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3:99-CV-02705 MCREYNOLDS V. STANDARD INSURANCE

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\*DECL.\*

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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY:

*J. H. [Signature]* DEPUTY

1 WARREN H. NELSON, JR. # 104744  
A PROFESSIONAL CORPORATION  
2 7400 El Cajon Boulevard, Suite 302  
La Mesa, CA 91941-3417  
3 Telephone: 619 466 9400  
Facsimile: 619 466 9402  
4

Attorney for Defendant  
5 STANDARD INSURANCE COMPANY  
6  
7  
8

9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 DONLEY G. McREYNOLDS, M.D., ) Case No.: 99 CV 2705 IEG (JAH)  
12 )  
Plaintiff, )  
13 )  
vs. )  
14 )  
STANDARD INSURANCE COMPANY, ET )  
15 AL., )  
16 )  
Defendants. )  
17 )  
18 )  
19 )

THIRD DECLARATION OF WARREN H. NELSON, JR.--FILED IN SUPPORT OF DEFENDANT STANDARD INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT  
Date: February 5, 2001  
Time: 10:30 AM  
Before the Honorable Irma E. Gonzalez

20 Warren H. Nelson, Jr., under penalty of perjury, declares  
21 as follows:

22 1. I am counsel to defendant Standard Insurance Company  
23 (Standard) in this action. I am a member of the State Bar of  
24 California and am enrolled to practice before this Court. I  
25 have been responsible for the litigation of this matter since  
26 December 1999. I have personal knowledge of the matters stated  
27 below and would testify to them, if the Court asked me to do so.  
28

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1           2. Attached collectively hereto as Exhibit 1 are true and  
2 correct copies of UNUM's documents authenticating its claim file  
3 records produced pursuant to subpoena in this matter. In my  
4 second declaration, filed January 22, 2001, I had stated that  
5 this page was included in Exhibit 1 to the second declaration  
6 and this was incorrect. I apologize for my error.

7           3. Attached collectively hereto as Exhibit 2 are true and  
8 correct copies of excerpts from the transcript of the  
9 depositions of Dr. McReynolds, his employee, Shirley Romero and  
10 his expert, Mr. Vavoulis. I took Mr. Vavoulis' deposition on  
11 September 21, 2000. I took Ms. Romero's deposition on October  
12 23, 2000. I took Dr. McReynolds' deposition on October 24 and  
13 25, 2000. The transcript from October 24, 2000 is referred to  
14 as "McR Dep [Volume] I" in the accompanying reply brief, filed  
15 herewith. The transcript from October 25, 2000 is referred to  
16 as "McR Dep [Volume] II" in the accompanying reply brief, filed  
17 herewith. I have attached copies from the "mini" transcript of  
18 the McReynolds and Romero depositions to reduce the size of this  
19 exhibit to my declaration.

20           4. Attached collectively hereto as Exhibit 3 are true and  
21 correct copies of correspondence between Mr. Rasmussen,  
22 plaintiff's counsel in this case, and me.

23           5. I now turn to respond to Mr. Rasmussen's Declarations  
24 dated January 2 and 22, 2001. I try to avoid making the conduct  
25 of counsel an issue but must respond in light of Mr. Rasmussen's  
26 two declarations, both of which accuse me of wrongdoing. I hope  
27 that the Court will consider my response on the understanding  
28 that these issues were not raised by me but by Mr. Rasmussen.

1           6. Initially, Mr. Rasmussen falsely stated to the Court  
2 that I had produced the SPD to him in December 2000. I have  
3 established by means of my second declaration, filed January 22,  
4 2001, that it was produced in early November 2000 and Standard  
5 has shown in its moving and opposition papers on the instant  
6 cross-motions that Dr. McReynolds at all times had it. No  
7 explanation was given under oath for Mr. Rasmussen's error.  
8 Rather, plaintiff filed a so-called "Notice of Errata," that the  
9 Court told him was inappropriate in its "Notice of Document  
10 Discrepancies."

11           7. Mr. Rasmussen argues that Standard undertook  
12 inappropriate discovery in deposing Dr. McReynolds and Ms.  
13 Romero and serving written discovery, allegedly as an improper  
14 means of introducing evidence outside the administrative record  
15 and to imply that I acted inappropriately. Rasmussen Decl,  
16 filed January 22, 2001, ¶¶ 5-6. Nevertheless, the first action  
17 taken in this case indicating that anyone would offer evidence  
18 outside the administrative record **was Mr. Rasmussen's**. Attached  
19 collectively hereto as Exhibit 4 are Mr. Rasmussen's July 2000  
20 Declaration and Amended Declaration concerning the designation  
21 of an expert witness, Mr. Vavoulis. If Mr. Rasmussen believed,  
22 as he now suggests, that this matter is limited to the  
23 administrative record, he should not have designated an expert  
24 to testify outside the administrative record nor should he have  
25 offered Mr. Vavoulis' Declaration on the instant motion.  
26 Further, Mr. Rasmussen's July 27, 2000 Amended Declaration  
27 states that Mr. Vavoulis will testify on "the appropriate  
28 accounting methods that Standard should have used in determining

1 Policy benefits," yet Mr. Vavoulis is not an accounting expert  
2 and makes his living doing damages calculations for the defense  
3 insurance bar, not figuring out how much anybody "earned."  
4 Please see excerpt from Mr. Vavoulis' Deposition a true and  
5 correct copy of which is attached hereto as Exhibit 2-20  
6 (attached). In any event, once Mr. Rasmussen designated Mr.  
7 Vavoulis, he was signaling that he did not believe that the  
8 administrative record would govern resolution of this matter or  
9 he would not have provided a report outside the administrative  
10 record.

11 8. Despite my invitation of October 20, 2000, before the  
12 depositions of Dr. McReynolds and Ms. Romero were taken, Mr.  
13 Rasmussen never sought a protective order against any of  
14 Standard's discovery nor did he ever state that he wanted to  
15 meet and confer on such an order. Exhibit 3-32 (attached). Mr.  
16 Rasmussen also knew by this time that plaintiff would assert a  
17 conflict of interest claim and that Standard had to be given an  
18 opportunity to rebut that claim. I presume that Mr. Rasmussen  
19 recognized that it would have been frivolous to try to preclude  
20 Standard's discovery in light of his intention to raise a  
21 conflict claim, which, indeed, plaintiff has raised.

22 10. Mr. Rasmussen's reference to his September 12, 2000  
23 letter to me is misleading. Rasmussen Decl, January 22, 2001,  
24 ¶¶ 5-6. I did not ignore his claim that discovery was  
25 inappropriate. I specifically responded to it in my September  
26 27, 2000 letter to him (Exhibit 3-26, 27(attached)) (I was on  
27 vacation between September 1-14, 2000), and, further, pointed  
28 out that he had requested an extension of the discovery cut-off

1 so that he could take discovery, so that I assumed that the  
2 issue was moot. Exhibit 3-27 (attached). Further, Mr.  
3 Rasmussen knows that, as of September 2000, he was taking the  
4 position that his client had not decided whether this case  
5 should be treated as a bad faith matter or an ERISA case. Mr.  
6 Rasmussen originally filed this matter as a bad faith claim.  
7 Removed State Court Complaint. Following discussions involving  
8 the parties and Magistrate Judge Houston, he submitted a first  
9 amended complaint in May 2000 that alleged jurisdiction under  
10 ERISA and Standard answered that complaint. Then, in September  
11 2000, Mr. Rasmussen announced to me that plaintiff might be  
12 taking the position that ERISA did not govern this case after  
13 all but that it was a bad faith action. Mr. Rasmussen did not  
14 abandon the threat of a bad faith claim until October 5, 2000,  
15 when he wrote me and advised that plaintiff would not pursue  
16 this as a bad faith case. Ex 3-29 (attached). Thus, I had no  
17 way of knowing for sure even what position plaintiff was taking  
18 on the applicability of ERISA when discovery was propounded and  
19 scheduled and no assurance that Mr. Rasmussen would not attempt  
20 to reverse field yet again and claim that this was a bad faith,  
21 rather than ERISA, case. The discovery Standard undertook would  
22 be appropriate in a bad faith case.

23 11. Finally, Mr. Rasmussen's attempt to characterize  
24 another dispute over the sealing of records in his declaration  
25 filed in connection with the instant motions is inappropriate.  
26 See Rasmussen Decl, January 22, 2001, ¶¶ 1-3. When the Court

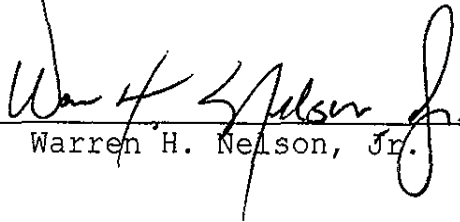
27 --

28 --

1 schedules a hearing on those issues, I will respond, but those  
2 issues are not before the Court on the instant cross-motions.

3 I declare, under penalty of perjury under the laws of  
4 California and the United States that the foregoing is true and  
5 correct.

6 Executed this 29<sup>th</sup> day of January, 2001, at La Mesa,  
7 California.

8   
9 Warren H. Nelson, Jr.

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1 TABLE OF CONTENTS--EXHIBITS TO 3d DECLARATION OF  
2 WARREN H. NELSON, JR. FILED IN SUPPORT OF DEFENDANT  
3 STANDARD INSURANCE COMPANY'S REPLY ON ITS MOTION FOR  
4 SUMMARY JUDGMENT.

(Local Civil Rule 5.1e)

7 <u>EXHIBIT</u>	<u>PAGES</u>
8	
9 Exhibit 1	8-10
10 (UNUM'S document authenticating	
11 its claim file for	
12 Dr. McReynolds' claim)	
13	
14 Exhibit 2	11-20
15 (Excerpts from the transcript	
16 of the depositions of	
17 Dr. McReynolds, Mr. Vavoulis	
18 and Ms. Romero)	
19	
20 Exhibit 3	21-32
21 (Selected correspondence between	
22 Nelson and Rasmussen)	
23	
24 Exhibit 4	33-44
25 (Rasmussen Declaration and Amended	
26 Declaration re Expert)	
27	
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# EXHIBIT 1



UNUM.

Protecting everything you work for™

Susan E. Schulman  
Paralegal  
Tel (508) 929-6151  
Fax (508) 751-7263

October 10, 2000

Via Airborne Express

Warren H. Nelson, Jr.  
7400 El Cajon Blvd., Suite 302  
La Mesa, CA 91941

**RE: Records Pertaining to Donley McReynolds, M.D.**

Dear Mr. Nelson:

In accordance with the above captioned subpoena, enclosed are the requested records pertaining to **Donley McReynolds** along with Certification for same. These records contain our entire Unum claim file as well as our entire Provident Life & Accident claim file.

I have also enclosed an invoice representing our Administrative Fee. We ask that you expedite this invoice at your earliest convenience and have enclosed a self-addressed envelope for your convenience. Please make the check payable to **The Paul Revere Life Insurance Company; Attn: Susan Schulman.**

Very truly yours,

Susan E. Schulman  
Paralegal  
The Paul Revere Life Insurance Company

ses  
encls.

UNUMPROVIDENT CORPORATION  
18 Chestnut Street, Worcester, Massachusetts 01608-1528  
508.799.4441

Unum is the marketing brand of UnumProvident Corporation

EXHIBIT 1 - Pg. 9



UNUM.

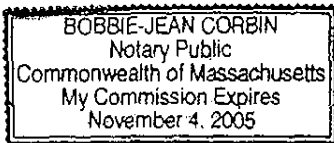
Protecting everything you work for®

### CERTIFICATION

I, Susan E. Schulman, hereby certify on this 10th day of October, 2000 that the enclosed copies are true and accurate copies of records pertaining to **Donley McReynolds** and are kept in the ordinary course of business at The Paul Revere Life Insurance Company.

Susan E. Schulman  
Paralegal

SWORN TO AND SUBSCRIBED before me  
this 10<sup>th</sup> day of October, 2000

  
Bobbie-Jean Corbin, Notary Public  
My commission expires:

# EXHIBIT 2

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UNITES STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

- - -

DONLEY McREYNOLDS, M.D.,  
Plaintiff,  
vs.  
STANDARD INSURANCE COMPANY,  
Defendant.

No. 99 CV 2705  
IEG (JAH)

DEPOSITION OF  
DONLEY McREYNOLDS, M.D.,  
VOLUME II  
LA MESA, CALIFORNIA  
OCTOBER 25, 2000

ATKINSON-BAKER, INC.  
COURT REPORTERS  
600 B Street, Suite 1480  
San Diego, California 92101-4506  
(619) 595-1952

REPORTED BY: JANICE D. DOUGLAS, CSR NO. 11696

FILE NO.: 9A075B5

*EXhibit 2 - pg 12*

PAGE 42

1 vascular laboratory work was charged under your name. I  
2 have Dr. Sedwitz's vascular lab work as well in these  
3 sheets, right?

4 A. Plus every other physician -- no. Well,  
5 no. I'm sorry. I didn't understand. Could you restate  
6 it?

7 Q. Yeah. And I don't think it was very  
8 clear. So let me strike it. And start again.

9 I assume that I have every bit of vascular lab  
10 work that's been done by McReynolds and Sedwitz from  
11 March 1997 forward, because it was all charged under  
12 your name, correct?

13 MR. RASMUSSEN: On the these provider  
14 productivity reports that include the vascular lab?  
15 BY MR. NELSON:

16 Q. No. I'm talking about the super bills,  
17 right?

18 A. No.

19 Q. Well, why not? Aren't they all charged  
20 under your name?

21 A. The charges were placed on my productivity  
22 report as I understand it from Shirley, because they  
23 didn't know where else to put them.

24 Q. So I should have them all, right?

25 A. I don't know that.

26 MR. RASMUSSEN: No. We went through these  
27 super bills and tried to isolate Dr. McReynold's super  
28 bills as you requested. If there would have been a

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PAGE 44

1 the corporation.

2 A. It was put on my productivity report. It  
3 wasn't a super bill made in my name. What they did, I  
4 believe and Shirley can clarify this, is they took all  
5 of the procedures that Dr. Bergan performed and a stack,  
6 they did all the ones that Dr. Sedwitz referred, all the  
7 ones that Dr. Shively, (phonetic) anyone else in the  
8 building referred -- had a stack of vascular procedures,  
9 they then entered that stack number into my productivity  
10 report and that's why it's erroneous.

11 Q. And so what's the source document for the  
12 productivity report? It isn't the super bill then, is  
13 it?

14 A. It most likely was super bills, but the  
15 super bills, I don't know where those -- I don't know if  
16 it was super bills. It may have come from the  
17 technician.

18 Q. It can't be -- the sources for the  
19 vascular lab charges that were backed out of the  
20 provider productivity reports in the enclosures to your  
21 May 12, 1998 letter to Ms. Sabo, okay. Those vascular  
22 lab charges, the source documents, cannot be these super  
23 bills, can they?

24 A. I don't believe they are.

25 Q. No. Okay. Look at page 398.

26 A. Yes.

27 Q. The patient's name is on there. Let's not  
28 mention it. Let's make sure we're on the same page,

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1 super bill generated by Dr. Sedwitz, for example, that  
2 would not be in this stack.

3 MR. NELSON: Well, yes, it would be. Because  
4 all of the vascular labs charges went in under  
5 Dr. McReynold's name, right?

6 MR. RASMUSSEN: No. You misunderstand.

7 MR. NELSON: Okay.

8 THE WITNESS: Again, the only procedures I  
9 believe that would be shown in my super bills would be  
10 patients that I personally referred to the lab. Now, if  
11 Dr. Bergan referred a patient, and I don't know how that  
12 super bill got in here, because I had nothing to do with  
13 that patient or saw that patient, but I would guess that  
14 Dr. Bergan referred three or four patients a week to the  
15 lab. I would guess that if we went through these super  
16 bills we would not see 150 super bills from  
17 Dr. Bergan in my super bills, if you will.

18 So there were a lot of other people,  
19 cardiologists in the building which were referring  
20 patients. Those wouldn't show up unless I saw the  
21 patient as a consult.

22 BY MR. NELSON:

23 Q. But I may just not be understanding things  
24 you just correct me step-by-step --

25 A. All right.

26 Q. -- apparently I am misunderstanding.

27 I thought that all of the vascular lab work was  
28 charged to your name because you were the president of

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PAGE 45

1 Doctor.

2 A. Yes, I have it.

3 Q. I see reason for visit, follow-up.

4 A. Right.

5 Q. Time, 11:30?

6 A. Right.

7 Q. Is that right?

8 A. Correct.

9 Q. Now, this refers to work done by you on  
10 March 17th, 1997, in the office, correct?

11 A. That would be correct.

12 Q. Now, did you see this patient?

13 A. Yes, I know this patient.

14 Q. Okay. And this was an office procedure,  
15 correct?

16 A. It was an office -- it was a follow-up  
17 visit, actually.

18 Q. I'm sorry. Let me strike that. Excuse  
19 me.

20 What does it mean problem focused low?

21 A. It means the level of care that I provided  
22 for that patient that day.

23 Q. Okay. And what is it? Can you put it  
24 into layman's terms for non-medical person?

25 A. Sure. This was a doctor's wife and also  
26 the doctor. I had operated on him. The wife had had  
27 surgery in Rochester, New York where I trained by the  
28 professor of surgery and she was referred to me for

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1 Q. This is right in line with what you said  
 2 before the break.  
 3 A. Right.  
 4 Q. You indicated that sometime in March or  
 5 April it's -- the payroll switched over from North Coast  
 6 Medical Management Consultants, which we'll treat as one  
 7 entity, to McReynolds and Sedwitz; is that right?  
 8 A. That's right.  
 9 Q. And then thereafter did you continue to  
 10 get a \$20,000 a month draw?  
 11 A. Yes.  
 12 Q. And it just came from McReynolds and  
 13 Sedwitz instead of from Medical Management  
 14 Consultants/North Coast Surgeons; is that right?  
 15 A. Yes.  
 16 Q. Okay. Thank you, sir.  
 17 Now, the adjustment to that draw, as I  
 18 understand it, would be based on the profit and loss of  
 19 North Coast Surgeons and/or McReynolds and Sedwitz; is  
 20 that correct?  
 21 A. Yes. At North -- or North Coast Surgeons  
 22 it was predicated on a formula.  
 23 Q. Which was?  
 24 A. That I believe at the time 25 percent of  
 25 overhead was divided equally. 75 percent was based on  
 26 production. And that was based on collections.  
 27 Q. And how was that handled at McReynolds and  
 28 Sedwitz?

1 A. Well, they were loans that Dr. Sedwitz and  
 2 I took out, No. 1, for tenant improvements in our new  
 3 suite; No. 2, the ultrasound machine belonged to North  
 4 Coast Surgeons or that entity, and we had to buy that  
 5 machine from them. I believe the first figure, I think,  
 6 was 30,000. I think the machine was 50,000. Then I  
 7 believe there was another note for \$200,000 that was  
 8 used to maintain our draw, if you will, to pay back the  
 9 monies that we were using for our practice until our  
 10 accounts receivable began to pay. So we had to pay that  
 11 money back to North Coast Surgeons, which was then split  
 12 up according to the formula to all of the previous  
 13 shareholders.  
 14 Q. And is the significance of the loan  
 15 documents that you feel that your earnings should be  
 16 reduced by the amount that you paid back? Your 1997  
 17 earnings should be reduced by the amount that you paid  
 18 back to McReynolds and Sedwitz --  
 19 A. Yes.  
 20 Q. -- to cover those promissory notes?  
 21 A. Yes. I'm sorry, yes.  
 22 Q. And what's the theory behind that?  
 23 What's -- why would that be so?  
 24 MR. RASMUSSEN: Maybe your accountant would  
 25 have to explain that.  
 26 BY MR. NELSON:  
 27 Q. And it's not appropriate for anybody to  
 28 suggest an answer to you. But if you don't know or

1 A. We were, as I understand, and from the  
 2 settlement, things that we discussed earlier, that we  
 3 would take an arbitrary draw, and that was set at  
 4 \$20,000. And again, that was to be adjusted at the end  
 5 of the year. And again, it was based on splitting  
 6 overhead equally. And then production would be split on  
 7 the basis of percentage that --  
 8 Q. And are there documents that exist that  
 9 show how you accomplished that split?  
 10 A. I believe there is an employment  
 11 agreement. I don't know exactly what the wording of  
 12 that is.  
 13 Q. I've seen -- I think I have seen the  
 14 employment agreement. I think it's in the UNUM file.  
 15 But what I was asking you is, are there documents that  
 16 show computationally how you and Dr. Sedwitz did that  
 17 split?  
 18 A. I think that I provided some information  
 19 or a document that was provided by Clifford Brown that  
 20 may have contained that information.  
 21 Q. I think that's probably -- that's Bates  
 22 No. beginning 323.  
 23 Now, you produced some documents that concern a  
 24 Grossmont Bank loan to McReynolds and Sedwitz, I  
 25 believe. Do you recollect those documents?  
 26 A. Yes.  
 27 Q. What significance do you attach to those  
 28 documents, if any?

1 somebody working for you would have to tell you, then  
 2 you should always tell me that.  
 3 A. Yes. I think the accountant could explain  
 4 that.  
 5 Q. But you couldn't?  
 6 MR. RASMUSSEN: You could attempt to do so.  
 7 THE WITNESS: Only to the extent what we've  
 8 gone through before, and I think two or three times.  
 9 But the draw was to be adjusted at the end of year. My  
 10 collections for the, I think, for the total year -- and  
 11 I think that's in a letter to Blanch Sabo -- again, if  
 12 we refer back to that, were somewhere in the range of  
 13 over \$300,000. Our overhead at that time was running, I  
 14 believe, close to 40 to 45 percent, maybe, thereabouts.  
 15 So taking 40 percent of 300,000 was what? 120,000. So  
 16 that left maybe \$180,000 that would be salary for me.  
 17 BY MR. NELSON:  
 18 Q. Your production was greater in the first  
 19 half of 1997 than the second, correct?  
 20 A. That's correct.  
 21 Q. Because you began working half-time in the  
 22 second half of 1997?  
 23 A. That's correct. That's when Dr. Risley  
 24 arrived.  
 25 Q. And prior to that you had worked more than  
 26 half-time for most of 1997, correct?  
 27 A. Yes.  
 28 Q. Can you tell me -- you recognize that

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DONLEY G. MCREYNOLDS, M.D., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 STANDARD INSURANCE COMPANY, )  
 )  
 Defendant. )

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No. 99CV2705IEG JAH

DEPOSITION OF  
SHIRLEY ROMERO  
LA MESA, CALIFORNIA  
OCTOBER 23, 2000

ATKINSON-BAKER, INC.  
CERTIFIED COURT REPORTERS  
600 B Street, Suite 1480  
San Diego, California 92101  
(619) 595-1952

REPORTED BY: KIM O'HARE, CSR NO. 8869

FILE NO.: 9A075B3

*Exhibit 2-pg. 15*<sup>1</sup>



1 A. It's a course that is offered for educating  
 2 people to work in doctors' offices, whether it be back  
 3 office, helping the physician, or front office, doing  
 4 billing.  
 5 Q. Okay. And is this sort of a paraprofessional  
 6 kind of program, maybe like what a lawyer might call a  
 7 paralegal or a legal assistant type program?  
 8 A. Yes.  
 9 Q. For doctors?  
 10 A. Yes. I'm sorry.  
 11 Q. That's okay. What kinds of training did you  
 12 get in order to be certified as a medical assistant,  
 13 what kinds of classes did you take?  
 14 A. It was a year program at a school,  
 15 specifically designed for medical assistants. You  
 16 worked also in a nine month internship program in  
 17 doctors' offices.  
 18 Q. And where did you get this training?  
 19 A. In Sepulveda, California, near Woodland  
 20 Hills.  
 21 Q. What was the name of the school?  
 22 A. Oh --  
 23 Q. If you can't remember, that's okay.  
 24 A. I believe it is Medical Assistant Training  
 25 Institute.  
 26 Q. Now, if I was listening properly, I thought I  
 27 heard you say that there was as well an additional kind  
 28 of certification you had that had to do with coding or

1 Q. Robert Burns?  
 2 A. No.  
 3 Q. Cynthia Weber?  
 4 A. No.  
 5 Q. Joel Barish?  
 6 A. No.  
 7 Q. B-a-r-i-s-h. Weber and Burns and Foster are  
 8 all as you would expect. Brian Gustafson?  
 9 A. No.  
 10 Q. G-u, Sam, Tom, a, Frank, Sam, o, Nancy. Mark  
 11 Mallett?  
 12 A. No.  
 13 Q. M-a-l-l-e-t-t. Shanna or Shawna Erance?  
 14 A. No.  
 15 Q. Emma Cull, C-u-l-l-?  
 16 A. No.  
 17 MR. RASMUSSEN: Who is the Weber that you asked  
 18 about?  
 19 MR. NELSON: Cynthia.  
 20 MR. RASMUSSEN: Thank you.  
 21 BY MR. NELSON:  
 22 Q. Do you know know a Joseph Skoma?  
 23 A. No.  
 24 Q. David Baker?  
 25 A. No.  
 26 Q. Clyde Beck?  
 27 A. Can I back up one?  
 28 Q. Yeah.

1 billing?  
 2 A. That is correct. It's a coding specialist  
 3 certificate. I took a test for that approximately two  
 4 years ago. It was offered for people that work in  
 5 doctors' offices, and the test was administered up at  
 6 UCLA.  
 7 MR. RASMUSSEN: What's an IPA, by the way?  
 8 THE WITNESS: I don't know. I should know, and I  
 9 do. But I don't remember right now.  
 10 MR. RASMUSSEN: Okay.  
 11 BY MR. NELSON:  
 12 Q. Are you an accountant?  
 13 A. No.  
 14 Q. Do you hold yourself out as an accounting  
 15 expert?  
 16 A. No.  
 17 Q. Are you going to be testifying -- well,  
 18 strike that. Are you a bookkeeper?  
 19 A. No.  
 20 Q. Have you been involved as a witness on behalf  
 21 of Dr. McReynolds or in connection with Dr. McReynolds  
 22 at any time in the past?  
 23 A. No.  
 24 Q. Were you aware of litigation between  
 25 Dr. McReynolds and a company called Berkshire Life?  
 26 A. No.  
 27 Q. Have you ever heard of a Mary Foster?  
 28 A. No.

1 A. I knew of a physician, David Baker at Scripps  
 2 Memorial Hospital, but I don't know if that's the person  
 3 that you mentioned.  
 4 Q. And do you know anything about him?  
 5 A. No.  
 6 Q. Except that he was a physician?  
 7 A. No.  
 8 Q. Who worked at Scripps?  
 9 A. No.  
 10 Q. Okay. Do you know if he ever practiced with  
 11 Dr. McReynolds?  
 12 A. No.  
 13 Q. What about James Hansen?  
 14 A. There's a James Hansen that is a physician at  
 15 Scripps, but I don't know him.  
 16 Q. Do you have any information that he's ever  
 17 practiced with Dr. McReynolds?  
 18 A. No.  
 19 Q. How about Michael Millbern, M-i-l-l-b-e-r-n?  
 20 A. I know he's a doctor. I don't know him. I  
 21 don't know.  
 22 Q. What about Harold Shively?  
 23 A. I know who he is.  
 24 Q. A doctor?  
 25 A. Yes.  
 26 Q. Richard Jones?  
 27 A. No.  
 28 Q. John Kiser, K-i-s-e-r?

*Exhibit 2 - pg. 16*

SHEET 4 PAGE 22

- 1 A. No.
- 2 Q. Thomas Waltz, W-a-l-t-z, just like the old
- 3 Viennese Waltz?
- 4 A. I don't know him.
- 5 Q. Ted Bunn?
- 6 A. No.
- 7 Q. That's B-u-n-n. Have you ever heard of Tower
- 8 Cleaners?
- 9 A. No.
- 10 Q. Have you ever heard of North coast Cleaners?
- 11 A. No.
- 12 Q. Thanks for your patience.
- 13 A. That's all right.
- 14 Q. Okay. Let's go back to your job duties with
- 15 McReynolds & Sedwitz. Okay. I want to understand.
- 16 What you would do in a normal workday there between 7:00
- 17 a.m. and 3:00 p.m. when you'd go out there on Friday,
- 18 what kinds of tasks do you perform for them?
- 19 A. You're speaking of now, not back in 1997,
- 20 correct?
- 21 Q. Well, we'll talk about now and then we'll go
- 22 back and see if there's any changes. Okay?
- 23 A. I go in on Fridays. I sort through medical
- 24 records that have been left for me during the week.
- 25 Also, superbills that have been accumulated and are
- 26 left. Mail, I go through through. I make copies of
- 27 just about everything. I organize. And I go home.
- 28 Q. Who gives you your instructions about what to

22

PAGE 24

- 1 understanding of why he was there?
- 2 A. Yes. I don't know why he was there, but he
- 3 came in and asked me if I could provide information if
- 4 need be about the practice in 1997.
- 5 Q. Okay. So I take it that the only time you've
- 6 seen him in the last year is in connection with the
- 7 matters that have brought us here together today; is
- 8 that correct?
- 9 A. That is correct.
- 10 Q. Okay. Was there anybody else present when
- 11 you saw him?
- 12 A. There were other people in the office around
- 13 me, but I --
- 14 Q. I understand that.
- 15 A. -- but I don't --
- 16 Q. I mean, there was no one in the meeting other
- 17 than you --
- 18 A. No.
- 19 Q. -- and Dr. McReynolds?
- 20 A. No.
- 21 Q. Okay. What did he -- was this meeting set up
- 22 in advance? Did he indicate? Did he call you in
- 23 advance or you call him to indicate that you would be
- 24 meeting on this particular day?
- 25 A. No, I wouldn't call it a meeting. He came in
- 26 to my office and talked to me briefly.
- 27 Q. And what did he tell you?
- 28 A. He said that there may be a need for me to

24

PAGE 23

- 1 do at the present time?
- 2 A. Nobody.
- 3 Q. Okay. You know what to do?
- 4 A. Yes.
- 5 Q. Now, you described what you do now. Was it
- 6 different when you started --
- 7 A. Absolutely.
- 8 Q. -- at McReynolds & Sedwitz?
- 9 A. Sorry.
- 10 Q. That's okay. That's all right. How is it
- 11 different?
- 12 A. When I started with Dr. McReynolds and
- 13 Sedwitz, I needed to establish the billing practice that
- 14 I was going to have with them. So it was trial and
- 15 error as to the best way to organize and get the billing
- 16 done for them.
- 17 Also, when I first started billing for them,
- 18 Dr. McReynolds, in particular, would give me tickets
- 19 indicating who he saw at the hospital, what he did at
- 20 the hospital, and I used those for billing. That isn't
- 21 the case anymore, because he doesn't work with the group
- 22 anymore.
- 23 Q. Does he still maintain an office?
- 24 A. Not that I'm aware of.
- 25 Q. Have you seen him in the McReynolds & Sedwitz
- 26 office in the last year?
- 27 A. Probably once.
- 28 Q. And do you know -- do you have any

23

PAGE 25

- 1 provide information about the practice statistically for
- 2 Year 1997, and would I be able to get that information.
- 3 Q. Did he say anything to you about 1996
- 4 information?
- 5 A. No.
- 6 Q. Now, we've indicated that this was within the
- 7 last year. Is there some way that we could narrow down
- 8 the time frame? Do you remember when the meeting was?
- 9 Has it been, for example, within the last two months?
- 10 A. Yes.
- 11 Q. Okay. Can you tell me what month it was in?
- 12 A. I believe September.
- 13 Q. Of 2000?
- 14 A. Correct.
- 15 Q. Okay. Now, was it before or after Labor Day?
- 16 A. Oh, I don't remember.
- 17 Q. You can't recall?
- 18 A. No.
- 19 Q. Any way that -- let me ask you this: Prior
- 20 to that time, what's the last time that you discussed
- 21 any kind of business with Dr. McReynolds?
- 22 A. Approximately two years ago, probably before
- 23 that.
- 24 Q. Let me tell you this: Dr. McReynolds claims
- 25 that he stopped working as of June 15, 1998, at least
- 26 stopped performing surgery. I don't know about totally
- 27 cease working. And I think Mr. Rasmussen would agree
- 28 with this, that that's his position in the case. Was it

25

PAGE 26

1 prior to that that you last had a business contact with  
 2 him?  
 3 A. Probably about that time. I had very little  
 4 contact with Dr. McReynolds when he was working.  
 5 Q. Now, had you had any prior -- did the name  
 6 Standard Insurance Company come up in the September 2000  
 7 meeting?  
 8 A. No.  
 9 Q. How long did the meeting last?  
 10 A. Minutes, maybe three minutes.  
 11 Q. Okay. What did Dr. McReynolds tell you he  
 12 would want you to do other than what you've already told  
 13 me?  
 14 A. He said that I may be called to testify or to  
 15 give a deposition regarding the information or my  
 16 recollection of his practice during 1997.  
 17 Q. Okay. Had you met Dr. McReynolds prior to  
 18 March 1997?  
 19 A. I don't believe so.  
 20 Q. How about Dr. Sedwitz?  
 21 A. No.  
 22 Q. How did you come to work for them?  
 23 A. I -- excuse me. I worked for the cardiac  
 24 surgical group, La Jolla Cardiovascular and Thoracic  
 25 Surgeons. The administrator of that group, Leslie  
 26 Rodes, gained McReynolds & Sedwitz as clients. She  
 27 needed somebody to do their billing. So she took me  
 28 from doing the cardiac surgical billing, and I began

26

PAGE 28

1 A. Oh.  
 2 Q. Okay. That's what's brought us together here  
 3 today.  
 4 A. Oh, I didn't know.  
 5 Q. Okay. Were you -- then you were not aware --  
 6 I take it that you weren't aware that a certified public  
 7 accountant named Mark Selid, S-e-l-i-d, was sent by  
 8 Standard to look at certain business records of North  
 9 coast and McReynolds & Sedwitz in early 1998.  
 10 A. No.  
 11 Q. And did you -- I take it it's also true that  
 12 you didn't assist in any way in gathering materials that  
 13 were to be shown to Mr. Selid; is that correct?  
 14 MR. RASMUSSEN: To the extent you're aware.  
 15 THE WITNESS: No.  
 16 MR. NELSON: Yeah.  
 17 Q. As far as you know?  
 18 A. No, no.  
 19 Q. Did the words diagnostic x-ray or vascular  
 20 lab come up in your discussion with Dr. McReynolds in  
 21 September of 2000?  
 22 A. Yes.  
 23 Q. And in what connection?  
 24 A. He asked me if I remembered that when I set  
 25 up the billing system, I included the vascular charges  
 26 and payments under his ID number in my billing system.  
 27 And I told him, yes, I did remember that.  
 28 And I -- did I remember that initially

28

PAGE 27

1 billing for Dr. McReynolds and Sedwitz.  
 2 Q. Did you interview with Dr. McReynolds prior  
 3 to going to work for them?  
 4 A. Never.  
 5 Q. I take it that you do not know Dr. McReynolds  
 6 socially at all.  
 7 A. No.  
 8 Q. Never been to his home?  
 9 A. No.  
 10 Q. Never been to yours?  
 11 A. No.  
 12 Q. And you've never been out to lunch with him  
 13 or anything like that?  
 14 A. No.  
 15 Q. Okay. Now, were you aware that Standard sent  
 16 a certified -- do you know who Standard Insurance  
 17 Company is?  
 18 A. I do not.  
 19 Q. You do now?  
 20 A. Not really.  
 21 Q. Okay. What's your understanding of what  
 22 Standard Insurance Company's role in this case is?  
 23 A. I can only guess.  
 24 Q. I don't want to you guess. Standard  
 25 Insurance Company is being sued by Dr. McReynolds for  
 26 disability insurance benefits on a group insurance  
 27 policy that Standard Insurance Company issued to North  
 28 Coast Surgeons.

27

PAGE 29

1 reports that were brought together, for what purpose I  
 2 don't know, but years ago, some reports were done of his  
 3 production. And that initially, the vascular -- the  
 4 vascular lab charges and payments were reflected under  
 5 his name.  
 6 And at that time, we were -- we, meaning  
 7 another girl in the office and I -- were instructed to  
 8 separate the vascular lab out of his name, and have a  
 9 different name so that we could set aside those charges  
 10 clearly.  
 11 Q. How were the charges assigned to his name in  
 12 if the first place?  
 13 A. Because the insurance companies, when a bill  
 14 is submitted under the vascular lab portion of our  
 15 bills, they need to be under one of the physician's  
 16 names.  
 17 Because when I set up the system,  
 18 McReynolds's name -- honestly, this is the way it was  
 19 done -- Dr. McReynolds's name was first. It was  
 20 McReynolds and Sedwitz. So I set up Dr. McReynolds as  
 21 the person that I would be identifying to the insurance  
 22 company as the provider of care.  
 23 Q. I see. And how many doctors worked at  
 24 McReynolds & Sedwitz?  
 25 A. At that time, two.  
 26 Q. Okay.  
 27 MR. RASMUSSEN: Madam Reporter, would you mark that  
 28 last testimony.

Exhibit 2 - Pg 18<sup>29</sup>  
 1-800-288-3376

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA

3  
4 DONLEY McREYNOLDS, M.D., )  
5 Plaintiff, )  
6 vs. )  
7 STANDARD INSURANCE COMPANY, )  
8 Defendant. )  
9

CERTIFIED  
COPY

Case No.  
99 CV 2705 IEG (JAH)

10  
11  
12  
13  
14  
15 DEPOSITION OF  
16 TED VAVOULIS, Ph.D.  
17 LA MESA, CALIFORNIA  
18 SEPTEMBER 21, 2000  
19  
20  
21  
22  
23

*Vavoulis*  
*with*  
*no*  
*depos.*

24 ATKINSON-BAKER, INC.  
25 COURT REPORTERS  
26 402 West Broadway, Suite 400  
San Diego, California 92101  
(619) 595-1952

27 REPORTED BY: JANICE D. DOUGLAS, CSR NO. 11696

28 FILE NO.: 9A067F7

*Exhibit 2 - Pg 19 1*

1 issue, sir?

2 A. What's an accounting issue.

3 Q. You're an economist, and you want me to  
4 define what an accounting issue is for you?

5 A. Sure, for your question.

6 Q. In your opinion, have you ever testified  
7 on an accounting issue? Why don't you use your own  
8 definition, and then you can tell me what issue it is  
9 that you think you have.

10 A. Well, I mean, an accounting issue could  
11 be any kind of issue that deals with a financial  
12 statement or tax return or profit and loss statement.

13 Q. Is it your position that you are an  
14 accounting expert?

15 A. No.

16 Q. Your practice is essentially that you do  
17 damages calculations largely for the defense insurance  
18 bar; is that correct?

19 A. True.

20 Q. Is that how you came to know the  
21 Edwards, Sooy firm?

22 A. I don't know. This is the first case  
23 I've been retained by them on. I don't know how they  
24 found me.

25 Q. And in your opinion, have you testified  
26 as an expert on issues similar to that presented in  
27 this case in the past?

28 A. Yes.

EXHIBIT 2 - pg. 20<sup>14</sup>

# EXHIBIT 3

Warren H. Nelson, Jr.  
A Professional Corporation  
7400 El Cajon Blvd., Suite 302  
La Mesa, CA 91941-3417

September 27, 2000

**VIA FACSIMILE ONLY**

(619) 231-1588

Glen M. Rasmussen, Esq.  
Edwards, Sooy & Byron  
101 W. Broadway, Ninth Floor  
San Diego, CA 92101-8285

Re: McReynolds v. Standard Insurance Company, No. CV 99 2705 IEG  
(JAH), U.S.D.C. (S.D. Cal.), Production of documents

Dear Mr. Rasmussen:

This responds to your August 30 and September 12, 15 and 26, 2000 letters. It also concerns our telephone conversation of September 7, discussions that occurred last week on September 21 at the deposition of Dr. Vavoulis and your voice mail message of September 26, requesting an extension up to and including October 19 to respond to Standard's first set of interrogatories that were served upon you by mail on August 31, 2000.

For reasons that follow, I believe that it is critical that we reach some understandings about what is and is not at issue in this case. The orderly gathering and presentation of evidence and compliance with the Court's schedule for this matter is at stake.

1. Status of case, ERISA vs. common law issues. On September 7, 2000 in our telephone discussion and subsequently by letter dated September 12, 2000, you advised that plaintiff was considering whether he would try to re-address the issue, resolved by you on March 7, 2000, whether ERISA or the common law governs resolution of this dispute.

While I do appreciate your disclosure (to avoid, as you put it, "ambushing" me) that plaintiff may now seek to amend his complaint to allege that this action is not governed by ERISA but is a common law bad faith action, I am concerned about both the timing and substance of this. A brief review of the bidding is in order. This action was, as you know, initially filed by your firm as a common law bad faith action in California Superior Court on November 8, 1999, and then removed to the Federal Court. Upon

provided you with excerpts from the North Coast Surgeons Medical Group, Inc. ("North Coast") summary plan description, North Coast's application for coverage and a copy of the North Coast policy.

Pursuant to the Court's order at the ENE Conference, on February 15, 2000, I sent you a letter, attached hereto as Exhibit A. The letter was sent at my instruction while I was out of my office, so it was unsigned, although you have confirmed that you received it and sent me the copy of it from your files, which I appreciate. The letter explained why Standard believes that this is an ERISA case. Additionally, I proposed a document exchange, advising you that I would produce the administrative claim file, Standard's computer file for this claim and a copy of the policy in exchange for plaintiff's stipulation to produce his own documents. I specifically told you that I was willing to produce the contract file, if plaintiff wished to pursue the issue whether the group LTD policy at issue in this case was governed by ERISA or the common law. The Court had ordered Dr. McReynolds to respond to my letter within fifteen days, but there was neither any response nor any request for clarification nor any request to see any further documents.

At a telephonic Case Management Conference ("CMC") on March 7, 2000, plaintiff advised the Court that he would amend the complaint to state a claim under ERISA and that a "couple" of weeks would be required to draft the amended complaint. The Court set a second telephonic CMC for April 5, 2000. On the eve of the April 5 CMC, we spoke by telephone on April 4 and at that time agreed in principle to an informal exchange of documents, but you provided no specifics as to what Dr. McReynolds would voluntarily produce. I have repeatedly advised you that Standard would not agree to produce by stipulation unless we knew in advance what Dr. McReynolds would produce. See, e.g., my letters to you of February 15 and August 22. At the April 5 telephonic CMC, the Court assigned the case processing deadline dates. During the conference, you stated that Dr. McReynolds was "having trouble getting stuff [his documents] together." Nothing further about document exchange was then discussed nor could it have been--Standard was unwilling to trade its voluntary production in a situation where plaintiff did not even know yet what materials he had and did not have.

Plaintiff then attempted to file his first amended complaint, which was rejected because neither Standard's stipulation nor an order permitting the filing of an amended complaint had been obtained. On April 21, 2000, Standard signed a stipulation drafted by your firm, admitting that the original complaint was defective and stating that the parties stipulated to the filing of an amended complaint:

The original Complaint sets forth State Law [common law] causes of action, which [sic] are preempted by . . . ERISA . . . . The First Amended complaint cures the defects in the original Complaint, in that it sets forth a cause of action pursuant to ERISA. Order Re: Stipulation of the Parties regarding First Amended complaint for Damages 2:1-5. Emphasis added.

Standard incurred the fees and costs necessary to answer that complaint on June 9, 2000.

EXHIBIT 3 - pg. 23



Then, without any notice between March 7, when you told the Court that an amended complaint would be filed, and our September 7 telephone conversation, you stated that plaintiff might revisit this issue, that an otherwise unidentified case called Kennedy supported plaintiff's position and that you did not want to "ambush" me so you were disclosing this. With discovery coming to a close, the expert deadline gone and after many months during which both parties apparently anticipated that this was an ERISA action, Standard disagrees that plaintiff may now re-assert this issue. At the end of the deposition of Mr. Vavoulis on September 21, I raised some concerns about this issue and you stated that plaintiff might not pursue it after all. I hope that is the case, but, if it is not, Standard will not agree to yet another round of amending the complaint. Further, Standard must insist that plaintiff without any further delay unambiguously and finally announce his intentions in this regard.

This request is necessary, because there has been no bad faith discovery in this matter, as this case has been litigated to date as an ERISA matter. There will be significant impact on scheduling matters should the case be litigated as a bad faith case and significantly more work will be required to ready this case, if it is tried as a bad faith matter. In that event, I presume that each of us will wish to present expert testimony on bad faith issues and, Standard wishes to even if plaintiff does not. Yet, the expert deadline is, as you know, long gone, and passed before plaintiff even raised this issue. There will, moreover, be at least some discovery on the "ERISA vs. common law issues" and Standard will file a motion to determine the ERISA issue in its favor, all of which will substantially delay processing of the case and require substantial changes in the discovery and pretrial discovery beyond the recent extension of the discovery cut off from October 6 to October 27, 2000 and the dispositive motion hearing cut-off from November 13 to December 4, 2000, neither of which will be sufficient to allow for completion of the work that must be completed if this is to be a bad faith case.

In deciding what to do, please consider the following.

First, plaintiff has admitted that his original complaint was defective.

Second, the time for making motions to amend has passed, and, more importantly, very significant amounts of time have elapsed since March 7, 2000, when you announced that plaintiff would amend the complaint and proceed under ERISA. From that date to September 7, 2000, *six months*, there was no inkling that this case would be handled as other than an ERISA case.

Third, plaintiff twice sought to amend this complaint and continued the second effort after his initial effort was rejected.

Fourth, the Kennedy case you referred to was apparently Kennedy v. Allied Mutual Insurance Company, 952 F.2d 262 (9<sup>th</sup> Cir. 1991). This case was over eight years old when the ERISA issue came up in this case in February 2000, and no reason has ever been provided to explain why it was not considered prior to the time that plaintiff voluntarily amended his complaint. Even assuming that the case, involving an issue

EXHIBIT 3 - pg. 24

whether any employee other than an owner ever had "vested" rights under a pension plan, is factually apposite, the case does not come close to holding that a plan properly constituted as an ERISA plan in the first place becomes a common law plan when the only remaining covered employees are owners as their business ceases operations. Such a result would be antithetical to the proposition that ERISA preemption is broadly construed to effectuate the remedial purposes of ERISA.

2. ERISA vs. common law issue--documents. I disagree with the statement in your September 12 letter to me that your firm "will not be able to evaluate" the ERISA issue until you receive documents from me. Your firm has evaluated this issue and an amended complaint alleging ERISA has been on file for months.

Following your September 12 letter, I mailed to you on September 18 under separate cover the documents that Standard stated that it would produce in my correspondence to your firm dated February 15, 2000, namely the administrative claim file (STND/97 00001-00557), the computer file for Dr. McReynolds' claim (STND/97 00558-00568) and the policy (STND/97 00569-00595), the correct number of which is 611337-B, not 10018210, as stated incorrectly in my February 15 correspondence to you. No documents were withheld on any ground from that production.

As noted, I offered to produce the entire contract file for this matter, except for confidential financial materials that have nothing to do with the merits of this case, on February 15, 2000, *assuming that plaintiff decided to dispute the ERISA issue*. Plaintiff did not elect to dispute the ERISA issue and therefore the material was not produced, but it is certain this issue *could* have been earlier evaluated. In any event, plaintiff voluntarily amended his complaint to drop the common law claims without asking to look at *anything*, and my presumption must be that this would not have occurred unless plaintiff and his counsel were satisfied that ERISA did preempt plaintiff's common law claims. Absent a court order, Standard declines to produce its contract file to plaintiff, as it has now produced everything that it said it would produce to plaintiff.

You have also requested copies of the excerpted materials that were provided to plaintiff at the ENE, viz., the North Coast summary plan description and North Coast's application for insurance. To the extent that plaintiff is claiming that complete copies of these documents must be examined before a decision on the ERISA preemption issue can be reached, I disagree based on the fact that these documents were marked upon presentation to you as "excerpted" and complete copies could have been requested at any time after the date I gave them to you, February 4, 2000. The copies of these documents I gave you on February 4 (and that you recently produced back to me) are all marked to show that they were excerpted; yet, they were not requested before now.

Far more importantly, and giving rise to concerns on Standard's part, *North Coast and Dr. McReynolds, the principal of North Coast, should have these documents. You are requesting a Summary Plan Description that North Coast ordered from Standard to give to its employees. You are requesting an application for coverage that North Coast*

EXHIBIT 3 - Pg. 25

*signed and gave to Standard. One would expect that North Coast would have these documents.*

In any event, given that the scope of the requested production is small, I will voluntarily provide these summary plan and application documents to you, *if you advise that plaintiff intends to pursue the ERISA issue and a conference is set up with Magistrate Judge Houston to get his thoughts on the propriety of plaintiff's pursuit of this issue at this late date and the effect on the deadlines applicable to this action.*

This entire question of missing and misplaced documents leads to the next part of this letter concerning the whereabouts of significant documents that have not yet been produced by plaintiff.

3. Plaintiff's document production to Standard. I am very concerned about the quality and level of production received from plaintiff. This portion of the letter is an attempt to meet and confer on one of these issues, the Vascular Lab materials.

If I understand the situation correctly, and please correct me if I do not, plaintiff has now completed his production of documents to Standard that are responsive to Standard's First Request for Production of Documents to plaintiff and the request for documents annexed to the deposition notice for Mr. Vavoulis, plaintiff's expert. Nowhere in those materials plaintiff has produced is there any reference to any accounting changes or any source back up with respect to the issue of the Vascular Lab charges or any other lab charges, other than the A/R Running reports which do not support Dr. Vavoulis' opinion and which do not even contain the words "Vascular" or "lab." Dr. Vavoulis has now testified that he has never seen any documentary back up for the claim that Dr. McReynolds' post-disability production has been overstated. Where are these materials; where is the back up documentation; *and, when will it be produced?* If the A/R running reports are the only documentation of the changes Dr. McReynolds is arguing for, then please advise me of that fact, so that we can take the matter from there.

This is a matter of urgency and conclusory statements that Dr. McReynolds cannot find them are unhelpful. I must know whether any such documents exist or existed, and ask you to be very clear about that in the upcoming formal, written response to Standard's First Request for Production. If they do exist or ever have existed, I need very specific information about whether they will be produced and, if not, exactly why not. Without this kind of disclosure, I have no choice but to take up the matter with Judge Houston.

4. Scope of discovery. In your September 12, 2000, letter you have questioned me about the discovery Standard has propounded in light of the position that, in an ERISA case, review is limited to the administrative record. It was plaintiff who first went outside the administrative record by providing the report of an expert. Following your September 12 letter, you have also requested and obtained an extension of the discovery deadline to permit your client to depose two individuals in Portland and to serve written

*EXHIBIT 3 - Pg. 26*

September 12 letter, you have also requested and obtained an extension of the discovery deadline to permit your client to depose two individuals in Portland and to serve written discovery. This issue appears to be moot since plaintiff has elected to proceed with discovery. Nevertheless, Standard, and, I assume, plaintiff reserves its rights to claim that review is limited to the administrative claim file. If you disagree, please let me know.

5. Plaintiff's request for extension of time to respond to Standard's first set of interrogatories. I have received your voice mail message of September 26 requesting an extension of time to respond up to and including October 19 to Standard's first set of interrogatories. A true and correct transcription of your message is attached to this letter as Exhibit B.

I disagree with the content of the message. Most of the operative documents from the administrative claim file have been in plaintiff's possession for years. The voluminous medical records in the file have little to do with the current controversy and so are largely irrelevant, given what we currently know about this claim. Further, plaintiff has always had in his possession the correspondence between or among him, his agents and Standard. The fact that the file was only recently produced to you is not Standard's problem. I had these documents marked for production last February. You only recently took action with respect to document exchange and that is the cause for delay.

In any event, Interrogatory Nos. 4-9 have little if anything to do with the administrative claim file. Interrogatory Nos. 2-4 only tangentially involve the administrative claim file. Interrogatory No. 1 is the only one specifically directed to that file, large portions of which, as pointed out above have been in plaintiff's possession for years. If we cannot resolve this issue informally, which I am attempting to do here, then I will take the time to figure out exactly what is new and what is not new in the administrative claim file. Further, I must have a reasonable opportunity to move to compel if answers are incomplete or there are unacceptable objections to the discovery. With an extended discovery cut off of October 27, an October 19 response date does not allow adequate time.

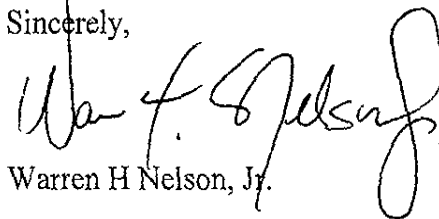
Standard will grant an extension to October 9, 2000, if that will resolve the matter and if the responses are personally served or served by facsimile. If that is unacceptable, then you may wish to take the matter up with Magistrate Judge Houston. To the extent that you intend to raise any matter with him in connection with any motion for the extension, please ensure that you have disclosed it to me prior to raising it with him, as is required by the letter and spirit of the meet and confer process.

6. Plaintiff's request for the claim manual. This request is outside the scope of what I agreed to produce to you. Standard's claim manual is a private, proprietary, confidential and protected document having commercial value to Standard's competitors. It is large and will not be produced in its entirety because much of it has nothing to do with this case. I am willing to cooperate to try to resolve this issue. Following entry of

EXHIBIT 3 - pg. 27

entered. You can then review the Table of Contents and we can attempt to agree upon what documents you reasonably require to prosecute this litigation.

Sincerely,

A handwritten signature in black ink, appearing to read "Warren H. Nelson, Jr.", written in a cursive style.

Warren H Nelson, Jr.

EXHIBIT 3 - pg. 28

# EDWARDS, SOOY & BYRON

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

101 WEST BROADWAY, NINTH FLOOR  
SAN DIEGO, CALIFORNIA 92101-8285

(619) 231-1500

FAX: (619) 231-1588

Web site: [www.esb-legal.com](http://www.esb-legal.com)

EXTENSION: 278

E-MAIL: [GRASMUSSEN@ESB-LEGAL.COM](mailto:GRASMUSSEN@ESB-LEGAL.COM)

TIN: 33-0244768

LAS VEGAS OFFICE

EDWARDS, SOOY & BYRON, APC

3880 HOWARD HUGHES PARKWAY, 5TH FLOOR

LAS VEGAS, NV 89109-5972

(702) 474-0861

FAX: (702) 990-3583

OF COUNSEL

STANLEY J. WEZELMAN

JEFFREY T. BREID

1 ALSO ADMITTED IN NEVADA  
0 ALSO ADMITTED IN ARIZONA

MICHAEL M. EDWARDS  
RICHARD R. SOOY  
THOMAS W. BYRON  
OLEN M. RASMUSSEN  
MICHAEL M. EDWARDS, JR.  
VALERIE L. McLAUGHLIN  
DOUGLAS J. SUITS  
JERRIE J. M. BLYTH  
DEMETRI D. LAHANAS  
KATHRYN M. LOOCK  
SCOTT B. MILBERG  
DAVID A. RENTTO  
BART M. BLECHSCHMIDT  
J. SCOTT SCHALLER  
JOHN K. SCHLICHTING  
CHAD N. DUNIGAN  
DAVID B. KAHN  
ADAM K. WOELLERT  
MARA E. FORTIN  
ROBERT J. WALTERS

October 5, 2000

Warren H. Nelson, Jr., Esq.  
LAW OFFICE OF WARREN H. NELSON, JR.  
7400 El Cajon Blvd., Suite 302  
La Mesa, CA 91941-3417

VIA FAX

Re: McReynolds v. Standard Ins. Co.  
Our File: 5905

Dear Mr. Nelson:

- (1) We are not going to contest ERISA jurisdiction.
- (2) Thank you for agreeing to provide the Summary Plan Description and Application for Coverage.
- (3) With regard to the "source documents" that begat the information on the provider productivity reports, Dr. McReynolds has long maintained that for Standard to correctly understand his productivity, his explanation is necessary. Standard chose to ignore this offer of proof. It will come forth in his deposition. Standard has also, on numerous occasions, claimed that it had all documentation necessary to evaluate the claim. We are obtaining the "superbills" of Dr. McReynolds from which his billing service generates the reports. You are the first to ask for such "source documents" and those with the oral testimony will further substantiate Dr. McReynold's claim. They will be brought to my office the afternoon of Tuesday, October 10, for your review prior to Dr. McReynold's deposition. When you see the volume of these, I think you will agree to take Dr. McReynold's deposition here. Please consider this a request to do so.
- (4) I will have the responses to Standard's Request for Production of Documents and answers to the Interrogatories to you by October 10. Thank you for the additional time. October 9, is a holiday.

EXHIBIT 3 - pg. 29

EDWARDS, SOOY & BYRON  
A PROFESSIONAL CORPORATION

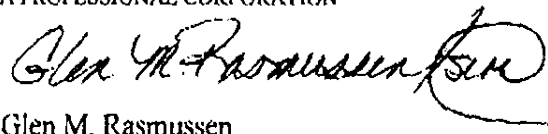
Warren H. Nelson, Jr., Esq.  
October 5, 2000  
Page 2

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(5) I agree to execute the Stipulated Protective Order as drafted. I will get a "Confidential" stamp and will apply it to the appropriate exhibits to Mr. Vavoulis' deposition exhibits. Please similarly stamp all the "hospital logs" plaintiff produced to you; I shall do so on my copies as well as on any "source documents" you choose to mark as exhibits.

Very truly yours,

EDWARDS, SOOY & BYRON  
A PROFESSIONAL CORPORATION



Glen M. Rasmussen

GMR:mb  
cc: Donley McReynolds, M.D.

SDL18/330816.1

EXHIBIT 3 - pg 30

Warren H. Nelson, Jr.  
A Professional Corporation  
7400 El Cajon Blvd., Suite 302  
La Mesa, CA 91941-3417

October 20, 2000

**VIA FACSIMILE ONLY**

(619) 231-1588

Glen M. Rasmussen, Esq.  
Edwards, Sooy & Byron  
101 W. Broadway, Ninth Floor  
San Diego, CA 92101-8285

Re: McReynolds v. Standard Insurance Company, No. CV 99 2705 IEG  
(JAH), U.S.D.C. (S.D. Cal.), Discovery issues

Dear Mr. Rasmussen:

This responds to your October 19 letter to me.

First, thank you for being forthcoming about the status of the Berkshire litigation. With regard to Berkshire, no information that you have provided to me and nothing in the Court file suggests that there is any impediment of any kind to obtaining the unprivileged portions of the litigation, deposition and correspondence files with respect to the Berkshire litigation, except as to material that was designated CONFIDENTIAL under the stipulated protective order in the file. As it turns out, we need not at this point discuss whether Dr. McReynolds will voluntarily produce those documents, as I believe that I will be able to get with them without Dr. McReynolds' cooperation. Ms. Levy confirms the confidentiality of the settlement agreement and I will follow-up on the lines you have suggested.

Second, I cannot understand your remarks about the alleged expense of this litigation. Your client claimed in signed, written applications for insurance that contain warnings about insurance fraud and the consequences of making purposeful misrepresentations that he had a net worth of \$2.6 million as of 1996. He reaffirmed those statements in 1997. I suppose it is possible that he has suffered major economic reverses since then, although that would not be typical of individuals in the current economic environment. Certainly, litigation is burdensome for anyone, but Dr. McReynolds does not appear to be unable to bear the fees and costs associated with a lawsuit that he has decided to bring.

*EXHIBIT 3-08 31*



Further, there is no dissonance between the level of discovery and the amount at issue in this case. Dr. McReynolds' expert, Mr. Vavoulis, values this claim at about \$572,000.00, so we are not dealing with a paltry sum here. I am available to meet and confer with you with respect to any allegedly improper or burdensome discovery activity, but you have never raised the issue before now. By all means, if you believe that any discovery is improper, meet and confer on the issue with me and we can then discuss with it the Court.

**REDACTED**

**REDACTED**

**REDACTED**

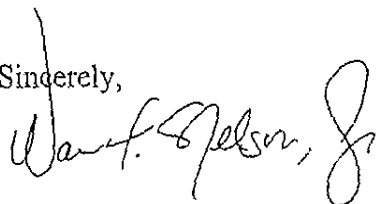
*(Discussion about settlement.)*

One possible way to avoid the litigation costs associated with trial is for the court to consider motions for summary judgment. If we extend the current dispositive motion cut-off, each side would be assured of having time to file one. Let me know if you wish to do this.

Third, based on your statement that Mr. Gilmore may testify at trial, I will wish to depose him. I very much appreciate your cooperation in making him available prior to the October 27 discovery cut-off, and I do appreciate your candor in disclosing this possibility to me now.

Finally, I do not understand your position on copying costs. When I served the subpoenas on Scripps and Unum you called and stated that Dr. McReynolds had no objection to them. You asked for copies of these third parties' document that were produced to Standard and I stated that I would give them to you, if you paid copying costs. You agreed. I then billed you at \$.04 per page for them. Now, having received my bill, you state that Dr. McReynolds intends to charge Standard for copies of material that he has produced, which is something that we never agreed to. Standard has not charged Dr. McReynolds for the cost of copying its first party productions. For your information, Standard has been billed \$600.00 by Unum for producing the file to it. I suppose I could have taken the position that Dr. McReynolds should pay one half of that, in exchange for his copies. I did not, and I believe that I have been fair about this. Please reconsider your position on this issue.

Sincerely,



Warren H Nelson, Jr.

*EXHIBIT 3-Pg 32*

# EXHIBIT 4

*Exhibit 4 - pg. 33*

1 GLEN M. RASMUSSEN, #117334  
2 **EDWARDS, SOOY & BYRON**  
3 A Professional Corporation  
4 101 West Broadway, Ninth Floor  
5 San Diego, California 92101-8285  
6 Telephone: (619) 231-1500  
7 Facsimile: (619) 231-1588

8 Attorneys for Plaintiff Donley G. McReynolds,  
9 M.D.

10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 DONLEY G. MCREYNOLDS, M.D.,,

No. 99CV2705IEG JAH

13 Plaintiff,

**DECLARATION OF GLEN M.  
RASMUSSEN IN SUPPORT OF EXPERT  
WITNESS DESIGNATION**

14 v.

15 STANDARD INSURANCE  
16 COMPANY,

17 Defendant.

18 I, Glen M. Rasmussen, declare as follows:

19 1. I am an attorney at law duly licensed to practice before all the courts in the  
20 State of California and am a member of the law firm of EDWARDS, SOOY & BYRON,  
21 attorneys of record for plaintiff DONLEY G. McREYNOLDS. I make this expert witness  
22 declaration pursuant to Federal Rule 26(a)(2).

23 2. The plaintiff in this matter intends to offer the expert opinion testimony of  
24 the following experts at the trial of this action, either orally or by deposition testimony.

25 3. Ted Vavoulis, M.S. has agreed to testify at trial.

26 4. Mr. Vavoulis is an economist.

27 5. Mr. Vavoulis will testify at trial regarding  
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6. Mr. Vavoulis is, or will be, sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the testimony described above, including his expert opinions and the basis therefor.

7. Mr. Vavoulis' fee for providing deposition testimony is \$300.00 per hour.

8. True and correct copies of Mr. Vavoulis' Curriculum Vitae and opinion are attached hereto under Federal Rule 26(a)(2)(B).

DATE: July 5, 2000

EDWARDS, SOOY & BYRON  
A PROFESSIONAL CORPORATION

By: *Glen Rasmussen*  
Glen M. Rasmussen  
Attorneys for Plaintiff  
Donley G. McReynolds, M.D.

EDWARDS, SOOY & BYRON  
A PROFESSIONAL CORPORATION  
EDWARDS, SOOY & BYRON  
101 WEST CALIFORNIA AVENUE, SUITE 1000  
SAN DIEGO, CALIFORNIA 92101-9285

# VAVOULIS & ASSOCIATES, INC.

*Economic Consultants*

215 North Marengo Avenue  
Third Floor  
Pasadena, California 91101  
Telephone (626) 796-7100  
Facsimile (626) 796-7227

## TED VAVOULIS, M.S.

### EMPLOYMENT

- Economist and Principal in Vavoulis & Associates, Inc.

### EDUCATION

- Bachelor of Arts, Economics: California State University, Fresno, 1981
- Master of Science, Operations Research: University of California, Berkeley, 1983

### EXPERIENCE

- Economic Consultant, Vavoulis & Associates, Inc., 1996 – present
- Economic Consultant, Brinton Economics, Inc., 1989 – 1996
- Lecturer, Department of Economics, Business, Mathematics, California State University, Fresno, 1984 – 1989
- Economic Consultant, Vavoulis Economic Services, 1984 – 1989
- Investment Broker / Advisor, Financial Futures Contracts, U.S. Government Bonds, Fourchy & Vavoulis Capital Management, 1984 – 1987
- Arbitrator, National Futures Association, 1985 – present

### PUBLICATIONS AND PROFESSIONAL ACTIVITIES

- "Determining Economic Damages," 10<sup>th</sup> Revised Edition, James Publishing Group, Santa Ana, California, 1998, with Gerald Martin
- "Economic Damages in a Catastrophic Injury to a Child," WEA, July 1996, San Francisco, California, Case Study Presentation
- "The Use of TIPS in Discounting to Present Value," NAFE, January 1998, Chicago, Illinois, Discussant

### PROFESSIONAL MEMBERSHIPS

- National Association of Forensic Economics
- National Association of Business Economics
- American Academy of Economic & Financial Experts

EXHIBIT 14 - PG 36

# VAVOULIS & ASSOCIATES, INC.

Economic Consultants

215 North Marengo Avenue  
Suite 170  
Pasadena, California 91101  
Telephone (626) 796-7100  
Facsimile (626) 796-7227

June 22, 1999

Glen M. Rasmussen, Esq.  
Edwards, Sooy & Byron  
101 West Broadway, 9th Floor  
San Diego, California 92101

**Re: Donley McReynolds, M.D. v. Standard Insurance Company (2879)**

Dear Mr. Rasmussen:

As you requested, I have reviewed the financial records relative to Dr. Donley McReynold's income and production as a surgeon, the denial of disability benefits correspondence between Dr. McReynolds and Standard, the report of Mark Selid, CPA, and the disability policy. As a result, I have reached the following conclusions:

1. That Dr. McReynold's production (his ability to earn income as a doctor) decreased by at least 20 percent following February 24, 1997 and therefore his benefits should not have been denied.
2. That the past loss of disability benefits to Dr. McReynolds is \$196,157.
3. That the present value of future loss of disability benefits to Dr. McReynolds is \$375,720.

The Standard policy indicates that the 12 months previous to a disability are to be used in determining the "Pre-disability Earnings". Dr. McReynolds earns money as a doctor and charges for his service at the time the service is performed. The production records provided by Dr. McReynolds and reviewed by Standard's expert, Mark Selid, CPA, indicate an amount of \$129,300 as average monthly production. This figure is in fact the same figure derived from Appendix C of Mr. Selid's January 21, 1998 report. There cannot be much dispute about this.

The post-disability period covers February 24, 1997 to May 24, 1997, which coordinates with Standards 90-day waiting period. I have reviewed Dr. McReynolds production during this period and found \$100,053 for February 24, 1997 through March 24, 1997, \$105,339 for March 24, 1997 through April 24, 1997, and \$81,666 for April 24, 1997 through May 24, 1997. The average monthly amount for the above figures is \$95,686. This represents a drop from the pre-disability period of 26 percent, well below the 20 percent required.

EXHIBIT 4-Pg 37

Standard, based on Mr. Case's letters, is only relying on the initial production numbers provided by Dr. McReynold's billing service. The initial production numbers overstated Dr. McReynold's post-disability production in comparison to his pre-disability production in that the post-disability production numbers included charges from the Vascular Lab which were never included in the pre-disability production numbers. The billing service has addressed this issue and the figures that I have relied on have been adjusted for this.

The next approach taken by Standard as addressed in the April 24, 1998 letter from Standard's Ms. Sabo, was to deny benefits based on the fact that Dr. McReynold's salary didn't change from where it was in February 1997 to where it was in March, April or May 1997. Obviously if this were a valid method of determining one's eligibility for disability benefits, no self-employed person would ever get benefits. A self-employed person's current salary is being paid by work done 60, 90 or 120 days earlier.

Additionally, self-employed persons are not paid a salary in the traditional sense of the word. They are paid a draw with a year-end adjustment based on the profitability of the business. Dr. McReynold's partnership, McReynolds & Sedvitz, borrowed money to help start the business. Dr. McReynold's salaries during the post-disability periods were paid in part by this loan, thus not representing actual earnings or production for that period.

The past loss of disability benefits covers the period of May 24, 1997 to July 1, 1999. The maximum monthly benefits that Dr. McReynolds is entitled to is \$10,000. Since Dr. McReynolds continued to work until June 15, 1998, he was entitled to a partial disability payment during this period. The partial disability payment is equal to the \$10,000 maximum benefit times the percentage diminution in income. The calculations for the past loss to June 15, 1998 are found in the enclosed document "Summary of Loss of Disability Benefits Sustained by Donley McReynolds, M.D." Dr. McReynold's post-disability production records were used to determine the diminution in income.

Since June 15, 1998 Dr. McReynolds has not worked. From this point, he is entitled to the maximum monthly benefit of \$10,000 to his 65<sup>th</sup> birthday. The above-mentioned document contains the calculation of lost disability benefits from June 15, 1998 to Dr. McReynold's 65<sup>th</sup> birthday on December 5, 2002.

*EXHIBIT 4-0838*

Glen M. Rasmussen, Esq. - Page Three - June 22, 1999

**Re: Donley McReynolds, M.D. v. Standard Insurance Company (2879)**

---

It has been a pleasure working with you on this matter. Should you have any questions or comments on any of the above, please call me.

Very truly yours,

VAVOULIS & ASSOCIATES, INC.

Economic Consultants

A handwritten signature in black ink, appearing to read 'Ted Vavoulis', with a stylized flourish at the end.

Ted Vavoulis, M.S.

TV/udw

EXHIBIT 14 - pg. 39



# VAVOULIS & ASSOCIATES, INC.

Economic Consultants

215 North Marengo Avenue  
Suite 170  
Pasadena, California 91101  
Telephone (626) 796-7100  
Facsimile (626) 796-7227

## Summary of Loss of Disability Benefits Sustained by Donley McReynolds, M.D.

Prepared June 18, 1999

Past Loss of Disability Benefits

\$196,157

Future Loss of Disability Benefits

\$375,720

Total Past and Future Loss of Disability Benefits

\$571,878

EXHIBIT 4-BB-4D

## Future Loss of Disability Benefits

Period: 3.43 yrs  
 Basis: \$120,000 \$10,000/mo  
 Discount Rate: 5.50% current yield US government notes maturing 2002

Period	Time	N	Future Value	Present Value
07/01/99 -07/01/00	1.00	0.5	\$120,000	\$117,150
07/01/00 -07/01/01	1.00	1.5	\$120,000	\$110,739
07/01/01 -07/01/02	1.00	2.5	\$120,000	\$104,966
07/01/02 -12/05/02	0.43	3.5	\$120,000	\$42,864
<b>Total</b>	<b>3.43</b>			<b>\$375,720</b>

EXHIBIT 4 - pg. 41

EDWARDS, SOOY & BYRON  
A PROFESSIONAL CORPORATION  
EDWARDS, SOOY & BYRON  
101 WEST BROADWAY, NINTH FLOOR  
SAN DIEGO, CALIFORNIA 92101-8285

PROOF OF SERVICE

Court: U. S. District Court, Southern District  
Case Title: McREYNOLDS v. STANDARD INSURANCE CO.  
Case No.: 99CIV2705 IEG JAH

I, Muriel A. Borger, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 101 West Broadway, Ninth Floor, San Diego, CA 92101-8285. On July 5, 2000, I served the within documents:

DESIGNATION OF EXPERT WITNESSES;  
DECLARATION OF GLEN M. RASMUSSEN  
IN SUPPORT OF DESIGNATION OF EXPERT  
WITNESSES

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.
- by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a \_\_\_\_\_ agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Warren H. Nelson, Jr., Esq;  
7400 El Cajon Blvd., Suite 302  
La Mesa, CA 91941-3417

STANDARD INSURANCE CO.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 5, 2000, at San Diego, California.

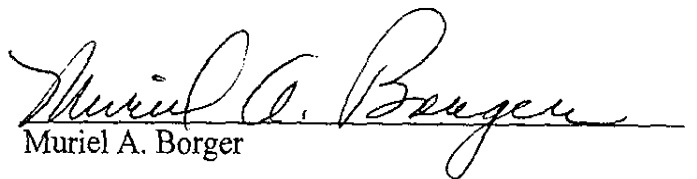
  
Muriel A. Borger

EXHIBIT 4 - pg. 42

1 GLEN M. RASMUSSEN, #117334  
2 EDWARDS, SOOY & BYRON  
3 A Professional Corporation  
4 101 West Broadway, Ninth Floor  
5 San Diego, California 92101-8285  
6 Telephone: (619) 231-1500  
7 Facsimile: (619) 231-1588

8 Attorneys for Plaintiff Donley G. McReynolds,  
9 M.D.

10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 DONLEY G. MCREYNOLDS, M.D.,

No. 99CV2705IEG JAH

AMENDED DECLARATION OF GLEN M.  
RASMUSSEN IN SUPPORT OF EXPERT  
WITNESS DESIGNATION

13 Plaintiff,

14 v.

15 STANDARD INSURANCE  
16 COMPANY,

17 Defendant.

18 I, Glen M. Rasmussen, declare as follows:

19 1. I am an attorney at law duly licensed to practice before all the courts in the  
20 State of California and am a member of the law firm of EDWARDS, SOOY & BYRON,  
21 attorneys of record for plaintiff DONLEY G. McREYNOLDS. I make this expert witness  
22 declaration pursuant to Federal Rule 26(a)(2).

23 2. The plaintiff in this matter intends to offer the expert opinion testimony of  
24 the following experts at the trial of this action, either orally or by deposition testimony.

25 3. Ted Vavoulis, M.S. has agreed to testify at trial.

26 4. Mr. Vavoulis is an economist.

27 ///

EDWARDS, SOOY & BYRON  
A PROFESSIONAL CORPORATION  
EDWARDS, SOOY & BYRON  
101 WEST BROADWAY, SUITE 1100  
SAN DIEGO, CALIFORNIA 92101-0285

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5. My original declaration inadvertently omitted the nature of Mr. Vavoulis' testimony. Mr. Vavoulis will testify at trial regarding the appropriate accounting methods Standard should have used in determining policy benefits. Mr. Vavoulis will testify at trial regarding what benefits are due and the correct and generally accepted method for arriving at the benefits due.

6. Mr. Vavoulis is, or will be, sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the testimony described above, including his expert opinions and the basis therefor.

7. Mr. Vavoulis' fee for providing deposition testimony is \$300.00 per hour.

8. True and correct copies of Mr. Vavoulis' Curriculum Vitae and opinion are attached hereto under Federal Rule 26(a)(2)(B).

DATE: July 27, 2000

EDWARDS, SOOY & BYRON  
A PROFESSIONAL CORPORATION

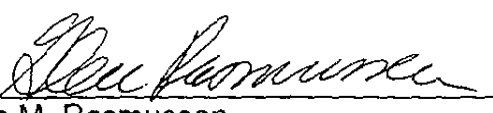
By:   
Glen M. Rasmussen  
Attorneys for Plaintiff  
Donley G. McReynolds, M.D.

EXHIBIT 4-PB.44

DOCKET No. 99 CV 2705 IEG (JAH)

PROOF OF SERVICE BY HAND

I, Eddie R. Chance, the undersigned, hereby certify and declare under penalty of perjury that I am over the age of 18 years and am not a party to this action. My business address is Warren H. Nelson, Jr., A Professional Corporation, 7400 El Cajon Blvd., Suite 302, La Mesa, CA 91941, telephone (619) 466-9400 and facsimile (619) 466-9402. On the 29<sup>th</sup> day of **January 2001**, I served a true copy of the foregoing documents titled exactly:

THIRD DECLARATION OF WARREN H. NELSON, JR.--FILED IN

SUPPORT OF DEFENDANT STANDARD INSURANCE COMPANY'S REPLY

IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

by personally delivering it to the following offices of the following persons:

Glen M. Rasmussen, Esq.  
7855 Ivanhoe Avenue  
Suite 400  
La Jolla, CA 92037

Thomas M. Monson, Esq.  
Miller, Monson, et al.  
501 W. Broadway,  
Suite 700  
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29<sup>TH</sup> day of **January 2001** at San Diego, California.

  
Eddie R. Chance