

USDC SCAN INDEX SHEET



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3:04-CV-01038 SELZNICK V. XELAN INC

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11
12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

ORIGINAL

14 JAY KEVIN SELZNICK, D.M.D., M.D., an
15 individual, DOUBLE R ORAL &
16 MAXILLOFACIAL SURGERY, INC., a Nevada
17 personal service corporation; DOUBLE R ORAL &
18 MAXILLOFACIAL SURGERY, INC. EMPLOYEE
19 BENEFITS PLAN, an employee benefits plan
20 under ERISA, BRANDY J. ROWLAND, an
21 individual,

21 Plaintiffs,

22 v.

23 XELAN, INC. aka XELAN, a California
24 corporation; XELAN THE ECONOMIC
25 ASSOCIATION OF HEALTH PROFESSIONALS
26 aka XELAN, a California corporation; XELAN
27 WELFARE BENEFIT TRUST, aka "XELAN 419
28 PLAN," "multi-employer group welfare benefit
plan"; L. DONALD GUESS, DMD aka LEWIS D.
GUESS, DMD, TRUSTEE OF XELAN WELFARE
BENEFIT TRUST; L. DONALD GUESS, DMD
aka LEWIS D. GUESS, DMD, an individual;
INDIANAPOLIS LIFE INSURANCE COMPANY,
a Domestic Insurance Corporation; PYRAMIDAL
FUNDING SYSTEMS INC., d/b/a XELAN
INSURANCE SERVICES, a California
Corporation; XELAN MALPRACTICE EQUITY
TRUST, a Xelan Trust in the British Virgin Islands;

CASE NO.:

04 CV 1038 L (JFS)

COMPLAINT FOR:

ERISA CLAIMS

- (1) DECLARATORY RELIEF
- (2) RESCISSION OF INSURANCE
TRANSACTIONS AND RESTITUTION OF
AMOUNTS PAID (ERISA § 502 (a)(3), federal
common law)
- (3) ERISA 502(a)(2) NONDISCLOSURE
PENALTY PER §502(c)
- (4) ACCOUNTING
- (5) BREACH OF FIDUCIARY AND CO-
FIDUCIARY DUTY, FRAUD AND
MISREPRESENTATION UNDER ERISA (29
U.S.C. §§ 1104, 1105(a), 1106(a) 1109(a),
1132(a) (2) & (3) [ERISA §§ 404(a), 405(a),
406(a), 409(a), 502(a)(2) & (3)])

**PENDENT/SUPPLEMENTAL
STATE CLAIMS**

- (6) PRE-PLAN NEGLIGENT MISREPRESENTA-
TION
- (7) PRE-PLAN FRAUD AND DECEIT AND
CONCEALMENT; POST-PLAN TERMINATION
FRAUD, DECEIT, MISREPRESENTATION,
CONCEALMENT (Civ. C. §§ 1709, 1710,
1711, 1712, 1713; 2306, 2316, 2317, 2318,

Continued

1 XELAN INSURANCE COMPANY aka XELAN
2 INSURANCE COMPANY, LTD., domiciled and
3 licensed in Barbados, BVI; XELAN DISABILITY
4 EQUITY TRUST, a Xelan Trust in Canada; PAN-
5 AMERICAN LIFE INSURANCE COMPANY, a
6 Louisiana corporation, and DOES 1 through 100,
7 inclusive

8
9
10 Defendants.

2330, 2333, 2334, 2338, 2343)

(8) FRAUD AND DECEIT, MISREPRESENTATION, AND CONCEALMENT DURING THE ADMINISTRATION OF THE 419 PLAN

(9) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

(10) VIOLATION OF UNFAIR COMPETITION ACT (Bus. & Prof. C. § 17200) AND UNFAIR PRACTICES OR DECEPTIVE ACTS (Ins. C. §§790.02, 790.03)

DEMAND FOR JURY TRIAL

11 Plaintiffs JAY KEVIN SELZNICK, D.M.D., M.D. ("SELZNICK"), DOUBLE R ORAL &
12 MAXILLOFACIAL SURGERY, INC. ("DOUBLE R"), DOUBLE R ORAL & MAXILLOFACIAL
13 SURGERY, INC. EMPLOYEE BENEFITS PLAN ("DOUBLE R EBP"), BRANDY J. ROWLAND
14 ("ROWLAND"), by their undersigned counsel, *allege as their Complaint against Defendants*, XELAN,
15 INC. aka XELAN ("XELAN"); XELAN THE ECONOMIC ASSOCIATION OF HEALTH
16 PROFESSIONALS aka XELAN ("XELAN ASSOCIATION"); XELAN WELFARE BENEFIT
17 TRUST aka "XELAN 419 PLAN" ("XELAN WBT"); L. DONALD GUESS, DMD aka LEWIS D.
18 GUESS, DMD, TRUSTEE OF XELAN WELFARE BENEFIT TRUST; L. DONALD GUESS, DMD
19 aka LEWIS D. GUESS, DMD, individually and as agent of INDIANAPOLIS LIFE INSURANCE
20 COMPANY. (Dr. Guess will be referred to collectively as "Dr. Guess"); INDIANAPOLIS LIFE
21 INSURANCE COMPANY ("INDIANAPOLIS LIFE"); PYRAMIDAL FUNDING SYSTEMS INC.
22 d/b/a XELAN INSURANCE SERVICES ("PYRAMIDAL FUNDING"); XELAN MALPRACTICE
23 EQUITY TRUST ("MALPRACTICE TRUST"); XELAN DISABILITY EQUITY TRUST
24 ("DISABILITY TRUST"); XELAN INSURANCE COMPANY aka XELAN INSURANCE
25 COMPANY, LTD. ("XELAN INS. CO."); PAN-AMERICAN LIFE INSURANCE COMPANY
26 ("PAN-AM LIFE"), and DOES 1 through 100, inclusive, as follows:

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PRELIMINARY STATEMENT

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2 1. This action concerns *pre-plan, ERISA-exempt*, fraud and concealment, false inducement
3 and breach of common law fiduciary duty by insurers and insurance agents in connection with pre-plan
4 promotion and marketing of certain proposed future benefits plans and insurance coverage. The
5 individual Plaintiffs became Plan Participants in employer DOUBLE-R's benefit plan which arose in
6 connection with DOUBLE-R's "membership" with XELAN and participation in its plans. Specifically,
7 corporate Plaintiff DOUBLE-R was a member of an alleged "multiple employer" "employee welfare
8 benefit plan" and the employer plan sponsor and Plan Administrator, under ERISA, for its employees is
9 the Plaintiff personal services C-Corporation.

10 2. Plaintiffs SELZNICK and DOUBLE R claim they were fraudulently induced by certain
11 individual and entity Defendants, including Dr. Guess and his XELAN family including the various
12 XELAN defendants herein with false promises related to proposed participation in an alleged multiple
13 employer employee welfare benefit plan. The inducement was obtained through misrepresentation,
14 concealment and deceit, and was further in violation of the Cal. Bus.& Prof. Code § 17200, the Unfair
15 Competition Act, and §§ 790.02 and/or 790.03 of the California Insurance Code (Unfair practices in
16 business of insurance prohibited, Prohibited unfair or deceptive acts or practices), including but not
17 limited to subdivisions (a) and (h)(1) and its governing Regulations. Further Plaintiffs claim that certain
18 Defendants including Dr. Guess, the XELAN Defendants and insurance Defendant INDIANAPOLIS
19 LIFE participated or assisted in breaches of fiduciary duty including self-dealing and conversion of Plan
20 assets. These losses have yet to be calculated, and depend on a variety of factors, but will likely exceed
21 \$1.7 million, exclusive of interest, expenses, fees, general and exemplary damages.

22 3. Plaintiffs also claim that XELAN WBT aka the "419 TRUST" is not a valid multiple
23 employer welfare benefits plan under the IRC and ERISA.

24 4. Plaintiffs alternatively claim certain Defendants were and/or are fiduciaries or co-
25 fiduciaries or owe non-fiduciary duties to said Plan/Trust, other Xelan Plans and to Plaintiffs. Plaintiffs
26 claim that Defendants breached fiduciary duties to each XELAN employer "member", participant and
27 beneficiary in violation of the common law and ERISA § 409 (29 U.S.C. § 1109) in a variety of ways.

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1 5. Plaintiffs claim that the Defendants are obliged, under ERISA and state common law, to
2 make good to the plan all loss suffered as a result of Defendant's fiduciary or co-fiduciary breaches and
3 prohibited transactions, to account for all funds contributed to or paid related to Plaintiffs' participation,
4 and for an order in equity entitling Plaintiffs to rescind and unwind the transactions related to the various
5 insurance policies and involvement with any part of the XELAN structure and to refund, return and
6 restore to Plaintiffs all costs, expenses, fees, premiums, paid, plus interest or disgorgement of profits
7 thereon. Plaintiffs claim that the various Defendants' post-plan representations and actions are subject
8 to traditional state law and the full panoply of applicable state remedies.

9 6. With respect to the ERISA actions, Plaintiffs seek any and all remedies available under
10 ERISA, including all recognized types of "equitable relief" related to ERISA § 409(a), § 502(a),
11 subsection (1)(a) [enforcing 502(c)], subsection (a)(2) for appropriate relief under §409 of Title 1,
12 subsection (a)(3) for injunctive and other appropriate equitable relief. The above relief sought includes
13 but is not limited to ① unwinding the transactions, ② declaratory relief as to whether the subject "419
14 Plan" constitutes an "ERISA plan"; ③ preliminary injunction and restraining orders against breaching
15 fiduciaries, ④ rescission of prohibited transactions or other transactions violating fiduciary standards of
16 conduct, ⑤ permanent injunction enjoining persons from serving as fiduciaries, ⑥ divestiture of assets
17 and disgorgement of profits made therefrom, ⑦ accounting; ⑧ constructive trust on and restitution of
18 monies, ⑨ *alter ego* liability, ⑩ prejudgment interest.

19 7. In addition or in the alternative, Plaintiffs seek to hold the Defendant insurance companies,
20 including INDIANAPOLIS LIFE, and it's agents accountable under traditional state law of general
21 application, as it involves traditional areas of state regulation not preempted by section 514(a) of ERISA,
22 for pre-plan fraud and misrepresentation, fraudulent inducement, and for post-policy-surrender self
23 dealing, and all damages and remedies available related thereto.

24 JURISDICTION AND VENUE

25 8. This Court's exclusive jurisdiction is invoked pursuant to 28 U.S.C. § 1331, 1337 and 29
26 U.S.C. § 1132(a), (c), (e), (f) and (g), of Title I the Employee Retirement Income Security Act of 1974,
27 29 U.S.C. § 1101, *et seq.* ("ERISA") and under 28 U.S.C. § 1331 as this action involves a federal
28

1 question with respect to post-plan formation and administration; and additionally pursuant to the Court's
2 supplemental (pendent or ancillary) jurisdiction with respect to related pre-plan events and activities,
3 and post-surrender events and activities in that they are transactionally related to the federal claims and/or
4 are necessary to the Court's ability to render an efficacious judgment or for the control of the pending
5 litigation.

6 9. Venue is properly laid within the Southern District of California pursuant to Title 1 of
7 ERISA, at 29 U.S.C. § 1132(e)(2), ERISA § 502(e)(2), and under the court's supplemental (pendent)
8 jurisdiction in that the "plan" is administered in this district, and/or this is the district in which conduct
9 alleged herein took place, and/or where the defendants may be found.

10 THE PARTIES

11
12 10. Plaintiff, JAY KEVIN SELZNICK, D.M.D., M.D. ("SELZNICK") is and at all times
13 relevant herein was a resident and citizen of the State of Nevada, City of Henderson.

14 11. Plaintiff "DOUBLE R ORAL & MAXILLOFACIAL SURGERY, INC." ("DOUBLE-R")
15 is and at all times relevant herein was since approximately December 1998 a small personal service C-
16 Corporation, organized and licensed in the State of Nevada, through which SELZNICK conducts his
17 medical practice and provides medical services.

18 12. Plaintiff "DOUBLE R ORAL & MAXILLOFACIAL SURGERY, INC. EMPLOYEE
19 BENEFITS PLAN," ("DOUBLE-REBP") is and at all times was since approximately late 1998 or early
20 1999 a plan fund or program established and maintained by DOUBLE-R for the purpose of providing its
21 employees and their beneficiaries certain employee welfare benefits through the purchase of insurance
22 or otherwise obtained through the XELAN "structure".

23 13. Plaintiff BRANDY JEAN ROWLAND ("ROWLAND") is and at all times relevant
24 herein was and a resident and citizen of the State of Nevada and an employee of DOUBLE-R and
25 participant in its employee benefit plan.

26 14. Upon information and belief, Defendant XELAN, INC. aka "XELAN" ("XELAN") is
27 and at all times relevant herein was a California corporation organized and existing pursuant to the laws
28 of the State of California, with his principle offices at 401 West A. Street, Suite 2210 in San Diego,

1 California.

2 15. Defendant "XELAN, THE ECONOMIC ASSOCIATION OF HEALTH
3 PROFESSIONALS" aka XELAN ("XELAN ASSOCIATION") is and at all times relevant herein was
4 a California Corporation with its corporate headquarters located in the First National Bank Center at 401
5 West A Street, Suite 2210, San Diego 92101, at contact@xelan.com; <http://www.xelan.com>. Upon
6 information and belief, XELAN ASSOCIATION is an incorporated form of a Membership Organization
7 founded in 1971, incorporated in or about 1974, and in 1999 represented its "membership" to comprise
8 approximately 4000 members.

9 16. Upon information and belief, Defendant L. DONALD GUESS, DMD, also known as
10 LEWIS D. GUESS, DMD ("Dr. Guess"), is and at all times relevant herein was a resident of the State
11 of California, County of San Diego.

12 17. Defendant Dr. Guess is and sometimes relevant herein was represented to be a named
13 "Trustee" and fiduciary of alleged "ERISA" Trusts alleged herein.

14 18. Upon information and belief, Dr. Guess is and sometimes relevant herein was an agent
15 or employee for or of each of the Xelan entities alleged herein.

16 19. Defendant INDIANAPOLIS LIFE INSURANCE COMPANY ("INDIANAPOLIS
17 LIFE") is and at all times relevant herein was an Indiana Corporation with its principle offices located
18 in the City of Indianapolis, State of Indiana.

19 20. Upon information and belief, Dr. Guess is and at all times relevant herein was an
20 insurance agent for INDIANAPOLIS LIFE.

21 21. Defendant PYRAMIDAL FUNDING SYSTEMS, INC. d/b/a XELAN INSURANCE
22 SERVICES ("PYRAMIDAL FUNDING"), is and at all times relevant herein was, a California
23 corporation organized and existing pursuant to the laws of the State of California and doing business as
24 a general insurance agency in the County of San Diego at 401 West A. Street, Ste. 2210, San Diego,
25 through Lewis D. Guess aka "L. Donald Guess, Trte".

26 22. Upon information and belief, Defendant "XELAN WELFARE BENEFIT TRUST" aka
27 "XELAN 419 TRUST" (hereinafter "XELAN WBT") at all times relevant herein held itself out to
28 constitute an IRC § 419 "multiple employer welfare benefits Plan" governed by ERISA § 210, and trust

1 under the laws of the State of Michigan. XELAN WBT is a proper party defendant pursuant to ERISA.

2 23. The "Plan Sponsor" of the XELAN WBT is XELAN.

3 24. The named "Trustee" for XELAN WBT is and at all relevant times herein was Defendant
4 Dr. Guess and is and at all times was, if the XELAN WBT is a valid multiple employer employee welfare
5 benefits plan governed by ERISA, a fiduciary under ERISA.

6 25. Upon information and belief, Defendant XELAN INSURANCE COMPANY aka XELAN
7 INSURANCE COMPANY, LTD. ("**XELAN INS. CO.**") is and at all relevant times herein was an
8 integral part of the Xelan structure, and which is domiciled and licensed in Barbados, conducting its
9 management and administration in the U.S. and British Virgin Islands ("BVI").

10 26. Upon information and belief, XELAN MALPRACTICE EQUITY TRUST
11 ("**MALPRACTICE TRUST**") is a XELAN-formed Trust in the British Virgin Islands and is part of
12 the Xelan family and structure through which XELAN INS. CO. provides insurance coverage to "insured
13 participating employees" of employer members of XELAN. MALPRACTICE TRUST is a proper party
14 defendant pursuant to ERISA.

15 27. Upon information and belief, XELAN DISABILITY EQUITY TRUST ("**DISABILITY**
16 **TRUST**") is and at all relevant times herein was an "Association Group Insurance Trust" under Canadian
17 Law for "C-Corporation" members of XELAN. Upon information and belief, the DISABILITY TRUST
18 was established by XELAN INC. to hold long term disability policies that were issued by PAN
19 AMERICAN LIFE INSURANCE COMPANY to or through XELAN INS. CO. The DISABILITY
20 TRUST is a proper party defendant pursuant to ERISA.

21 28. Upon information and belief, Defendant PAN-AMERICAN LIFE INSURANCE
22 COMPANY ("**PAN-AMLIFE**") is and at all relevant times herein was a Louisiana Corporation licensed
23 in 42 states including California and the District of Columbia (DC), as well as Puerto Rico and the Virgin
24 Islands with its home city in New Orleans, LA.

25 29. The DISABILITY TRUST, MALPRACTICE TRUST AND XELAN WBT are sometimes
26 hereinafter referred to as the "various XELAN Trusts."

27 30. Plaintiffs are ignorant of the true names and capacities of those Defendants named herein
28 as DOES 1 through 100, inclusive. Plaintiffs allege that each of these Defendants named herein as DOES

1 1 through 100, inclusive, are responsible in whole or in part for the actions and/or omissions alleged
2 herein. Plaintiffs will amend this Complaint to list the true names and capacities of those named herein
3 as DOES 1 through 100 when the same have been ascertained.

4 31. Upon information and belief, DOES 1 through 100 are residents and citizens or entities
5 of the States of California or Nevada, and made representations and promises to Plaintiffs during the sale
6 of the insurance policy or proposed benefits plan which is the subject matter of this action.

7 32. Upon information and belief, DOES 1 through 100 are residents and citizens or entities
8 of the States of California or Nevada and participated in communications and representations related to
9 the "surrender" of the insurance policies which are the subject matter of this action.

10 33. Upon information and belief, at all times herein mentioned, Defendants, and each of them,
11 were the agents and employees of each of the remaining Defendants, and were at all times acting within
12 the purpose and scope of said agency and employment, and each Defendant has ratified and approved the
13 acts of its agent.

14
15 FIDUCIARY STATUS OF CERTAIN DEFENDANTS

16 34. During the relevant period, Defendants XELAN ASSOCIATION, XELAN WBT, Dr.
17 Guess, the various XELAN 'Trusts', XELAN INS. CO., (sometimes collectively referred to as
18 "**Fiduciary Defendants**") exercised discretion respecting the management and distribution of funds
19 related to the plans that are the subject of this action, and/or the managements or disposition of the plan
20 assets.

21 35. During the relevant period alleged herein, the Fiduciary Defendants acted as either or
22 inclusive, 'fiduciaries' or co-fiduciaries of the various Trusts (MALPRACTICE, DISABILITY, the
23 XELAN WBT /'419 Plan") pursuant to the common law and/or ERISA § 3(21)(A) (29 U.S.C. 1002
24 (21)(A)) and the law interpreting that section.

25 36. To the extent the plans alleged herein (the MALPRACTICE TRUST, the DISABILITY
26 TRUST, the XELAN WBT /'419 Plan") are valid plans governed by ERISA, ERISA requires every plan
27 to provide for one or more named Fiduciaries, who will have 'authority to control and manage the
28 operation and administration of the plan." ERISA §1102(a)(1) (29 USC §1102(a)(1)).

1 37. In addition to expressly named fiduciaries, ERISA defines ‘fiduciary’ not in terms of
2 formal trusteeship, but in functional terms of control and authority over the plan and therefore an ERISA
3 fiduciary includes anyone who exercises discretionary authority over the plan's management, anyone who
4 exercises authority over the management of its assets, and anyone having discretionary authority or
5 responsibility in the plan's administration.

6 38. During the relevant period, Dr. Guess and XELAN WBT were designated as named
7 Fiduciaries and/or Trustees under the plans.

8 39. ERISA treats as Fiduciaries not only persons explicitly named as Fiduciaries under
9 402(a)(1), but also persons who act as Fiduciaries. ERISA 3(21)(A)(I) (29 USC § 1102(21)(A)(I) makes
10 a person, including a juridical ‘person’ such as XELAN, a fiduciary to the extent he exercises any
11 discretionary authority or discretionary control respecting management of such Plan or exercises any
12 authority or control respecting management or disposition of its assets. Under this standard, a person
13 who appoints a fiduciary has a fiduciary responsibility to monitor the person appointed.

14 40. During the relevant period, whether or not named Trustees or fiduciaries, Dr. Guess and
15 XELAN WBT exercised authority, responsibility ro control of the plan and all XELAN “trusts”.

16 41. In addition, under ERISA, in various circumstances, non-fiduciaries who knowingly
17 participate in fiduciary breaches may themselves be liable. To the extent any of the fiduciary defendants
18 are not named fiduciaries, they remain liable as non fiduciaries who knowingly participated in the
19 fiduciary breaches described herein.

20 42. INDIANAPOLIS LIFE issued policies and provides services to XELAN and Dr. Guess,
21 who was, among other, jointly and concurrently Trustee for XELAN WBT and agent for
22 INDIANAPOLIS LIFE, and INDIANAPOLIS LIFE is a “party in interest” under ERISA § 3(14)(B), 29
23 U.S.C. § 1002(14)(B).

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1 GENERAL ALLEGATIONS

2 43. Upon information and belief, the California-based XELAN Defendants marketed "tax
3 reduction plans," life insurance and severance policies and other services targeting thousands of
4 physicians and dentists including but not limited to SELZNICK under the leadership of dentist-cum-
5 financial guru L. Donald Guess ("Dr. Guess").

6 44. Upon information and belief, marketing of "tax reduction plans" life insurance and other
7 services by the XELAN Defendants and their employees and agents *prior to* the participation of
8 Plaintiffs or the formation by the employer of their employee welfare benefits plans are *pre-plan activities*
9 outside of ERISA's preemptive force and subject to the traditional laws of the state of California.

10 45. Upon information and belief, XELAN ASSOCIATION is and at all times relevant herein
11 was one of a veritable family of affiliated interrelated corporations, alter egos, and "financial advisors"
12 under "XELAN," which include but are not limited to XELAN INC. aka XELAN; XELAN INS. CO.
13 LTD.; Xelan Administrative Services, Inc.; Xelan Investment Services, Inc.; Xelan Foundation, Inc.;
14 Xelan Annuity Co., Ltd.; PYRAMIDAL FUNDING d/b/a Xelan Insurance Services, a general insurance
15 agency, and that Xelan materials refer to these entities collectively as "Xelan", "us", "we" or "our". A
16 true and correct copy of the "Xelan Family of Companies" from the Xelan web site is attached as
17 **Exhibit "A"**.

18 46. Upon information and belief, Xelan Financial Planning, Inc. and Defendant PYRAMIDAL
19 FUNDING are each California corporations, each with its principle offices at 401 West A. Street, Suite
20 2210 in San Diego, California and provide or arrange life insurance, disability insurance, long term care
21 insurance and annuities.

22 47. Upon information and belief, XELAN INS. CO. may be the same entity or an alter ego
23 of PYRAMIDAL FUNDING dba XELAN INS. SERVICES.

24 48. Upon information and belief, Dr. Guess is and at all times relevant herein was the founder,
25 chairman and President of Xelan entities in his Xelan structure.

26 49. Upon information and belief, Defendants represent Xelan to be "the only fully integrated
27 planning program," that it includes "[f]inancial education, income protection, tax reduction, investment
28 management, asset protection, and value system endowment for doctors"and that XELAN marketing

1 materials represent the “X” in “Xelan” to stand for “the individuals savings required to finance lifestyle
2 costs through life expectancy”, and as explained to Plaintiff, ‘the unknown variable’, and that the suffix
3 “elan” is “French for lifestyle of personal freedom.”

4 50. Upon information and belief, Dr. Guess and the XELAN Defendants assist and at all times
5 relevant herein assisted in promoting the Xelan family, structure, “plans” and “trusts” by advising,
6 counseling, educating, marketing and providing written financial plans and markets through educational
7 seminars and symposiums.

8 51. Upon information and belief, XELAN and XELAN ASSOCIATION established, marketed
9 and administered a “Trust” called the “Xelan Welfare Benefit Trust” aka “XELAN 419 PLAN”
10 (“XELAN WBT”), which Xelan represented to constitute a “multiemployer group welfare benefits plan”
11 under § 210 of Employee Retirement Income Security Act (ERISA) 29 U.S.C.S. § 1001 et seq.

12 52. Upon information and belief, XELAN and XELAN WBT offered severance and life
13 “benefits” through life insurance policies it obtained through INDIANAPOLIS LIFE.

14 53. SELZNICK began his surgical residency in 1990 in the state of New York, moving to
15 Nevada in 1995, where he continued to provide surgical services as a sole proprietor working out of the
16 University Medical Center, Las Vegas, and in private practice in oral and maxillofacial surgery.

17 54. SELZNICK devoted a massive number of work hours of 80 to 90-plus hours per week in
18 his commitment to his medical practice, which also resulted in high earnings at or about \$300,000 *in*
19 *excess of his needs*, per year.

20 55. Dental surgeon Daniel Orr, II, DDS, PhD, JD, MD (“Dr. Orr”), Chief of Maxillofacial
21 Surgery, University Medical Center, was a member of the “Xelan Doctors National Advisory Board.”

22 56. For several years, Dr. Orr encouraged the workaholic SELZNICK to become involved in
23 “Xelan,” finally convincing him to attend a short educational seminar about “Xelan” in San Diego in or
24 about 1998 and meet “Xelan” founder, Dr. Guess.

25 57. After SELZNICK revealed in his answers to questions by Dr. Guess, his age, extremely
26 high earnings level, and expected future earnings, Dr. Guess and his Xelan family of companies engaged
27 in concerted pursuit of SELZNICK with assurances, guarantees and accolades about XELAN’s
28 uniqueness, sophistication, creative programs and successes including through its marketing and sales

1 advertisements and materials.

2 58. Dr. Guess convinced SELZNICK to form a C-Corporation which, as employer, could
3 become a "member" of "Xelan" through which it could offer employee benefits plans to its several
4 employees including SELZNICK.

5 59. Dr. Guess had SELZNICK fill out questionnaire forms disclosing financial asset
6 information and become involved in, using Xelan terminology, its "Critical Capital Mass" concept.

7 60. Dr. Guess convinced SELZNICK he should place all of his annual "surplus income" in
8 various Xelan pre-tax savings plans in which the proposed new C-Corporation that he would develop
9 would participate, including 1) an umbrella Malpractice Equity Trust Plan (the subject "MALPRACTICE
10 TRUST"); 2) a "supplemental" Disability Equity Trust Plan (the subject "DISABILITY TRUST"); 3)
11 a Long Term Care Equity Trust Plan ("Long Term Care Trust"); 4) Family Public Charity/Xelan
12 Foundation Plans" the President of which was also Dr. Guess).

13 61. Dr. Guess told SELZNICK that Dr. Guess would counsel and advise SELZNICK
14 individually and specially, and that Dr. Guess took a personal and "special" interest in SELZNICK, high
15 earnings ability and his finances and that SELZNICK would not be counseled by the usual local
16 "financial counselor" in Las Vegas, Robert Bouchard.

17 62. Dr. Guess specifically advised SELZNICK that he should limit his communications to Dr.
18 Guess and rely on Dr. Guess's particular expertise in his financial planning matters.

19 63. Dr. Guess wooed and induced SELZNICK through his concerted sales pitches and
20 investment advice to invest well over \$300,000 per year, the bulk of his "extra" annual income, in an
21 alleged "419 multiple employer welfare benefits plan" to provide employee death and severance benefits.

22 64. SELZNICK was assured the Xelan's "unusual" program was innovative and supported
23 by relevant professionals including "X"-IRS tax attorneys, law firms and attorneys who would provide
24 him with detailed legal opinion letters about each plans or trust. Dr. Guess stressed SELZNICK's need
25 that he conduct his medical services through a new C-Corporation which would join XELAN to
26 "prevent[] losses of earnings to unnecessary income taxes, inappropriate financial structures and
27 inappropriate financial products."

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1 65. Upon information and belief, such lengthy legal “opinion” letters were provided to
2 SELZNICK and DOUBLE-R by, for instance, Pittsburgh Pennsylvania law firm *Williams & Coulson*
3 through Michael E. Lloyd in 1999 and 2001, or G. Thomas Roberts in 2000, involving or at the direction
4 of Dr. Guess, and Leslie S. Buck, MBA, “President, Xelan Ins. Co.”, and “Executive Vice President,
5 Xelan [XELAN],” Harrisburg Pennsylvania law firm *Eckert Seamans Cherin & Mellott, LLC*,

6 66. Dr. Guess explained “XELAN” liked to use off-shore institutions such as located in the
7 Cook Islands as “another level of protection”, assured SELZNICK all he would have to do is “write
8 checks to Xelan” and that Dr. Guess and XELAN would administer the “plan” for him.

9 67. Dr. Guess proposed that SELZNICK should even consider starting his own insurance
10 company offshore and serve as its CEO, Treasurer, Board of Directors.

11 68. Dr. Guess made the arrangements with XELAN general counsel and vice president to
12 assist in accomplishing the incorporation of SELZNICK according to Dr. Guess’s plan.

13 69. Trusting and relying on Dr. Guess’s financial expertise and counseling, SELZNICK
14 followed his instructions, advice and reassurances and completed the paperwork provided by him or at
15 his direction to effect the incorporation of his medical business as “DOUBLE-R.”

16 70. After completing said incorporation, Dr. Guess and XELAN arranged for DOUBLE-R to
17 become a participating employer-“member” of XELAN ASSOCIATION, —member number 15199.

18 71. First, XELAN arranged for DOUBLE-R to participate in a “supplemental malpractice
19 insurance policy on a group basis” in or about **December 1998** through XELAN and XELAN
20 ASSOCIATION, “for excess loss medical malpractice liabilities,” loss of revenue and expenses. The
21 Trust was represented to be a British Virgin Islands Trust that would own the master group policy issued
22 by XELAN INS. CO., and that at the end of seven years (end 2005) the policy could be “surrendered”,
23 depending on the claims made during that time, if any, and premiums would be refunded.

24 72. In 2003, however, SELZNICK received a supplemental certificate related to the
25 MALPRACTICE TRUST for the first time indicating investment management was through “The
26 Vanguard Group,” and that it was administered by “third party administrator” Doctors Insurance Services
27 Inc., in Tortola, British Virgin Islands and/or the Doctors Benefit Insurance Company Ltd., domiciled and
28 licensed in Barbados, W.I., but requiring contribution checks to be sent to XELAN ASSOCIATION.

1 73. Upon information and belief, DOUBLE-R paid a \$10,000.00 premium for the
2 “supplemental” malpractice insurance in or about **December 1998**, and received a Certificate of
3 malpractice Insurance, Number 1010 issued by XELAN INS. CO., approved by Leslie S. Buck, President
4 XELAN INS. CO., on or about December 31, 1998, that listed the MALPRACTICE TRUST as the policy
5 owner. Upon information and belief, DOUBLE-R continued to pay the \$4,000 annual premium,
6 including for 2000, 2001, and 2002, plus a \$650 and \$575 “administration fee” in each of August 2001,
7 and September 2002 .

8 74. On or about **May 28, 1999**, Dr. Guess provided SELZNICK with a list of Xelan’s
9 continued development of programs, services, products, and solicited SELZNICK to attend a “Xelan
10 Planning Conference in San Diego July 1999 to promote Xelan’s Public Charity/Xelan Foundation
11 program.” Dr. Guess represented that the “Xelan Foundation program” had created enormous
12 opportunity to perpetually multiply doctors’ assets to support charitable, educational and professional
13 organizations. It touts the alleged “sophistication and *integrated nature* of the Xelan programs, service
14 and products and ultimate benefits they create.” Assuring Plaintiff that any “initial uncertainty” would
15 be “replaced, over time, with great appreciation for the elegance of the Xelan Program and the
16 significance of the end results,” Dr. Guess’s materials assured SELZNICK that “once a doctor begins the
17 Xelan journey, the results are guaranteed.”

18 75. Dr. Guess continued to court SELZNICK to contribute even more funds for
19 “supplemental” disability income coverage, but urged and convinced SELZNICK not to obtain “own
20 occupation” disability coverage unless he went through Dr. Guess.

21 76. In or about **June 1999**, Dr. Guess convinced SELZNICK and DOUBLE-R to participate
22 in the “DISABILITY TRUST” —represented to be a Canadian Trust holding a group long term disability
23 policy also issued by the XELAN INS. CO., which company held itself out to be a “fully licensed and
24 accredited life and disability insurance company domiciled in British Virgin Islands.”

25 77. Plaintiffs are informed and believe and thereon alleges that the DISABILITY TRUST
26 offers only “supplemental” disability coverage with a partial return of premium benefit after insurance
27 coverage has been in force for seven (7) years, and in **June 1999**, DOUBLE-R applied to PAN-AM LIFE
28 INS. CO. through agent Dr. Daniel L. Orr, II, DDS, MS, Ph.D., J.D., of Las Vegas NV, paid the first

1 annual premium of \$4,128, and policy number 0013120830 was issued on or about **September 15, 1999**
2 naming the policy "owner" the DISABILITY TRUST, "administered" by "Trustee" "Euro American
3 Trust Company." DOUBLE-R paid a \$1,250 'Set up fee' and committed to a \$650-'annual
4 administration fee' plus an annual investment advisory and custodian fee of 1.2 % to participate in this
5 Xelan product.

6 78. On **December 17, 1999**, DOUBLE-R paid an additional \$10,000 to Xelan, related to the
7 "DISABILITY TRUST."

8 79. DISABILITY TRUST was represented by Xelan to be, since 1995, "an Association *Group*
9 *Insurance Trust* organized under Canadian law" and designated Royal Trust Corporation of Canada as
10 Trustee. Upon information and belief, the "Trust" was purported to be "A New Approach to Disability
11 Insurance and Savings" and to exist for the purpose of making available a group insurance plan providing
12 disability income protection to corporate members of XELAN ASSOCIATION.

13 80. Participation in Xelan's "proprietary" DISABILITY TRUST required DOUBLE-R commit
14 to contribute **between \$4000 to \$10,000 annually**, payable to the Royal Bank of Canada for the first
15 seven years, in addition to paying a \$1900 set up fee. Xelan promised that premiums would be invested
16 by the insurance company in segregated accounts at a major US-based institutional trust company or an
17 institutional discount brokerage firm, and that the Trust had a "Return of Premium feature", unless the
18 premium amount was not paid each year for seven years. DOUBLE-R paid XELAN ASSOCIATION
19 the \$4000 premium each December of 2000, 2001, 2002.

20 81. Through the "Return of Premium" feature, "insureds who participate in the DISABILITY
21 TRUST for at least 7 years and who do not have any claim also may receive substantial savings benefits
22 over and above other disability income programs." Xelan's literature expressly promised to provide
23 Plaintiffs with periodic statements from the custodian stating the exact value in this account.

24 82. DOUBLE-R and its plan, DOUBLE-R EBP, received a Certificate of Insurance, made
25 effective **December 31, 1999**, from "XELAN INS. CO.": 1) Certificate No. 1010 from XELAN
26 MALPRACTICE *Trust*; 2) Certificate No. 1751 from the DISABILITY TRUST' under Royal Trust
27 Corp. of Canada, Toronto, Canada, Trustee.

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1 83. As an employer-“member” of XELAN ASSOCIATION, DOUBLE-R was solicited to
2 participate in the XELAN WBT “§ 419” plan to provide welfare benefits to DOUBLE-R’s employees,
3 which included SELZNICK and two other employees including ROWLAND.

4 84. In April 1999, Xelan’s Dr. Guess convinced SELZNICK to cancel and replace his
5 existing Northwestwestern Mutual Life Insurance policy and instead place \$300,000 per year of his
6 “surplus” income for five years into Xelan’s “structure” by using the C-corporation’s revenue stream for
7 funding, and that XELAN would “handle the tax reduction, income protection, investment management,
8 asset protection and value system endowment issues”. The Xelan “structure” to which Dr. Guess
9 referred was a life insurance policy with INDIANAPOLIS LIFE that would insure SELZNICK in the
10 face amount of \$10,000,000.

11 85. Life insurance was extremely important to SELZNICK, who was a physician and dental
12 surgeon constantly exposed to body fluids in the practice of oral surgery, had previously in or about 1996,
13 been diagnosed as “HIV positive,” *although this finding was later determined to be “falsely positive”*
14 *and SELZNICK was not HIV positive.* SELZNICK attaches and at all times herein alleged attached
15 significant importance to the need to maintain excellent life insurance coverage.

16 86. Through July 1999 Dr. Guess and XELAN INC. explained that the life insurance policy
17 was a main feature of the XELAN WBT, and represented the XELAN WBT to be a “multiple employer
18 welfare trust” under IRC § 419A(f)(6) and a “welfare benefit fund” under IRC § 419(e)(1). Plaintiffs
19 were told the “Trustee” of the XELAN WBT was Dr. Guess.

20 87. Plaintiffs thereafter received thirteen (13) pages of INDIANAPOLIS LIFE application
21 forms for life insurance coverage.

22 88. At no time in 1998 or through 2003 did “Trustee” Dr. Guess reveal to SELZNICK that he
23 was an agent for INDIANAPOLIS LIFE or that he would make enormous commissions on policies he
24 caused to be sold.

25 89. Defendants at all times represented that the C-Corporation DOUBLE-R’s contributions
26 to the “Xelan 419 Plan” to provide employee benefits to its employees was allowed and legal, that
27 DOUBLE-R’s contributions to employee benefit trusts were fully deductible to DOUBLE-R, and that
28 the program, the favorable tax treatment under a “419 plan,” and the legal accumulation of a huge future

1 cash value, would provide SELZNICK with the life insurance needed and would allow SELZNICK to
2 “retire beyond your dreams.” The XELAN defendants and Dr. Guess told Plaintiffs they had nothing
3 to worry about with respect to the non-taxability representations made to Plaintiffs, and that if the IRS
4 raised any taxation questions or instituted an audit, that Plaintiffs were to *immediately* report to Dr. Guess
5 and to make Xelan’s lawyers aware of it so they could “handle it.”

6 90. Dr Guess assured Plaintiffs and led them to believe that the proposed life insurance policy
7 was a front end loaded springing cash value policy, bolstered the credibility of the program by
8 emphasizing that thousands of doctors were participating in the XELAN WBT.

9 91. Dr. Guess and Xelan assured Plaintiffs, repeatedly, that funding of the life insurance
10 contract would be complete on and after the fifth policy year, and that after the proposed corporation -to-
11 be, DOUBLE-R had paid five years of premium contributions totaling \$1,405,000.00, the policy would
12 *self fund* the sixth year’s \$281,000 contribution, for a total of \$1,686,000.00 payments through the six
13 years, and would have sufficient earnings from the contributions and its cash value to complete the
14 funding of the policy.

15 92. Dr. Guess represented to Plaintiff that the policy funds would produce earnings of ten
16 percent and that once year five was funded, the policy would have sufficient earnings to fund itself
17 throughout the future years.

18 93. SELZNICK continued to trust and rely on the seemingly-expert financial investment
19 advice of Dr. Guess and his XELAN structure of companies and on or about **August 2, 1999**,
20 SELZNICK, through DOUBLE-R, applied for a ten million dollar (\$10,000,000) INDIANAPOLIS LIFE
21 life insurance policy to insure its employee SELZNICK through XELAN WBT. In so doing, and in
22 reliance on Xelan’s representations and assurances, SELZNICK committed on or about **April 9, 1999**
23 to contribute \$300,000 in annual life insurance premiums each year for five years to insure himself, plus
24 pay \$2,500 in fees (including a \$1900 one-time set up fee; \$600 per year administration fee to fund the
25 life insurance program).

26 94. Defendants arranged the INDIANAPOLIS LIFE policy to be “owned” by “TRTE Xelan
27 Welfare Benefit Trust.”

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1 95. As alleged hereinabove, the Trustee of the XELAN WBT was Dr. Guess, also agent for
2 INDIANAPOLIS LIFE.

3 96. Plaintiffs received an "Expected Contribution Schedule" for DOUBLE-R's funding
4 agreement for \$300,000 per year which "will fund the life insurance costs and provide projected funding
5 for the accrued severance benefits." The "Schedule" form lists annual premium funding of \$281,000
6 for the first five years, but nothing for years six (6) through fifteen (15).

7 97. Upon information and belief, "Maximum Monthly Expense Charges" of \$23,400 per
8 month (or \$280,800 in expense charges for the first year), and thereafter, \$11,700 per month (or a total
9 of \$280,800 for the next two years), were paid as identified on a "Table of Surrender Charges."

10 98. Guaranteed cash and other values list the guaranteed cash value of the policy at \$271,400,
11 for year five, which is the nearly the amount to self-fund the sixth and final funding year, or \$382,800
12 at year six.

13 99. Upon information and belief, INDIANAPOLIS LIFE issued life insurance policy number
14 000 1000 55098 on or about **September 29, 1999**, in the face amount of ten million dollars (\$10,000,000)
15 insuring SELZNICK, and on **September 30, 1999**, Xelan "congratulated" DOUBLE-R on the issuance
16 of the policy, but did not provide him with a copy, instead providing Plaintiffs with a form to set up a
17 "cash management account" into which DOUBLE-R would deposit its substantial payments.

18 100. On **November 23, 1999**, Xelan confirmed XELAN WBT's receipt of a partial payment
19 of \$93,660.66 toward the life insurance premium annual contribution for 1999, confirmed the annual
20 fixed 'commitment' of \$300,000 each year for five years, and on December 10, 1999, confirmed the
21 Trust's receipt of the remaining \$200,000.00 contribution for the life insurance policy for 1999.

22 101. XELAN WBT represented that INDIANAPOLIS LIFE policy 0001000 55098 carried a
23 "**guaranteed cash value**" at the end of 4 years to equal, for example: (a) of \$163,700.00 with \$1,040,000
24 in "surrender charges", —which Plaintiffs believe are shy of the \$1,124,000 in total premium payments
25 (\$281,000 x 4 years) by \$84,000; (b) or \$271,400 at five years, —less than one year's premium—
26 compared to \$1,405,000 in five years' premium contributions, *plus* \$281,000 in total "expense" charges",
27 *plus* \$2,400 for the initial year set up and administrative fee and \$2,400 in "administrative" fees over the
28 next four years. Plaintiff is therefore informed and believes and thereon alleges that the \$1,040,000.00

1 “surrender charge” plus the aforementioned fees totals \$1,325,900, —\$80,000 less than the premiums
2 paid over that period.

3 102. Upon information and belief, Plaintiffs received a beneficiary designation schedule, but
4 again, neither SELZNICK nor DOUBLE-R were given a copy of the life insurance policy, including from
5 the date of its issuance in September 1999 until in or about July 2003.

6 103. When SELZNICK finally obtained a copy of the policy in or after September mid 2003,
7 he found that it lists the number of years payable as “lifetime,” and that it was “owned” by “TRTE Xelan
8 Welfare Benefit Trust”. Upon information and belief, annual contributions of \$281,000, if paid each
9 year for 35 years, is \$10,000,000.

10 104. Upon information and belief, the next two years “expenses” —which total \$561,600—
11 exceed the listed four-year “cash value” of \$163,700 by nearly \$400,000, and exceeded the projected cash
12 value at year five by nearly \$300,000.

13 105. Plaintiffs were never advised that they would have no control over whether the policy
14 DOUBLE-R was paying for, insuring SELZICK, could unilaterally and without Plaintiffs’ authorization
15 be “surrendered” at any time without a return of all premiums.

16 106. On or about **December 29, 1999**, and without prior notice or participant in the decision
17 by Plaintiffs, Xelan’s XELAN WBT unilaterally amended the Xelan “§ 419” WBTrust and Summary
18 Plan Description, effective retroactively to January 1999.

19 107. Xelan provided Plaintiffs with a document alleged to be the XELAN WBT “Summary
20 Plan Description” (SPD), which contained reference to the life insurance “death benefits” program at
21 page 4 through 5. Plaintiffs are informed and believe and based thereon allege that the alleged SPD did
22 not contain a description of the life insurance policy provisions that were “sufficiently comprehensive
23 to apprise the plan’s participants and beneficiaries of their rights and obligations” under that aspect of the
24 plan in violation of the Department of Labor Regulations, 29 C.F.R. § 2520.102-2(a), and that it also
25 violated subdivision (b) requirements of, among other, that “[t]he format of the summary plan description
26 must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries.
27 . . . The advantages and disadvantages of the plan shall be presented without either exaggerating the
28 benefits or minimizing the limitations.”

1 108. The SPD states the XELAN WBT is administered by the XELAN WBT, and confirms Dr.
2 Guess is the "Trustee".

3 109. On or about **November 13, 2000**, DOUBLE-R contributed \$300,000 to XELAN WBT
4 for the annual year 2000 funding of the life insurance policy insuring SELZNICK, paid \$100,000 in mid
5 September 2001, \$115,000 in late December 2001, \$73,500 in March 2002, \$100,000 in May 2002, and
6 \$150,000 on July 1, 2002.

7 110. In **2001**, DOUBLE-R also obtained through XELAN WBT and Dr. Guess,
8 INDIANAPOLIS LIFE insurance policies insuring the lives of employees, Leanne Wright, *Policy No.*
9 *B05009478*, in the face amount of \$433,500; Rosanna Hernandez, and ROWLAND, *Policy Number*
10 *B05009477* in the face amount of \$450,300.

11 111. Upon information and belief, DOUBLE-R paid **\$10,038** in premiums (of \$5,014 per year
12 in each of June 2001 and June 2002) for employee Wright, **\$8,808.00** in premiums (of \$2,936.00 each
13 June of 2001 and 2002, and January 2003) for employee ROWLAND, and in excess of \$2000 per year
14 for two years for employee Hernandez.

15 112. Defendants again solicited Plaintiffs on or before **end December 2000** to participate in
16 another of its "group insurance trusts" for XELAN ASSOCIATION members such as DOUBLE-R,
17 —the "Xelan Long Term Care Equity Trust." Upon information and belief, Plaintiffs' received for the
18 information indicating the "Trust" was being administered by the "Doctors Benefit Insurance Company,
19 Ltd, also located in Tortola, BVI, by committing to a significant amount of **premium of \$40,000.00**, and
20 continued contributions year each of seven (7) years . Upon information and belief, payment of \$40,000
21 each of 7 years is a total contribution of \$280,000. Long term care Certificate of Insurance 1102 was
22 issued by "Doctors Benefit Ins. Co., Ltd, Policy number 0013120830, effective December 31, 2000, to
23 owner *Xelan Long Term Care Equity Trust*, insuring SELZNICK. Upon information and belief, the
24 Trustee of the *Xelan Long Term Care Equity Trust* is the "AMS Trust Co." located in Tortola, BVI.
25 Plaintiffs honored the contract and paid the \$4,000 premium for 2001 and 2002.

26 113. On or about **November 21, 2002**, Dr. Guess provided a "\$419 Plan Tax Update" to all
27 "Xelan Financial Counselors" and "Xelan 419 Plan participants" advising that the IRS had audited 10
28 employer participants in the plan, one of which had resolved with no change to the tax return, and arguing

1 proposed IRS regulations of July 2002 “are contrary to court cases” but that “if finalized” the “419”
2 XELAN WBT plan would need amendment or termination.

3 114. On or about March 11, 2003, Dr. Guess assured Plaintiff that “for the past 32 years all of
4 us at xelan have been committed to the task of helping our doctor members maximize the efficiency,
5 control, and safety of their financial structures.”

6 115. One month later, Defendants issued an **April 11, 2003** “Memo” to “*Xelan* Financial
7 Counselors” and “Xelan 419 Plan Participants” claiming IRS regulations had “changed dramatically”
8 as a result of revisions several times between 2000 and 2002, and on or about **May 12, 2003**, XELAN
9 ASSOCIATION through Dr. Guess invited Plaintiff to join “friends of *Xelan*” and XELAN
10 ASSOCIATION by attending a “Doctor’s Capital Distribution Planning Conference” on July 12, 2003
11 at the U.S. Grant Hotel. Upon information and belief, the meeting was meant for Xelan and its agents.

12 116. Plaintiff responded by complaining to Dr. Orr and Dr. Guess that Plaintiff had received
13 no statements to reflect the huge amounts of money DOUBLE-R had paid, or reflecting the policy cash
14 value. Dr. Guess continuously reassured Plaintiff, “that would all become apparent” but still would not
15 provide Plaintiffs with a copy of the policy.

16 117. Without prior warning, communications or other notice to Plaintiffs, XELAN WBT,
17 through Dr. Guess, issued a letter to Plaintiffs dated **May 29, 2003**, representing for the first time that
18 the “Xelan 419 Welfare Benefit Trust” had been terminated, effective the prior day, May 28, 2003,

19 118. Plaintiff was given 30 days from the date of the letter to pay XELAN WBT \$160,212.37
20 which it alleged was the policy ‘cash value’ on or before June 28, 2003, to “purchase” the \$10,000,000
21 INDIANAPOLIS LIFE Policy No. 10055098. Then to date, DOUBLE-R had already contributed
22 approximately \$1,200,000.00. Defendants stated Plaintiffs had to “transfer” “ownership” from XELAN
23 WBT to Plaintiffs.

24 119. On or about **June 15, 2003**, Plaintiffs and co-signatory Dr. Guess on behalf of XELAN
25 WBT signed Xelan’s Transfer of Ownership to Policy B05009477 naming The Selznick Family Trust
26 as beneficiary. Upon information and belief, the transfer was recorded on July 22, 2003, and a August
27 23, 3004 letter from XELAN WBT confirmed receipt of \$160,232 from Plaintiff to “purchase” the life
28 insurance policy held in the XELAN WBT. XELAN WBT notified Plaintiffs that they would receive the

1 “insurance policy” and a “terminal distribution” of \$160,212 within 30 days.

2 120. Similarly, DOUBLE-R and ROWLAND were given 30 days to purchase her policy and
3 complete a new beneficiary designation, and on or about **June 25, 2003**, ROWLAND signed a
4 “Beneficiary and Settlement Designation” regarding her policy B05009477.

5 121. By letter of **September 12, 2003**, Dr. Guess notified Plaintiffs that the XELAN WBT
6 attorney and XELAN WBT had processed Plaintiffs’ “purchase” of the DOUBLE-R life insurance policy,
7 insuring SELZNICK, enclosed a “*terminal distribution payment*” in the amount of the alleged “accrued
8 benefits” of \$160,885.18, using on a “formula that applies to all participants in the trust” and confirmed
9 the policy, using the same policy number, was now an individual policy for which the insurer
10 INDIANAPOLIS LIFE would bill Plaintiff directly for the remaining premium due.

11 122. SELZNICK paid, on force of loss of the policy, the \$160,212 to “purchase” it as a whole
12 life policy. ROWLAND was similarly forced to pay money to purchase her policy.

13 123. At no time prior to XELAN WBT’s notice of life policy “surrender” to SELZNICK and
14 employees of DOUBLE-R did Plaintiffs submit a request to surrender or authorize XELAN WBT to
15 surrender, terminate, cancel or rescind the policies that insured their lives.

16 124. At no time prior to Plaintiff’s receipt of the unexpected letter dated **May 29, 2003** as
17 alleged hereinabove did XELAN WBT ever notify or warn Plaintiffs of any risk or issue related to his
18 life insurance policy or any loss of the substantial premiums Plaintiffs paid then to date to insure himself.

19 125. When Plaintiffs were required to “transfer ownership” of the policy from XELAN WBT
20 to Plaintiffs as individuals, neither XELAN WBT or Dr. Guess, nor INDIANAPOLIS LIFE informed
21 Plaintiffs whether commissions would be made on the “sale” and “purchase” of the policy to whom or
22 in what amount those commissions would be.

23 126. Upon information and belief, INDIANAPOLIS LIFE paid enormous commissions to Dr.
24 Guess and/or his XELAN structure for the sale of Plaintiffs’ policies in 1999 and again in 2003.

25 127. In **September 2003**, after INDIANAPOLIS LIFE notified SELZNICK of his continued
26 obligation to pay the same \$281,000 annual premium, and that approximately \$70,000 was due by
27 September 29, 2003 for the then-current year of 2003, Plaintiff contacted Dr. Guess by telephone about
28 the \$281,000 premium he allegedly owed, was assured, “don’t worry,” that the insurance company would

1 advance the money and all Plaintiff had to pay was "\$27,000." Plaintiff complained that the lack of cash
2 value in the policy was not what was promised, and was again assured by Dr. Guess to 'not worry'
3 because by age 65, there would be seven million dollars (\$7,000,000) in the plan on which SELZNICK
4 could draw \$350,000.00 per year on which to retire, and which amount Plaintiff would never have to pay
5 back because it is life insurance.

6 128. The assistant for Dr. Guess, Trish DeLaTorre, first instructed SELZNICK all he had to pay
7 was \$25,000.

8 129. When, within two weeks of De La Torre's instructions, SELZNICK paid nothing, De La
9 Torre instructed him to pay just \$10,000.

10 130. When SELZNICK had sent no payment, De La Torre advised SELZNICK he need not pay
11 anything and suggested SELZNICK could have a "loan within the policy" against the future cash value
12 against which Plaintiff would borrow approximately eighty percent, but the remainder would 'pay the
13 premium'. SELZNICK did not obtain any forms for such authorization, and did not authorize De La
14 Torre or Dr. Guess to make arrangements for policy loans.

15 131. However, on or about **September 29, 2003**, INDIANAPOLIS LIFE documented receipt
16 of \$281,000, in payment of the premium on SELZNICK's policy, and in **November 21, 2003**
17 SELZNICK received a letter from Xelan Banking Services located in San Diego, Lewis D. Guess, L.
18 Donald Guess "Trustee," that attached an "annual report from 9/29/02 - 9/29/03." Said "annual report"
19 listed receipt on 9/29/03 of the \$281,000 premium, less \$8,513 in "risk premiums," less \$16,800 in "rider
20 and expense charges," a credit of \$43,385 interest, a "guaranteed cash value of \$163,700 and thus
21 surrender value" of \$163,700," but warning, "if you do not pay your premium as scheduled, the options
22 on lapse provision of the policy will apply."

23 132. Upon information and belief, Dr. Guess, on his own, and/or on behalf of XELAN,
24 PYRAMIDAL FUNDING and INDIANAPOLIS LIFE, without Plaintiff's authority, "authorized"
25 payment of the amount due from Plaintiff's policy.

26 133. When SELZNICK finally received a copy of the policy in or after September 2003, he was
27 advised by INDIANAPOLIS LIFE that Dr. Guess was actually the registered insurance agent with
28 INDIANAPOLIS LIFE. Plaintiff was never advised of this fact by XELAN WBT or Dr. Guess, or by

1 INDIANAPOLIS LIFE, or any other person connected with these individuals or entities at any time
2 during the transactions at issue related to the XELAN WBT or Plaintiff's purchase of the policy.

3 134. The copy of INDIANAPOLIS LIFE policy 000100055098 issued **September 29, 1999**
4 insuring SELZNICK, that Plaintiffs first received in or after September 2003, defines "Cash Surrender"
5 at 6.4 as:

6 "You may surrender this policy for its Surrender Value. Upon surrender, this policy will
7 terminate and the Surrender Value will be paid to you in one (1) sum. Surrender will be
8 effective on the date we have received both this policy and a written surrender request on
9 a form acceptable to us. We reserve the right to defer payment for not more than the six
10 (6) months from the date of surrender. . ."

11 135. The copy of the INDIANAPOLIS LIFE policy 000100055098 that SELZNICK first
12 received in or after September 2003, states it was issued on **September 29, 1999** insuring SELZNICK,
13 defines "Surrender charge" at 6.5 as:

14 "If the policy is surrendered during the first nine (9) years, a Surrender Charge will be
15 deducted from the Accumulation Value. Surrender Charges are shown on Page Three.
16 Your policy will terminate on the monthly deduction day on or next following the date we
17 receive your written request for full surrender in our Home Office."

18 136. The copy of the INDIANAPOLIS LIFE policy 000100055098 issued **September 29, 1999**
19 insuring SELZNICK, that Plaintiffs first received in or after September 2003 states under 7.2, Transfer
20 of Ownership" that:

21 "you may transfer the Ownership of this policy on forms provided by us. The written
22 evidence of transfer must be recorded by us at our Home Office. The transfer will then
23 be effective as of the date it was signed. We may require the return of the policy for
24 endorsement. The transfer is subject to any payment made or other action taken by us
25 before we received your written request in our Home Office."

26 137. Plaintiffs were unaware of, and Defendants at all times concealed that XELAN WBT
27 through INDIANAPOLIS LIFE reserved the unilateral right in XELAN WBT to surrender, terminate or
28 transfer the policy insuring Plaintiffs at any time, and that the policy it did not condition such surrender,
termination or transfer of the policy to any entity on notice, authorization or consent of the insureds under
the policy.

1 138. Upon information and belief, on or about **October 14, 2003**, Plaintiffs were provided for
2 the first time a "First Amendment to the X415 WBT," which had been adopted effective December 1,
3 1997, and which was amended and restated effective January 1, 2000, and amended again March 25,
4 2002 and made effective January 1, 2002

5 139. Upon information and belief, on **October 18, 2003**, Plaintiffs were provided for the first
6 time with a Trust document for the XELAN WBT (for death and severance benefits) dated December 1,
7 1997, amended and restated May 19, 2000, and signed by Dr. Guess December 31, 2000.

8 140. On **January 30, 2004**, SELZNICK received a statement requesting he pay the quarterly
9 \$70,250.00 premium for the life policy by 12/29/03, on a "Whole Life Insurance Special Offer to Avoid
10 Policy Lapse."

11 141. On or about **February 3, 2004**, SELZNICK received a letter from INDIANAPOLIS LIFE
12 Client Service Department bearing the date **January 27, 2004**, enclosing a "Minimum Deposit
13 Illustration" and confirming it was INDIANAPOLIS LIFE's "understanding" SELZNICK "wish[ed] to
14 utilize the Minimum Deposit provision to pay the September 29, 2003 quarterly premium" and requested
15 him to complete "the enclosed loan form" within 10 days, after which INDIANAPOLIS LIFE would
16 "process your request and pay the SEPTEMBER quarterly premium." The attached Ledger listed the
17 "Net Premium Outlay" as \$218,000 for each year 1, 2, 3, 4 and \$27,6078 for year 5. It also listed a
18 schedule for Gross Premium Outlay of \$281,000 each year from year 5 through 10, and the increasing
19 "Loan Balance" projection of \$382,548 by year 10.

20 142. INDIANAPOLIS LIFE "cc'd" the February 3, 2004 letter to "PY000/PY003" which
21 Plaintiffs are informed and believe and based thereon allege refers to PYRAMIDAL FUNDING, from
22 which Plaintiff is informed and believes Dr. Guess also operates.

23 143. SELZNICK had never made any request for information about Minimum Deposit
24 provision, did not sign the payment authorization, and had never communicated to INDIANAPOLIS
25 LIFE any wishes or instructions related to taking loans against his policy or to utilize its "Minimum
26 Deposit provision."

27 144. On or about **February 9, 2004**, Plaintiff received a similar notice of \$2,936 annual
28 premium due on the life policy related to BRANDY ROWLAND.

1 145. SELZNICK made no payments, but on or about February 25, 2004, SELZNICK received
2 a letter dated **February 19, 2004** from INDIANAPOLIS LIFE on his individual policy, again "cc'd" to,
3 "PY000/PY003 Pyramidal Funding Systems Inc., Lewis D. Guess, L. Donald Guess Trte," advising
4 SELZNICK that his, "life insurance coverage is now paid to March 29, 2004 because the premium has
5 been paid by the Automatic Premium Loan Provision" which is alleged to "state[] that if the premium
6 is paid within 31 days of the due date, a loan will be taken against the cash value of the policy in order
7 to pay the premium." INDIANAPOLIS LIFE also advised SELZNICK that he had a "PREMIUM LOAN
8 AMOUNT" of \$70,250 and a "NEW LOAN PRINCIPAL" of \$149,838 at a 7.11% "LOAN INTEREST
9 RATE."

10 146. The **February 19, 2004**, letter from INDIANAPOLIS LIFE, "cc'd" to Dr. Guess of
11 "PY000/PY003 Pyramidal Funding Systems Inc." listed the "next premium due" date as March 29, 2004.

12 147. Upon information and belief, at or about the filing of this Complaint, the policy "cash
13 value" is approximately \$55,000, soon to be "0".

14 148. On or about early **May 2004**, SELZNICK contacted INDIANAPOLIS LIFE, asking for
15 a new schedule related to his policy and was informed that on April 22, 2004 "your insurance agent, Dr.
16 Guess, requested information regarding converting this one particular policy." SELZNICK informed
17 INDIANAPOLIS LIFE this was the first he had heard about this in any manner and that it was not
18 something he requested, and demanded that since this was *his, SELZNICK's policy*, INDIANAPOLIS
19 LIFE send him copies of the identical paperwork it already had sent to Dr. Guess. SELZNICK received
20 the paperwork on or about May 11, 2004, and found a proposed "Conversion" "exchange" of
21 SELZNICK's policy, neither requested or authorized by SELZNICK, and showing a net cash value of
22 "0" at age 58.

23 149. Upon information and belief, in advising Plaintiffs, Defendants XELAN INC., XELAN
24 ASSOCIATION, XELAN WBT, Dr. Guess as Trustee and/or Dr. Guess individually, and
25 INDIANAPOLIS LIFE directly and indirectly, and acting in concert with others, engaged in acts and
26 practices, made numerous misrepresentations and omitted to state material facts to Plaintiffs at numerous
27 times, prior to DOUBLE-R creating its employee benefit plan, thereafter, and associated with and
28 following the "surrender" of Plaintiffs' policies and transfer to plaintiffs' individually, and continuing

1 thereafter, which operated to defraud and deceive or directly mislead Plaintiffs in that said acts were done
2 for the purpose of inducing SELZNICK to incorporate his business to contribute to the purchase the
3 Policies from INDIANAPOLIS LIFE, that would be owned not by DOUBLE-R or SELZNICK but by
4 Xelan, and after beginning participation in the "419 Plan" to further induce SELZNICK and DOUBLE-R
5 to continue contributing huge sums in premiums and expenses and other fees to continue participation
6 in the "419 Plan", and continue contributions in the transferred policy on XELAN WBT's termination
7 and required "transfer of ownership".

8 150. Plaintiff refused to make further payments on the policies in which Plaintiffs were induced
9 to procure, including disability, malpractice and life which was supposed to be self-funding after year
10 five, due to fraud, misrepresentation, deception, and concealments by Defendants and Plaintiff's intent
11 to sue for rescission of and to unwind the transactions and for restoration to Plaintiffs of all amounts paid
12 to Defendants related to the policies.

13 151. Plaintiffs discovered the true state of affairs and by and through this Complaint, make and
14 made demands herein on Defendants to return the premiums and other expenses, commissions, and
15 amounts paid for the Policies. Notwithstanding the demands, Defendants have refused, and continue
16 to refuse, to return the gross premiums paid, expenses, fees, or any other amounts.

17 152. Plaintiffs are informed and believe and thereon allege that Defendants scammed and
18 duped Plaintiffs by utilizing a spiderweb of interrelated family of companies commonly referred to as
19 "XELAN," made misrepresentations to Plaintiffs with the intent that Plaintiff rely on and act on those
20 representations, which Plaintiffs did reasonably rely and act on those representations, and treated
21 Plaintiffs' policies as their own and in breach of their fiduciary duties to Plaintiffs. Upon information
22 and belief, Defendants knew or should have known that the representations made to Plaintiffs were
23 exaggerated, false or failed to disclose complete and accurate information. Had Plaintiffs known the true
24 facts and information about the representations made by Defendants, Plaintiffs would never have agreed
25 to become involved in the Xelan structure and contribute the sums contributed to the Xelan structure.

26 153. Upon information and belief, XELAN's founder and principal, Dr. Guess and his Xelan
27 structure and shell corporations, including its various subdivisions is a single enterprise and *alter ego*
28 entities, and that these entities are inseparably intertwined with and constitute *alter egos* of the other

1 XELAN Defendants named herein.

2 154. Upon information and belief, Dr. Guess and his Xelan structure used 'shell game'-like
3 maneuvers to shift their fiduciary obligations by terminating the Xelan WBT and "surrendering"
4 Plaintiffs' policies forcing Plaintiffs to "purchase" their existing policies while channeling profits related
5 to Defendants' self-dealing to themselves or separate legal entities under their control and domination.
6 Plaintiffs seek such Order and request for disregard of the corporate boundaries where the above actions
7 are inconsistent with ERISA's remedial purposes.

8 155. Upon information and belief, there exists, and at all times herein mentioned, there existed,
9 a unity of interest and ownership between Dr. Guess and his various XELAN entities, and between and
10 among the various XELAN entities named as Defendants herein, such that any individuality and
11 separateness between them ceased to exist.

12 156. Upon information and belief, adherence to the fiction of the separate existence of Dr.
13 Guess and his Xelan entities, and between and among the Xelan structure, would permit an abuse of the
14 corporate privilege and would sanction fraud or promote injustice in this situation by shielding these
15 Defendants from responsibility and accountability for any violations of ERISA which they directed.

16 157. Upon information and belief, there exists and at all times herein mentioned existed, a
17 unity of interest and ownership between Dr. Guess and the components of his Xelan structure such that
18 no individuality or separateness exists between them, and they were a single enterprise or are alter egos.

19
20 **FIRST CLAIM FOR RELIEF**

21 **DECLARATORY RELIEF**

22 (Against Defendant XELAN WBT and its
23 sponsors XELAN ASSOCIATION, XELAN, INC., and Trustee, Dr. Guess)

24 158. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
25 paragraphs as though they were fully set forth herein.

26 159. Plaintiffs contend that the XELAN WBT 419 Plan does *not* meet the requirements of or
27 constitute a section 419 Plan under ERISA, is thus *not* a validly formed and operated multiple employer
28 "employee welfare benefit plan" under ERISA but is a series of individual benefits plans established for

1 the plaintiff employer by the defendant insurance producers to market group insurance products and
2 services.

3 160. Upon information and belief, the XELAN WBT and policies issued by XELAN INS. CO.
4 were under the control of XELAN founder, financial counselor and Trustee Dr. Guess. Upon information
5 and belief, XELAN became affiliated with the various employer plans at the behest and action of Dr.
6 Guess.

7 161. Upon information and belief, XELAN and/or its affiliates paid Dr. Guess a substantial sum
8 to take over administration of the plans.

9 162. Upon information and belief, XELAN and Dr Guess administered the "trust" in the 419
10 plan with the intention of looting the assets of the employers directly or indirectly by creating a
11 mandatory termination event for all plan employers such as DOUBLE-R.

12 163. XELAN and/or its affiliates are in the business of operating a purported § 419(A)(f)(6)
13 arrangement funded with life insurance policies (XELAN WBT).

14 164. Xelan and/or it affiliates and agents, including Dr. Guess, directly or indirectly and secretly
15 received large insurance commissions when insurance policies are placed in the Xelan 419 Plan, which
16 should have been disclosed to Plaintiffs.

17 165. Upon information and belief, XELAN, its administrators, Dr. Guess and the insurance
18 companies are on notice that the XELAN WBT does not comply with section 419 A(f)(6) under said
19 Proposed Regulations or under Private Letter Ruling 200127047.

20 166. Moreover, upon information and belief, XELAN, its administration including Dr. Guess
21 were or should have been on notice that under the Tax Court decisions of *Grant-Jacoby, Inc. v.*
22 *Commissioner*, 73 T.C. 700 (1980), *Wellons v. Comm.*, 31 F.3d 569 (7th Cir. 1994), aff'g 64 T.C.M. 1499
23 (1992), IRS Notice 95-34, 1995-23 I.R.B. 1 (Release Date May 18, 1995), William B. Lynch, Severance
24 Pay Section 419A Plans, Sept. 1994 (F.O. No. 22-4282), *Booth v. Comm.*, 108 T.C. No. 25 (1997)
25 (issued 6/17/97), and *Neonatology Assoc, P.C. v. Comm.*, 115 T.C. 43 (2000) aff'd 293 F.3d 128 (3d Cir.
26 2002), that the XELAN WBT is not a welfare benefit Plan for tax purposes because it is designed to
27 discriminate against participation of non-owner employees and serves no valid welfare purpose.

28 167. Upon information and belief, Dr. Guess and XELAN knew or should have known that the

1 few case law selections for discussion and disclosure to Plaintiffs through representations about to
2 Plaintiffs were selectively incomplete among other pertinent case opinions and in the discussion of the
3 case themselves, concealed or purposefully limited the scope of discussion of relevant legal issues and
4 distinguishing facts and were prepared with a smoke-and-mirror purpose of impressing Plaintiffs with
5 complexity, and completeness, inducing Plaintiffs' reliance on Defendants' explanation for which
6 Plaintiffs paid.

7 168. Upon information and belief, participating employers, such as DOUBLE-R, did not
8 participate in the overall administration of the "419 Plan" established by XELAN, which established the
9 plan and controlled its global operation. While DOUBLE-R created a valid single-employer employee
10 benefits plan for its employees, including SELZNICK, upon information and belief, the XELAN WBT
11 itself is not a valid multiple employer benefit plan and therefore it and its agents are subject to and
12 governed by traditional state law.

13 169. Upon information and belief, the XELAN WBT is not a bona fide association of
14 employers brought together by a common economic representation interest unrelated to the provision of
15 benefits.

16 170. Upon information and belief, the participating employer members did not exercise control
17 in form and substance over the plan, but that XELAN WBT plan and its Trustee and employees exercise
18 control over the plan and retained the full power and authority to unilaterally amend, as it pleased, the
19 plan documents and SPD, without approval or input by participating employer member sponsors of their
20 own plans offered to their individual employees.

21 171. Upon information and belief, XELAN established "XELAN WBT" for the marketing of
22 insurance products and/or services such as products of INDIANAPOLIS LIFE policies and is thus not
23 considered a multiple employer "employee welfare benefit plan" under ERISA.

24 172. Plaintiffs therefore allege that the misrepresentation claims alleged herein, with respect
25 to defendants' pre-plan misrepresentations and concealments, made to induce plaintiffs to purchase life
26 and other insurance so that Defendants' would earn substantial sums in commissions from the insurance
27 sales, and other amounts, are pre-plan misrepresentations that are governed by traditional state law and
28 are not preempted by ERISA.

1 173. Plaintiffs further allege that the misrepresentation claims alleged herein, with respect to
2 defendants' continued post-plan misrepresentations and concealments after DOUBLE-R became a
3 "member" of XELAN ASSOCIATION and a participating employer in the 419 plan, are nevertheless not
4 preempted by ERISA since the 419 Plan did not meet the requirements of a valid multiple employer
5 "employee welfare benefit plan" and are thus misrepresentations that are governed by traditional state
6 law and are not preempted by ERISA.

7 174. Upon information and belief, it is expected that Defendants will contend that the XELAN
8 WBT "419" Plan meets all of the requirements of and constitutes a section 419 Plan under ERISA and
9 thus is governed by ERISA including 29 U.S.C. § 1144, ERISA § 514, preemption, and that is not subject
10 to state law or state law causes of action.

11 175. Upon information and belief, an actual controversy has arisen and now exists between
12 Plaintiffs and Defendants concerning the nature of the XELAN WBT 419 Plan and concerning their
13 respective rights, duties and remedies under the Policies at issue in this lawsuit.

14 176. Plaintiffs desire a judicial determination as to the nature of the XELAN WBT and whether
15 it is subject only to ERISA, or subject to all applicable state laws and state causes of action.

16
17 **SECOND CLAIM FOR RELIEF**

18 **RESCISSION OF AND UNWINDING OF THE TRANSACTIONS**
19 **AND RESTORATION OF ALL AMOUNTS PAID BY PLAINTIFFS TO DEFENDANTS**

20 ERISA § 502(a)(3); 502(a)(2) for appropriate relief under § 409
21 (Against the Fiduciary Defendants, the XELAN Defendants, the Plan Trustees)

22 alternatively

23 pursuant to state law, Ins. C. §§ 331, 338, 359, Civ.C. § 1689(b)(7)
24 (Against Dr. Guess, PYRAMIDAL FUNDING, the XELAN Defendants, the Insurer Defendants)

25 177. Plaintiffs incorporate herein by reference the paragraphs alleged in this Complaint as
26 though they were fully set forth herein.

27 178. ERISA prohibits certain transactions between ERISA plans and their parties in interest.
28 Parties in interest are defined by ERISA 3(15), 29 U.S.C. 1002(14).

///

1 179. "Fiduciaries" are parties in interest; and persons providing services to the plan, including
2 insurance companies, are parties in interest.

3 180. ERISA prohibits fiduciary self-dealing including acting in any transaction involving the
4 plan on behalf of a party, or represent a party, whose interests are adverse to the interests of the plan, or
5 its participants or beneficiaries.

6 181. Services to the plan can be the lending of money or other extension of credit, the
7 furnishing of goods, services or facilities and the transfer to, or use by or for the benefit of, a party in
8 interest, any assets of the plan, whether such transactions are "directly" or "indirectly" of the foregoing
9 type.

10 182. Dr. Guess is not only the Trustee and fiduciary of XELAN WBT, but an agent for
11 INDIANAPOLIS LIFE and a party in interest under ERISA.

12 183. Upon information and belief, the Defendants, breached fiduciary duties and/or the
13 Fiduciary Defendants and parties in interest engaged in prohibited transactions and dealt with the assets
14 of Plaintiffs for their own benefit and failed to comply with the requirements of Prohibited Transaction
15 Class Exemption 77-9.

16 184. Federal regulations under 29 U.S.C. § 1108 impose additional disclosure requirements on
17 parties in interest who are insurance agents.

18 185. Prohibited Transaction Class Exemption 77-9, 49 Fed. Reg. 13209 (1984), reprinted in
19 Pension Plan Guide, P 16,607 (CCH 1984), §§ III, V(b), makes it a prohibited transaction to sell
20 insurance to a plan without proper disclosure of the commissions, and in the required format.

21 186. Dr. Guess was Trustee of the XELAN WBT as well as the insurance agent acting on
22 behalf of the insurance companies selling the product to the participating employer's (DOUBLE-R)
23 benefits plan (DOUBLE-R EBP), to insure its employees, SELZNICK, ROWLAND, Leanne Wright and
24 Rosanna Hernandez.

25 187. Defendants failed to provide the following information to Plaintiffs prior to the execution
26 of the subject transactions:

- 27 (a) Sales commission for the first year and each of the succeeding renewal years or
28 surrender and transfer year, and each renewal year thereafter, that would be paid by the

1 insurance company to each agent or broker who received a commission in connection with
2 the purchase of any and all of the recommended Policies; and

3 (b) A description of the charges, fees, discounts, penalties or adjustments which may
4 be imposed under the recommended contract in connection with the purchase, holding,
5 exchange, termination or sale of the subject contracts.

6 (c) all commissions, fees or other benefits obtained by any of the defendants for the
7 “transfer of ownership” of the life insurance policies from XELAN WBT to Plaintiffs in
8 2003.

9 (d) accurate information related to all payments related to the policies and all earnings
10 that the policy funds paid by Plaintiffs would yield, the risks of loss and expenses that may
11 affect that yield, and which inaccurate information subjected Plaintiffs to commitments
12 of annual contributions in excess of the maximum five year commitment with policy self-
13 funding thereafter.

14 (e) Furthermore, Defendants failed to require Plaintiff DOUBLE-R to acknowledge
15 in writing receipt of the above-described information prior to the transaction as required
16 to maintain the Prohibited Transaction Class Exemption.

17 188. Defendants thereby deprived Plaintiffs of the ability to make realistic informed decision
18 making related to the life insurance policies. Had Plaintiffs been informed of the true state of events,
19 Plaintiffs would have elected other individual life insurance vehicles and investment opportunities for
20 the Plaintiffs’ earnings.

21 189. Defendants’ XELAN and Dr. Guess’s representations about the propriety of the alleged
22 419 Plan as a valid and legitimate multiple employer “employee welfare benefit plan” were incomplete,
23 and either intentionally or negligently and carelessly, and in violation of the statutory fiduciary duties
24 under ERISA § 404(a), failed to inform Plaintiffs of pertinent case law and the risk of violating
25 provisions of the Internal Revenue Code, and misled Plaintiffs to Defendants’ self interest and financial
26 advantage.

27 190. Defendants representations related to Plaintiffs’ policies, the contributions or premiums
28 due, and when, the policies’ cash value, the features of the policies, the advantages and disadvantages

1 of the policies, promises made regarding Plaintiffs' policies, were incomplete and either intentionally or
2 negligently and carelessly failed to inform Plaintiffs of material facts and circumstances that, had
3 Plaintiffs known them, they would not have entered into the transactions or become involved with
4 Defendants.

5 191. Upon information and belief, Dr. Guess received excessive compensation for his
6 investment counseling and services, obtaining a loan from SELZNICK's policy without SELZNICK's
7 knowledge or authorization, and engaging in other similar activities in violation of ERISA §§ 406(a)(1),
8 408(b), 29 U.S.C. §§ 1106(a)(1), 1108(b).

9 192. Upon information and belief, as a result of Defendants misrepresentations and
10 concealments, upon which Plaintiffs relied to their detriment, Plaintiffs are entitled to unwind each and
11 all transactions between Plaintiffs and Defendants by obtaining a surrender by Defendants of the
12 insurance policies, including but not limited to, all life insurance policies related to Plaintiffs, in exchange
13 for the return to Plaintiffs of all commissions, premiums, expenses, costs and fees paid by Plaintiffs
14 related to the policies.

15 193. Because Defendants' transactions are illegal under ERISA, Plaintiffs are authorized by the
16 equitable powers under section 502(a)(3) "to redress such violations," and prohibited transactions fall
17 within this category.

18 194. Because the transactions arose from numerous misrepresentations and concealment by
19 Defendants that, had the true and complete facts been disclosed, Plaintiffs would not have entered into
20 the contracts and would not have become involved in the XELAN structure, Plaintiffs' are authorized
21 pursuant to state law to rescind the contracts and unwind the transactions.

22 195. Civil Code section 1691 provides that the service of pleading in an action or proceeding
23 that seeks relief based on rescission shall be deemed to be such notice or offer of rescission and
24 restoration to the other party everything of value which he has received.

25 196. Plaintiffs hereby offer to rescind and restore to Defendants all right, title and interest in
26 and to the life insurance policies and demand that Defendants restore to Plaintiffs all funds paid as alleged
27 herein. Accordingly, Plaintiffs seek damages in excess of the sum of \$1,700,000.00 and to be proven at
28 trial.

1 197. Plaintiffs are entitled to unwind all transactions with Defendants, including but not limited
2 to supplemental malpractice insurance coverage through XELAN ASSOCIATION, Certificate number
3 1010, issued to MALPRACTICE TRUST covering SELZNICK, in exchange for the return to Plaintiffs
4 of all premiums, expenses and fees paid by Plaintiffs related to said supplemental malpractice coverage.
5 Plaintiffs hereby offer to rescind and restore to Defendants all right, title and interest in and to the
6 malpractice insurance coverage and demands that said Defendants restore to Plaintiffs all funds paid as
7 alleged herein.

8 198. Plaintiffs are informed and believe and based thereon allege against XELAN
9 ASSOCIATION, XELAN INS. CO., DISABILITY TRUST and PAN AM LIFE, that as a result of
10 Defendants misrepresentations and concealments related to the entire "Xelan structure," upon which
11 Plaintiffs relied and induced Plaintiffs to become involved with the Xelan structure, Plaintiffs are entitled
12 to unwind the transactions related to the supplemental disability insurance coverage through XELAN
13 ASSOCIATION, certificate number 1751, and return the certificate to Defendants in exchange for the
14 return to Plaintiffs of all premiums, expenses and fees paid to Defendants related to said supplemental
15 disability coverage. Plaintiffs are informed and believe and thereon allege that the "Reserve Value" was
16 listed as \$16,258.87 on September 30, 2003.

17 199. Plaintiffs hereby offer to rescind and restore to Defendants all right, title and interest in
18 and to the supplemental disability coverage and demands that said Defendants restore to Plaintiffs all
19 funds paid as alleged herein.

20 200. Upon information and belief, Defendants will contend that they have conducted the
21 transactions concerning the subject insurance policies and coverage in conformance with the rules and
22 regulations enumerated in ERISA, or under state law, and that the purchase of the insurance coverage by
23 Plaintiffs was made without misrepresentations or omissions of any material fact related to the taxability
24 of the premiums contributed, without any misrepresentation or omission of material fact related to
25 commissions, fees or expenses, without misrepresentation or omission of material fact related to the
26 policy or "plan" terms or the advantages or disadvantages of the plan and policies thereunder. On this
27 basis, Defendants are expected to contend Plaintiffs are not entitled to a restoration of the premiums,
28 expenses and fees paid related to the insurance policies covering Plaintiffs or DOUBLE-R's

1 “participation” in the XELAN WBT or XELAN’s various Trusts.

2 201. Upon information and belief, Defendant INDIANAPOLIS LIFE will contend that it is not
3 a party to the alleged failure of the other Defendants to comply with the requirements of ERISA. On this
4 basis, INDIANAPOLIS LIFE is expected to contend it has no authority to restore the premiums, fees and
5 other expenses paid related to the life insurance policies.

6 202. Upon information and belief, Defendant PAN-AM LIFE will contend that it is not a party
7 to the alleged failure of the other Defendants to comply with the requirements of ERISA. On this basis,
8 PAN-AM LIFE is expected to contend it has no authority to restore the premiums, fees and other
9 expenses paid related to the supplemental disability insurance policy.

10 203. Plaintiffs desire a judicial determination of their rights and duties and a declaration as to
11 Plaintiffs right to restoration return of premiums, interest, earnings, expenses, fees costs and commissions
12 paid related to said life, malpractice and disability policies.

13 204. A judicial determination is necessary and appropriate at this time under the circumstances
14 in order that Plaintiffs may ascertain its rights and duties with respect to a restoration of all amounts paid
15 into the Xelan structure related to said insurance policies.

16 205. As a direct and proximate result of the controversy surrounding the respective rights and
17 duties of the parties, Plaintiffs have been deprived of funds in an amount which, upon information and
18 belief, exceed \$1,700,000, plus interest thereon, to which Plaintiffs are entitled.

19 206. Plaintiffs have been required to obtain counsel and incur costs of suit, and continues to
20 incur attorneys' fees and costs of suit, in order to ascertain its rights and duties. Plaintiffs request
21 reasonable attorney’s fees and costs of suit pursuant to 29 U.S.C. § 1132(g) (ERISA 502(g)).
22

23 **THIRD CLAIM FOR RELIEF**

24 **502(c) PENALTY CLAIM ENFORCED THROUGH ERISA § 502(a)(1)(a)**

25 **for failure to provide documents as required by ERISA**

26 (Against all Defendant Plan Administrators and fiduciaries administering the Plan)

27 207. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
28 paragraphs as though they were fully set forth herein.

1 208. At all times material to the present action, Defendant XELAN ASSOCIATION and
2 XELAN WBT were plan administrators. These defendants as well as Dr. Guess, were “fiduciaries” as
3 that term is defined under ERISA, 29 U.S.C. § 1002 (21) and had a fiduciary duty to act exclusively for
4 the benefit of plan participants, including plaintiffs, under ERISA, 29 U.S.C. § 1104. As fiduciaries,
5 defendants were responsible for providing timely, accurate and complete information and documents to
6 plaintiff.

7 209. Section 502(c) of ERISA requires “any administrator”
8 who fails or refuses to comply with a request for any information which
9 such administrator is required by this title to furnish to a participant or
10 beneficiary (unless such failure or refusal results from matters reasonably
11 beyond the control of the administrator) by mailing the material requested
12 to the . . . participant or beneficiary within 30 days after such request may
13 in the court’s discretion be personally liable to such participant or
14 beneficiary in the amount of up to [\$110] a day from the date of such
failure or refusal and the court may in its discretion order such other relief
as it deems proper.”

15 210. ERISA § 502(c)(1)(B) treats “each violation,” with respect to any single participant or
16 beneficiary, “as a separate violation.”

17 211. Title I of ERISA, at § 104(b)(4), 29 U.S.C. § 1024(b)(4) requires, upon written request,
18 that the administrator “furnish a copy of the latest updated summary plan description, plan description,
19 and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or
20 other instruments under which the plan is established or operated.”

21 212. Upon information and belief, it is the view of the Department of Labor (“DOL”), DOL
22 Advisory Opinion Letter 96-14, that, for purposes of § 1024(b)(2) and (4), any document or instrument
23 that specifies procedures, formulas, methodologies, or schedules to be applied in determining or
24 calculating a participant's or beneficiary's benefit entitlement under an employee benefit plan would
25 constitute an instrument under which the plan is established or operated, regardless of whether such
26 information is contained in a document designated as the “plan document.”

27 213. The Summary Plan Description (SPD) for the 419 Trust “must not have the effect of
28 misleading, misinforming, or failing to inform participants and beneficiaries” and “ must present “[t]he

1 advantages and disadvantages of the plan . . . without either exaggerating the benefits or minimizing the
2 limitations,” and mandates that “any description of exceptions, limitations, reductions, and other
3 restrictions shall not be minimized, rendered obscure or otherwise made to appear unimportant” pursuant
4 to the DOL regulations, at 29 CFR 2520.102-2(b).

5 214. Upon information and belief, the 419 Trust’s SPD, which is supposed to be a summary
6 of the principal parts of the plan, does not contain a summary of each of the principal provisions of the
7 life insurance instrument governing Plaintiffs’ life insurance coverage so that Plaintiffs could reasonably
8 be apprised of the terms of their policies.

9 215. The SPD for the XELAN WBT failed to contain a “sufficiently accurate and
10 comprehensive” description of the life insurance coverage terms and conditions set forth in the
11 INDIANAPOLIS LIFE policies of insurance “to reasonably apprise participants and beneficiaries of their
12 rights and obligations under the plan” with respect to said life insurance coverage, —“specific enough
13 to enable the ordinary employee to sense when there is a danger that benefits could be lost or diminished”
14 and be apprised of “events or actions could trigger a loss of benefits.” For the reasons set forth herein
15 immediately above, SELZNICK and DOUBLE-R, and each of them, made specific requests to Dr. Guess
16 and to the assistant for Dr. Guess, Trish De La Torre, on dozens of occasions starting in 1999 to end-May
17 2003 when the XELAN WBT was suddenly terminated without notice, specifically asking, repeatedly,
18 to obtain a copy of each of the insurance policies covering SELZNICK, but most specifically focusing
19 on the life insurance policy under the XELAN WBT. Dr. Guess always responded either evasively with
20 words of assurance and guarantees to pacify and placate Plaintiffs while at all time stalling, failing and
21 refusing to provide a copy of the life insurance, malpractice and disability insurance policies, or in other
22 delaying elusiveness in ‘passing the buck’ to his assistant, De La Torre, who he communicated would
23 act on his behalf and provide the policies but who took the same approach as Dr. Guess in failing and
24 refusing to provide any copy of the requested insurance policies.

25 216. The first time Plaintiffs were finally able to obtain a copy of the insurance policies
26 covering themselves was after May 28, 2003 when XELAN WBT was suddenly terminated.

27 217. Plaintiffs made numerous requests for other plan-related information which Plaintiffs are
28 informed and believe and thereon allege is required to be disclosed by the plan’s administrator upon

1 request, but which Defendants failed and refused to provide.

2 218. Pursuant to 29 U.S.C. § 1132 (c)(1), plan administrators are liable to participants or
3 beneficiaries for penalties in an amount up to **\$110.00 per day** from thirty days after the date of
4 plaintiffs' request for plan documents under §101, SPD with the contents as described by ERISA § 102
5 and its governing regulations according to §104(b) within 90 days after becoming a participant, and
6 within 30 days of a written request for a copy of the latest updated SPD the latest annual report, any
7 terminal report, the trust agreement, contract or other instruments under which the plan is established or
8 operated, through the dates said documents were finally produced to plaintiffs.

9 219. Upon information and belief, Defendants failed to provide Plaintiffs with copies of the
10 contracts and instruments under which the insurance coverage was provided from 1999 through
11 approximately September/October 2003.

12 220. Upon information and belief, Defendants amended the XELAN WBT several times but
13 did not timely provide Plaintiffs with the amended 'Trust' document or SPD related to said amendments.

14 221. Plaintiffs seek a 502(c) remedy in an amount to the maximum of \$110 per day for the
15 plans' failure and refusal to provide the information requested during the four years that the information
16 and plan instruments were repeatedly requested.

17
18 **FOURTH CLAIM FOR RELIEF**

19 **For Accounting**

20 (against all Defendants)

21 222. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
22 paragraphs as though they were fully set forth herein.

23 223. On numerous occasions since 1999, SELZNICK requested that Dr. Guess and XELAN
24 ASSOCIATION provide him with a statement or an accounting of all of his contributions to the life
25 insurance policy. Defendants never provided him with such information, and Plaintiffs had no ability
26 to determine where Plaintiffs' money was placed, what it was earning, or to whom part or all of it was
27 being distributed.

28 ///

1 224. In spite of Plaintiffs' request for an accounting of contributions and plan earnings with
2 respect to his policy, Defendants failed, neglected and refused to provide an accounting or the required
3 monthly statement of income and expense.

4 225. Upon information and belief, in violation of the duty and obligation assumed by
5 Defendants in receiving contributions, and in violation of their representations and agreement with
6 Plaintiffs, the DOUBLE-R life insurance policy insuring SELZNICK did not have the funds to self-fund
7 on and after year five as Defendants represented it would, and acting unilaterally, Defendants caused the
8 policy to "loan" funds necessary for the premium contributions further indebting Plaintiffs without their
9 knowledge and depleting what minimal cash value existed in the policy in September 2003 despite
10 Plaintiffs contribution of over \$1.2 million. Defendants persistently failed and neglected to perform the
11 duties of a fiduciary in managing the monies contributed to fund the policies and defeated the agreement
12 that the policies would self fund after four years, also failing to provide statements of contributions,
13 earnings and expenses to Plaintiffs, failing to properly manage the policies' funds; wrongfully and
14 without notice or authorization, "surrendering" the policies that insured Plaintiffs and placing them in
15 the position of having to produce a substantial amount as a buy out premium, which would be refunded
16 by taxed to Plaintiffs, and with respect to fiduciary Dr. Guess, for Dr. Guess to act in his own interest as
17 the licensed commission-earning insurance agent after forcing the sale of the life insurance policies to
18 Plaintiffs without notifying Plaintiffs that he was acting in that capacity or earning a commission off of
19 Plaintiffs, and continuing to make personal decisions about Plaintiffs' policies after they had been
20 purchased and transferred to Plaintiffs, and causing the policy cash value to ever-deplete to pay
21 contributions that were otherwise unpaid solely because of Defendants breach of promise and agreement
22 in inducing Plaintiffs to enroll as members of XELAN ASSOCIATION and participate in the XELAN
23 WBT to begin with in reliance on Defendants' promise of policy self-funding after year four.
24 Defendants' conduct caused a resulting loss to Plaintiffs well in excess \$1.6 million, which amount will
25 be proven at trial.

26 226. Upon information and belief, Defendants have exclusive constructive or actual control
27 and possession of the books, papers, accounts, and records of XELAN's business and Plaintiffs' various
28 payments. From 1999 until the present, Defendants have excluded Plaintiffs from any access to

1 information or the records themselves related to amounts paid by Plaintiffs.

2 227. Plaintiffs performed all of their obligations under the terms and conditions of their
3 obligations as agreed with Defendants upon inducement to participate in the plans and structure of
4 XELAN.

5 228. Plaintiff seeks an accounting be taken of all the dealings and transactions of the XELAN
6 WBT and the XELAN ASSOCIATION, XELAN INC., XELAN WBT, Dr. Guess, in all of his fiduciary
7 and individual capacities, INDIANAPOLIS LIFE INS. CO., PAN AM. LIFE, XELAN INS. CO., and
8 Plaintiffs' insurance policies and coverage and all amounts paid in expenses, fees, commissions,
9 contributions, interest, investments, earnings, distribution of funds, payment for advice, including legal
10 or tax or investment, which Plaintiffs have paid since the commencement of Plaintiffs' involvement with
11 and in the XELAN structure, and since Plaintiffs' first communications with Dr. Guess.

12
13 **FIFTH CLAIM FOR RELIEF**

14 **BREACH OF FIDUCIARY AND CO-FIDUCIARY DUTY**
15 **FRAUD AND MISREPRESENTATION UNDER ERISA**

16
17 (29 U.S.C. §§ 1104, 1105(a), 1106(a), 1109(a), 1132(a) (2) & (3)
[ERISA §§ 404(a), 405(a), 406(a), 409(a), 502(a)(2) & (3)]);

18 (against all XELAN Plan Defendants including XELAN, XELAN WBT,
19 XELAN ASSOCIATION, and all Fiduciary defendants)

20 229. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
21 paragraphs as though they were fully set forth herein.

22 230. Both common law and ERISA fiduciary duties exist.

23 231. ERISA § 404(a)(1)(A) imposes on a Plan fiduciary a duty of loyalty —that is, “discharge
24 his duties with respect to a plan solely in the interest of the participants and beneficiaries (A) for the
25 exclusive purpose of: (I) providing benefits to participants and their beneficiaries; and (ii) defraying
26 reasonable expenses of administering the plan.”

27 232. Section 404(a)(1)(B) also imposes on a Plan fiduciary a duty of prudence —that is, “a
28 duty to discharge his duties with respect to a plan *solely* in the interest of the Participants and

1 beneficiaries” “with the care, skill, prudence, and diligence under the circumstances then prevailing that
2 a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an
3 enterprise of like character and with like aims[.]”

4 233. While ERISA tolerates the existence of a conflict of interest, it does not tolerate any
5 adverse consequence to plan participants and beneficiaries.

6 234. ERISA guarantees plan participants and beneficiaries, by statute, a fiduciary who acts
7 *solely* in their interests, and requires that a fiduciary laboring under a conflict of interest to “act as if he
8 is ‘free’ of such a conflict’.

9 235. Upon information and belief, there is no balancing of the fiduciary’s or co-fiduciary’s or
10 a third party’s interests, as ERISA commands undivided loyalty to the plan participants.

11 236. Upon information and belief, Congress intended ERISA’s fiduciary responsibility
12 provisions to be a codification of the common law of trusts, and the duties of care and integrity demanded
13 of a fiduciary are among the highest, if not the highest, known to common law.

14 237. Under the common law and ERISA, a fiduciary is liable not only for his own fiduciary
15 breaches, but also to use reasonable care to prevent his co-fiduciaries from breaching their duties.

16 238. A fiduciary who knows of a co-fiduciary’s breach is liable pursuant to ERISA § 405 unless
17 he makes reasonable efforts to remedy the breach.

18 239. A fiduciary is also prohibited under ERISA § 406 from engaging in or causing the plan
19 to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect
20 lending of money or other extension of credit between the plan and a party of interest, transfer to, or use
21 by or for the benefit of, a party in interest, any assets of the plan.

22 240. A fiduciary is prohibited under ERISA § 406(b) from dealing with the assets of the plan
23 in his own interest or for his own account; or in his individual or in any other capacity act in any
24 transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse
25 to the interests of the plan or its participants or beneficiaries; or to receive any consideration for his own
26 personal account from any party dealing with such plan in connection with a transaction involving the
27 assets of the plan.

28 ///

1 241. Under the common law and ERISA, a Plan fiduciary's duties of loyalty and prudence
2 include a duty to disclose and inform. This duty entails: 1) a negative duty not to misinform; 2) an
3 affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and
4 3) a duty to convey complete and accurate information material to the circumstances of Participants and
5 beneficiaries.

6 242. During the relevant period after DOUBLE-R became a member of the XELAN
7 ASSOCIATION and began participating as an employer in the XELAN WBT, the XELAN Defendants,
8 Dr. Guess, and the Fiduciary Defendants breached their fiduciary duties to disclose and inform with
9 respect to the Prohibited Transaction Exemption as alleged herein, the Internal Revenue Code
10 requirements, ERISA requirements, who would be paid what amounts related to Plaintiffs' participation
11 in the Xelan structure and obtaining of insurance products, or in sum, the true state of events and
12 obligations and risks related to the insurance policies which they refused to produce or disclose to
13 Plaintiffs.

14 243. Upon information and belief, the XELAN defendants, Fiduciary Defendants and Dr. Guess
15 owed a fiduciary duty to Plaintiff as persons providing managements services and financial advice with
16 respect to the disposition of the funds of Plaintiff DOUBLE-R's employee benefits plans.

17 244. Upon information and belief, Defendants and each of them directly and indirectly singly
18 and in concert, in violation of their fiduciary duties owed to Plaintiff DOUBLE-R, have performed a non-
19 exempt prohibited transaction as defined in 29 USC § 1106, in that said Defendants are fiduciaries who
20 have done, among others, the acts as alleged in this Complaint.

21 245. Defendants breached their duty to avoid conflicts of interest and promptly resolve them
22 when they occur, and by engaging in self-dealing, deception and evasion.

- 23 (a) dealt with the assets of Plaintiffs for their own interest or for their own account;
24 (b) Received consideration for their own personal account in connection with a transaction
25 involving assets of Plaintiffs;
26 (c) Failed to provide information prior to the transaction to Plaintiffs regarding the sales
27 commissions for the first year and for each of the succeeding renewal years paid by Defendant
28 insurance company to the agent or broker in connection with the purchase of the recommended

1 policy;

2 (d) failed to provide information prior to the transaction to Plaintiffs regarding the charges,
3 fees, discounts, penalties or adjustments which could be imposed under the recommended policies
4 in connection with the purchase, holding, exchange, termination or sale of the policies; and

5 (e) failed to obtain a written receipt from Plaintiffs prior to the transaction acknowledging
6 receipt of the information concerning the sales commissions and other charges and approving the
7 transaction on behalf of the benefit plan.

8 246. Upon information and belief, the above Defendants and each of them, directly and
9 indirectly, singly and in concert in violation of their fiduciary duties owed to Plaintiff DOUBLE-R and
10 its participants and beneficiaries, have made numerous misrepresentations to Plaintiffs SELZNICK and
11 DOUBLE-R which operated to defraud and deceive these Plaintiffs and their employees and that said acts
12 as alleged in this Complaint were done for the purpose of inducing DOUBLE-R to purchase the policies
13 from Defendant insurance companies.

14 247. Plaintiffs SELZNICK AND DOUBLE-R are informed and believe and based thereon
15 allege that the above Defendants, and each of them, directly and indirectly, singly and in concert, in
16 violation of their fiduciary duties owed to Plaintiffs, omitted to state numerous material facts in order to
17 make the statements which made to Plaintiffs misleading, or dealt with Plaintiffs funds and policy value
18 as if it was their own, and without Plaintiffs' consent, which operated to defraud and deceive Plaintiffs
19 and the said material facts were omitted for the purpose of inducing DOUBLE-R to continue its payments
20 toward the policies including from Defendant INDIANAPOLIS LIFE. Material facts omitted by
21 Defendants include, among others, the following:

22 (a) that payment of the life insurance premiums for the life insurance policies with income
23 of DOUBLE-R through an employee benefit plan insuring SELZNICK, WRIGHT and ROLAND
24 would not result in additional income tax liability, when, in contrast, Plaintiffs have become
25 aware of and were and are placed at risk of proceedings by the IRS such as has occurred and is
26 presently ongoing in *Cohen v. United States of America (USA)*, 2004 U.S. Dist LEXIS 2081
27 (E.D. PA February 10, 2004), involving XELAN ASSOCIATION, Dr. Guess, PYRAMIDAL
28 FUNDING, and various other components of the Xelan family or structure, and related issues

1 determined in and proceedings at *Xelan Inc. v. USA*, 2004 U.S. Dist LEXIS (E.D. PA May 6,
2 2004) (Governments motion for summary enforcement granted) and *Cohen v. U.S.A.*, 2004 U.S.
3 Dist LEXIS 6483 (E.D. Pa April 12, 2004), and articles covering Xelan's approach such as The
4 New York Times coverage in Lynnley Browning, Judge Backs I.R.S. Effort to Get Tax Shelter
5 Files, N.Y. Times, February 13, 2004, at C3, for participating in what Plaintiff now believes and
6 based thereon alleges was a carefully crafted, deceptive, improper tax avoidance scheme by Xelan
7 which the *Cohen* court stated "might diplomatically term xelan's more aggressive programs are
8 indeed the road to tax-deferred riches (or, in xelanese, the accumulation of 'critical capital
9 mass')."

10 (b) that at all relevant times, Defendants Dr. Guess and the XELAN entities were on notice
11 of Tax court litigation issues and IRS position and intentionally failed to notify employers and
12 employees involved in the various XELAN programs of the IRS claims concerning the types of
13 XELAN plans into which Defendants induced Plaintiffs to participate before and after the
14 beginning of the Cohen litigation, which could significantly impact and damage Plaintiffs related
15 to the potential for loss of tax deductions, assessment of tax penalties and interest as has occurred
16 in Dr. David Cohen and others.

17 (c) that XELAN entities and Dr. Guess's promotion of its programs, for which Plaintiffs were
18 charged membership fees, would also pay to XELAN and Guess and other Defendants in
19 unknown amounts, undisclosed commissions and other earnings.

20 (d) that in advising Plaintiffs, Defendants and each of them directly and indirectly, and acting
21 in concert, engaged in acts and practices, made numerous misrepresentations and omitted to state
22 material facts to Plaintiffs DOUBLE-R benefit plan and SELZNICK about the guarantees under
23 the life insurance policy, its self-funding in and after year five, and its cash value, which operated
24 to defraud and deceive Plaintiffs, and that said acts were done for the purpose of inducing
25 Plaintiffs to purchase the policies and coverages alleged herein.

26 (e) failed to advise Plaintiffs that it would be necessary to purchase life insurance policies for
27 all other eligible participants of DOUBLE-R's benefit plans to prevent discrimination in
28 operation;

- 1 (f) failed to advise Plaintiffs that death benefit proceeds from the Policies would be subject
2 to estate taxation;
- 3 (g) failed to advise and provide DOUBLE-R with the right to examine the Policies for ten (10)
4 days and refuse the Policies if desired;
- 5 (h) failed to advise Plaintiffs that DOUBLE-R would incur additional annual reporting costs
6 as a result of purchasing the Policies;
- 7 (I) that the purchase of the Policies by DOUBLE-R was a non-exempt prohibited transaction
8 as defined in 29 U.S.C. § 1106 (ERISA § 406) (g).
- 9 (j) that there existed a term life insurance alternative including reentry options and
10 renewability for life;
- 11 (k) that an amendment to the DOUBLE-R plan would be required to specify pre-retirement
12 death benefit from the Policies;
- 13 (l) that an amendment to the DOUBLE-R plan would be required to allow for Policies which
14 are well in excess of the projected monthly benefit at a normal retirement age; and
- 15 (m) that the DOUBLE-R plan was to receive information from Defendants XELAN, GUESS,
16 XELAN WBT, XELAN ASSOCIATION and INDIANAPOLIS LIFE describing the sales
17 commissions, charges, fees, discounts, penalties or adjustments incurred in connection with the
18 transaction prior to the execution of the transactions.

19

20 248. As a direct and proximate result of the breach of fiduciary duties by the Fiduciary
21 Defendants as alleged herein, Plaintiffs have been damaged in an amount well in excess of \$1.7 million
22 together with interest thereon as provided by law.

23 249. Plaintiff has been required to retain counsel and incur costs of suit, and continue to incur
24 attorney's fees and costs of suit as a result of the breach of fiduciary duties by Defendants. Plaintiffs
25 request reasonable attorneys fees and costs of suit incurred herein pursuant to 29 USC 1132(g) (ERISA
26 502(g)).

27 ///

28 ///

1 **SIXTH CLAIM FOR RELIEF**

2 **SUPPLEMENTAL / PENDENT STATE CLAIM**

3 **for Pre-Plan negligent misrepresentation**

4 (against Defendants XELAN, XELAN WBT, XELAN ASSOCIATION, Dr. Guess)

5
6 250. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
7 paragraphs as though they were fully set forth herein.

8 251. Defendants XELAN entities by and through its founder and agent, Dr. Guess, negligently
9 and carelessly through exaggeration and misrepresentation induced and persuaded Plaintiff to incorporate
10 his business and his new business to join XELAN ASSOCIATION and participate in XELAN'S structure
11 by enrolling in XELAN's "multiple employer" plans and contributing huge sums of SELZNICK's
12 "surplus" annual income. Said promises as alleged herein when negligently made prior to the formation
13 of and not relevant to the administration of an ERISA plan except peripherally or tangentially, if at all,
14 as alleged in Plaintiffs' FIRST CLAIM for relief.

15 252. Upon information and belief, Defendants Dr. Guess, and his XELAN structure (and
16 subsets including XELAN INC., XELAN ASSOCIATION and XELAN WBT) negligently
17 misrepresented and concealed the true qualifications of the 419 Plan and its tax risks and possible
18 consequences of the XELAN WBT "employee benefit plan" and specifically did so to induce a high
19 income earner such as SELZNICK to incorporate his business into a business structure of Defendants
20 advising and to cause that business structure to become a member of XELAN WBT and participate in
21 its benefit structure. Plaintiffs relied on the representations and did not know of the negligently concealed
22 information which, had it been disclosed, would have notified Plaintiffs of serious risks and concerns
23 about the Xelan structure and its dealings and Plaintiff would not have become involved in this
24 organization.

25 253. Plaintiffs are further informed and believe and based thereon allege that Defendants
26 negligently induced Plaintiffs to participate in the XELAN structure by carelessly and negligently
27 misleading Plaintiffs related to the scope and length of annual funding contributions Plaintiffs would be
28 required to make to the policies issued under the XELAN WBT, and with respect to the self-funding of

1 the policy following year five.

2 254. In so doing, Defendants negligently failed to advise Plaintiffs that Defendants could
3 unilaterally and in their own interests "surrender" Plaintiff's policy, force him to pay additional sums to
4 buy out the policy after Defendants' unilateral decision, which funds that would be taxed .

5 255. Defendants, including Dr. Guess or INDIANAPOLIS LIFE, negligently failed to advise
6 Plaintiffs that Dr. Guess, who was "Trustee" of the XELAN WBT and caused the XELAN WBT to
7 terminate after four years' participation by Plaintiff, was also an individual agent for INDIANAPOLIS
8 LIFE and would earn commissions from the required-purchase of the insurance policy by Plaintiff from
9 XELAN WBT in or about September 2003.

10 256. Plaintiffs were damaged by the negligent nondisclosure and the negligent representations
11 and inducements to participate in the XELAN structure.

12 257. At the same time, Plaintiffs are further informed and believe and based thereon that
13 Defendant Guess earned significant sums in commissions from the sale of insurance to Plaintiffs.

14 258. Defendants further negligently concealed and failed to disclose to Plaintiffs that XELAN
15 WBT had reserved the sole power to cancel, rescind or surrender the life insurance policy insuring
16 Plaintiffs without prior notice to Plaintiffs, sacrificing the majority of Plaintiffs' annual contributions of
17 \$300,000 over a four year period, while Plaintiffs lost substantial sums of money associated with the
18 payment of those commissions.

19 259. Upon information and belief, Defendants Dr. Guess and the XELAN defendants knew or
20 should have known of the potential adverse tax consequences and not only negligently failed to tell
21 Plaintiffs but carelessly reassured Plaintiffs at all times that the contributions would be tax deductible if
22 Plaintiffs agreed to participate and let "XELAN" handle everything.

23 260. Upon information and belief, Dr. Guess as insurance agent for INDIANAPOLIS LIFE, and
24 INDIANAPOLIS LIFE are accountable for said pre-plan misrepresentations and false inducements to
25 purchase and/or negligent processing of an application for insurance.

26 261. Upon information and belief, with respect to Dr. Guess and INDIANAPOLIS LIFE,
27 Plaintiffs' pre-plan misrepresentation and concealment claims are not subject to ERISA preemption and
28 that neither Dr. Guess nor INDIANAPOLIS LIFE were ERISA entities or fiduciaries for the sale of said

1 insurance policy and that their role was to create or market the "XELAN WBT" alleged "employee
2 benefit plan" or the insurance used to fund the plan, and involve preplan misrepresentations.

3 262. Plaintiffs are entitled to rescind the life insurance policy, unwind the transactions, obtain
4 a constructive trust over all contributions, earnings and interest and a return of all expenses, fees, costs,
5 premiums, commissions or other amounts Plaintiffs have paid.

6 263. As a proximate result of the aforementioned negligent and careless conduct, Plaintiffs have
7 suffered, and will continue to suffer in the future, damages under said insurance coverage plus amounts
8 of expenses, fees and interest for a total amount to be shown at the time of trial.

9 264. As a further proximate result of the aforementioned wrongful conduct of Defendants,
10 Plaintiffs have suffered anxiety, worry, mental and emotional distress, financial injury, and other
11 incidental damages and out-of-pocket expenses, including attorneys' fees, all to Plaintiffs' damage in a
12 sum to be determined at time of trial, but in any event a sum in excess of the jurisdictional requirements
13 of the above-entitled Court.

14
15 **SEVENTH CLAIM FOR RELIEF**

16 **SUPPLEMENTAL / PENDENT STATE CLAIM**

17 **alternatively for Pre-Plan fraud, deceit, concealment, fraudulent inducement**
18 **and post-plan termination fraud and deceit, misrepresentation and concealment,**
19 **and conspiracy to defraud**

20 Civ. C. §§ 1709, 1710, 1711, 1712, 1713;

21 Fraudulent acts by agents, Civ. C. §§ 2306, 2316, 2317, 2318, 2330, 2333, 2334, 2338, 2343
22 (Against Defendants Dr. Guess, XELAN, XELAN ASSOCIATION, XELAN WBT,
23 and the Insurance Defendants)

24 265. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
25 paragraphs as though they were fully set forth herein.

26 266. Plaintiffs SELZNICK and ROLAND are individuals who were defrauded in transactions
27 that were at times parallel to, but independent of, the alleged ERISA transactions.

28 267. Specifically, the pre-plan promises and assurances, representations and misrepresentations
and concealments to induce Plaintiffs to enroll and participate in the XELAN structure and its policies
did not and do not affect the administration or calculation of benefits under ERISA except peripherally

1 or tangentially and include but are not limited to the following:

2 (a) Defendants Dr. Guess, and his XELAN structure (and subsets including XELAN, XELAN
3 ASSOCIATION and XELAN WBT), Dr. Guess as agent of INDIANAPOLIS LIFE, and
4 INDIANAPOLIS LIFE, misrepresented and concealed the true qualifications of what the “419
5 Plan” would be, its tax benefits, the value of insurance policies that would be obtained thereunder,
6 employer tax risks thereunder, and the consequences and risks of the XELAN WBT “employee
7 benefit plan”, and specifically did so to induce physician and dentist high income earners such
8 as SELZNICK to incorporate into a C-Corporation business structure of Defendants advising and
9 to cause that business structure to become a member of XELAN WBT and participate in its
10 benefit structure. Plaintiffs relied on the representations and did not know of the concealed
11 information which, had it been disclosed, would have notified Plaintiffs of serious risks and
12 concerns about the XELAN structure and its dealings.

13 (b) Defendants XELAN entities by and through its founder and agent, Dr. Guess, falsely and
14 through exaggeration, misrepresentation and concealment and with the intent to influence,
15 persuade and induce Plaintiff to incorporate his business and induce that new business through
16 other pre-plan representations to join XELAN ASSOCIATION and participate in XELAN’s
17 structure by enrolling in XELAN’s “multiple employer” plans and contributing huge sums of
18 SELZNICK’S annual earnings, did so induce Plaintiffs by the promises alleged in this Complaint.
19 Said promises when made did not relate to an ERISA plan except peripherally or tangentially, —*if*
20 *at all* as alleged in Plaintiffs’ FIRST CLAIM for relief.

21 (c) Defendants misrepresented and concealed information related to the nature, extent,
22 amount, and length of required annual funding on life insurance policies to be issued under the
23 XELAN WBT, and particularly with respect to the self-funding of the proposed life insurance
24 policy after the fifth year, and what the cash value of said policies, particularly the life insurance
25 policy.

26 (e) In so doing, Defendants failed to disclose and intentionally concealed from Plaintiffs that
27 Defendants would and did reserve a unilateral right, in their own interests irrespective of the
28 disadvantage or harm to Plaintiffs, to “surrender” any policy insuring the Plaintiffs herein, and

1 did so, and forced the participating Plaintiffs to pay additional sums to buy out the policy after
2 Defendants' unilateral decision, which funds that would be taxed, and leave Plaintiffs' with a
3 policy having insignificant cash value compared to the huge sums of premiums contributed by
4 Plaintiffs.

5 (f) No Defendant, including Dr. Guess or INDIANAPOLIS LIFE, ever advised Plaintiffs that
6 Guess, who held himself out as SELZNICK's personal and special financial counselor, and
7 "Trustee" of the XELAN WBT, was also an insurance agent for and on behalf of
8 INDIANAPOLIS LIFE, and would secretly earn huge commissions upon the first sale, and
9 Plaintiffs belief again in 2003 after Dr. Guess caused the XELAN WBT to be "terminated" and
10 Plaintiffs' life policies to be "surrendered" with requisite transfer and re-purchase of the insurance
11 policy from XELAN WBT in Plaintiffs' names, individually.

12
13 268. As a direct result of the representations made by Defendants, Plaintiffs believed and relied
14 upon them, and were thereby induced to restructure their medical practice so as to enter into the
15 transactions and relationship with Defendants and to pay large sums to purchase policies and pay
16 expenses, costs and fees, and participate in a scheme of insurance products and "structure" of XELAN
17 which Plaintiffs would never have participated had they known the true facts.

18 269. At the time these willful, malicious, false and fraudulent representations were made by
19 Defendants, Defendants each knew that the representations were false and were made wilfully and
20 maliciously intending that Plaintiffs would rely on them and that said representations and concealed
21 information would and did cause Plaintiffs to become entrenched in the Xelan structure through the
22 contribution and payment of well over 1.5 million dollars.

23 270. Plaintiffs were damaged by the undisclosed and concealed information and the
24 misrepresentations and false inducements to participate in the XELAN structure.

25 271. At the same time, Plaintiffs are further informed and believe and based thereon that
26 Defendants earned significant sums in secret commissions from the sale of insurance to Plaintiffs, which
27 was not disclosed to Plaintiffs.

28 ///

1 272. Defendants further concealed and failed to disclose to Plaintiffs that XELAN WBT had
2 reserved the sole power to cancel, rescind or surrender the life insurance policy insuring Plaintiff without
3 prior notice to Plaintiff, sacrificing the majority of Plaintiff's annual contributions of \$300,000 over a
4 four year period, while plaintiffs lost substantial sums of money associated with the payment of those
5 commissions.

6 273. Upon information and belief, Defendants knew of the potential adverse tax consequences
7 and not only failed to tell plaintiffs but affirmatively reassured Plaintiffs at all times that the contributions
8 would be tax deductible if Plaintiffs agreed to participate and let "Xelan" handle everything.

9 274. Upon information and belief, Dr. Guess, as insurance agent for INDIANAPOLIS LIFE,
10 and INDIANAPOLIS LIFE are accountable for said pre-plan misrepresentations and fraudulent
11 inducement to purchase and/or negligent processing of an application for the life insurance policy.

12 275. Upon information and belief, Plaintiffs' pre-plan misrepresentation and concealment
13 claims are not subject to ERISA preemption and that the Defendants in making pre-plan
14 misrepresentations neither Dr. Guess or INDIANAPOLIS LIFE were ERISA entities or fiduciaries for
15 the sale of said insurance policy and that their role was to create or market the "XELAN WBT" alleged
16 "employee benefit plan" or the insurance used to fund the plan, and involve preplan misrepresentations.

17 276. At the time these pre-plan representations were made and concealed information not
18 disclosed, Plaintiff was ignorant of their falsity or that they were materially incomplete, but believed them
19 to be true.

20 277. With respect to post-plan fraud and deceit, concealment and misrepresentation, Defendants
21 also made misrepresentations, and concealed material facts and deceived Plaintiffs after unilaterally and
22 without notice "terminated" the XELAN WBT on or about May 28, 2003, related to "surrendering"
23 Plaintiffs' life insurance policies, giving Plaintiffs little notice and no choice and forced Plaintiffs
24 thereafter to "purchase" their own policies insuring their lives, which policies had insignificant cash
25 value, as follows:

- 26 (a) failure to disclose to Plaintiff's Defendants agency and economic relationship between Dr.
27 Guess (and his various Defendant XELAN entities) and INDIANAPOLIS LIFE

28 ///

1 (b) failure to disclose to Plaintiffs that Dr. Guess would earn additional commissions and
2 receive other fees or expenses after forcing Plaintiffs to purchase their policies after Dr. Guess,
3 as Trustee of the XELAN WBT terminated the plan and caused Plaintiffs policies to be
4 “surrendered.”

5 (c) failure to return or refund expenses and fees paid by Plaintiffs that Dr. Guess and the
6 Xelan entities caused to be lost when they terminated the XELAN WBT and “surrendered”
7 Plaintiffs’ policies

8 (d) treated Plaintiffs’ policies as if they were Defendants’ Dr. Guess and PYRAMIDAL
9 FUNDING and INDIANAPOLIS’ LIFE’S own, by, among other, (I) without notice to or
10 authorization by Plaintiffs, requesting and arranging for loans to be taken against the policy, (ii)
11 without notice to or authorization by Plaintiffs, causing amounts to be paid from the policy
12 through loans taken against the policy, (iii) attempting, after the fact, and through concealing to
13 Plaintiffs and intentionally misrepresenting the true facts and events, to obtain Plaintiff’s
14 authorization to allow payment of premiums and contributions through loans against the policy
15 *several months after the loan was already actually been made at Defendants’ requests without*
16 *Plaintiffs’ knowledge or consent.* (iv) Dr. Guess’ secretly requesting from INDIANAPOLIS LIFE,
17 without notice to Plaintiff, information from INDIANAPOLIS LIFE about converting Plaintiff’s
18 insurance policy, illustrations and proposals, (v) Dr. Guess and PYRAMIDAL FUNDING
19 obtaining from INDIANAPOLIS LIFE the information Dr. guess and PYRAMIDAL FUNDING
20 had previously requested from INDIANAPOLIS LIFE, without any concurrent notice to or copy
21 provided to SELZNICK; (vi) sending SELZNICK a duplicate copy of the information and
22 paperwork, illustrations and proposals only after SELZNICK inadvertently learned such secret
23 clandestine communications were occurring between Dr. Guess, PYRAMIDAL FUNDING and
24 INDIANAPOLIS LIFE and after SELZNICK demanded he be provided a duplicate copy of the
25 papers being exchanged between Defendants.

26
27 278. At the same time, upon information and belief, Defendants earned significant sums in
28 commissions from the sale of insurance to Plaintiffs.

1 279. Upon information and belief, Dr. Guess, as insurance agent for INDIANAPOLIS LIFE,
2 and INDIANAPOLIS LIFE are accountable for said post-plan misrepresentations, concealment, self-
3 dealing, and treating of Plaintiffs' transferred policies as if it was their own.

4 280. Upon information and belief, INDIANAPOLIS LIFE and Dr. Guess and PYRAMIDAL
5 FUNDING engaged in secret communications and proposals related to Plaintiff's policy after it was
6 transferred to him, but without the knowledge of Plaintiff that each of the communications were
7 occurring.

8 281. Upon information and belief, the misrepresentations and concealment of material
9 information related to Plaintiffs' transfers of policies to individual ownership, by Dr. Guess and
10 INDIANAPOLIS LIFE, are not subject to ERISA preemption and that neither Dr. Guess nor
11 INDIANAPOLIS LIFE were ERISA entities or ERISA fiduciaries after the transfer of said insurance
12 policies to Plaintiffs.

13 282. At the time these representations, concealments, and unauthorized actions in dealing with
14 SELZNICK'S policy after May 2003, SELZNICK was ignorant of their falsity and/or that such
15 unauthorized actions were occurring until after-the-fact and until after SELZNICK only inadvertently
16 learned said communications and arrangements were occurring between INDIANAPOLIS LIFE and Dr.
17 Guess and PYRAMIDAL FUNDING to the exclusion of SELZNICK.

18 283. INDIANAPOLIS LIFE was and is a direct participant with Dr. Guess, PYRAMIDAL
19 FUNDING in the fraud and concealment alleged herein.

20 284. As a proximate result of the aforementioned wrongful conduct of Defendants related to
21 pre-plan, and the post-plan events, Plaintiffs have suffered, and will continue to suffer in the future,
22 damages under said insurance coverage plus amounts of expenses, fees and interest for a total amount
23 to be shown at the time of trial.

24 285. Plaintiffs are entitled to rescind the life insurance policy, unwind the transactions, obtain
25 a constructive trust over all contributions, earnings and interest and a return of all expenses, fees, costs,
26 premiums, commissions or other amounts Plaintiffs have paid.

27 286. As a further proximate result of the aforementioned wrongful conduct of Defendants,
28 Plaintiffs have suffered anxiety, worry, mental and emotional distress, financial injury, and other

1 incidental damages and out-of-pocket expenses, including attorneys' fees, all to Plaintiffs' damage in a
2 sum to be determined at time of trial, but in any event a sum in excess of the jurisdictional requirements
3 of the above-entitled Court.

4 287. Upon information and belief, Defendants, and each of them, acted knowingly, willfully,
5 intentionally, oppressively and with the intent to defraud and deceive Plaintiffs with a conscious and
6 callous disregard of Plaintiffs' rights and the fiduciary duties of Defendants XELAN, GUESS, XELAN
7 WBT, XELAN ASSOCIATION and INDIANAPOLIS LIFE. Plaintiffs are therefore entitled to punitive
8 and exemplary damages in an amount to be proven at trial.

9 288. Defendants' despicable conduct described herein was done with a conscious disregard of
10 plaintiff s rights and with the intent to vex, injure or annoy plaintiff, such as to constitute oppression,
11 fraud or malice under California Civil Code § 3294, entitling plaintiff to punitive damages in an amount
12 appropriate to punish or set an example of defendants.

13 14 **EIGHTH CLAIM FOR RELIEF**

15 **ALTERNATIVE, SUPPLEMENTAL / PENDENT STATE CLAIM** 16 **For fraud and deceit, misrepresentation and concealment** 17 **during the administration of the 419 Plan**

18 289. Plaintiffs SELZNICK, as plan participant suing on behalf of the plan, DOUBLE-R
19 employer plan sponsor, and the DOUBLE-R EBP, incorporate herein by reference the above paragraphs
20 as though they were fully set forth herein..

21 290. Upon information and belief, the subject 419 XELAN WBT is not governed by ERISA
22 and does not meet the qualifications of the "multiple employer" "employee welfare benefit plan," and
23 thus not subject to ERISA, and to the extent the Court concurs, Plaintiffs' claims related to Defendants
24 wrongful actions are subject to state law.

25 291. Upon information and belief, all misrepresentations and concealments and self dealing by
26 Xelan entities and agents *even after* DOUBLE-R became a member of XELAN ASSOCIATION and
27 began participating in the "419 Plan" are not preempted by ERISA, not governed by ERISA, and subject
28 to state law remedies including fraud and deceit, alternative negligent misrepresentation, breach of

1 contract, breach of the implied covenant of good faith and fair dealing, extra contractual and punitive
2 damages in an amount to be proven at trial.

3 292. After DOUBLE-R became a member of XELAN WBT and contributed huge sums for
4 insurance coverage for substantial life insurance for SELZNICK and other employees, supplemental
5 *malpractice and disability and long term care insurance, Defendants XELAN and Dr. Guess continued*
6 to promise and assure Plaintiff throughout 1999 to 2003, that the XELAN WBT was a valid multiple
7 employer 419 employee benefit plan under ERISA, continued to represent that the policies contained and
8 would contain huge cash value, that Plaintiffs would owe no additional contributions after year five
9 because the cash value in the policies plus their earnings would be fully sufficient to complete the funding
10 thereafter, and that the XELAN plans and structure would unquestionably provide valid and fully
11 acceptable tax-free and tax-deferred programs.

12 293. These representations were made false and knowingly made with the intent to continually
13 deceive and induce Plaintiffs' continued reliance on and participation in the XELAN programs, continue
14 to contribute huge sums.

15 294. Defendants knew that SELZNICK was fully engrossed in his medical practice and
16 expending sometimes up to 90 or 100 hours per week to produce the earnings he was producing, that he
17 had a family with which he spent any of his remaining precious time, and needed to rely on what he was
18 being led to believe by Dr. Guess and XELAN was individually-focused expert investment advice
19 specifically designed for SELZNICK and related to sophisticated and complex financial programs offered
20 by XELAN, and knew that SELZNICK and DOUBLE-R would rely on their representations and advice.

21 295. Plaintiffs and each of them did continue to reasonably rely on Defendants acts and
22 representations, did not know the facts and information concealed, and continued to invest each year the
23 huge sums for the promised life insurance policy values, security, disability, malpractice, and long term
24 care insurance.

25 296. Plaintiffs have been damaged as alleged herein and throughout this Complaint, and as a
26 result SELZNICK currently has a life policy with nearing-"zero" cash value and which does not and have
27 not had sufficient value to "self fund" for the life of the policy or even for one additional year.

28 ///

1 297. Upon information and belief, Dr. Guess developed XELAN as an extraordinarily complex
2 spider web of shell entities and scam programs which the IRS considers to be a promulgation and
3 production of improper tax evasion and that Dr. Guess and the XELAN Defendants through their
4 misrepresentation, concealment and other acts fitted to deceive have exposed Plaintiffs to serious
5 proceedings by the IRS, as reflected by the Cohen and other cases alleged herein.

6 298. As a direct and proximate result of Defendants' unlawful conduct alleged in this
7 Complaint, Plaintiffs have suffered substantial losses in an amount in excess of \$2,000,000, the amount
8 of which will be proven at trial.

9 299. As a proximate result of the aforementioned wrongful conduct of defendants, Plaintiffs
10 have suffered, and will continue to suffer in the future, damages plus interest for a total amount to be
11 shown at the time of trial.

12 300. As a further proximate result of the aforementioned wrongful conduct of Defendants,
13 Plaintiffs SELZNICK and ROWLAND have suffered anxiety, worry, mental and emotional distress,
14 financial injury, and other incidental damages and out-of-pocket expenses, including attorneys' fees, all
15 to Plaintiffs' damage in a sum to be determined at time of trial, but in any event a sum in excess of the
16 jurisdictional requirements of the above-entitled Court.

17 301. Defendants' despicable conduct described herein was done with a conscious disregard of
18 plaintiff s rights and with the intent to vex, injure or annoy plaintiff, such as to constitute oppression,
19 fraud or malice under California Civil Code Section 3294, entitling Plaintiffs to punitive damages in an
20 amount appropriate to punish or set an example of defendants.

21
22 **NINTH CLAIM FOR RELIEF**

23 **Supplemental State Claim for**

24 **BREACH OF COVENANT OF GOOD FAITH and FAIR DEALING**

25 **Against all defendants**
26

27 302. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
28 paragraphs as though they were fully set forth herein..

1 303. Plaintiffs entered into contracts for the provision of insurance according to the promises
2 and assurances made to Plaintiffs as alleged herein, and insurance contracts were issued by Defendants
3 for life insurance, malpractice insurance, and disability insurance covering the employees of DOUBLE-R.

4 304. Plaintiffs paid the premiums, expenses, costs, fees as described and arranged by
5 Defendants expecting that Defendants would honor the oral and written assurances made to Plaintiffs.

6 305. Defendants breached and continue to breach their oral and written contractual obligations
7 owed to Plaintiffs by charging secret fees, costs and expenses related to the contracts and providing
8 Plaintiffs with policies that failed to meet the oral and written representations and assurances by the
9 Defendants.

10 306. Moreover, a special and trusting and fiduciary relationship existed between Defendants
11 and Plaintiffs, the express and implied promises made in connection with that relationship, and the acts,
12 conduct, and communications resulting in these implied promises, Defendants promised to act in good
13 faith toward and deal fairly with Plaintiffs. Upon information and belief, this duty requires, among other
14 things, that:

15 (a) Each party in the relationship must act with *good faith* towards the
16 other concerning all matters related to the employment;

17 (b) Each party in the relationship must act with *fairness* toward the
18 other concerning all matters related to the employment

19 (c) Neither party would take any action to unfairly prevent the other
20 from obtaining the benefits of the employment relationship;

21 (d) Defendants would comply with their various representations, rules,
22 policies and procedures in dealing with Plaintiffs;

23 (e) Defendants would not deal with Plaintiffs in an unfair, self-
24 interested manner;

25 (f) Defendants would give Plaintiffs' interest as much consideration
26 as it gave its own interest.

27 307. Defendants misrepresentations as alleged herein related to the Trusts, the insurance
28 policies, and the guarantees related to benefits and advantages of the Defendants plan were false,

1 wrongful, in bad faith and unfair and therefore a violation of Defendants legal duties in that they have
2 concealed material information from Plaintiffs, made false promises, siphoned Plaintiffs' funds that were
3 in Defendants' possession to the benefit of Defendants, and leaving Plaintiffs with policies and coverage
4 that do not accomplish that which was promised to Plaintiffs.

5 308. As a direct and proximate result of Defendants' unlawful conduct alleged in this
6 Complaint, and breach of the covenant of good faith and fair dealing, Plaintiffs have suffered substantial
7 losses in an amount in excess of \$2,000,000, the amount of which will be proven at trial.

8 309. As a proximate result of the aforementioned wrongful conduct of defendants, Plaintiffs
9 have suffered, and will continue to suffer in the future, damages under said insurance contracts plus
10 interest for a total amount to be shown at the time of trial.

11 310. As a further proximate result of the aforementioned wrongful conduct of Defendants,
12 Plaintiffs SELZNICK and ROWLAND have suffered anxiety, worry, mental and emotional distress,
13 financial Injury, and other incidental damages and out-of-pocket expenses, including attorneys' fees, all
14 to Plaintiffs' damage in a sum to be determined at time of trial, but in any event a sum in excess of the
15 jurisdictional requirements of the above-entitled Court.

16 311. Defendants' despicable conduct described herein was done with a conscious disregard of
17 plaintiff s rights and with the intent to vex, injure or annoy plaintiff, such as to constitute oppression,
18 fraud or malice under California Civil Code Section 3294, entitling Plaintiffs to punitive damages in an
19 amount appropriate to punish or set an example of defendants.

20 21 **TENTH CLAIM FOR RELIEF**

22 **Supplemental State Claim**

23 **Violation of Unfair competition Act** (Cal. Bus. & Prof. Code § 17200);
24 **Violation of Unfair Practices or Deceptive Acts** (Cal.Ins.C. § 790.02, 790.03)
25 (against the XELAN Defendants, INDIANAPOLIS LIFE, Dr. Guess)

26
27 312. Plaintiffs SELZNICK and DOUBLE-R incorporate herein by reference the above
28 paragraphs as though they were fully set forth herein.

///

1 313. Upon information and belief, Defendants have violated the Unfair Practices Act by, among
2 other activities, misrepresentations and concealments alleged hereinabove:

- 3 (a) accepting secret and undisclosed payments and commissions or discounts,
4 whether in the form of money or otherwise,
5 (b) jointly colluding with other such persons in the violation of the Act under
6 Bus. & Prof. C. § 17048,
7 (c) falsely advertising products and services by exaggeration, misleading and
8 false promises.

9 314. The above alleged acts or practices and other alleged in this Complaint and incorporated
10 herein, which violate the Unfair Practices Act and therefore constitute an unlawful business act or
11 practice within the meaning of Business and Professions Code section 17200, were and are likely to
12 mislead the general public in that Defendants' representations and promotion of the 419 plan as an
13 ERISA welfare benefits plan, that would require contributions to the life insurance policies only for the
14 first five years and thereafter self fund are false, and that contrary to representations and promises made
15 to induce participation in and purchase of the policies, the promised life insurance policies do not and
16 will not have the cash value as represented.

17 315. The unfair and/or fraudulent and unlawful business practices of Defendants are likely to
18 continue and therefore will continue to mislead the public and present a continuing threat to the public.
19 As a direct and proximate result of the defendants' conduct, Defendants have received and continue to
20 receive ill gotten gains, commissions and contributions that rightfully belong to Plaintiffs who were
21 adversely affected and deceived by Defendants' conduct, as members of the general public.

22 316. Plaintiffs seek a permanent injunction pursuant to Business and Professions Code § 17203
23 restraining and enjoining Defendants from continuing the acts of unfair competition set forth
24 hereinabove.

25 317. For a preliminary injunction during the pendency of this action pursuant to Business and
26 Professions Code section 17203 to enjoin and restrain defendants from the acts of unfair competition set
27 forth above.

28 ///

1 318. As a further proximate result of the aforementioned wrongful conduct of Defendants,
2 Plaintiffs have been caused to have suffered reasonable attorneys' fees together with costs of suit which
3 Plaintiffs are allowed to recover in an amount to be determined by the Court pursuant to Business and
4 Professions Code section 17082.

5 319. As a further proximate result of the aforementioned wrongful conduct of Defendants in
6 violation of the Unfair Practices Act, Plaintiffs are entitled to injunctive relief.

7 320. As a further proximate result of the aforementioned wrongful conduct of Defendants,
8 Plaintiffs are entitled to an award of mandatory treble damages, at the rate of three times the *actual*
9 *damages* sustained by Plaintiffs without regard to malice, which amount will be proven at the time of trial
10 but which *actual damages* exceed \$1.6 million dollars.

11
12 **DEMAND FOR JURY TRIAL**

13 Plaintiffs hereby demand a jury trial pursuant to rule 38 of the Federal rules of Civil Procedure.
14

15 **WHEREFORE**, Plaintiffs pray for judgment against Defendants, and each of them under the
16 applicable actions, above, as follows:
17

18 1. For a declaration that the XELAN WBT "419 Plan" is not a valid multiple employer
19 "employee welfare benefit plan" under ERISA and is thus not governed by ERISA but by traditional state
20 law as to any representations and actions during XELAN's handling of its "plan" and insuring insurance
21 policies.

22 2. To the extent the XELAN WBT or other XELAN plans are valid ERISA plans and subject
23 to ERISA, for 502(c) penalties at the rate of \$110 per day for failure to provide plan instruments and
24 documents as required by ERISA and/or following 30 days from a request by Plaintiffs;

25 3. To the extent the XELAN WBT or other XELAN plans are valid ERISA plans and subject
26 to ERISA, for such other appropriate equitable relief to redress violations of ERISA or to enforce any
27 provisions of ERISA, or to redress violations of the Plans or to enforce any terms of the plans, pursuant
28 to 29 USC 1132 (a)(3).

1 4. To the extent the XELAN WBT or other XELAN plans are valid ERISA plans and subject
2 to ERISA, for the permanent removal of Dr. Guess as a "Trustee" of any "ERISA benefits plan" and
3 injunction against Dr. Guess from serving as a Trustee of any such ERISA plan in the future pursuant to
4 ERISA § 502(a)(2) and 409 as brought by Plaintiff employee benefits plan of DOUBLE-R; and
5 alternatively as brought by all Plaintiffs pursuant to § 502(a)(3).

6 5. Whether or not the XELAN WBT or other plans are valid ERISA plans, for a declaration
7 that Plaintiff JAY SELZNICK is entitled to unwind all transactions with Defendants by surrendering all
8 policies issued by Defendants to Plaintiffs in exchange for the return of all premiums, expenses, fees,
9 charges, costs paid related to the policies.

10 6. For a declaration that Plaintiff ROWLAND is entitled to unwind all transactions involving
11 her with Defendants by surrendering her policy she was forced to purchase in or about June 2003 after
12 Defendants terminated the XELAN WBT plan in exchange for the return of all premiums, expenses, fees,
13 charges, costs paid related to the policy after she purchased it..

14 7. For a declaration that Plaintiff DOUBLE-R employee benefit plan and its Plan Sponsor
15 DOUBLE-R are entitled to restitution of all amounts paid related to their transactions with and through
16 the XELAN structure, including with the Defendant insurers, in excess of \$1.7 million together with
17 interest other expenses, commissions, fees, and interest thereon, as provide by law, as a return of the
18 premium and costs paid for:

- 19 I. INDIANAPOLIS LIFE POLICY insuring SELZNICK,
- 20 ii. INDIANAPOLIS LIFE POLICY that had insured employee LEANNE WRIGHT,
- 21 iii. INDIANAPOLIS LIFE POLICY that insures employee BRANDY ROWLAND,
- 22 iv. XELAN INS. CO. policy providing SELZNICK with supplemental malpractice
23 insurance.
- 24 v. PAN-AM LIFE INS. CO. supplemental disability policy providing SELZNICK
25 with supplemental disability insurance

26 8. General damages to SELZNICK and ROWLAND for mental and emotional distress and
27 other incidental damages in a sum to be determined at the time of trial;

28 ///

1 9. For any amount of increased taxes upon full recovery in this action that exceeds the
2 amount of taxes Plaintiffs each would have paid during each of the years 1999 through 2003 had
3 Plaintiffs not been induced to become involved with XELAN, in order that Plaintiffs be made whole.

4 10. Permanent injunction under the applicable State claims pursuant to Business and
5 Professions Code § 17203 restraining and enjoining Defendants from continuing the acts of unfair
6 business practices

7 11. For punitive and exemplary damages under the applicable State claims against Dr.
8 Guess, the XELAN entities, PYRAMIDAL FUNDING, and each of them in an amount appropriate
9 to punish or set an example of defendants;

10 12. Alternatively, mandatory treble damages, at the rate of three times the *actual damages*
11 sustained without regard to malice, for Defendants' unfair practices act violations

12 13. For prejudgment interest on all damages

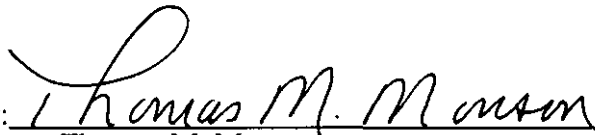
13 14. For reasonable attorneys' fees and costs of suit incurred herein;

14 15. For such other and further relief as the Court deems just and proper.

15
16
17 MILLER, MONSON PESHEL, POLACEK & HOSHAW

18
19 Dated: May 20, 2004

20 By: _____



21 Thomas M. Monson
22 Attorneys for Plaintiffs
23 Jay Kevin Selznick, D.M.D., M.D.,
24 Double R Oral & Maxillofacial Surgery, Inc.;
25 Double R Oral & Maxillofacial Surgery, Inc. Employee
26 Benefits Plan; Brandy J. Rowland
27
28



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THE ECONOMIC ASSOCIATION OF HEALTH PROFESSIONALS

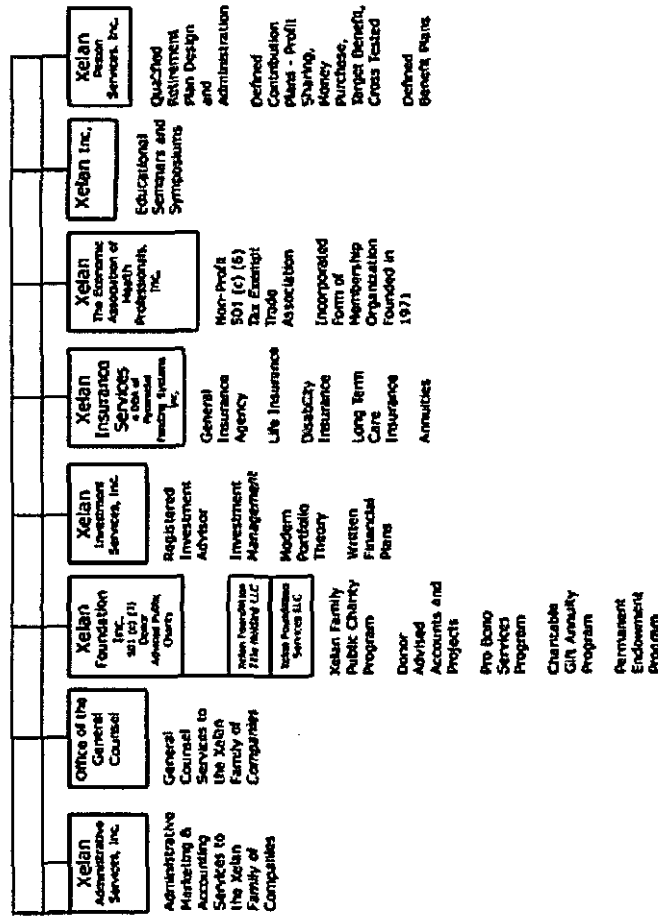
- Introduction
- Membership Plans
- The Company
- Key Personnel
- References
- Event Calendar
- Privacy Policy
- Doctors Only
- Financial Services
- Unnecessary Losses
- Members Only

Member ID:

Password:

The Company Family of Companies

Xélan Family of Companies Providing Integrated Planning Solutions to Prevent Doctor's Losses



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The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

CIVIL COVER SHEET

04 MAY 20 PM 3:16

I (a) PLAINTIFFS

JAY KEVIN SELZNICK, D.M.D., M.D. an individual, et al. (see attachment)

DEFENDANTS

XELAN, INC, et al. XELAN, a California Corporation, et al. (see attachment)

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES) CLARK, NV

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) SAN DIEGO, CA

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

THOMAS M. MONSON, SBN71993; SUSAN L. HORNER, SBN144806 MILLER MONSON PESHEL POLACEK & HOSHAW 501 West Broadway, Suite 700 San Diego, CA 92101 (619) 239-7777 (see attachment)

ATTORNEYS (IF KNOWN)

04 CV 1038 L (JFS)

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- U.S. Government Plaintiff
Federal Question ERISA (U.S. Government Not a Party)
2 U.S. Government Defendant
Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
Foreign Nation

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY). RECISSION: ERISA 502 (a) (3); ACCOUNTING; DECLARATORY RELIEF; BREACH OF FIDUCIARY DUTY ERISA 29, 404(a), 405(a), 406(a), 502.

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, BANKRUPTCY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Property Rights, etc.

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- Original Proceeding
Removal from State Court
Remanded from Appellate Court
Reinstated or Reopened
Transferred from another district (specify)
Multidistrict Litigation
Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 DEMAND Over \$2,000,000.00 JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE May 20, 2004 SIGNATURE OF ATTORNEY OF RECORD Thomas M. Monson

#103911 150- MS

Handwritten initials 'CP'

1 (a)

JAY KEVIN SELZNICK, D.M.D., M.D., an individual, **DOUBLE R ORAL & MAXILLOFACIAL SURGERY, INC.**, a Nevada personal service corporation; **DOUBLE R ORAL & MAXILLOFACIAL SURGERY, INC.**, a Nevada personal service corporation, on behalf of employee **BRANDY JEAN ROWLAND**, an individual; **DOUBLE R ORAL & MAXILLOFACIAL SURGERY, INC.**, a Nevada personal service corporation, on behalf of employee **LEANNE WRIGHT**, an individual; **DOUBLE R ORAL & MAXILLOFACIAL SURGERY, INC.**, a Nevada personal service corporation, on behalf of **the employee benefits plan**,

Plaintiffs

v.

XELAN, INC. aka **XELAN**, a California corporation; **XELAN THE ECONOMIC ASSOCIATION OF HEALTH PROFESSIONALS** aka **XELAN**, a California corporation; **XELAN WELFARE BENEFIT TRUST**, aka “**XELAN 419 PLAN**,” “multi-employer group welfare benefit plan”; **L. DONALD GUESS, DMD** aka **LEWIS D. GUESS, DMD, TRUSTEE OF XELAN WELFARE BENEFIT TRUST**; **L. DONALD GUESS, DMD** aka **LEWIS D. GUESS, DMD**, an individual; **INDIANAPOLIS LIFE INSURANCE COMPANY**, a Domestic Insurance Corporation; **Xelan Malpractice Equity Trust** is a Xelan Trust in the British Virgin Islands; **Xelan Insurance Company** aka **Xelan Insurance Company, Ltd.**, domiciled and licensed in Barbados, BVI; **Xelan Disability Equity Trust**, a Xelan Canadian Trust; **Pan-American Life Insurance Company**, and **DOES 1 through 100**

Defendants

1 (c)

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FAX: (858) 444-2346
e-mail: mschechter@bsllp.com