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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF KERN

JEANNE LAMB and GREG LAMB,

Plaintiff,

vs.

FRANK YNOSTROZA, M.D.; SAN DIMAS  
MEDICAL GROUP; MILLENNIUM  
SURGERY CENTER, and DOES 1-100,  
inclusive,

Defendants.

Case No. BC387043

**PLAINTIFF'S EX PARTE APPLICATION  
FOR AN ORDER CONTINUING THE  
MOTION FOR SUMMARY  
JUDGMENT OR FOR AN ORDER  
CONTINUING THE TRIAL DATE OR,  
IN THE ALTERNATIVE, FOR AN  
ORDER SHORTENING TIME FOR  
NOTICE AND HEARING ON A  
MOTION SEEKING SUCH RELIEF;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATION OF  
JOHN R. CONTOS, ESQ., GAIL  
LANGER and BARBARA SPENCER**

HON. William D. Palmer  
DEPT. 15

Date: August 5, 2009  
Time: 8:30 a.m.  
Place: Dept. 15

Complaint Filed: 04/02/08  
Trial Date: 09/08/09

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiffs Jeanne Lamb and Gregory Lamb hereby apply, ex  
parte, to this Court pursuant to Rule 3.1332, subsections (b) and (c)(1) of  
the California Rules of Court for an Order:

1           1) continuing the August 5, 2009, hearing date currently  
2 scheduled for Defendant Ynostroza's Motion for Summary Judgment for  
3 at least 30 days to allow plaintiffs' Opposition to be timely filed;

4           2) continuing the Mandatory Settlement Conference currently  
5 set for August 28, 2009, to September 28, 2009, or later and Trial,  
6 scheduled for September 8, 2009, to October 8, 2009, or later;

7           3) extending the discovery cutoff to permit plaintiffs additional  
8 time to withdraw Dr. Frumovitz and redesignate a new expert witness.

9           In the alternative, pursuant to Code of Civil Procedure § 1005  
10 and Cal. Rules of Court, Rule 3.1300, the Plaintiff applies *ex parte* for an  
11 Order shortening time for notice and hearing on a Motion to Continue  
12 Defendant's Motion for Summary Judgment currently set for August 5,  
13 2009, setting Time for Hearing Within 30 Days of the Date of Trial.

14           This *ex parte* application is made on the grounds that good  
15 cause exists for the relief sought herein because plaintiffs recently  
16 learned that plaintiffs and defendants have both designated the same  
17 expert witness, William Frumovitz, M.D. Plaintiffs were unaware of this  
18 conflict until July 21, 2009, the day *after* plaintiffs served their designation  
19 of expert witnesses, because Defendant Ynostroza's Motion for Summary  
20 Judgement, served on May 22, 2009, is supported only by the  
21 declaration of the defendant himself and is not supported by the  
22 declaration of any expert retained on behalf of defendant Ynostroza.

23           Even the expert himself, Dr. Frumovitz, was unaware that  
24 opposing parties had both requested his services as an expert witness on  
25 the same case until 4:30 p.m. on July 20, 2009 – the day before the  
26 parties' expert designations were due, at which time he informed a  
27 paralegal in the office of plaintiffs' counsel, Gail Langer, that he could  
28 not serve as plaintiff's expert because of a conflict of interest related to

1 defendant's counsel, Dennis Thelan, but would not disclose the nature of  
2 the conflict.

3 Plaintiffs' counsel, John Contos, a sole practitioner, was  
4 engaged in trial in Riverside County at this time and continues to be  
5 engaged in that trial, which is expected to continue through mid-  
6 August.

7 Upon learning that a conflict existed, Ms. Langer immediately  
8 attempted to contact Mr. Thelan the next morning, July 21, to request,  
9 that he stipulate to continuing the Motion for Summary Judgment in light  
10 of an apparent conflict of interest between plaintiffs' expert witness and  
11 Mr. Thelan, the nature of which was unknown to Ms. Langer at that time.  
12 She requested that defendant stipulate to allowing plaintiffs additional  
13 time to retain a new expert and allow that expert some time to review  
14 the records in preparation for the opposition to the defendant's Motion  
15 for Summary Judgement. Mr. Thelan was on vacation and his secretary,  
16 after consulting another lawyer in the firm, informed Ms. Langer that  
17 they would not grant plaintiff any additional time to retain and  
18 designate a new expert, despite the fact that the conflict was clearly  
19 unforeseeable and, apparently due to some relationship with Mr. Thelan.  
20 Defense counsel also refused to continue the hearing on the Motion for  
21 Summary Judgment.

22 Plaintiffs retained a new expert that afternoon, had a  
23 voluminous set of medical records delivered to the new expert the  
24 following day, began revising the expert declaration and received the  
25 signed expert declaration on Friday afternoon, July 24, 2009. Mr. Contos  
26 attempted to contact Mr. Thelan upon his return from vacation on  
27 Monday, July 27, 2009, without success. Mr. Thelan faxed a letter to Mr.  
28 Contos advising that he would not stipulate to any extensions to

1 plaintiffs' counsel (Letter from Thelan, dated July 27, 2009, Exhibit A).

2 Plaintiffs' failure to file timely opposition to defendant's motion  
3 for summary judgment on July 22, 2009, was in no way the result of any  
4 lack of due diligence on the part of plaintiffs' counsel, but, in fact, was  
5 caused by some unforeseeable relationship which apparently existed  
6 between plaintiffs' expert and Mr. Thelan. Defense counsel chose to  
7 take advantage of plaintiffs' predicament and refused to extend any  
8 professional courtesy in this highly unusual circumstance. As a result of  
9 the conflict, plaintiffs were unable to file and serve their opposition to  
10 defendant's Motion for Summary Judgement until July 28, 2009.

11 Plaintiffs will be severely prejudiced if they are precluded from  
12 designating a new expert to replace Dr. Frumovitz and further, if  
13 plaintiffs' late filed opposition to the Motion for Summary Judgement is  
14 not considered, solely as a result of unforeseeable circumstances. It is  
15 within the Court's discretion to allow plaintiffs to file late opposition, or, in  
16 the alternative, to continue the Motion for Summary Judgement for 30  
17 days to allow plaintiffs to file timely opposition supported by a  
18 declaration from their new expert witness.

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1           This application is based upon the accompanying  
2 Memorandum of Points and Authorities, the declarations of John R.  
3 Contos, Gail Langer, Barbara Spencer, the pleadings, records, and  
4 papers on file herein, and such evidence and argument as the Court  
5 may allow at the time of the hearing on this matter.

6 DATED: August \_\_, 2009

CONTOS & BUNCH

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9 By \_\_\_\_\_  
10 JOHN R. CONTOS, ESQ.  
11 Attorneys for Plaintiffs, Jeanne  
12 Lamb and Gregory Lamb  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 In January, 2008, plaintiffs retained Contos & Bunch and  
5 declarant, John R. Contos, as counsel to represent their interests in the  
6 subject case. Gail Langer, a paralegal in the office of plaintiffs'  
7 counsel, contacted William Frumovitz, M.D., a OB/Gyn to discuss liability  
8 and retain his services to act as an expert witness on behalf of plaintiffs.  
9 Ms. Langer discussed the facts of the case with Dr. Frumovitz, which  
10 included a discussion of an operative report written by defendant  
11 Ynostroza and the hysterosalpingogram, as set forth in her declaration.  
12 Based on their discussion, Dr. Frumovitz gave her a positive preliminary  
13 opinion and agreed to review the records and act as an expert on  
14 behalf of plaintiffs. A memo written by Ms. Langer documented this  
15 early discussion, as well as the fees requested by Dr. Frumovitz, along  
16 with his tax ID number.

17 Plaintiffs' counsel has had a long relationship of many years with  
18 Dr. Frumovitz. He has reviewed many obstetric cases for our firm and has  
19 acted as an expert on behalf of our clients many times over the years. It  
20 is our custom and practice, with any new case we are considering, to  
21 contact Dr. Frumovitz to discuss the facts and liability and obtain a  
22 preliminary opinion. Dr. Frumovitz' opinion is a major factor in our  
23 decision to represent a client. Thereafter, records and a retainer fee  
24 are forwarded to Dr. Frumovitz for his review and final opinions.

25 The issue before the Court is complicated because the  
26 undersigned attorney of record for plaintiffs, John Contos, has been  
27 involved in a lengthy medical malpractice trial in Riverside County  
28 Superior Court, Charalambopoulos v. Inland Valley Medical Center. Mr.

1 Contos was in communication with and directing his office staff via  
2 email and telephone from Riverside, California, and also attempted to  
3 contact defense counsel in an attempt to resolve the expert witness  
4 conflict to no avail.

5         The details of communications between Gail Langer and Barbara  
6 Spencer of Contos & Bunch and Dr. Frumovitz are set forth in detail in their  
7 declarations which are attached in support of this Ex Parte Application. Events  
8 have been reconstructed based on file memos and phone records and  
9 therefore, the declarations of Gail Langer and Barbara Spencer accurately  
10 and unequivocally document that Dr. Frumovitz inadvertently and  
11 unknowingly was acting as an expert for both plaintiffs and defendant  
12 Ynostroza and, more importantly, that he has been provided with privileged  
13 information by counsel for plaintiffs, who had no way of knowing that Dr.  
14 Frumovitz had also been retained by defendant Ynostroza. Although the facts  
15 of this case are unique, it is clear that Dr. Frumovitz had not been provided with  
16 sufficient information by defendants to enable him to recognize similarity in the  
17 two cases or, he simply failed to recall facts that had been described to him in  
18 a series of phone conversations.

19         Our office, as previously stated, has had a long relationship of many  
20 years with Dr. Frumovitz and our custom and practice has always been to  
21 discuss the factual and liability issues in phone conversations to obtain a  
22 preliminary opinion prior to forwarding medical records and retention is  
23 handled on a fairly informal basis until the experts are formally designated prior  
24 to trial. This case was no different, with the exception that photos of the subject  
25 surgery that were critical to plaintiffs' case, and had been requested by Dr.  
26 Frumovitz when the case was first discussed with him, had been "lost or  
27 misplaced" by defendant.

28         The missing photos were discussed with Dr. Frumovitz in August, 2008

1 following the defendant's response to plaintiffs' discovery and again in  
2 preparation for opposing the defendant's Motion for Summary Judgement  
3 when defendant Ynostroza declared, for the first time, that his chart note of  
4 January 11, 2007, was in error, that he never took any photos of the surgery, nor  
5 reviewed them on January 11, 2007, and further, that his operative report was  
6 also in error and he never "cut and removed the left fallopian tube." Although  
7 Dr. Ynostroza stated he had "no independent memory of the procedure," his  
8 Motion for Summary Judgement asks the Court to completely disregard the  
9 medical records that were created contemporaneously with the events and  
10 accept Dr. Ynostroza's new version of facts that is completely unsupported any  
11 medical evidence; facts that Dr. Ynostroza has stated he, himself, cannot even  
12 recall.

13           The apparent deliberate destruction of evidence critical to plaintiffs'  
14 case is now compounded by defendant's refusal to cooperate with plaintiffs  
15 counsel in resolving an expert witness conflict that was caused, in part, by their  
16 office. Plaintiffs acted immediately upon learning of the expert conflict,  
17 retained a new expert, made arrangements to provide the new expert with  
18 records and obtained a medical record review and signed declaration from  
19 the new expert within four days of learning of the conflict, thereafter filing and  
20 serving an opposition to defendant Ynostroza's Motion for Summary  
21 Judgement two business days later, Tuesday, July 28, 2009.

22           Plaintiffs have demonstrated a good faith effort to resolve the conflict,  
23 but their efforts have been thwarted by defense counsel, who attempts to take  
24 advantage of the conflict by refusing to agree to any continuances of the  
25 Motion for Summary Judgement or Trial and by attempting to prevent plaintiffs  
26 from amending their designation or successfully opposing defendant  
27 Ynostroza's Motion for Summary Judgement.

28           As set forth in the attached declarations, plaintiffs have acted

1 reasonably and expeditiously in an attempt to resolve the expert conflict and  
2 defense counsel has given no inch and has failed and refused to cooperate in  
3 any way, even though the conflict directly involves their office. Plaintiffs  
4 request the Court, exercise it's sound discretion to resolve the dispute.

5 **II.**

6 **GOOD CAUSE EXISTS FOR THE RELIEF SOUGHT HEREIN**

7 Rule 3.1332(b) of the California Rules of Court permits a party to apply  
8 *ex parte* for an order to continue a trial date. Courts may continue a trial date  
9 upon a showing of good cause. (Cal. Rules of Court, Rule 3.1332(c).) The court  
10 may grant a continuance on an affirmative showing of good cause,  
11 "circumstances that may include good cause include: **1)the unavailability of an**  
12 **essential lay or expert witness because of death, illness or other excuseable**  
13 **circumstances.**" "In ruling on a motion or application for continuance, the court  
14 must consider all the facts and circumstances that are relevant to the  
15 determination." (Cal. Rules of Court, Rule 3.1332(d).) Such facts and  
16 circumstances include a consideration of: (1) the Court's file in the case and any  
17 supporting declarations concerning the motion; (2) the diligence of counsel in  
18 bringing the issue to the Court's attention and to the attention of opposing counsel  
19 at the first available opportunity; (3) the nature of any previous continuances,  
20 extensions of time or other delay attributable to any party; (4) the proximity of the  
21 trial date; (5) whether the interests of justice are best served by continuance; and  
22 (6) any other facts and circumstances, relevant to a fair determination of the  
23 motion. (Cal. Rules of Court, Rules 3.1332(d)(2),(3),(5),(10).)

24 Plaintiffs' counsel acted immediately, upon notice of a conflict, to retain  
25 a new expert and filed opposition to defendant's Motion for Summary Judgment  
26 on the fifth business day following first notice of the conflict.

27 In deciding whether to grant a continuance, the trial judge must exercise  
28 discretion with due regard to all interests involved. A denial of the continuance,

1 which has the practical effect of denying the applicant a fair hearing, is often  
2 held to be reversible error. (*Vann v. Shileh* (1963) 54 Cal.App.3d 192; *Palimar*  
3 *Mortgage Co. v. Lester* (1963) 212 Cal.App.2d 236, 239.) The trial court's ruling  
4 should be guided by fixed legal principle and exercised in a manner to  
5 accomplish substantial justice in light of all facts and circumstances. (*Vann v.*  
6 *Shileh, supra*, 54 Cal.App.3d at 198-199; *Palimar Mortgage v. Lester, supra*, 212  
7 Cal.App.2d at 239.)

8 In this instance, the interests of justice require that either that the pending  
9 September 8, 2009, trial date and Mandatory Settlement Conference be  
10 continued to allow plaintiffs to file an Amended designation of Experts or that the  
11 hearing date on the Defendant's Motion for Summary Judgment be continued  
12 in order to allow the Plaintiffs' counsel and their new expert reasonable time to  
13 review the records and prepare opposition to defendants motion for summary  
14 judgement.

15 Code of Civil Procedure section 437c, subdivision (a) provides: "The  
16 [summary judgment] motion shall be heard no later than 30 days before the date  
17 of trial, unless the court for good cause orders otherwise." The 30-day time limit on  
18 summary judgment hearings before trial is necessary to permit the completion of  
19 discovery and to provide the trial court with sufficient time to consider the motion  
20 and any supplemental papers to be filed. (*Campanano v. California Medical*  
21 *Center* (1995) 38 Cal.App.4th 1322, 1327.)

22 The intent underlying section 437c is well established. "The aim of the  
23 [summary judgment] procedure is to discover, through the media of affidavits,  
24 whether the parties possess evidence requiring the weighing procedures of a  
25 trial." (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.)

26 The Plaintiff will be severely prejudiced if:

27 1) plaintiffs motion to continue defendant's Motion for Summary  
28 Judgment is not granted or

1           2) if plaintiffs are not provided some reasonable, additional time to file  
2 opposition to the Motion for summary judgment and

3           3) if plaintiffs are precluded from designating a new expert to replace Dr.  
4 Frumovitz.

5           In the instant case, there is nothing to indicate that any party will be  
6 prejudiced by the requested relief sought herein. Defendant alleges Dr. Frumovitz  
7 was retained "long ago," however, defendant's Motion for Summary Judgement  
8 filed and served just six weeks ago was not supported by the declaration of Dr.  
9 Frumovitz. If plaintiffs had been made aware of a potential conflict six weeks  
10 ago, when defendant's motion for judgement was served, plaintiffs would have  
11 had ample opportunity to find another expert to testify in their case.

12           Instead, plaintiffs found out at the close of business on Monday, July 20,  
13 2009, that Dr. Frumovitz could not act as an expert witness on plaintiffs' behalf, nor  
14 sign a declaration for an opposition to defendant's Motion for Summary  
15 Judgement that had to be filed. Barbara Spencer, a secretary in the office of  
16 plaintiffs' counsel, had contacted Dr. Frumovitz personally the previous week and  
17 obtained a current fee schedule, tax ID number for payment and a current  
18 curriculum vitae from Dr. Frumovitz himself. Plaintiffs had, for the previous eighteen  
19 months, reasonably relied upon conversations with Dr. Frumovitz regarding his  
20 opinions on liability and his availability to act as an expert on plaintiff's behalf.  
21 When suddenly presented with a conflict, on the day designation of experts had  
22 been served and with an opposition to a motion for judgement due, plaintiffs  
23 were forced to retain a new expert, arrange for delivery of the medical records  
24 to the new expert, obtain a new expert consultation and prepare opposition to  
25 defendant's motion for summary judgement.

26           Even Dr. Frumovitz did not recognize the similarity between the case for  
27 which plaintiffs had requested his services eighteen months ago and that of the  
28 case which defendant had also requested his services. Because defendant did



1 not submit a declaration by Dr. Frumovitz in support of the motion for summary  
2 judgement, plaintiffs were unaware that any conflict existed until after plaintiffs  
3 had served a designation of expert witnesses and were preparing opposition to  
4 defendant's motion for summary judgement. Without an expert witness  
5 declaration, plaintiffs could not prepare a timely opposition to the defendant's  
6 motion for summary judgement and were forced to file and serve a late  
7 opposition on Tuesday, July 28, 2009.

8 However, plaintiffs immediately retained a new expert and have filed  
9 and served withdrawal and designation of the previously designated expert  
10 witness, William Frumovitz, M.D. and filed and served opposition to defendant's  
11 motion for summary judgement. Plaintiffs request this Court's assistance in  
12 continuing the Motion for Summary Judgement and Trial dates to allow plaintiff's  
13 expert to thoroughly review the medical records as well as defendant's moving  
14 papers and prepare timely opposition or allow plaintiffs to file late opposition to  
15 defendant's motion for summary judgement and file an amended designation of  
16 experts.

17 Accordingly, in the interest of justice, this Court should grant the  
18 requested relief.

19 III.

20 **THE COURT HAS THE AUTHORITY TO SHORTEN TIME FOR NOTICE AND HEARING ON**

21 **A MOTION TO CONTINUE A TRIAL DATE**

22 In general, a motion, including all moving and supporting papers, must  
23 be served and filed and notice given, at least 16 court days before the time set  
24 for hearing. (Code Civ. Proc., §1005.) However, upon a showing of good cause,  
25 the Court may prescribe a shorter time for notice than is generally provided for a  
26 noticed motion. (Id.; Cal. Rules of Court, Rule 3.1300; L.A. County Superior Court,  
27 Rule 400, Section 7.) Accordingly, in the event the Court chooses not to grant the  
28 relief sought on this date, the Court may instead shorten time for a hearing on a



1 motion seeking such relief.

2 IV.

3 **CONCLUSION**

4 For all the foregoing reasons and in light of the above-cited authorities,  
5 the Plaintiff respectfully requests that this Court issue an Order

6 1) continuing the August 5, 2009 hearing date currently scheduled for  
7 Defendant's Motion for Summary Judgment for at least 30 days and continue the  
8 Mandatory Settlement Conference currently set for August 28, 2009 and the Trial,  
9 currently set for September 8, 2009, for at least 60 days to allow plaintiffs to file an  
10 amended designation of expert witnesses and for the parties to resolve the expert  
11 witness dispute.

12 2) In the alternative, plaintiffs request an Order continuing both the  
13 currently-set September, 8, 2009 trial date and August 28, 2009 Mandatory  
14 Settlement Conference for approximately 30 days and Plaintiffs respectfully  
15 request that this Court issue an order shortening time for notice and hearing on a  
16 motion to continue defendant Ynostroza's Motion for Summary Judgment and  
17 other relief that the court deems just or has been requested herein.

18 DATED: August 3, \_\_, 2009

CONTOS & BUNCH

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21 By \_\_\_\_\_  
22 JOHN R. CONTOS, ESQ.  
23 Attorneys for Plaintiffs, JEANNE  
24 LAMB and GREGORY LAMB  
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1 review the records Monday evening and would be able to sign a  
2 declaration in support of plaintiffs' opposition to defendant Ynostroza's  
3 Motion for Summary Judgment on Tuesday, July 20, 2009. Dr. Frumovitz also  
4 personally returned the phone call of Ms. Spencer, provided his fees, tax ID  
5 number and directed his office to fax his curriculum vitae to our office.

6           6. On Monday, July 20, 2009, at 2:54 p.m. Ms. Langer telephoned  
7 Dr. Frumovitz's office to advise that the records and retainer would be  
8 delivered at approximately 3:30 p.m. Contrary to the declarations  
9 prepared by defense counsel, she did not ask to meet with Dr. Frumovitz or  
10 interrupt his office schedule. Ms. Langer simply asked the receptionist for  
11 the doctor's email address. The receptionist conveyed the request to Dr.  
12 Frumovitz, who invited Ms. Langer into his office. Ms. Langer told Dr.  
13 Frumovitz that we would be designating experts by the end of the day on  
14 July 20, 2009, and would need to respond to defendant's Motion for  
15 Summary Judgment by Wednesday, July 20, 2009. She discussed the  
16 missing photos of the surgical procedure with Dr. Frumovitz, who suggested  
17 that she subpoena the photos from Millennium Surgical Center, telling her  
18 that even if the doctor no longer had copies, the surgical center would  
19 have copies in their chart. He also indicated that we should obtain a  
20 copy of the hystero-salpingogram, which documented that the left  
21 fallopian tube, which defendant supposedly removed on June 8, 2005,  
22 was, in fact, present and patent. Dr. Frumovitz wrote his email address on  
23 a business card so she could send him the defendant's declaration. In turn,  
24 Ms. Langer provided her home phone and cell phone numbers and it was  
25 agreed they would speak later that evening regarding the substance of his  
26 declaration.

27           7. On Monday, July 20, 2009, plaintiffs counsel served a  
28 designation of expert witnesses, in which William Frumovitz, M.D., was

1 designated as an expert on behalf of plaintiffs.

2 8. At 4:37 p.m. on July 20, 2009, Ms. Langer received a phone call  
3 from Dr. Frumovitz on her cell phone, in which he indicated that he could  
4 not act as an expert on behalf of plaintiff because he had "a conflict with  
5 the defense attorney, Dennis Thelan," but declined to state the nature of  
6 the conflict. He provided her the names of two other physicians who might  
7 be willing to act as an expert on behalf of plaintiff.

8 9. Ms. Langer immediately contacted those individuals and left  
9 messages, indicating the urgency of her request.

10 10. On Tuesday, July 21, 2009, Ms. Langer left a message for Dennis  
11 Thelan on his voice mail, to advise that plaintiffs' expert had just disclosed  
12 a conflict due to some relationship with Mr. Thelan, that plaintiffs would  
13 need to withdraw their designation and file an amended designation of  
14 experts. She also requested that he agree to continue the Motion for  
15 Summary Judgment and trial to allow plaintiffs' expert time to review the  
16 records, prepare a declaration and file an amended designation of  
17 experts. However, Mr. Thelan was on vacation and no one else in the  
18 office of defense counsel would agree to providing plaintiffs additional  
19 time to designate a new expert.

20 11. On Wednesday, July 22, 2009, at 1:50 p.m. Ms. Langer again  
21 contacted office for defense counsel, speaking to "Amber" and advised  
22 that, due to a conflict our expert had with their office, we had to retain a  
23 new expert, and requested: that defendants continue the Motion for  
24 Summary Judgement to allow our expert some time to review the records  
25 and prepare a declaration in support of our opposition, as well as  
26 additional time for plaintiffs to file an amended designation of experts.  
27 Amber called back Ms. Langer at 210 p.m., indicating the Motion for  
28 Summary Judgement could not be continued due to the September 8,

1 2009, trial date and defendant would not agree to extending plaintiffs any  
2 additional time to file an amended designation of experts.

3 12. On July 22, 2009, Plaintiffs received defendant's designation  
4 of expert witnesses and, for the first time, realized that plaintiffs and  
5 defendant had retained the same expert. Ms. Spencer also received a  
6 phone call from Amber regarding the expert designation. Ms. Langer  
7 called Amber at 2:39 p.m. advising her that we had already had a positive  
8 preliminary opinion from Dr. Frumovitz. Ms. Langer requested that both  
9 plaintiffs and defendant Ynostroza withdraw Dr. Frumovitz as an expert.

10 13. Amber indicated that defendant would not withdraw Dr.  
11 Frumovitz, and that, notwithstanding the mutual designation of the same  
12 expert, that defendants would not allow plaintiffs any additional time to  
13 designate a new expert or additional time to file opposition to defendant's  
14 Motion for Summary Judgement.

15 14. Thereafter, Ms. Langer received a letter by facsimile from  
16 Dennis Thelan's son, Kevin Thelan, in which he asserted that defendant had  
17 retained Dr. Frumovitz "long ago" and accused plaintiffs' counsel and Ms.  
18 Langer of violating the Rules of Professional Conduct in contacting Dr.  
19 Frumovitz. He refused to grant any additional time for plaintiffs to retain  
20 another expert or any additional time to file opposition to defendant's  
21 Motion for Summary Judgement. (Letter of Kevin Thelan, Exhibit A)

22 15. Ms. Langer responded to Mr. Thelan's letter, (Letter of Gail  
23 Langer, Exhibit B) advising that we had contacted Dr. Frumovitz in early  
24 2008, and that, after a preliminary positive opinion, he had agreed to testify  
25 on behalf of plaintiffs. Plaintiffs had relied upon conversations with Dr.  
26 Frumovitz and transmissions from his office indicating he was willing to act  
27 as an expert on behalf of plaintiffs in the case of Lamb v. Ynostroza and  
28 that plaintiffs had not violated any Rules of Professional Conduct in their

1 communications with Dr. Frumovitz.

2 16. Mr. Thelan responded to Ms. Langer's letter (Letter of Kevin  
3 Thelan, Exhibit C).

4 17. On Wednesday, July 22, Ms. Langer arranged for medical  
5 records and a retainer fee be delivered to Gene Parks, M.D., who had  
6 agreed, based on his discussions with Ms. Langer, to act as an expert on  
7 behalf of plaintiffs.

8 18. On Friday, July 24, 2009, Dr. Parks faxed to the office for  
9 plaintiffs' counsel, his signed declaration in support of plaintiffs' opposition  
10 to defendant's Motion for Summary Judgment.

11 19. On Monday, plaintiffs' counsel, John Contos, placed  
12 telephone calls to Dennis Thelan, requesting, under the unusual  
13 circumstances of the mutual designation by both plaintiffs and defendant  
14 of the same expert, that plaintiffs be granted additional time to withdraw  
15 Dr. Frumovitz and designate a new expert and that plaintiffs be granted  
16 additional time to file opposition papers to defendant's Motion for  
17 Summary Judgement. Mr. Thelan faxed a letter to John Contos on  
18 Monday, July 27, 2009, indicating that due to the proximity of the  
19 September 8, 2009, trial, that he was unable to grant plaintiffs any extension  
20 of time to either designate a new expert or oppose the Motion for Summary  
21 Judgement, even though the necessity for those extensions arose due to  
22 a conflict with his office.

23 20. Plaintiffs filed and served opposition to the Motion for  
24 Summary Judgement on Tuesday, July 28, 2009 and filed a withdrawal and  
25 amended designation of expert witnesses on Monday, August 3, 2009.

26 21. The foregoing recitation of facts clearly demonstrates that  
27 plaintiffs had first contacted Dr. Frumovitz in January, 2008, to act as an  
28 expert witness on behalf of plaintiffs and relied upon his responses and

1 availability to act as an expert until he advised Ms. Langer of a conflict at  
2 4:37 p.m. on Monday, July 20, 2009, after plaintiffs had already designated  
3 him as an expert. Plaintiffs were still unaware of the nature of the conflict  
4 until approximately 2:30 p.m. on Tuesday, July 21, 2009, when defendant's  
5 designation of expert witnesses was received and it became clear that the  
6 conflict was that Dr. Frumovitz had not recognized the similarity between  
7 the two cases that had been discussed with him and had agreed to  
8 become an expert for both plaintiff and defendant in the same case.

9         22. It is clear that Dr. Frumovitz had not received any medical  
10 records of Jeanne Lamb from defense counsel as of July 20, 2009, that  
11 would have allowed him to recognize it as the case he had discussed with  
12 plaintiffs. Further, the declaration of Dr. Frumovitz, or any other expert  
13 witness, is conspicuously absent from the defendant's Motion for Summary  
14 Judgement and it is reasonable to conclude that had Dr. Frumovitz  
15 reviewed records on behalf of defendant as of even six weeks earlier, his  
16 declaration, would have been included in support of defendant  
17 Ynostroza's Summary Judgement.

18         23. Based on the foregoing, it is respectfully requested that the  
19 defendants Motion for Summary Judgement be continued for 30 days to  
20 allow plaintiffs the opportunity to file a timely opposition, that the MSC and  
21 Trial dates be continued for 60 days to allow plaintiffs to designate a new  
22 expert and for the issue of Dr. Frumovitz's retention by both parties to be  
23 resolved. In the alternative, plaintiffs request that the Court accept and  
24 excuse plaintiffs Amended designation of expert witnesses and the  
25 Opposition to defendant Ynostroza's Motion for Summary Judgement.

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1 I declare under penalty of perjury under the laws of the State of  
2 California that the foregoing is true and correct. Executed on April \_\_, 2009, at  
3 Los Angeles, California.

4 By \_\_\_\_\_  
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1 records on the Lamb case for his review and that we would need to  
2 designate experts on Monday, July 20, 2009. Dr. Frumovitz was out of town,  
3 but called me on Friday, 17, 2009, instructing me to send the records to his  
4 office, with the retainer fee, and that he would review the records Monday  
5 evening and would be able to sign a declaration in support of plaintiffs'  
6 opposition to defendant Ynostroza's Motion for Summary Judgment on  
7 Tuesday, July 20, 2009. Barbara Spencer also informed me that Dr.  
8 Frumovitz had personally returned her phone call and had provided his  
9 fees, tax ID number and had faxed his curriculum vitae to our office.

10           6. On Monday, July 20, 2009, at 2:54 p.m. I telephoned Dr.  
11 Frumovitz's office to advise that the records and retainer would be  
12 delivered at approximately 3:30 p.m. Contrary to the declarations  
13 prepared by defense counsel, I did not ask to meet with Dr. Frumovitz or  
14 interrupt his office schedule. I only asked the receptionist for the doctor's  
15 email address. I was asked to wait while the receptionist conveyed the  
16 request to Dr. Frumovitz. I was asked to come into the office by the  
17 receptionist and Dr. Frumovitz invited me into his office. He was extremely  
18 cordial and remembered me from prior cases. I briefly discussed the most  
19 relevant issues, including the new claims by Dr. Ynostroza that his chart  
20 note was an "error", that he never took any photos of the surgery or  
21 reviewed them and that his operative report was "in error" and he never  
22 removed the left fallopian tube. Dr. Frumovitz suggested that we  
23 subpoena the "missing" photos from Millennium Surgical Center, stating  
24 that even if the doctor no longer had copies, the surgical center would  
25 have copies of any photos that had been taken in their chart. He also  
26 indicated that we should obtain a copy of the hystero-salpingogram,  
27 which documented that the left fallopian tube, which defendant  
28 supposedly removed on June 8, 2005, was, in fact, present and patent. Dr.

1 Frumovitz wrote his email address on a business card forme so I could send  
2 him the defendant's declaration later that evening. In turn, I provided him  
3 with my home phone and cell phone numbers. It was agreed we would  
4 speak later that evening regarding the substance of his declaration.

5 7. On Monday, July 20, 2009, plaintiffs counsel served a  
6 designation of expert witnesses, in which William Frumovitz, M.D., was  
7 designated as an expert on behalf of plaintiffs.

8 8. At 4:37 p.m. on July 20, 2009, I received a phone call from Dr.  
9 Frumovitz on her my cell phone, in which he indicated that he could not  
10 act as an expert on behalf of plaintiff because he had "a conflict with the  
11 defense attorney, Dennis Thelan," I asked what the nature of the conflict  
12 was, but said "I can't tell you." I asked if Mr. Thelan was his attorney and  
13 he responded, I'm sorry but I can't discuss that." I asked if he could  
14 recommed another physician and he gave me the names of two other  
15 physicians who might be willing to testify for plaintiffs.

16 9. My phone records reflect that I immediately contacted those  
17 individuals and left messages, indicating the urgency of my request.

18 10. On Tuesday, July 21, 2009, I left a message for Dennis Thelan on  
19 his voice mail, to advise that plaintiffs' expert had just disclosed a conflict  
20 due to some relationship with Mr. Thelan, that plaintiffs would need to  
21 withdraw their designation and file an amended designation of experts.  
22 I also requested that he agree to continue the Motion for Summary  
23 Judgment and trial to allow plaintiffs' new expert time to review the  
24 records, prepare a declaration and file an amended designation of  
25 experts. However, Mr. Thelan was on vacation and no one else in the  
26 office of defense counsel would agree to providing plaintiffs additional  
27 time to designate a new expert.

28 11. On Wednesday, July 22, 2009, at 1:50 p.m. I again contacted

1 office for defense counsel, speaking to "Amber" and advised that, due to  
2 a conflict our expert had with their office, we had to retain a new expert,  
3 and requested: that defendants continue the Motion for Summary  
4 Judgement to allow our expert some time to review the records and  
5 prepare a declaration in support of our opposition, as well as additional  
6 time for plaintiffs to file an amended designation of experts. Amber called  
7 me back at 210 p.m., indicating the Motion for Summary Judgement could  
8 not be continued due to the September 8, 2009, trial date and defendant  
9 would not agree to extending plaintiffs any additional time to file an  
10 amended designation of experts.

11 12. Later that day, on July 22, 2009, we received defendant's  
12 designation of expert witnesses and, for the first time, realized that plaintiffs  
13 and defendant had retained the same expert. Barbara Spencer also  
14 received a phone call from Amber regarding the expert designation. I  
15 therefore called Amber at 2:39 p.m. advising her that we had already  
16 obtained a positive preliminary opinion from Dr. Frumovitz. I requested  
17 that both plaintiffs and defendant Ynostroza withdraw Dr. Frumovitz as an  
18 expert.

19 13. Amber indicated that defendant would not withdraw Dr.  
20 Frumovitz, and that, notwithstanding the mutual designation of the same  
21 expert, that defendants would not allow plaintiffs any additional time to  
22 designate a new expert or additional time to file opposition to defendant's  
23 Motion for Summary Judgement.

24 14. Thereafter, I received a letter by facsimile from Dennis Thelan's  
25 son, Kevin Thelan, in which he asserted that defendant had retained Dr.  
26 Frumovitz "long ago" and accused Barbara Spencer and I of violating the  
27 Rules of Professional Conduct in contacting Dr. Frumovitz. He refused to  
28 grant any additional time for plaintiffs to retain another expert or any

1 additional time to file opposition to defendant's Motion for Summary  
2 Judgement. (Letter of Kevin Thelan, Exhibit A)

3 15. I responded to Mr. Thelan's letter, (Letter of Gail Langer, Exhibit  
4 B) advising that we had contacted Dr. Frumovitz in early 2008, and that,  
5 after a preliminary positive opinion, he had agreed to testify on behalf of  
6 plaintiffs. Plaintiffs had relied upon conversations with Dr. Frumovitz and  
7 transmissions from his office indicating he was willing to act as an expert on  
8 behalf of plaintiffs in the case of Lamb v. Ynostroza and that plaintiffs had  
9 not violated any Rules of Professional Conduct in their communications  
10 with Dr. Frumovitz.

11 16. Mr. Thelan sent a somewhat less accusatory letter in response  
12 to my letter. (Letter of Kevin Thelan, Exhibit C).

13 17. On Wednesday, July 22, I arranged for medical records and a  
14 retainer fee be delivered to Gene Parks, M.D., who had agreed, based on  
15 our discussions, to act as an expert on behalf of plaintiffs.

16 18. On Friday, July 24, 2009, Dr. Parks faxed to our office his signed  
17 declaration in support of plaintiffs' opposition to defendant's Motion for  
18 Summary Judgment.

19 19. On Monday, John Contos, the attorney of record, placed  
20 telephone calls to Dennis Thelan, requesting, under the unusual  
21 circumstances of the mutual designation by both plaintiffs and defendant  
22 of the same expert, that plaintiffs be granted additional time to withdraw  
23 Dr. Frumovitz and designate a new expert and that plaintiffs be granted  
24 additional time to file opposition papers to defendant's Motion for  
25 Summary Judgement. I reviewed a letter Mr. Thelan faxed to John Contos  
26 on Monday, July 27, 2009, indicating that due to the proximity of the  
27 September 8, 2009, trial, that he was unable to grant plaintiffs any extension  
28 of time to either designate a new expert or oppose the Motion for Summary

1 Judgement, even though the necessity for those extensions arose due to  
2 a conflict with his office.

3 20. On Tuesday, July 28, 2009, our office filed and served an  
4 opposition to defendant Ynostroza's Motion for Summary Judgement and  
5 at the direction of John Contos, I filed a withdrawal and amended  
6 designation of expert witnesses on Monday, August 3, 2009.

7 21. Based on my recollection of phone conversations with Dr.  
8 Frumovitz and my notes regarding phone conversations with Dr. Frumovitz,  
9 it appears that I first contacted Dr. Frumovitz in January, 2008, to act as an  
10 expert witness on behalf of plaintiffs and relied upon his responses and  
11 availability to act as an expert until 4:37 p.m on July 20, 2009, when I  
12 received a phone call from Dr. Frumovitz, advising that he had a conflict  
13 with Dennis Thelan.

14 22. However, as of 4:37 p.m. on Monday, July 20, 2009, our office  
15 had already served plaintiffs' designation of expert witnesses. Although Dr.  
16 Frumovitz had indicated he had a conflict, I was still unaware of the  
17 reason for the conflict.

18 23. In the mid-afternoon on July 21, 2009, our office received a  
19 copy of defendant's designation of expert witnesses, which designated Dr.  
20 Frumovitz as defendant's expert.

21 24. At 2:30 p.m. on Tuesday, July 21, 2009, our office received  
22 defendant's designation of expert witnesses and it became clear that the  
23 conflict was that Dr. Frumovitz had not recognized the similarity between  
24 the two cases that had been discussed with him and had unknowingly  
25 agreed to become an expert for both plaintiff and defendant in the same  
26 case.

27 25. It is clear from our previous discussions that Dr. Frumovitz had  
28 been provided with little, if any, medical information regarding the

1 defendant's case. The facts of this case are unique and, at the time of our  
2 discussion in his office at 4:00 p.m. on July 20, 2009, he clearly did not  
3 recognize that the case sounded familiar to any other he might have  
4 reviewed. Further, the defendant's moving papers are supported only by  
5 the declaration of the defendant himself. Neither Dr. Frumovitz, nor any  
6 other expert witness, has ever signed a declaration in support of  
7 defendant's motion for summary judgement.

8           26. In fact, although defense counsel went to the trouble to have  
9 Dr. Frumovitz sign a declaration in which he stated he did not recall ever  
10 discussing the case with me, defense counsel still has not obtained a  
11 declaration from their only expert, Dr. Frumovitz, in which he renders an  
12 opinion on the standard of care applicable to this case, nor does Dr.  
13 Frumovitz state that Dr. Ynostroza acted within the standard of care in his  
14 treatment of plaintiff Jeanne Lamb. Furthermore, there was never any  
15 indication during any discussion with Dr. Frumovitz that the facts of the case  
16 sounded familiar to him.

17           I declare under penalty of perjury, under law of the State of California,  
18 that the foregoing is true and correct.

19           Executed this \_\_\_\_ day of August, 2009, at Westlake Village, California.  
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23 Gail Langer, Declarant  
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1 Millennium chart.

2 6. At 4:39 p.m. Gail Langer called to tell me that she had just received  
3 a phone call from Dr. Frumovitz and that he was unable to act as our expert. I  
4 told her the designation of experts had already been mailed.

5 7. On Tuesday, July 21, 2009, I received a phone call from Amber in the  
6 office of defense counsel. She told me that their expert was Dr. Frumovitz. I told  
7 her that I thought we had retained Dr. Frumovitz, but she would need to speak to  
8 Gail Langer. She claimed she had spoken to Dr. Frumovitz and he didn't know  
9 anything about our case and had never spoke to us.

10 8. I told Amber, that I had spoken to Dr. Frumovitz personally the previous  
11 week and he had provided me with his fees, tax ID number and his office had  
12 faxed over his curriculum vitae. She said that I could not possibly have because  
13 he was on vacation. I told her I had left a message with his office and he had  
14 returned my phone call from wherever he was and had provided me with the  
15 information I needed. I again told her she would need to discuss any issues  
16 regarding Dr. Frumovitz with the paralegal, Gail Langer, who works with the  
17 experts on the cases.

18 9. Later that afternoon, our office received defendant's designation of  
19 expert witnesses, in which Dr. Frumovitz was designated on behalf of defendant  
20 Ynostroza.

21 10. I have been employed by Contos and Bunch for twenty years and  
22 I have dealt with Dr. Frumovitz's office on many occasions during the years. It is  
23 my custom and practice to identify the case name whenever I make a phone  
24 call and even if I were to omit the information, the person taking my message  
25 always asks what case the message is regarding. I clearly identified the case of  
26 Lamb v. Ynostroza in my phone conversations prior to the time our designation of  
27 experts was served.

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1 I declare under penalty of perjury, under the laws of the state of  
2 California, that the foregoing is true and correct.

3 Executed this \_\_\_\_ day of August, 2009, at Westlake Village, California.  
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7 BARBARA SPENCER, Declarant  
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