

**EXHIBIT K**



PLEA IN INTERVENTION

TO THE HONORABLE COURT:

Comes now, Dr. Richard Gillespie; Dr. Stewart Stephenson individually and as representative of Accident and Industrial Injury Center, Inc.; Accident and Industrial Injury Center, Inc; Dr. Ted Stephenson; Dr. Odion E. Ojo, individually and as representative of Astrodome Chiropractic and Sports Clinic; Astrodome Chiropractic and Sports Clinic; Dr. Richard G. Ivy; and, Dr. Carlos Xavier Domino, as well as others to be named latter, and file, as Intervenors, this Plea in Intervention and would show the Court as follows:

**PARTIES**

Intervenors are individual chiropractors and their businesses whose names, addresses, and principal place of businesses are as follows:

Intervenor, Dr. Richard Gillespie, 1520 Ranch Road, Suite 12, San Marcos, Texas 78666.

Intervenor, Dr. Stewart Stephenson, Accident & Industrial Injury Center, Inc., 2005 South Texas Street, Bryan, Texas 77801.

Intervenor, Dr. Ted Stephenson, 1313 Briarcrest, Bryan, Texas 77802.

Intervenor, Odion E. Ojo, Astrodome Chiropractic & Sports Clinic, 2630 Westridge, Houston, Texas 77054.

Intervenor, Dr. Richard G. Ivy, 124 North West Newton, Burleson, Texas 76028.

Intervenor, Dr. Carlos Xavier Domino, 5271 Memorial Drive, Houston, Texas 77007.

Plaintiff Ben Beard is an individual residing in Houston, Texas. Plaintiff David Bailey is an individual residing in Bryan, Texas. Plaintiff Dan Petrosky is an individual residing in El Paso, Texas. Defendants have been served and answered herein.

**BACKGROUND FACTS**

Defendants are attorneys licensed to practice law in the State of Texas. Defendants filed suit purporting to represent Intervenors in a class action suit for certain causes of action against numerous insurance companies in Cause No. 88-7707, *Dr. Walter Rhodes, et al. v. American General Fire and Casualty, et al.*, in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707." See Exhibit A, attached hereto and incorporated herein for all purposes.

On July 28, 1988, Defendants brought Cause No. 88-7707 on behalf of all Texas chiropractors alleging that certain insurance companies had engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Defendants herein, alleged among other things that chiropractors suffered damages due to the insurance companies' non-payment and slow payment of chiropractors' bills; and, that the chiropractic profession was defamed and maligned by acts of certain insurance companies.

Suit was filed on behalf of all Texas chiropractors with Drs. La Rock and Superville named as class representatives. (See Exhibit A).

Defendants had a prior referral relationship with the named representatives LaRock and Superville. After settlements on behalf of the class were made, settlement proceeds were either taken as attorneys' fees or distributed to LaRock and Superville. None of the unnamed class members received any of the settlement proceeds and, in some circumstances, Defendants retained one hundred percent of the settlement proceeds. In March of 1994, Defendants entered into an agreed final dismissal of the class action suit.

A portion of the settlement proceeds that rightly belong to the intervenors are in the registry of this Court. Intervention herein is essential to effectively protect the intervenors' interest.

## CAUSES OF ACTION

### NEGLIGENCE

Defendants were jointly and severally negligent in proximately causing intervenors' damages. Defendants were negligent in one or more of the following ways:

- (1) Defendants were negligent in that they failed to certify, or even attempt to certify, a class action suit.
- (2) Defendants were negligent in their representation of the class.
- (3) Defendants were negligent in that they settled class causes of action without the consent of the class or without a denial of certification of the class.
- (4) Defendants were negligent in that they did not do adequate discovery.
- (5) Defendants were negligent in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation.
- (6) Defendants were negligent in not properly distributing settlement proceeds among the class.
- (7) Defendants 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.
- (8) Defendants were negligent in undertaking a representation of the class action when they did not have, or were unwilling to commit, adequate financial resources to maintain the class action.
- (9) Defendants were negligent in settling the suit for a fraction of its actual value for the benefit of certain class representatives.
- (10) Defendants were negligent in selection and retention of Drs. LaRock and Superville as class representatives.

(11) Defendants were negligent in using a purported class action as leverage for settlement for a chosen few.

BREACH OF FIDUCIARY DUTY

In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duties to Intervenor's' at least in the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly distribute settlement proceeds;
- (3) in failing to provide the class with an accurate account of claimed expenses;
- (4) failing to inform Intervenor's of settlement negotiations;
- (5) in favoring LaRock and Superville over all other class members;
- (6) in taking more fees than they were permitted to do under the fee contract;
- (7) in failing to do proper discovery
- (8) in settling the suit in the manner in which it was settled
- (9) by appointment of inadequate counsel
- (10) in naming improper class representatives

Defendant Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Intervenor's 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 fees 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.

#### ACTUAL AND CONSTRUCTIVE FRAUD

Defendants represented to Intervenor that they intended to represent all chiropractors in the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be Defendants and Drs. La Rock and Superville. Defendants also stated that any proceeds from Cause No. 88-7707 would be divided among the class. These representations were false; Defendants knew that the representations were false when they were made, or made them recklessly without any knowledge of their truth and as a positive assertion. These representations were made with the intention that the Intervenor would act upon them, and the Intervenor did in fact act upon them. Defendants committed fraud against Intervenor by collecting more fees than they were entitled under the term of the contingent fee contract and making all distributions to LaRock and Superville. Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated above. Defendants also fraudulently concealed their true relationship with La Rock and Superville.

Defendants breached the above stated fiduciary duties owed to Intervenor and thereby committed constructive fraud, as well as actual fraud upon Intervenor. Defendants have proximately caused Intervenor actual damages as a result of these acts.

CONSPIRACY

In addition, Defendants participated in a conspiracy to defraud Intervenors. Intervenors' damages were a proximate result of this conspiracy. The acts of civil conspiracy are set out in the preceding paragraphs.

VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Furthermore, at all times material hereto, Intervenors were "consumers" of goods and services as that term is defined in the DTPA. Plaintiffs allege that Defendants violated the following provisions of the DTPA:

1. Sec 17.46(b)(2), to wit: "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;"
2. Sec. 17.46(b)(5), to wit: "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has sponsorship, approval, status affiliation, or connection which he does not;"
3. Sec. 17.46(b)(7), to wit: "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;" and
4. Sec. 17.46(b)(12), to wit: "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

In addition, Defendants committed unconscionable actions and courses of actions as defined by § 17.45(5) DTPA. Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages.

Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages. Plaintiffs are suing for additional damages, as Defendants' conduct was committed knowingly.



Plaintiffs are therefore entitled to three times their actual damages that exceed \$1,000.00, as well as court costs and attorneys' fees.

### CONVERSION

Defendant Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of Intervenors - more specifically the sums of \$86,500.00, \$50,000, \$75,000.00 and \$95,000, all received in separate settlements in Cause No. 88-7707 - - expenses for which there is 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 claims for expenses in Cause No. 88-7707 and payment of all such sums to Intervenors.

### ACTION TO VOID ATTORNEYS' FEES

As the Defendants violated their fiduciary duties to Intervenors, Intervenors seek a judgment of this Court that the payment of any attorneys' fees to Defendants in Cause No. 88-7707 is 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 and that the all attorneys fees and/or expenses be returned to this Honorable Court.

### DAMAGES

Intervenors are entitled to their actual damages including their share of the monies in the registry of the Court, punitive or exemplary damages, additional and treble damages under the Deceptive Trades Practices Act, costs of court and expense of litigation, repayment of all settlement proceeds distributed, and attorney's fees of thirty-three percent.

In addition their its contractual damages and extra-contractual damages, Intervenorors are entitled to recover from Defendants both prejudgment interest and post judgment interest at the maximum rate allowed by law.

These damages exceed the minimum jurisdictional limits of this Honorable Court.

**JURY DEMAND**

Pursuant to Rule 216 of the Texas Civil Rules of Procedure Intervenorors hereby demand a jury.

**NO ELECTION OF REMEDIES**

The foregoing facts and theories are pled cumulatively and alternatively, with no election or waiver of rights or remedies.

WHEREFORE, PREMISES CONSIDERED, Intervenorors pray that after hearing hereon, they be awarded the above-mentioned damages and any further relief, both at law and in equity, to which they may show themselves to be entitled under the facts and circumstances of this case.

Respectfully submitted,

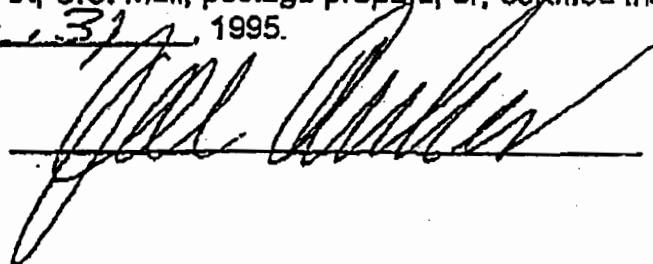
ARCHER, WALDNER & VICKERY, L.L.P.



JOSEPH F. ARCHER  
State Bar No. 0129200  
2929 Allen Parkway, Suite 2410  
Houston, Texas 77019  
Phone: (713) 526-1100  
Fax: (713) 523-5939

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing pleading has been served upon all counsel of record via FAX, U.S. Mail, postage prepaid; or, certified mail, return receipt requested on Aug. 31, 1995.



**EXHIBIT L**

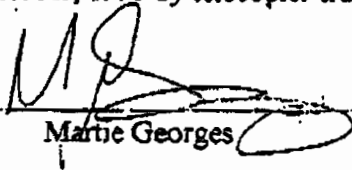
BEN BEARD, DAVID BAILEY and  
DAN PETROSKY,  
Plaintiffs,  
v.  
JAMES FRANKLIN SCHERR, NOEL GAGE§  
and GAGE, BEACH & AGER, §  
Defendants, §  
AND §  
JAMES F. SCHERR §  
Counter-Plaintiff, §  
v. §  
BEN BEARD, DAVID BAILEY and §  
DAN PETROSKY §  
Counter-Defendants, §  
AND §  
JAMES F. SCHERR §  
Third-Party Plaintiff, §  
v. §  
MARJORIE GEORGES and §  
JONES & GEORGES, P.C. §  
Third-Party Defendants, §  
NOEL A. GAGE §  
Counter Plaintiff §  
DR. RICHARD GILLESPIE ET AL. §  
Intervenors §

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

EXHIBIT NO. 27  
M. KUHLMANN

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 on this the 31st day of October, 1995 by telecopier transmission.

  
Martie Georges

FIRST AMENDED PLEA IN INTERVENTION

TO THE HONORABLE COURT:

Comes now, Dr. Richard Gillespie; Dr. Stewart Stephenson individually and as representative of Accident and Industrial Injury Center, Inc. and Accident and Injury Center, Inc.; Accident and Industrial Injury Center, Inc; Accident and Injury Center, Inc.; Dr. Ted Stephenson; Dr. Odion E. Ojo, individually and as representative of Astrodome Chiropractic and Sports Clinic Inc.; Astrodome Chiropractic and Sports Clinic Inc.; Dr. Richard G. Ivy, and, Dr. Carlos Xavier Domino; Dr. Kathryn L. Keith-Arden individually and as representative of Mesa Hills Chiropractic and Back Care Clinic; Mesa Hills Chiropractic and Back Care Clinic; Dr. David Niekamp; Dr. Gregory D. Peter, individually and as representative of Huntsville Chiropractic Health Care; Huntsville Chiropractic Health Care; Dr. Kenneth N. Huete, individually and as representative of Doctors Chiropractic Health & Rehabilitation Center and Doctors Chiropractic Health Center; Doctors Chiropractic Health & Rehabilitation Center; Doctors Chiropractic Health Center, Dr. Kent Rice, individually and as representative of Cy-Fair Chiropractic Association; Cy-Fair Chiropractic Association, as well as others to be named later, and file, as Intervenors, this Plea in Intervention and would show the Court as follows:

**PARTIES**

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Houston, Texas 77054.

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Intervenor, Dr. Carlos Xavier Domino, 5271 Memorial Drive, Houston, Texas 77007.

Intervenor, Dr. Katherine L. Keith-Arden, 6512 North Mesa St., El Paso, Texas 79912.

Intervenor, Dr. David Niekamp, 3815 Reveille, Houston, Texas 77087.

Intervenor, Dr. Gregory D. Peter, 901 Normal Park, Suite 201, Huntsville, Texas 77340.

Intervenor, Dr. Kenneth N. Huete, 3429 West Holcombe, Houston, Texas 77025.

Intervenor, Dr. Kent Rice, 1125 West Road, Building J, Houston, Texas 77065.

Plaintiff Ben Beard is an individual residing in Houston, Texas. Plaintiff David Bailey is an individual residing in Bryan, Texas. Plaintiff Dan Petrosky is an individual residing in El Paso, Texas. Defendants have been served and answered herein.

#### BACKGROUND FACTS

Defendants are attorneys licensed to practice law in the State of Texas. Defendants filed suit purporting to represent Intervenor in a class action suit for certain causes of action against numerous insurance companies in Cause No. 88-7707, *Dr. Walter Rhodes, et al. v. American General Fire and Casualty, et al.*, in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707."

On July 28, 1988, Defendants brought Cause No. 88-7707 on behalf of all Texas chiropractors alleging that certain insurance companies had engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Defendants herein, alleged among other things that



chiropractors suffered damages due to the insurance companies' non-payment and slow payment of chiropractors' bills; and, that the chiropractic profession was defamed and maligned by acts of certain insurance companies.

Suit was filed on behalf of all Texas chiropractors with Drs. La Rock and Superville named as class representatives.

Defendants had a prior referral relationship with the named representatives LaRock and Superville. After settlements on behalf of the class were made, settlement proceeds were either taken as attorneys' fees or distributed to LaRock and Superville. None of the unnamed class members received any of the settlement proceeds and, in some circumstances, Defendants retained one hundred percent of the settlement proceeds. In March of 1994, Defendants entered into an agreed final dismissal of the class action suit.

A portion of the settlement proceeds that rightly belong to the Intervenor's are in the registry of this Court. Intervention herein is essential to effectively protect the Intervenor's interest.

#### CAUSES OF ACTION

##### NEGLIGENCE

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Defendants were negligent in one or more of the following ways:

- (1) Defendants were negligent in that they failed to certify, or even attempt to certify, a class action suit.
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- (3) Defendants were negligent in that they settled class causes of action without the consent of the class or without a denial of certification of the class.
- (4) Defendants were negligent in that they did not do adequate discovery.

- (5) Defendants were negligent in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation.
- (6) Defendants were negligent in not properly distributing settlement proceeds among the class.
- (7) Defendants 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.
- (8) Defendants were negligent in undertaking a representation of the class action when they did not have, or were unwilling to commit, adequate financial resources to maintain the class action.
- (9) Defendants were negligent in settling the suit for a fraction of its actual value for the benefit of certain class representatives.
- (10) Defendants were negligent in selection and retention of Drs. LaRock and Superville as class representatives.
- (11) Defendants were negligent in using a purported class action as leverage for settlement for a chosen few.

#### BREACH OF FIDUCIARY DUTY

In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duties to Intervenor's at least in the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly distribute settlement proceeds;
- (3) in failing to provide the class with an accurate account of claimed expenses;
- (4) failing to inform Intervenor's of settlement negotiations;
- (5) in favoring LaRock and Superville over all other class members;
- (6) in taking more fees than they were permitted to do under the fee contract.
- (7) in failing to do proper discovery

- (8) in settling the suit in the manner in which it was settled
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Defendant Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Intervenor 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 fees 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.

#### ACTUAL AND CONSTRUCTIVE FRAUD

Defendants represented to Intervenor that they intended to represent all chiropractors in the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be Defendants and Drs. La Rock and Superville. Defendants also stated that any proceeds from Cause No. 88-7707 would be divided among the class. These representations were false; Defendants knew that the representations were false when they were made, or made them recklessly without any knowledge of their truth and as a positive assertion. These representations were made with the intention that the Intervenor would act upon them, and the Intervenor did in fact act upon them.

Defendants committed fraud against Intervenors by collecting more fees than they were entitled under the term of the contingent fee contract and making all distributions to LaRock and Superville. Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated above. Defendants also fraudulently concealed their true relationship with La Rock and Superville.

Defendants breached the above stated fiduciary duties owed to Intervenors and thereby committed constructive fraud, as well as actual fraud upon Intervenors. Defendants have proximately caused Intervenors actual damages as a result of these acts.

#### CONSPIRACY

In addition, Defendants participated in a conspiracy to defraud Intervenors. Intervenors' damages were a proximate result of this conspiracy. The acts of civil conspiracy are set out in the preceding paragraphs.

#### VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Furthermore, at all times material hereto, Intervenors were "consumers" of goods and services as that term is defined in the DTPA. Plaintiffs allege that Defendants violated the following provisions of the DTPA:

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3. Sec. 17.46(b)(7), to wit: "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;" and

4. - Sec. 17.46(b)(12), to wit: "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

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Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages. Plaintiffs are suing for additional damages, as Defendants' conduct was committed knowingly. Plaintiffs are therefore entitled to three times their actual damages that exceed \$1,000.00, as well as court costs and attorneys' fees.

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#### ACTION TO VOID ATTORNEYS' FEES

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## DAMAGES

Intervenors are entitled to their actual damages including their share of the monies in the registry of the Court, punitive or exemplary damages, additional and treble damages under the Deceptive Trades Practices Act, costs of court and expense of litigation, repayment of all settlement proceeds distributed, and attorney's fees of thirty-three percent.

In addition their its contractual damages and extra-contractual damages, Intervenors are entitled to recover from Defendants both prejudgment interest and post judgment interest at the maximum rate allowed by law.

These damages exceed the minimum jurisdictional limits of this Honorable Court.

## JURY DEMAND

Pursuant to Rule 216 of the Texas Civil Rules of Procedure Intervenors hereby demand a jury.

## NO ELECTION OF REMEDIES

The foregoing facts and theories are pled cumulatively and alternatively, with no election or waiver of rights or remedies.

WHEREFORE, PREMISES CONSIDERED, Intervenors pray that after hearing hereon, they be awarded the above-mentioned damages and any further relief, both at law and in equity, to which they may show themselves to be entitled under the facts and circumstances of this case.

Respectfully submitted,

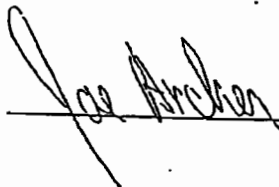
ARCHER, WALDNER & VICKERY, L.L.P.



\_\_\_\_\_  
JOSEPH F. ARCHER  
State Bar No. 0129200  
2929 Allen Parkway, Suite 2410  
Houston, Texas 77019  
Phone: (713) 526-1100  
Fax: (713) 523-5939

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing pleading has been served upon all counsel of record via FAX, U.S. Mail, postage prepaid; or, certified mail, return receipt requested on November 9<sup>th</sup>, 1995.

  
\_\_\_\_\_

**EXHIBIT M**





SECOND AMENDED PLEA IN INTERVENTION

TO THE HONORABLE COURT:

Comes now, Dr. Richard Gillespie; Dr. Stewart Stephenson individually and as representative of Accident and Industrial Injury Center, Inc. and Accident and Injury Center, Inc.; Accident and Industrial Injury Center, Inc., Accident and Injury Center, Inc.; Dr. Ted Stephenson; Dr. Odion E. Ojo, individually and as representative of Astrodome Chiropractic and Sports Clinic Inc.; Astrodome Chiropractic and Sports Clinic Inc.; Dr. Richard G. Ivy; and, Dr. Carlos Xavier Domino; Dr. Kathryn L. Keith-Arden individually and as representative of Mesa Hills Chiropractic and Back Care Clinic; Mesa Hills Chiropractic and Back Care Clinic; Dr. David Niekamp; Dr. Gregory D. Peter, individually and as representative of Huntsville Chiropractic Health Care; Huntsville Chiropractic Health Care; Dr. Gene A. Chapman individually and as representative of Chapman Chiropractic Clinic and Greenspoint Chiropractic; Chapman Chiropractic Clinic; Greenspoint Chiropractic; Dr. Kenneth N. Huete, individually and as representative of Doctors Chiropractic Health & Rehabilitation Center and Doctors Chiropractic Health Center; Doctors Chiropractic Health & Rehabilitation Center; Doctors Chiropractic Health Center, Dr. Kent Rice, individually and as representative of Cy-Fair Chiropractic Association; Cy-Fair Chiropractic Association, as well as others to be named later, and file, as Intervenor, this Plea in Intervention and would show the Court as follows:

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Intervenor, Dr. Carlos Xavier Domino, 5271 Memorial Drive, Houston, Texas 77007

Intervenor, Dr. Katherine L. Keith-Arden, 6512 North Mesa St., El Paso, Texas  
79912.

Intervenor, Dr. Gene A. Chapman, 4747 Research Forest Drive, Suite 155, The  
Woodlands, Texas 77381.

Intervenor, Dr. David Niekamp, 3815 Reveille, Houston, Texas 77087.

Intervenor, Dr. Gregory D. Peter, 901 Normal Park, Suite 201, Huntsville, Texas  
77340.

Intervenor, Dr. Kenneth N. Huete, 3429 West Holcombe, Houston, Texas 77025.

Intervenor, Dr. Keni Rice, 1125 West Road, Building J, Houston, Texas 77065.

Plaintiff Ben Beard is an individual residing in Houston, Texas. Plaintiff David  
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- (2) Defendants were negligent in their representation of the class.
- (3) Defendants were negligent in that they settled class causes of action without the consent of the class or without a denial of certification of the class.
- (4) Defendants were negligent in that they did not do adequate discovery.
- (5) Defendants were negligent in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation.
- (6) Defendants were negligent in not properly distributing settlement proceeds among the class.
- (7) Defendants 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.
- (8) Defendants were negligent in undertaking a representation of the class action when they did not have, or were unwilling to commit, adequate financial resources to maintain the class action.
- (9) Defendants were negligent in settling the suit for a fraction of its actual value for the benefit of certain class representatives.
- (10) Defendants were negligent in selection and retention of Drs. LaRock and Superville as class representatives.
- (11) Defendants were negligent in using a purported class action as leverage for settlement for a chosen few.

BREACH OF FIDUCIARY DUTY

In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duties to Intervenor<sup>s</sup> including but not limited to the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly distribute settlement proceeds;
- (3) in failing to provide the class with an accurate account of claimed expenses;
- (4) failing to inform Intervenor<sup>s</sup> of settlement negotiations;
- (5) in favoring LaRock and Superville over all other class members;
- (6) in taking more fees than they were permitted to do under the fee contract.
- (7) in failing to do proper discovery
- (8) in settling the suit in the manner in which it was settled
- (9) by appointment of inadequate counsel
- (10) in naming improper class representatives

Defendant Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Intervenor<sup>s</sup> 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 fees 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.

#### ACTUAL AND CONSTRUCTIVE FRAUD

Defendants represented to Intervenor that they intended to represent all chiropractors in the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be Defendants and Drs. La Rock and Superville. Defendants also stated that any proceeds from Cause No. 88-7707 would be divided among the class. These representations were false; Defendants knew that the representations were false when they were made, or made them recklessly without any knowledge of their truth and as a positive assertion. These representations were made with the intention that the Intervenor would act upon them, and the Intervenor did in fact act upon them. Defendants committed fraud against Intervenor by collecting more fees than they were entitled under the term of the contingent fee contract and making all distributions to LaRock and Superville. Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated above. Defendants also fraudulently concealed their true relationship with La Rock and Superville.

Defendants breached the above stated fiduciary duties owed to Intervenor and thereby committed constructive fraud, as well as actual fraud upon Intervenor. Defendants have proximately caused Intervenor actual damages as a result of these acts.

CONSPIRACY

In addition, Defendants participated in a conspiracy to defraud Intervenor. Intervenor's damages were a proximate result of this conspiracy. The acts of civil conspiracy are set out in the preceding paragraphs.

VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Furthermore, at all times material hereto, Intervenor was "consumer" of goods and services as that term is defined in the DTPA. Plaintiffs allege that Defendants violated the following provisions of the DTPA:

1. Sec. 17.45(b)(2), to wit: "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;"
2. Sec. 17.46(b)(5), to wit: "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has sponsorship, approval, status affiliation, or connection which he does not;"
3. Sec. 17.46(b)(7), to wit: "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;" and
4. Sec. 17.46(b)(12), to wit: "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

In addition, Defendants committed unconscionable actions and courses of actions as defined by § 17.45(5) DTPA. Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages.

Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages. Plaintiffs are suing for additional damages, as Defendants' conduct was committed



knowingly. Plaintiffs are therefore entitled to three times their actual damages that exceed \$1,000.00, as well as court costs and attorneys' fees.

#### CONVERSION

Defendant Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of Intervenor - more specifically the sums of \$86,500.00, \$50,000, \$75,000.00 and \$95,000, all received in separate settlements in Cause No. 88-7707 - expenses for which there is 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 claims for expenses in Cause No. 88-7707 and payment of all such sums to Intervenor.

#### ACTION TO VOID ATTORNEYS' FEES

As the Defendants violated their fiduciary duties to Intervenor, Intervenor seek a judgment of this Court that the payment of any attorneys' fees to Defendants in Cause No. 88-7707 is 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 and that the all attorneys fees and/or expenses be returned to this Honorable Court.

#### DAMAGES

Intervenor are entitled to their actual damages including their share of the monies in the registry of the Court, punitive or exemplary damages, additional and treble damages under the Deceptive Trades Practices Act, costs of court and expense of litigation, repayment of all settlement proceeds distributed, and attorney's fees of thirty-three

percent.

In addition their its contractual damages and extra-contractual damages, Intervenor's are entitled to recover from Defendants both prejudgment interest and post judgment interest at the maximum rate allowed by law.

These damages exceed the minimum jurisdictional limits of this Honorable Court.

JURY DEMAND

Pursuant to Rule 216 of the Texas Civil Rules of Procedure intervenors hereby demand a jury.

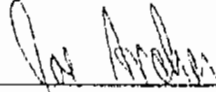
NO ELECTION OF REMEDIES

The foregoing facts and theories are pled cumulatively and alternatively, with no election or waiver of rights or remedies.

WHEREFORE, PREMISES CONSIDERED, Intervenor's pray that after hearing hereon, they be awarded the above-mentioned damages and any further relief, both at law and in equity, to which they may show themselves to be entitled under the facts and circumstances of this case.

Respectfully submitted,

ARCHER, WALDNER & VICKERY, L.L.P.



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JOSEPH F. ARCHER  
State Bar No. 0129200  
2929 Alien Parkway, Suite 2410  
Houston, Texas 77019  
Phone: (713) 526-1100  
Fax: (713) 523-5939

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing pleading has been served upon all counsel of record via FAX, U.S. Mail, postage prepaid; or, certified mail, return receipt requested on February 13, 1996.



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**EXHIBIT N**



THIRD AMENDED PLEA IN INTERVENTION

TO THE HONORABLE COURT:

Comes now, Dr. Richard Gillespie, individually and as representative of San Marcos Chiropractic Center; Dr. Stewart Stephenson, individually and as representative of Injury Treatment Center, Chiropractic Arts Center and Accident & Industrial Injury Center, Inc.; Dr. Ted Stephenson, individually and as representative of Stephenson Chiropractic Center; Dr. Odion E. Ojo, individually and as representative of Astrodome Chiropractic and Sports Clinic, Inc.; Dr. Richard G. Ivy, individually and as representative of Ivy Chiropractic; Dr. Carlos Xavier Domino, individually and as representative of Gentle Care Chiropractic Clinic and Chiro-Sports-Med Clinics of Houston; Dr. Kathryn L. Keith-Arden, individually and as representative of Mesa Hills Chiropractic and Back Care Clinic; Dr. David Niekamp, individually and as representative of Gulfgate Chiropractic Clinic, Inc.; Dr. Gene A. Chapman, individually and as representative of Chapman Chiropractic Clinic and Greenspoint Chiropractic; Dr. Kenneth N. Huete, individually and as representative of Doctors Chiropractic Health Center; Dr. A. Kent Rice, individually and as representative of Cy-Fair Steelechase Chiropractic Clinic and Cy-Fair Chiropractic Associates, P.C.; George G. Junkin, D.C., individually and as representative of Northwest Chiropractic Center, Inc.; Tracy A. Sanders, D.C., individually and as representative of Sanders Chiropractic Clinic and Town & Country Chiropractic Clinic; Lowery S. Stancil, D.C., individually and as representative of The Chiropractic Health Center; Dr. George Aubert, individually and as representative of Tomball Chiropractic Center, Inc.; Dr. John P. Johnston, individually and as representative of John P. Johnston, Inc.; Dr. William Colgin,

individually and as representative of Mr. William M. Colgin, D.C., P.C. and Dr. William Colgin d.b.a. Chiropractic Arts Center; Dr. Kurt Griesser, as well as others to be named later, and file, as Intervenors, this Third Amended Plea in Intervention and would show the Court as follows:

### PARTIES

Intervenors are individual chiropractors and their businesses whose names, addresses, and principal place of businesses are as follows:

Intervenor, Dr. Richard Gillespie, 1520 Ranch Road 12, San Marcos, Texas 78666.

Intervenor, Dr. Stewart Stephenson, Injury Treatment Center, Chiropractic Arts Center and Accident & Industrial Injury Center, Inc., 2005 South Texas Avenue, Bryan, Texas 77802.

Intervenor, Dr. Ted Stephenson and Stephenson Chiropractic Center, 1313 Briarcrest Drive, Bryan, Texas 77802.

Intervenor, Odion E. Ojo, Astrodome Chiropractic and Sports Clinic, Inc., 2630 Westridge, Houston, Texas 77054.

Intervenor, Dr. Richard G. Ivy and Ivy Chiropractic, 124 North West Newton, Burleson, Texas 76028.

Intervenor, Dr. Carlos Xavier Domino, Gentle Care Chiropractic Clinic and Chiro-Sports-Med Clinics of Houston, 5271 Memorial Drive, Houston, Texas 77007.

Intervenor, Dr. Katherine L. Keith-Arden and Mesa Hills Chiropractic and Back Care Clinic, 6512 North Mesa St., El Paso, Texas 79912.

Intervenor, Dr. David Niekamp and Gulfgate Chiropractic Clinic, Inc., 3815 Reveille, Houston, Texas 77087.

Intervenor, Dr. Gene A. Chapman, Chapman Chiropractic Clinic and Greenspoint Chiropractic, 4747 Research Forest Drive, Suite 155, The Woodlands, Texas 77381.

Intervenor, Dr. Kenneth N. Huete and Doctors Chiropractic Health Center, 3431 West Holcombe Boulevard, Houston, Texas 77025.

Intervenor, Dr. Kent Rice, Cy-Fair Steelechase Chiropractic Clinic and Cy-Fair Chiropractic Associates, P.C., 11250 West Road, Building J, Houston, Texas 77065.

Intervenor, George G. Junkin, D.C. and Northwest Chiropractic Center, Inc., 11510 Northwest Freeway, Houston, Texas 77092.

Intervenor, Tracy A. Sanders, D.C., Sanders Chiropractic Clinic and Town & Country Chiropractic Clinic, 8333 Katy Freeway, Suite 100, Houston, Texas 77024.

Intervenor, Lowery S. Stancil, D.C. and The Chiropractic Health Center, 906 West Main, Tomball, Texas 77375.

Intervenor, Dr. George Aubert and Tomball Chiropractic Center, Inc., 27030 Tomball Parkway, Tomball, Texas 77375.

Intervenor, Dr. John P. Johnston and John P. Johnston, Inc., 1990 Post Oak Boulevard, Suite G, Houston, Texas 77056.

Intervenor, Dr. William Colgin, Mr. William M. Colgin, D.C, P.C. and Dr. William Colgin d.b.a. Chiropractic Arts Center, 905 Heatherway Street, Rosenberg, Texas 77471.

Intervenor, Dr. Kurt Griesser, 905 Heatherway Street, Rosenberg, Texas 77471.



## BACKGROUND FACTS

Defendants are attorneys licensed to practice law in the State of Texas. Defendants filed suit purporting to represent Intervenors in a class action suit for certain causes of action against numerous insurance companies in Cause No. 88-7707, *Dr. Walter Rhodes, et al. v. American General Fire and Casualty, et al.*, in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707."

On July 28, 1988, Defendants brought Cause No. 88-7707 on behalf of all Texas chiropractors alleging that certain insurance companies had engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Defendants herein, alleged among other things that chiropractors suffered damages due to the insurance companies' non-payment and slow payment of chiropractors' bills; and, that the chiropractic profession was defamed and maligned by acts of certain insurance companies.

Suit was filed on behalf of all Texas chiropractors with Drs. La Rock and Superville named as class representatives.

Defendants had a prior referral relationship with, LaRock and Superville, the named representatives. After settlements on behalf of the class were made, settlement proceeds were either taken as attorneys' fees or distributed to LaRock and Superville. None of the unnamed class members received any of the settlement proceeds and, in some circumstances, Defendants retained one hundred percent of the settlement proceeds. In March of 1994, Defendants entered into an agreed final dismissal of the class action suit.

## CAUSES OF ACTION

### NEGLIGENCE

Defendants were jointly and severally negligent in proximately causing Intervenor's damages. Defendants negligence includes but is not limited to the following:

- (1) Defendants were negligent in that they failed to certify, or even attempt to certify, a class action suit.
- (2) Defendants were negligent in their representation of the class.
- (3) Defendants were negligent in that they settled class causes of action without the consent of the class or without a denial of certification of the class.
- (4) Defendants were negligent in that they did not conduct adequate discovery.
- (5) Defendants were negligent in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation.
- (6) Defendants were negligent in not properly distributing settlement proceeds among the class.
- (7) Defendants were negligent in their representation of the class in that they failed to acknowledge and respond to objections made by various class members as to the settlements that were being negotiated.
- (8) Defendants were negligent in undertaking a representation of the class action when they did not have, or were unwilling to commit, adequate financial resources to maintain the class action.
- (9) Defendants were negligent in settling the suit for a fraction of its actual value for the benefit of certain class representatives.
- (10) Defendants were negligent in selection and retention of Drs. LaRock and Superville as class representatives.
- (11) Defendants were negligent in using a purported class action as leverage for settlement for a chosen few.

### BREACH OF FIDUCIARY DUTY

In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duties to Intervenors including but not limited to the following respects:

- (1) in failing to promptly and accurately account for settlement proceeds;
- (2) in failing to promptly distribute settlement proceeds;
- (3) in failing to provide the class with an accurate account of claimed expenses;
- (4) failing to inform Intervenors of settlement negotiations;
- (5) in favoring LaRock and Superville over all other class members;
- (6) in taking more fees than they were permitted to do under the fee contract;
- (7) in failing to conduct proper discovery;
- (8) in settling the suit in the manner in which it was settled;
- (9) by appointment of inadequate counsel;
- (10) in naming improper class representatives;

Defendant Gage failed to inform Intervenors that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Intervenors 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 fees 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.

#### ACTUAL AND CONSTRUCTIVE FRAUD

Defendants represented to Intervenor that they intended to represent all chiropractors in the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be Defendants and Drs. La Rock and Superville. Defendants also stated that any proceeds from Cause No. 88-7707 would be divided among the class. These representations were false; Defendants knew that the representations were false when they were made, or made them recklessly without any knowledge of their truth and as a positive assertion. These representations were made with the intention that the Intervenor would act upon them, and the Intervenor did in fact act upon them. Defendants committed fraud against Intervenor by collecting more fees than they were entitled under the term of the contingent fee contract and making all distributions to LaRock and Superville. Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated above. Defendants also fraudulently concealed their true relationship with La Rock and Superville.

Defendants breached the above stated fiduciary duties owed to Intervenor and thereby committed constructive fraud, as well as actual fraud upon Intervenor. Defendants have proximately caused Intervenor actual damages as a result of these acts.

## CONSPIRACY

In addition, Defendants participated in a conspiracy to defraud Intervenor. Intervenor's damages were a proximate result of this conspiracy. The acts of civil conspiracy are set out in the preceding paragraphs.

## VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Furthermore, at all times material hereto, Intervenor was "consumer" of goods and services as that term is defined in the DTPA. Intervenor alleges that Defendants violated the following provisions of the DTPA:

1. Sec. 17.46(b)(2), to wit: "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services";
2. Sec. 17.46(b)(5), to wit: "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has sponsorship, approval, status affiliation, or connection which he does not";
3. Sec. 17.46(b)(7), to wit: "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another"; and
4. Sec. 17.46(b)(12), to wit: "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

In addition, Defendants committed unconscionable actions and courses of actions as defined by § 17.45(5) DTPA. Defendants' violation of the DTPA was a producing cause of Intervenor's damages.

Defendants' violation of the DTPA was a producing cause of Intervenor's damages. Intervenor is suing for additional damages, as Defendants' conduct was committed

knowingly. Intervenors are therefore entitled to three times their actual damages that exceed \$1,000.00, as well as court costs and attorneys' fees.

#### CONVERSION

Defendant Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of Intervenors - 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 or inadequate accounting. Defendants have wrongfully converted all sums they claim or claimed as expenses in Cause No. 88-7707 and accordingly, Intervenors seek a judgment of this Court denying claims for expenses in Cause No. 88-7707 and payment of all such sums to Intervenors.

#### ACTION TO VOID ATTORNEYS' FEES

As the Defendants violated their fiduciary duties to Intervenors, Intervenors seek a judgment of this Court that the payment of any attorneys' fees to Defendants in Cause No. 88-7707 is against the public policy of this State and that the all attorneys fees and/or expenses be returned to Intervenors.

#### DAMAGES

Intervenors are entitled to their actual damages including their share of the monies in the registry of the Court, punitive or exemplary damages, additional and treble damages under the Deceptive Trades Practices Act, costs of court and expense of litigation, repayment of all settlement proceeds distributed, and attorney's fees of thirty-three percent.

In addition to their contractual damages and extra-contractual damages, Intervenor  
are entitled to recover from Defendants both prejudgment interest and post judgment  
interest at the maximum rate allowed by law.

Intervenor plead for damages not to exceed five million dollars.

JURY DEMAND

Pursuant to Rule 216 of the Texas Civil Rules of Procedure Intervenor hereby  
demand a jury.

NO ELECTION OF REMEDIES

The foregoing facts and theories are pled cumulatively and alternatively, with no  
election or waiver of rights or remedies.

WHEREFORE, PREMISES CONSIDERED, Intervenor pray that after hearing  
hereon, they be awarded the above-mentioned damages and any further relief, both at law  
and in equity, to which they may show themselves to be entitled under the facts and  
circumstances of this case.

Respectfully submitted,

ARCHER, WALDNER, & VICKERY, L.L.P.  
2929 Allen Parkway, Suite 2410  
Houston, Texas 77019  
(713) 526-1100  
Facsimile (713) 523-5939

By: Joe Archer  
JOSEPH F. ARCHER- 01292000

ATTORNEYS FOR INTERVENOR

**EXHIBIT O**





2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide and issue by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached adding together each juror's figures and dividing by the number of jurors to get an average. Do not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by the verdict, those jurors who

agree to all findings shall each sign the verdict.

7. These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct, and it may require another trial by another jury; then all of our time will have been wasted.

8. The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

9. When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning. All other words not defined herein have their common ordinary meaning.

10. Questions to be answered "Yes" or "No" should be answered "Yes", if you so find from a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No". Your answers to all other questions must be based on a preponderance of the evidence. The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

11. A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who

saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may fairly and reasonable be inferred from other facts proved.

#### DEFINITIONS

When words are used in this Charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

1. The term "Gage, Beach & Ager" means the law firm by that name. It includes all persons employed by the law firm, and the law firm is responsible for the acts and omissions of such persons when they are or were acting in the course and scope of their employment.

2. The term "Plaintiffs" means David Bailey, Dan Petrosky and Ben Beard.

3. The term "Defendants" means James F. Scherr, Noel Gage and Gage, Beach & Ager.

4. "Contract" means the contracts for legal representation entered into between each of the Plaintiffs herein and James F. Scherr.

5. The term "proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that an attorney or law firm using ordinary care would have foreseen that the event or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an

event.

#### INSTRUCTIONS

1. You are instructed that the relationship between an attorney and his client is a fiduciary relationship. The lawyer's dealings with his or her client requires the utmost good faith, the most open candor, the complete absence of deceit or concealment and absolute honesty so that the lawyer's business with the client can be scrutinized just as between a trustee and his or her beneficiary. Further, a lawyer engaging in the practice of law and contracting to represent a client as a lawyer, impliedly represents that he or she possesses the requisite degree of skill, learning, and ability necessary to practice the [profession which others similarly situated ordinarily possess; will exercise reasonable and ordinary care and diligence in applying the skill and knowledge at hand. You are instructed that every act of every employee, on behalf of or in the name of the professional corporation if done within the scope of his authority, is in law the act of that professional corporation. Now, bearing in mind the foregoing, and any other instructions that may be given by the Court, or under its direction on, in connection with the questions hereinafter submitted, please answer the following questions.

QUESTION NUMBER ONE:

Did the defendants breach the fiduciary duty between an attorney and a client in their representation of Plaintiffs, and was such breach, if any, a proximate cause of damages to the Plaintiffs?

Definition/instruction: You are instructed that an attorney client relationship existed between Defendants and Plaintiffs and that the Defendants owed a fiduciary duty to Plaintiffs. The term "FIDUCIARY DUTY" means a duty of utmost good faith, loyalty, trust, and confidence, requiring absolute and perfect candor, openness, fairness, integrity, honesty, and the absence of any concealment or deception in matters which are material to the client's representation. As a fiduciary, an attorney is obligated to place the interest of his client above the attorney's own interest. The burden is on the attorney to show that his actions in relation to his client are fair, were for adequate consideration and were reasonable in light of all of the attending circumstances, and that the attorney has made reasonable use of the confidence placed in him.

The fiduciary relationship begins when the attorney client relationship is established. In this case, that relationship between Plaintiffs and Defendants Scherr and Gage began upon the date that each of the Plaintiffs signed a contingency fee contract with Mr. Scherr, and not before.

Answer "Yes" or "No" for each of the following in the corresponding blanks:

A. For events occurring at any time between the formation of the attorney client relationship and January 21, 199<sup>1/2</sup>:

	Defendant J. Scherr	Defendant GB&A	Defendant Noel Gage
A. D. Bailey	<u>YES</u>	<u>YES</u>	<u>YES</u>
B. B. Beard	<u>YES</u>	<u>YES</u>	<u>YES</u>
C. D. Petrosky	<u>YES</u>	<u>YES</u>	<u>YES</u>

B. For events occurring between January 21, 1992 and January 21, 1994:

	Defendant J. Scherr	Defendant GB&A	Defendant Noel Gage
A. D. Bailey	<u>YES</u>	<u>YES</u>	<u>YES</u>
B. B. Beard	<u>YES</u>	<u>YES</u>	<u>YES</u>
C. D. Petrosky	<u>YES</u>	<u>YES</u>	<u>YES</u>

If you have answered "Yes" as to any defendant then answer question number two as to that defendant for whom you answer "Yes"

QUESTION NUMBER TWO

Did James Scherr, Gage, Beach & Ager or Noel Gage act intentionally in breaching the fiduciary duty between attorney and client in their representation of Plaintiffs?

"INTENTIONALLY" means ill will or bad or evil motive or such gross indifference to the rights of another as amounts to a willful or wanton act done intentionally and without just cause or excuse.

	Defendant J. Scherr	Defendant GB&A	Defendant Noel Gage
A. D. Bailey	<u>YES</u>	<u>YES</u>	<u>YES</u>
B. B. Beard	<u>YES</u>	<u>YES</u>	<u>YES</u>
C. D. Petrosky	<u>YES</u>	<u>YES</u>	<u>YES</u>



QUESTION NUMBER THREE

Did any of the Defendants commit fraud against any of the Plaintiffs?

Fraud occurs when --

- a. A party make a misrepresentation of material fact; and
- b. the misrepresentation is made with the knowledge of its falsity or made recklessly Without any knowledge of the truth, and as a positive assertion; and
- c. the misrepresentation is made with the intention that it should be acted on by the other party; and,
- d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means a false statement of fact.

"A material fact" is any fact which a reasonable person, under the same or similar circumstances, would attach importance to in determining his/her course of conduct or action."

Answer: "Yes" or "No" for each of the following in the corresponding blanks.

A. For events occurring at any time between January 21, 1990 and January 21, 1994:

	Defendant J. Scherr	Defendant GB&A	Defendant Noël Gage
A. D. Bailey	<u>YES</u>	<u>YES</u>	<u>YES</u>
B. B. Beard	<u>YES</u>	<u>YES</u>	<u>YES</u>
C. D. Petrosky	<u>YES</u>	<u>YES</u>	<u>YES</u>

B. For events occurring at any time before January 21, 1990:

	Defendant J. Scherr	Defendant GB&A	Defendant Noel Gage
A. D. Bailey	<u>NO</u>	<u>NO</u>	<u>NO</u>
B. B. Beard	<u>NO</u>	<u>NO</u>	<u>NO</u>
C. D. Petrosky	<u>NO</u>	<u>NO</u>	<u>NO</u>

If you have answered "yes" as to any defendant in this question, then answer question number 4 as to that defendant for whom you answered "yes" in this question.

QUESTION NUMBER FOUR

Did Noel Gage, Gage, Beach & Ager or James Scherr act intentionally in committing fraud as against those plaintiffs for whom you answered yes in question number 3?

"INTENTIONALLY" means ill will or bad or evil motive or such gross indifference to the rights of another as amounts to a willful or wanton act done intentionally and without just cause or excuse.

	Defendant J. Scherr	Defendant GB&A	Defendant Noel Gage
A. D. Bailey	_____	_____	_____
B. B. Beard	_____	_____	_____
C. D. Petrosky	_____	_____	_____

QUESTION NUMBER FIVE

What sum of money, if any, are the persons listed below, if any, entitled to receive from the \$306,500.00 recovered in settlements with Travelers Insurance, T.E.I.A. Insurance, Home Insurance and Commercial Union Insurance.

Answer: Ben Beard 34,000  
David Bailey 34,000  
Dan Petrosky 34,000

QUESTION NUMBER SIX

Did Ben Beard commit fraud against any of the following persons?

Fraud occurs when --

- a. A party make a misrepresentation of material fact; and
- b. the misrepresentation is made with the knowledge of its falsity or made recklessly Without any knowledge of the truth, and as a positive assertion; and
- c. the misrepresentation is made with the intention that it should be acted on by The other party; and,
- d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means a false statement of fact.

"A material fact" is any fact which a reasonable person, under the same or similar circumstances, would attach importance to in determining his/her course of conduct or action."

Answer: "Yes" or "No" for each of the following in the corresponding blanks.

- A. James F. Scherr NO
- B. Gage, Beach & Ager NO
- C. Noel A. Gage NO

If you have answered question Number Six "Yes", and only in that event, then answer question number seven.

QUESTION NUMBER SEVEN

What sum of money, if any, would fairly and reasonably compensate Defendants James F. Scherr, Gage, Beach & Ager, and Noel A. Gage for the fraud committed against them by Ben Beard?

Answer in dollars and cents for damages, if any.

- A. James F. Scherr \$ \_\_\_\_\_
- B. Noel A. Gage \$ \_\_\_\_\_
- C. Gage, Beach, & Ager \$ \_\_\_\_\_

QUESTION NO. 8

Do you find that any of those persons named below waived any further recovery in connection with the TEIA/Travelers settlements in the underlying case?

"Waiver" is the intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

Answer "Yes" or "No" with respect to each of the following:

- Ben Beard YES
- David Bailey YES
- Dan Petrosky YES

QUESTION 9

Did BEN BEARD, DAVID BAILEY and/or DAN PETROSKY fail to comply with the contingency fee agreement?

Answer "Yes" or "No":

NO



QUESTION 10

Did JAMES F. SCHERR and/or Noel Gage perform compensable work for BEN BEARD, DAVID BAILEY and/or DAN PETROSKY?

One party performs compensable work if valuable services are rendered or materials furnished for another party who knowingly accepts and uses them and if the party accepting them should know that the performing party expects to be paid for the work.

Answer "Yes" or "No":

YES

QUESTION 11

What sum of money, if paid now in cash, would fairly and reasonably compensate James F. Scherr for his damages, if any?

Consider the following elements of damages, if any, and none other.

Attorneys' fees.

Answer in dollars and cents for damages, if any.

ANSWER: 0

QUESTION 12

What sum of money, if paid now in cash, would fairly and reasonably compensate James F. Scherr for his damages, if any?

Consider the following elements of damages, if any, and none other.

Expenses.

Answer in dollars and cents for damages, if any.

ANSWER: 0

QUESTION 13

What sum of money, if paid now in cash, would fairly and reasonably compensate Noel Gage for his damages, if any?

Consider the following elements of damages, if any, and none other.

Attorneys' fees.

Answer in dollars and cents for damages, if any.

ANSWER: 0

After retiring to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. To preside during your deliberations;
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge.
3. To write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the judge;
4. To vote on the questions;
5. To write your answers to the questions in the spaces provided; and
6. To certify to your verdict and to obtain the signatures of all the jurors who agree with the verdict, no one has any authority to communicate with you except the bailiff of this Court or Judge of this Court. If you want to communicate with the Court, explain what you want in writing and deliver your message, signed by your presiding juror, to the bailiff. He will deliver it to the Court. Do not orally explain to the bailiff. You should not discuss the case with anyone, not even with the other members of the jury, unless all of you are present and assembled in the jury, room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse or at your home, or elsewhere, please inform the Court at once.

When you have answered all of the questions which you are required to answer under the instructions of the Court, and your presiding juror placed your answers in spaces provided, and obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

\_\_\_\_\_  
JUDGE GREG ABBOTT

CERTIFICATE

We, the Jury have answered the above and foregoing Questions as herein indicated, and herewith return same into Court as our verdict.

\_\_\_\_\_  
PRESIDING JUROR  
(IF UNANIMOUS)

(To be signed by those rendering the verdict if not unanimous)

Trawick - NO

Elkins - NO