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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Nancy Sippe, wife; Joseph Lawrence Sippe,
husband,

No. CV-13-01140-PHX-GMS

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Plaintiffs,

ORDER

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v.

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13 Travelex Insurance Services, Incorporated,
a Delaware corporation; On Call
14 International, LLC, a Delaware corporation;
Stonebridge Casualty Insurance Company,
an Ohio corporation; et al.,

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Defendants.

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Pending before this Court is Plaintiff's Motion to Strike Defendant On Call International's Designations of Non-Party Tortfeasors or Alternatively, Motion for Leave To Amend Complaint and Vacate Existing Deadlines (Doc. 84). For the reasons set forth below the Motion to Strike is granted to the extent that the non-party designation of David Sippe is stricken. The balance of the Motion to Strike is denied. The Alternate Motion for Leave to Amend and to Vacate Existing Deadlines is granted in light of Defendants' non-opposition to it.

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BACKGROUND

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In this case, Plaintiffs sue three companies who were involved in an alleged joint venture to provide travel medical insurance. The initial Complaint alleges that after securing the travel policy, and while on vacation in Paros Island in Greece, Dr. Sippe slipped from his bunk and sustained a subdural hematoma. He began suffering

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1 hallucinations and engaging in combative behavior. Plaintiffs contacted Defendant On
2 Call and Dr. Sippe was transferred to Athens Medical Center. Evaluations immediately
3 provided to Defendant On Call from the physicians at Athens Medical Center attributed
4 the seizure to a recent increase in Dr. Sippe's medication. The Athens physicians were in
5 contact with Dr. Sippe's physicians in Phoenix and thus were aware that Dr. Sippe was
6 being treated for his Parkinson's Disease with a medication called Stalevo. The dosage
7 of Stalevo was increased by his treating neurologist, Dr. Darry Johnson, just prior to his
8 trip. The initial Complaint alleges that although the doctors in Athens diagnosed Dr.
9 Sippe with a subdural hematoma, they did not believe that it required treatment and could
10 not correctly diagnose the reason for his hallucinations and combativeness which they
11 apparently incorrectly believed resulted from the Stalevo medication or from a separate
12 condition.

13 The initial Complaint further alleges that during the care received in Athens,
14 Plaintiffs were in consultation with Dr. Sippe's neurologists in Phoenix including Dr.
15 Johnson and Dr. Ralph Pagano "who recommended that Larry be returned home to the
16 U.S. (Phoenix) immediately." Doc. 1-1 at ¶ 17. Mrs. Sippe apparently sought from
17 On Call Dr. Sippe's early return to the United States, and the complaint alleges, On Call
18 advised her that it would send a doctor to escort Dr. Sippe back to the United States, and
19 that it had arranged for transportation on a commercial flight. On Call, however,
20 according to the initial Complaint, failed to carry through on this promise, and further
21 declined to provide such transportation for an additional week because On Call stated that
22 Dr. Sippe's Greek physicians recommended that he stay in Athens. During this time, Ms.
23 Sippe, in association with David Sippe, Dr. Sippe's son, independently hired
24 supplemental nursing care to be provided to Dr. Sippe.

25 Plaintiffs' initial Complaint further alleges that during this period of alleged delay,
26 Dr. Sippe again fell out of his hospital bed on May 27, and thereafter remained
27 unconscious until after his eventual surgery in Phoenix. Mrs. Sippe alleges that she and
28 Dr. Sippe's son had to arrange for his transportation on a commercial carrier and carry it

1 out on their own without any assistance from On Call. The initial Complaint further
2 alleges that On Call refused to assist in the discharge of Dr. Sippe from Athens General
3 which required the payment of his fees there. Upon his arrival in Phoenix, Dr. Sippe’s
4 U.S. doctors determined that Dr. Sippe had a bleeding subdural hematoma that needed
5 immediate brain surgery. As a result of these alleged delays in returning Dr. Sippe’s to
6 the U.S., Plaintiffs allege that Dr. Sippe’s subdural hematoma was allowed to grow in
7 size and, as a result, he suffered “severe and permanent brain injury that has affected him
8 “cognitively, physically and emotionally.”

9 Based on the above factual allegations of delay in transportation, the initial
10 Complaint sets forth five substantive counts—breach of contract, bad faith (tort), breach
11 of fiduciary duty, negligence, and negligent or intentional misrepresentation. Plaintiffs
12 filed this suit in Maricopa County Superior Court on April 30, 2013. Defendants
13 removed the initial Complaint to this Court and On Call subsequently filed its initial
14 answer on June 12, 2013.

15 Plaintiffs, within the time period allowed by this Court’s Case Management Order
16 filed a Motion to Amend the Complaint. The First Amended Complaint (“FAC”) adds
17 two claims to the claims set forth in the previous complaint: (1) In the event that any
18 Defendant alleged that Travel Assistance and Concierge Services coverage was not
19 included in the insurance coverage purchased by the Sippes, the Sippes added an
20 alternative claim for statutory misrepresentation in connection with the sale of the travel
21 insurance policy under A.R.S. § 20-443, and, (2), the Sippes added a claim for
22 promissory estoppel that is based on the same factual allegations as the Plaintiffs’ claim
23 for negligent or intentional misrepresentation.

24 Plaintiffs also revised the factual allegations of the initial Complaint in a subtle but
25 important way. Paragraph 34 of the FAC subtly expands the theory of ¶ 34 of the initial
26 Complaint. In the initial Complaint, ¶ 34 alleged that the delay in returning Dr. Sippe to
27 the U.S. allowed Dr. Sippe’s subdural hematoma to grow in size resulting in injury. In
28 ¶ 34 of the FAC, however, Plaintiffs abandon any specification that the damage arose as a

1 result of the growth of the subdural hematoma during the delay and instead allege that the
2 delay prevented Dr. Sippe from receiving proper medical care and treatment for his
3 medical conditions which led to and/or resulted in him sustaining injury. Similarly, in ¶
4 16, the initial Complaint stated that the Greek physicians diagnosed the subdural
5 hematoma but recommended no treatment for it, and could not correctly diagnose the
6 cause of the continuing symptoms. In the FAC, the amended paragraph more broadly
7 alleges that the Greek hospital and physicians were unable to provide Dr. Sippe proper
8 treatment for his medical condition. Plaintiffs have further revised ¶ 17 of their FAC to
9 suggest that Drs. Pagano and Johnson informed Plaintiffs that Dr. Sippe needed to be
10 returned home to receive proper medical care and treatment and On Call was or should
11 have been aware of this advice.

12 Plaintiffs' motion to amend their complaint was filed on September 24, 2013.
13 After considering the responses in opposition, the Court granted the motion to amend on
14 November 22, 2013. Defendant On Call filed its Answer to the FAC on December 10,
15 2013. On January 21, 2014, On Call filed its non-party at fault designations, 209 days
16 after it had filed its initial answer and forty-two days after it filed its answer to the FAC.

17 ANALYSIS

18 The Arizona Rules of Civil Procedure specify that:

19 Any party who alleges . . . that a person or entity not currently
20 or formerly named as a party was wholly or partially at fault
21 in causing any personal injury . . . shall provide the identity
22 location and the facts supporting the claimed liability of such
23 nonparty . . . within one hundred fifty (150) days after the
24 filing of the party's answer. . . . The trier of fact shall not be
25 permitted to allocate or apportion any percentage of fault to
26 any nonparty whose identity is not disclosed . . . except upon
written agreement of the parties or upon motion establishing
good cause, reasonable diligence, and lack of unfair prejudice
to other parties.

27 Ariz. R. Civ. P. 26(b)(5). Because this 150 day limit is inextricably intertwined with
28 Arizona substantive law, it applies in federal court. *Wester v. Crown Controls Corp.*, 974

1 F. Supp. 1284, 1288 (D. Ariz. 1996).

2 On Call does not assert that it has a written agreement with Plaintiffs allowing for
3 later designation of non-parties at fault, nor did it file a motion with this Court asking
4 permission to file such designations late and in which it established good cause,
5 reasonable diligence and a lack of unfair prejudice to the other parties in the case. On
6 Call's principal response to the motion to strike is that its designations were timely. To
7 the extent that On Call argues that the 150 day period recommences with every
8 successive answer it files to an amended complaint, the Court has previously rejected that
9 argument, and does so again. *Monje v. Spin Master Inc.*, CV 09-1713-PHX-GMS, 2013
10 WL 2390625 at *10-11 (D. Ariz. May 30, 2013), *see also Daly v. Insurance Co. of*
11 *America*, CV 00-40-PXH-SRB, 2002 WL 1768887 at *17 (holding that "[Defendant]
12 asserts that the 150 –day time period begins to run after the last-filed answer but cites no
13 law to support this reading of Rule 26(b)(5). The text of Rule 26(b)(5) makes no
14 suggestion that the 150 days should be counted from anything but the initial answer.")

15 To the extent that an amended complaint raises new claims or facts so that
16 reasonable Defendants would not have been previously aware of the existence of or need
17 to name a non-party at fault until the amended complaint was filed, then the period in
18 which to name a non-party would be extended, presumably by motion filed by the
19 Defendant establishing good cause, to provide for a sufficient period in which to identify
20 such non-parties. On Call has filed no such motion. Nevertheless to the extent that the
21 parties have addressed such questions in the briefing on the motion to strike, the Court
22 will assume that On Call has raised all such arguments that it has in its Response, and
23 will not oblige it to refile a separate motion, although appropriate practice would have
24 dictated it do so.

25 With respect to some of On Call's designations, the proposed Second Amended
26 Complaint provides sufficient reason to allow the late designations. With respect to
27 others, it does not. The Plaintiffs' proposed Second Amended Complaint seeks to
28 recover for damages allegedly inflicted on Dr. Sippe, which resulted from Defendants

1 delaying his return to the United States which allegedly was necessary for him to receive
2 appropriate medical care. Thus, under the proposed Second Amended Complaint, the
3 parties may dispute whether transport was appropriate, or whether any additional damage
4 was caused Dr. Sippe due to the timing of his return to the United States. But, whether or
5 not any health care provider committed medical malpractice, or whether the Defendants
6 are vicariously liable for any such malpractice, is not at issue. Nevertheless, the proposed
7 Second Amended Complaint complicates the issue because in it, Plaintiff has added
8 assertions to allege that Dr. Sippe's American physicians were not just of the view that he
9 should immediately return home for treatment but, that Dr. Sippe could not receive
10 "proper medical care," for his condition in Greece. They further otherwise allege that On
11 Call made its determinations about returning Dr. Sippe home under circumstances in
12 which it was or should have been aware of their view that Dr. Sippe had to return home
13 immediately to receive appropriate care.

14 To the extent that the difference in the pleading now suggests that Dr. Sippe was
15 not receiving appropriate medical care and treatment in Greece, the Court allows the late
16 designation as a non-party at fault, of Private Nurse Katrina and other nurses who were
17 retained by the Plaintiffs in Greece to provide supplemental care.

18 The Court also allows the late designation of Dr. Pagano to the extent that in that
19 designation they allege that "Dr. Pagano provided direction to the Greek neurologists
20 regarding the medications Dr. Sippe required. To the extent that others are critical of the
21 manner in which the Greek neurologists managed Dr. Sippe's medications, their
22 management was directed by Dr. Pagano." The Court also allows the late designation of
23 Dr. Pagano for the purpose of claiming that, to the extent that he had an opinion that Dr.
24 Sippe could not receive adequate medical care in his situation in Greece, he was
25 negligent in taking steps in light of that opinion.

26 Defendants also designate Dr. Johnson for the purpose of claiming that, to the
27 extent the he had an opinion that Dr. Sippe could not receive adequate medical care in his
28 situation in Greece, he was negligent in taking steps in light of that opinion. The Court

1 will also allow the late designation on that topic. The Court is not sure how the allegation
2 that Dr. Johnson prescribed the Stalevo in the first place, and may have injured Dr. Sippe
3 by doing so, would constitute fault for the injury alleged in the proposed Second
4 Amended Complaint that would need to be designated pursuant to the non-party at fault
5 rules. “In assessing percentages of fault the trier of fact shall consider the fault of all
6 persons who contributed to the alleged injury.” A.R.S. § 12-2506. The injury alleged in
7 the proposed Second Amended Complaint appears to be the injury that arose as a result
8 of On Call’s alleged failure to timely evacuate Dr. Sippe from Greece. Any injury that
9 Dr. Johnson may have inflicted on Dr. Sippe, while possibly related to the extent that it
10 may have caused the need for care to arise in Greece, may be separate and apart from any
11 injury that Dr. Sippe received as a result of the transaction alleged in the proposed
12 Second Amended Complaint. Nevertheless, Defendants do not object to the filing of the
13 proposed Second Amended Complaint, which incorporates their entire designation as it
14 pertains to Dr. Johnson.

15 The Court, however, strikes the late designation of David Sippe based on his
16 independent efforts to transfer his father back home. Defendants have been aware of
17 these facts and their possible relevance since the inception of this suit. Nothing about the
18 Amended Complaint or any subsequent discovery justifies an extension in the deadline
19 for naming non-parties at fault. The late designation of David Sippe as a non-party at
20 fault is, therefore, stricken.¹

21 Although the Court would not otherwise permit any additional topics included in
22 the late designation as it pertains to any of the three designations that the Court has
23 permitted in part, the designations which the Court has allowed include the principal
24 topics contained in those designations. Further, Defendants do not otherwise oppose the
25 filing of the Second Amended Complaint proposed by the Plaintiff. Accordingly,

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28 ¹ To the extent that On Call continues to request a stay based on the Court’s striking of the designation of David Sippe as a non-party at fault so that it can appeal this order to the Ninth Circuit Court of Appeals, that request is denied.

