately informed of the progress of the litigation;
- (3) Defendant Scherr and Gage were negligent in their representation of the named members of the class in that they negotiated settlements that did not achieve the stated purposes of the litigation;

(4) Defendants Scherr and Gage were negligent in their representation of the named members of the class in that they did not adequately prepare them for their deposition;

(5) Defendants Scherr and Gage were negligent in their representation of the class in that they did not exhaust their administrative remedies prior to commencement of the litigation;

(6) Defendants Scherr and Gage were negligent in their representation of the class in that they never conducted a hearing for the purposes of certification; and

(7) Defendants Scherr and Gage were negligent in their representation of the class in that they failed to maintain records required by the Texas Rules of Civil Procedure in class action litigation;

(8) Defendants Scherr and Gage were negligent in their representation of the class in that they failed to inform the named members of the class of the legal consequences of the settlements they negotiated;

(9) Defendants Scherr and Gage were negligent in their representation of the class in that they failed to acknowledge and respond to objections made by various class members to the settlements that were being negotiated;

(10) Defendants Scherr and Gage were negligent in undertaking a class action of the nature envisioned in Cause No. 88-7707 when they did not have adequate financial capacity to maintain the class action; and

(11) Defendants Scherr and Gage were negligent in obtaining the participation of Ben Beard, David Bailey and Dan Petrosky upon the false pretext of what the class action would accomplish and that their principal clients LaRock and Superville would advance \$100,000.00 of the initial costs.

Plaintiffs anticipate other acts of negligence may be revealed during and leading up to the trial of this cause.

**ACTUAL AND CONSTRUCTIVE FRAUD**

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees than



those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr.

8. Defendants knowingly made false representations as to material facts to Plaintiffs with the intent of inducing Plaintiffs to enter the contingency fee contract and to participate in Cause No. 88-7707. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause No. 88-7707, instead of the sole benefit of Dr. LaRock and Dr. Superville, two Co-Plaintiffs in 88-7707;

2. That any proceeds from Cause No. 88-7707 would be divided by the Court in Cause No. 88-7707 and would be divided equally amongst the Plaintiffs.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the misrepresentations to their substantial injury and damage.

10. By reason of Plaintiffs reliance upon Defendants' representations, Plaintiffs have been

damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs. In Response to Special Exceptions of Gage and Gage, Beach & Ager, Plaintiffs herein assert specific acts of conduct.

*Defendant Gage and Gage, Beach & Ager*

- (1) Defendants Gage and Gage, Beach & Ager acted fraudulently in failing to reveal to Plaintiffs herein their special relationship with LaRock and Superville;
- (2) Defendants Gage and Gage, Beach & Ager acted fraudulently in attempting to recover expenses that were not incurred or not authenticated;
- (3) Defendants Gage and Gage, Beach & Ager acted fraudulently in accepting fees in excess of those contracted for by James Franklin Scherr;
- (4) Defendants Gage and Gage, Beach & Ager committed fraud by informing Plaintiffs that the settlements being negotiated were consistent with the stated purposes of the lawsuit;
- (5) Defendants Gage and Gage, Beach & Ager committed fraud when they filed a claim on behalf of LaRock and Superville against two members of the putative class; and
- (6) Defendant Gage and Gage, Beach & Ager committed fraud when they negotiated settlements in disregard of objections imposed by members of the class.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations, *cited specifically elsewhere in these pleadings* — *specifically in Paragraphs 5 and 11*, were false when they made them and thus the representations

were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action. Accordingly, Plaintiffs request the award of exemplary damages against defendants *in an amount of not less than \$2,000,000.00.*

### CONVERSION

14. Defendant *James Franklin Scherr* has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of plaintiffs -- more specifically the sums of \$86,500.00, \$50,000.00, \$75,000.00 and \$95,000.00 all received in separate settlements in Cause No. 88-7707 -- expenses for which there is either no accounting or inadequate accounting. All Defendants have wrongfully converted all sums they claim or claimed as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.

### ACTION TO VOID CONTRACT

15. Because of the ~~various acts of misconduct~~ and/or negligence previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State. and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

### EXEMPLARY DAMAGES

16. Defendants' conduct as described above was intentional, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that the Court assess punitive damages against Defendants.

## PREJUDGMENT INTEREST

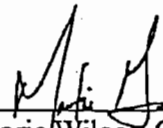
Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the maximum amount of \$2,303,900.00 and further,

1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;
2. Pre and post judgment interest as allowed by law;
3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

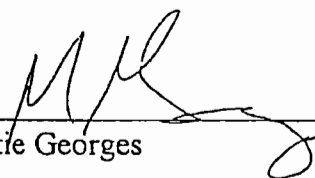
Jones & Georges  
303 Texas Ave., Ste. 800  
El Paso, TX 79901  
(915)534-0040  
FAX: 534-0055

By:   
Marjorie Wilcox Georges  
State Bar No. 21453075  
Attorney for Plaintiffs

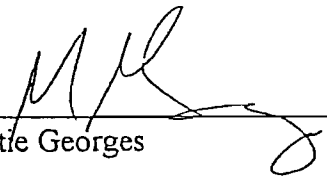
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to James Franklin Scherr at 109 N. Oregon, 8th Floor, El Paso, Texas 79901, fax number 532-1759, Noel Gage at 6044 Gateway E., Ste. 800, El Paso, Texas 79905 fax number 532-2423; Teresa Ford and Phillip Werner at 1300 Post Oak Blvd., Ste. 700, Houston, Texas 77056, fax number (713)961-3542 and Donald M. Hudgins, 24 Greenway Plaza, Suite 1007, Houston, Texas 77046, fax number (713) 623-2793 and Don Wilhelm at 713-4391178 on this, the 19th day of June, 1995.

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Martie Georges

- regular mail
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Martie Georges

**EXHIBIT I**

CAUSE NO. 94-03110

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY,

Plaintiffs,

v.

JAMES FRANKLIN SCHERR, NOEL  
GAGE and GAGE, BEACH & AGER,

Defendants,

AND

JAMES F. SCHERR

Counter-Plaintiff,

v.

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY

Counter-Defendants,

and

MARJORIE GEORGES and  
JONES & GEORGES, P.C.

Third Party Defendants.

NOEL A. GAGE

Counter Plaintiff

vs.

BEN BEARD, DAVID BAILEY, AND  
DAN PETROSKY

Counter Defendants

and

MARJORIE GEORGES, LUTHER JONES  
AND JONES & GEORGES,

Third Party Defendants

IN THE DISTRICT COURT OF  
HARRIS COUNTY, TEXAS  
129TH JUDICIAL DISTRICT

EXHIBIT NO. 17  
M. KUHLMANN

**PLAINTIFFS' SEVENTH AMENDED ORIGINAL PETITION  
TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their



Seventh Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges and file this their Answer to all Third Party Claims of James Franklin Scherr, Noel A. Gage and Gage Beach & Ager and in support thereof would respectfully present the following:

#### PARTIES

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in Bryan, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer. Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges are all residents of El Paso County, Texas.

#### VENUE

2. Plaintiffs' action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

#### FACTS

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial

District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707".

Defendant Scherr entered into an agreement with Defendant Gage, and his law firm Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the Plaintiffs, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated, for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, Plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various Plaintiffs therein, Defendants paid over to William LaRock and Joseph Superville a share greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707, Defendants paid to themselves legal fees in the amount of \$42,667.75, a sum in excess of that authorized by the contingent fee contract executed between James Franklin Scherr and the Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs herein, Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) Defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amounts of \$75,000.00 and \$95,000.00, the pretext for which is a claim for expenses which defendants have failed to validate or document in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs

in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiff class representatives -- LaRock and Superville -- in Cause No. 88-7707.

### BREACH OF FIDUCIARY DUTY

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly deliver collected settlement proceeds;
- (3) in failing to provide Plaintiffs with an accurate account of claimed expenses;
- (4) in failing to provide Plaintiffs with accurate information concerning one or more settlement negotiations; and
- (5) in favoring one client to the detriment of and against the interests of Plaintiffs.
- (6) in violating the contingency fee contract by taking more in attorneys fees than allowed.
- (7) in placing the interests of Cause No. 88-7707 Co-Plaintiffs' Dr. LaRock and Dr. Superville ahead of the interests of Plaintiffs and other members of the class.
- (8) in placing the their own interests ahead of the interests of Plaintiffs and other members of the class.

In response to Defendant Gage, and Gage, Beach & Ager's Special Exceptions to this paragraph, Plaintiffs assert the following specific acts of conduct. Defendants Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Plaintiffs that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic, that he was engaged in extensive litigation

involving Coronado Chiropractic including defense of a suit by the Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville, that he was representing the clinic in at least a dozen other causes of action both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid charges claimed by Coronado Chiropractic; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

In further response to the special exceptions of Gage and Gage, Beach & Ager, Plaintiffs assert that Defendants principal motivation in pursuing the alleged class action lawsuit was collection of unpaid bills of their client LaRock and Superville to the end of enriching themselves at the expense of the uncertified class; and further that Defendants at no time prosecuted the class action for the purpose of achieving the goals which they promised Plaintiffs would be accomplished.

As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

In connection with the allegations of negligence contained in this paragraph, Plaintiffs specifically plead the following specific acts of negligence:

- (1) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs and members of the putative class in that they assigned the principal responsibility for the management of the class to an attorney who admitted under oath that she had no experience in this type of litigation;
- (2) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that failing to keep them adequately informed of the progress of the litigation;
- (3) Defendant Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they negotiated settlements that did not achieve the stated purposes of the litigation;

- (4) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they did not adequately prepare them for their respective depositions;
- (5) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to exhaust their administrative remedies prior to commencement of the litigation;
- (6) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they never conducted a hearing for the purposes of certification; and
- (7) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to maintain records required by the Texas Rules of Civil Procedure in class action litigation;
- (8) Defendants Scherr and Gage were negligent breached their fiduciary duty to Plaintiffs in failing to inform the named members of the class of the legal consequences of the settlements they negotiated;
- (9) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to acknowledge and respond to objections made by various class members to the settlements that were being negotiated;
- (10) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in undertaking a class action of the nature envisioned in Cause No. 88-7707 when they did not have adequate financial capacity to maintain the class action; and
- (11) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in obtaining the participation of Ben Beard, David Bailey and Dan Petrosky upon the false pretext of what the class action would accomplish and that their principal clients LaRock and Superville would advance \$100,000.00 of the initial costs.

#### ACTUAL AND CONSTRUCTIVE FRAUD

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees

than those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr.

8. Defendants knowingly made false representations as to material facts to Plaintiffs with the intent of inducing Plaintiffs to enter the contingency fee contract and to participate in Cause No. 88-7707. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause No. 88-7707, instead of the sole benefit of Dr. LaRock and Dr. Superville, two Co-Plaintiffs in 88-7707;

2. That any proceeds from Cause No. 88-7707 would be divided by the Court in Cause No. 88-7707 and would be divided equally amongst the Plaintiffs.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the misrepresentations to their substantial injury and damage.

10. By reason of Plaintiffs reliance upon Defendants' representations, Plaintiffs have been

damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs. In Response to Special Exceptions of Gage and Gage, Beach & Ager, Plaintiffs herein assert specific acts of conduct.

*Defendant Gage and Gage, Beach & Ager*

- (1) Defendants Gage and Gage, Beach & Ager acted fraudulently in failing to reveal to Plaintiffs herein their special relationship with LaRock and Superville;
- (2) Defendants Gage and Gage, Beach & Ager acted fraudulently in claiming expenses that were not incurred or not authenticated;
- (3) Defendants Gage and Gage, Beach & Ager acted fraudulently in accepting fees in excess of those contracted for by James Franklin Scherr;
- (4) Defendants Gage and Gage, Beach & Ager committed fraud by informing Plaintiffs that the settlements being negotiated were consistent with the stated purposes of the lawsuit;
- (5) Defendants Gage and Gage, Beach & Ager committed fraud when they filed a claim on behalf of LaRock and Superville against two members of the putative class; and
- (6) Defendant Gage and Gage, Beach & Ager committed fraud when they negotiated settlements in disregard of objections imposed by members of the class.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations, *cited specifically elsewhere in these pleadings -- specifically in Paragraphs 5 and 11*, were false when they made them and thus the

representations were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action.

Accordingly, Plaintiffs request the award of exemplary damages against defendants *in an amount of not less than \$2,000,000.00.*

**CONVERSION**

14. Defendant *Janes Franklin Scherr* has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of plaintiffs -- more specifically the sums of \$86,500.00, \$50,000.00, \$75,000.00 and \$95,000.00 all received in separate settlements in Cause No. 88-7707 -- expenses for which there is either no accounting or inadequate accounting. Each Defendants has wrongfully converted all sums presently or previously claimed as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.

**ACTION TO VOID CONTRACT**

15. Because of the various acts of misconduct and/or negligence previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State, and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

**EXEMPLARY DAMAGES**

16. Defendants' conduct as described above was intentional, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that



the Court assess punitive damages against Defendants.

### PREJUDGMENT INTEREST

Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

### GENERAL DENIAL

Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges deny each and every third party claim asserted by Noel A. Gage or Gage, Beach & Ager, and demand strict proof thereof. Third Party Defendants Marjorie Georges and Jones & Georges deny each and every third party claim asserted by James Franklin Scherr.

### DENIAL OF SWORN ACCOUNT

Plaintiffs specially deny each and every item in defendant James Franklin Scherr's sworn account, and demands strict proof of all items in the account. In denying this sworn account Defendants further plead that defendant James Franklin Scherr has forfeited all right to compensation based upon his contingency fee contract with Plaintiffs for the reason that James Franklin Scherr is guilty of fraud, breach of fiduciary duty and conversion of client funds, the factual basis for which can be found in Paragraphs 5 and 11 herein.

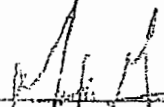
WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the maximum amount of \$2,303,900.00; that Counter Plaintiffs take nothing in their suit against Third Party Defendants and further,

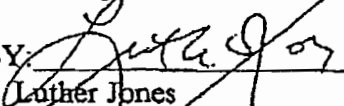
1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;

- 2. Pre and post judgment interest as allowed by law;
- 3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

Jones & Georges  
 303 Texas Ave., Ste. 800  
 El Paso, TX 79901  
 (915)534-0040  
 FAX: 534-0055

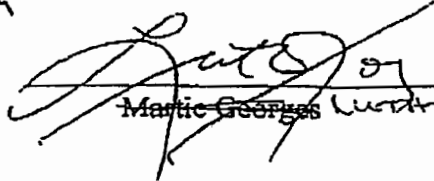
By:   
 Marjorie Wilcox Georges  
 State Bar No. 21453075  
 Attorney for Plaintiffs

BY:   
 Luther Jones  
 State Bar No. 10928000  
 Attorney for Plaintiffs and Third  
 Party Defendants

VERIFICATIONS ATTACHED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to Phillip Werner at 1300 Post Oak Blvd., Ste. 700, Houston, Texas 77056, fax number (713)961-3542 and Donald M. Hudgins, 24 Greenway Plaza, Suite 1007, Houston, Texas 77046, fax number (713) 623-2793 and Don Wilhelm at 1360 Post Oak Blvd., Suite 700, Houston, Texas, fax number 713-439-1178 and Anthony Griffin, 1115 Moody, Galveston, Texas, fax number (409) 763-0386 on this the ~~23~~<sup>24</sup> day of ~~June~~<sup>July</sup>, 1995 by telecopier transmission. Hand delivered.

  
 Marjorie Georges LUTHER JONES

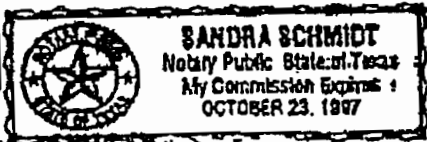
**VERIFICATION**

STATE OF TEXAS            )  
                                  )  
COUNTY OF BRAZOS        )

Before me, the undersigned Notary Public, on this day personally appeared *David Bailey*, who, after being duly sworn, stated under oath that he is the Plaintiff/Counter-defendant in Cause No. 9403110, that he has read the attached Plaintiff Seventh Amended Petition, and that every statement contained in the paragraph titled DENIAL OF SWORN ACCOUNT is within his personal knowledge and is true and correct.

*David Bailey*  
\_\_\_\_\_  
DAVID BAILEY

SUBSCRIBED AND SWORN TO BEFORE ME, on this the \_\_\_ day of June, 1995.



*Sandra Schmidt*  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of TEXAS

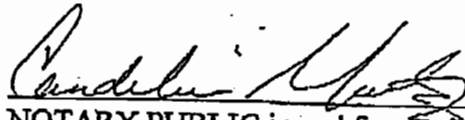
VERIFICATION

STATE OF TEXAS )  
 )  
COUNTY OF EL PASO )

Before me, the undersigned Notary Public, on this day personally appeared *Dan Petrosky*, who, after being duly sworn, stated under oath that he is the Plaintiff/Counter-defendant in Cause No. 9403110, that he has read the attached Plaintiffs Seventh Amended Petition; and that every statement contained in the paragraph titled DENIAL OF SWORN ACCOUNT is within his personal knowledge and is true and correct.

  
\_\_\_\_\_  
DAN PETROSKY

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 28<sup>th</sup> day of June, 1995.

  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of T E X A S

B18-2.455

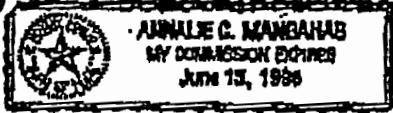
VERIFICATION

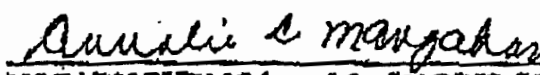
STATE OF TEXAS )  
 )  
COUNTY OF HARRIS )

Before me, the undersigned Notary Public, on this day personally appeared *Ben Beard*, who, after being duly sworn, stated under oath that he is the Plaintiff/Counter-defendant in Cause No. 9403110, that he has read the attached Plaintiff's Seventh Amended Petition; and that every statement contained in the paragraph titled DENIAL OF SWORN ACCOUNT is within his personal knowledge and is true and correct.

  
\_\_\_\_\_ **BEN BEARD**

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 28<sup>th</sup> day of June, 1995.



  
\_\_\_\_\_ **NOTARY PUBLIC in and for HARRIS COUNTY, TEXAS**

B14-2453

**EXHIBIT J**

ENTERED *Adrian*  
RECEIVED

CAUSE NO. 94-03110

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY,

Plaintiff,

v.

JAMES FRANKLIN SCHERR, NOEL  
GAGE and GAGE, BEACH & AGER,

Defendants.

AND

JAMES P. SCHERR

Counter-Plaintiff,

v.

BEN BEARD, DAVID BAILEY and  
DAN PETROSKY

Counter-Defendants,

and

MARJORIE GEORGES and  
JONES & GEORGES, P.C.

Third Party Defendants.

NOEL A. GAGE

Counter Plaintiff

vs.

BEN BEARD, DAVID BAILEY, AND  
DAN PETROSKY

Counter Defendants

and

MARJORIE GEORGES, LUTHER JONES  
AND JONES & GEORGES,

Third Party Defendants

IN THE DISTRICT COURT OF  
HARRIS COUNTY, TEXAS  
129TH JUDICIAL DISTRICT

EXHIBIT  
*36*  
DELGADO-BOYD, N.J.

**PLAINTIFFS' EIGHTH AMENDED ORIGINAL PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their

~~PLAINTIFFS' EIGHTH AMENDED PETITION (11-1-04)~~

Seventh Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants and Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges and file this their Answer to all Third Party Claims of James Franklin Scherr, Noel A. Gage and Gage Beach & Ager and in support thereof would respectfully present the following:

**PARTIES**

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in College Station, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer. Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges are all residents of El Paso County, Texas.

**VENUE**

2. Plaintiff's action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

**FACTS**

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial

~~PLAINTIFFS SEVENTH AMENDED PETITION (11/23/02)~~



District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707".

Defendant Scherr entered into an agreement with Defendant Gage, and his law firm Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. During the course of representing the Plaintiffs, Defendants failed to properly account for monies collected by Defendants on behalf of the Plaintiffs and favored specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated, for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. More specifically, and in response to special exceptions of defendant James Franklin Scherr, Plaintiffs allege the following facts: 1) in violation of the agreement of the plaintiffs in Cause No. 88-7707 that all funds recovered would be divided equally among the various Plaintiffs therein, Defendants paid over to William LaRock

Respectfully submitted,

Jones & Georges, P.C.

303 Texas Avenue, Ste. 800

El Paso, TX 79901

(915)534-0040

Fax: 534-0055

By: \_\_\_\_\_

Martie Georges

State Bar No. 21453075

Attorney for and Joseph Superville a share

~~PLAINTIFFS' SEVENTH AMENDED PETITION (01/23/04)~~

greater than they were entitled to receive pursuant to said agreement; 2) in violation of his contingent fee contract with the Plaintiffs in Cause No. 88-7707, Defendants paid to themselves legal fees in the amount of \$42,667.75, a sum in excess of that authorized by the contingent fee contract executed between James Franklin Scherr and the Plaintiffs; 3) in violation of the contingent fee contract between James Franklin Scherr and the Plaintiffs herein, Defendants paid to themselves one hundred percent of all monies recovered in a settlement negotiated with one particular insurance company; 4) Defendants are currently wrongfully withholding disbursement of funds recovered in settlements in the amounts of \$75,000.00 and \$95,000.00, the pretext for which is a claim for expenses which defendants have failed to validate or document in spite of repeated requests that they provide proper documentation.

4. Defendants intentionally defrauded Plaintiffs by causing them to become plaintiffs in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiff class representatives -- LaRock and Superville -- in Cause No. 88-7707.

**BREACH OF FIDUCIARY DUTY**

5. In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duty to Plaintiffs in one or more of the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly deliver collected settlement proceeds;
- (3) in failing to provide Plaintiffs with an accurate account of claimed expenses;

~~FOOTNOTES REVEREND MARY MCKAY (8111334)~~

- (4) in failing to provide Plaintiffs with accurate information concerning one or more settlement negotiations; and
- (5) in favoring one client to the detriment of and against the interests of Plaintiffs.
- (6) in violating the contingency fee contract by taking more in attorneys fees than allowed.
- (7) in placing the interests of Cause No. 88-7707 Co-Plaintiffs' Dr. LaRock and Dr. Superville ahead of the interests of Plaintiffs and other members of the class.
- (8) in placing the their own interests ahead of the interests of Plaintiffs and other members of the class.

In response to Defendant Gage, and Gage, Beach & Ager's Special Exceptions to this paragraph, Plaintiffs assert the following specific acts of conduct. Defendants Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Plaintiffs that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic, that he was engaged in extensive litigation involving Coronado Chiropractic including defense of a suit by the Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville, that he was representing the clinic in at least a dozen other causes of action both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid charges claimed by Coronado Chiropractic; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

In further response to the special exceptions of Gage and Gage, Beach & Ager, Plaintiffs assert that Defendants principal motivation in pursuing the alleged class action lawsuit was collection of unpaid bills of their client LaRock and Superville to the end of enriching themselves at the expense of the uncertified class; and further that Defendants at no time prosecuted the class action for the purpose of achieving the goals which they promised Plaintiffs would be accomplished.

~~PLAINTIFFS SEVENTH AMENDED PETITION (8152346)~~

~~Page 3~~

PAGE 33

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As a consequence of the aforementioned breaches of their fiduciary duties, defendants, jointly and severally caused Plaintiffs to suffer actual damages and have unjustly enriched themselves.

In connection with the allegations of negligence contained in this paragraph, Plaintiffs specifically plead the following specific acts of negligence:

(1) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs and members of the putative class in that they assigned the principal responsibility for the management of the class to an attorney who admitted under oath that she had no experience in this type of litigation;

(2) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that failing to keep them adequately informed of the progress of the litigation;

(3) Defendant Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they negotiated settlements that did not achieve the stated purposes of the litigation;

(4) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they did not adequately prepare them for their respective depositions;

(5) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to exhaust their administrative remedies prior to commencement of the litigation;

(6) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in that they never conducted a hearing for the purposes of certification; and

(7) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to maintain records required by the Texas Rules of Civil Procedure in class action litigation;

(8) Defendants Scherr and Gage were negligent breached their fiduciary duty to Plaintiffs in failing to inform the named members of the class of the legal consequences of the settlements they negotiated;

PLAINTIFFS' SEVENTH AMENDED PETITION (02-03-06)

Page 6

(9) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in failing to acknowledge and respond to objections made by various class members to the settlements that were being negotiated;

(10) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in undertaking a class action of the nature envisioned in Cause No. 88-7707 when they did not have adequate financial capacity to maintain the class action, and

(11) Defendants Scherr and Gage were negligent and breached their fiduciary duty to Plaintiffs in obtaining the participation of Ben Beard, David Bailey and Dan Petrosky upon the false pretext of what the class action would accomplish and that their principal clients LaRock and Superville would advance \$100,000.00 of the initial costs.

**ACTUAL AND CONSTRUCTIVE FRAUD**

6. Defendants committed fraud against the Plaintiffs by collecting more attorneys fees than those to which they were entitled under the terms of the contingency fee contract. Further Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated in paragraph IV above. Defendants also fraudulently concealed their true relationship with two of the other class representatives.

7. During the time Plaintiff's were represented by Defendants in Cause No. 88-7707, Defendants knowingly concealed their special relationship with class members LaRock and Superville to the detriment of the Plaintiffs in this cause. Had Plaintiffs known of the special relationship they would not have engaged themselves as Plaintiffs in Cause 88-7707 nor would they have executed the contingency fee contract with Defendant James Franklin Scherr.

8. Defendants knowingly made false representations as to material facts to Plaintiffs with

~~PLAINTIFFS' SEVENTH AMENDED PETITION (018-2346)~~

the intent of inducing Plaintiffs to enter the contingency fee contract and to participate in Cause No. 88-7707. Defendants knowingly made the following representations:

1. That Defendants intended to represent the class of all Texas Chiropractors for the benefit of all Texas Chiropractors in Cause No. 88-7707, instead of the sole benefit of Dr. LaRock and Dr. Supervilla, two Co-Plaintiffs in 88-7707;

2. That any proceeds from Cause No. 88-7707 would be divided by the Court in Cause No. 88-7707 and would be divided equally amongst the Plaintiffs.

9. Plaintiffs would not have entered into the contingency fee contract with Defendants on Cause No. 88-7707 had they known the falsity of the above representations. Plaintiffs relied on the misrepresentations to their substantial injury and damage.

10. By reason of Plaintiffs reliance upon Defendants' representations, Plaintiffs have been damaged in an amount in excess of the minimum jurisdiction of the Court.

11. Defendants breached the above stated fiduciary duties owed to Plaintiffs as a result of the Attorney Client relationship and as such committed constructive fraud as well as actual fraud upon Plaintiffs. In Response to Special Exceptions of Gage and Gage, Beach & Ager, Plaintiffs herein assert specific acts of conduct.

*Defendant Gage and Gage, Beach & Ager*

(1) Defendants Gage and Gage, Beach & Ager acted fraudulently in failing to reveal to Plaintiffs herein their special relationship with LaRock and Supervilla;

(2) Defendants Gage and Gage, Beach & Ager acted fraudulently in claiming expenses that were not incurred or not authenticated;

(3) Defendants Gage and Gage, Beach & Ager acted fraudulently in accepting fees in excess of those contracted for by James Franklin Scherr,

(4) Defendants Gage and Gage, Beach & Ager committed fraud by informing Plaintiffs that the settlements being negotiated were consistent with the stated purposes of the lawsuit;

(5) Defendants Gage and Gage, Beach & Ager committed fraud when they filed a claim on behalf of LaRock and Superville against two members of the putative class; and

(6) Defendant Gage and Gage, Beach & Ager committed fraud when they negotiated settlements in disregard of objections imposed by members of the class.

12. Plaintiffs have suffered actual damages as a result of these acts.

13. Defendants knew that the representations, cited specifically elsewhere in these pleadings – specifically in Paragraphs 5 and 11, were false when they made them and thus the representations were willful and malicious and constitute conduct for which the law allows exemplary damages. In this connection, Plaintiffs will show that they have incurred significant expenses, including attorneys fees in the investigation and prosecution of this action. Accordingly, Plaintiffs request the award of exemplary damages against defendants in an amount of not less than \$2,000,000.00.

**CONVERSION**

14. Defendant James Franklin Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of plaintiffs – more specifically the sums of \$86,500.00, \$50,000.00, \$75,000.00 and \$95,000.00 all received in separate settlements in Cause No. 88-7707 – expenses for which there is either no accounting or

~~CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER (11/25/02)~~

inadequate accounting. Each Defendants has wrongfully converted all sums presently or previously claimed as expenses in Cause No. 88-7707, and accordingly, Plaintiffs seek a judgment of this Court denying defendants claims for expenses in Cause No. 88-7707.

**ACTION TO VOID CONTRACT**

15. Because of the various acts of misconduct and/or negligence previously stated herein, Plaintiffs seek a judgment of this court that the contingency fee contracts executed in connection with Cause No. 88-7707, be declared null and void ab initio and also be declared as against the public policy of this State. and that the lien of Defendants' Scherr and Gage against the \$200,000.00 in the registry of the Court be extinguished.

**EXEMPLARY DAMAGES**

16. Defendants' conduct as described above was intentional, egregious, wanton and malicious with a flagrant disregard for the rights of Plaintiffs. Therefore, Plaintiffs request that the Court assess punitive damages against Defendants.

**PREJUDGMENT INTEREST**

Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

**GENERAL DENIAL**

Third Party Defendants Marjorie Georges, Luther Jones and Jones & Georges deny each and every third party claim asserted by Noel A. Gage or Gage, Beach & Ager, and demand strict proof thereof. Third Party Defendants Marjorie Georges and Jones & Georges deny each and every third party claim asserted by James Franklin Scherr.

~~CONFIDENTIAL - NOT TO BE REPRODUCED OR DISTRIBUTED~~



### AFFIRMATIVE DEFENSE

Third-Party Defendants Marjorie Georges, Luther Jones and Jones & Georges, and counter-defendant Ben Beard each were legally justified in engaging in the conduct Counter-Plaintiff James Franklin Scherr charges is the basis of their tortious interference with his contract for legal services with David Bailey and Dan Petrosky and/or civil conspiracy to deprive him of his fees, services, and expenses in that said conduct was legally justified.

Plaintiffs plead the *DISCOVERY RULE* in connection with defendants affirmative defense of *Statute of Limitations*. Plaintiffs assert that the limitations defense is meritless in that the statute does not begin to run until the attorney client relationship is terminated or until the litigation in which the attorney client relationship existed is terminated. *Hughes v. Mahoney and Higgins*, 821 S.W.2d 154, 157 (Tex. 1991). *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988)

### EQUITABLE ESTOPPEL

(Doanec's 70.164)

### DENIAL OF SWORN ACCOUNT

Plaintiffs specially deny each and every item in defendant James Franklin Scherr's sworn account, and demands strict proof of all items in the account. In denying this sworn account Defendants further plead that defendant James Franklin Scherr has forfeited all right to compensation based upon his contingency fee contract with Plaintiffs for the reason that James Franklin Scherr is guilty of fraud, breach of fiduciary duty and conversion of client funds, the factual basis for which can be found in Paragraphs 5 and 11 herein. Plaintiffs further deny Scherr's sworn account for the reason that said account is in nearly all respects fraudulent, defendant James Franklin Scherr having fabricated all or nearly all of the expenses contained

~~PLAINTIFFS' SEVENTH AMENDED PETITION (8/12/14)~~

Page 11

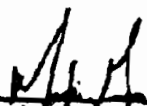
therein, and for the further reason that any expenses lawfully incurred are the responsibility of all class members which defendant Scherr negligently attempted to represent. Plaintiffs further deny that all lawful offsets, credits and payments have been allowed and finally, demand strict proof of any legitimate expense and what pro rata share, if any, should be assigned to the Plaintiffs.

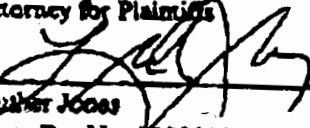
WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the maximum amount of \$2,303,900.00, that Counter Plaintiffs take nothing in their suit against Third Party Defendants and further.

1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;
2. Pre and post judgment interest as allowed by law;
3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

Jones & Georges  
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El Paso, TX 79901  
(915)534-0040  
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By:   
Marjorie Wilcox Georges  
State Bar No. 21453075  
Attorney for Plaintiffs

BY:   
Luther Jones  
State Bar No. 10928000  
Attorney for Plaintiffs and Third  
Party Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 1995 I delivered a copy of this document to all counsel by hand delivery.

  
\_\_\_\_\_  
Marie Georges

~~CONFIDENTIAL - SECURITY INFORMATION (SIF-1344)~~

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