

USDC SCAN INDEX SHEET



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

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FILED
JUL 21 2004
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

11 JAY KEVIN SELZNICK, D.M.D., M.D., et
al.,
12
13 Plaintiffs,
14 v.
15 XELAN, INC. aka XELAN, a California
corporation, et al.
16
17 Defendants.

CASE NO. 04 CV 1038 L (JFS)
Action Filed May 20, 2004
DEFENDANT L. DONALD GUESS, D.M.D.
aka LEWIS D. GUESS, D.M.D.'S NOTICE OF
MOTIONS AND MOTIONS (1) TO DISMISS
FOR FAILURE TO STATE A CLAIM UNDER
FEDERAL RULE OF CIVIL PROCEDURE
12(b)(6) AND (2) TO STRIKE UNDER
FEDERAL RULE OF CIVIL PROCEDURE
12(f)
Date: September 27, 2004
Time: 10:30 a.m.
Courtroom: 14

19 TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:
20 PLEASE TAKE NOTICE THAT ON September 27, 2004 at 10:30 a.m., or as soon thereafter
21 as the matter may be heard, in the above entitled Court located at 940 Front Street, San Diego,
22 California, Defendant, L. DONALD GUESS, D.M.D. aka LEWIS D. GUESS, D.M.D. ("Dr.
23 Guess") will and hereby does move this Court for an order dismissing the Complaint herein
24 under Federal Rule of Civil Procedure 12(b)(6), and to strike portions of the Complaint under
25 Federal Rule of Civil Procedure 12(f).

26 These motions are made on the grounds that: (1) all of Plaintiffs' state law claims for
27 relief are preempted by the Employee Retirement and Income Security Act of 1974 ("ERISA"),
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1 29 U.S.C. §§ 1001 *et seq.*, and Plaintiffs are limited to the specified remedies under ERISA,
2 even where ERISA does not provide a remedy for the harm alleged; (2) Plaintiffs' purported
3 ERISA claims are not authorized by ERISA; for example, Plaintiffs cannot sue for monetary
4 damages, including either compensatory or punitive damages; (3) Plaintiffs do not state a valid
5 claim for breach of fiduciary duty under ERISA Section 502(a)(2) because they cannot sue for
6 individual relief; (4) Plaintiffs do not state a valid claim for relief for breach of fiduciary duty
7 under ERISA Section 502(a)(3) because "other appropriate equitable relief" does not include
8 claims for legal restitution; and (5) Plaintiffs' claim for ERISA statutory penalties fails because
9 it can only be brought against the plan administrator. In addition, two of the four Plaintiffs are
10 not proper parties under ERISA; there is no right to a jury trial under ERISA; and Plaintiffs'
11 claims for compensatory and punitive damages, improper under ERISA, should be stricken.

12 For these reasons, detailed in the Memorandum of Points and Authorities filed
13 herewith, Plaintiffs' Complaint fails to state a claim upon which relief can be granted, and it
14 should be dismissed with prejudice.

15 These motions are based on this Notice of Motion and Motion, the Memorandum
16 of Points and Authorities, the Declaration of Patricia De La Torre, all pleadings and filings in
17 this matter, and such other oral and documentary evidence as may be presented to the Court on
18 this matter at or before the hearing.

19 Dated: July 21, 2004

Respectfully submitted,

LATHAM & WATKINS LLP
Kristine L. Wilkes

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22 By Kristine L. Wilkes
23 Kristine L. Wilkes
24 Attorneys for Defendant
25 L. DONALD GUESS, D.M.D. aka
26 LEWIS D. GUESS, D.M.D.
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