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Telephone:
Facsimile:

Attorney for Respondents

, and

IN THE MATTER OF ARBITRATION OF

ARBITRATION NO. 13384

Claimant,

**ORDER GRANTING RESPONDENTS'
MOTION FOR SUMMARY JUDGMENT**

v.

**Date: October 13, 2015
Time: 8:30 am
Dial-In: 800-861-4084
Code: 6947361585
Arb. Dates: 2-22-2016
Arbitrator: Julia J. Parranto, Esq.**

and

Respondents.

The Motion for Summary Judgment by RESPONDENTS

and

(“RESPONDENTS”) was properly served and filed.

After full consideration of the evidence, and the written and any oral submissions by the parties, the Arbitrator finds that there is no triable issue of material fact with respect to the entire Demand for Arbitration.

The record establishes RESPONDENTS are entitled to summary judgment because the statute of limitations ran before CLAIMANT (“CLAIMANT”) commenced this action. (Code Civ. Proc., § 340.5.) CLAIMANT suspected or should have suspected RESPONDENTS of wrongdoing no later than June 2013, more than one year before he filed his Demand for Arbitration in February 2015. Thus, the one-year statute of limitations has run

1 under Code of Civil Procedure section 340.5.

2 RESPONDENTS' motion is not granted on the alternative bases of standard of care and
3 causation. CLAIMANT opposed RESPONDENTS' motion with conflicting expert testimony on
4 the standard of care and causation.

5 In addition, having reviewed and considered RESPONDENTS' Objections to Evidence in
6 Support of CLAIMANT'S Opposition to RESPONDENTS' Motion for Summary Judgment; it is
7 HEREBY ORDERED that RESPONDENTS' Objections to Evidence in Support of CLAIMANT'S
8 Opposition to RESPONDENTS' Motion for Summary Judgment are all overruled as follows:

9 **Objections to Statement of _____, M.D.**

10 **Objection No. 1**

11 **Material Objected To:**

12 Entire Declaration of Dr.

13 **Grounds for Objection:**

14 (a) **Unsworn Statement.** (Code of Civ. Proc., § 2015.): Dr. 's statement does not
15 declare that it is under the penalty of perjury. The use of an unsworn statement is
16 precluded in a motion for summary judgment. (*Witchell v. De Korne* (1986) 179
17 Cal.App.3d 965, 975.)

18 (b) **Improper Expert Opinion.** (Ev. Code §§ 801, 803.) Dr. 's declaration is not based
19 on matter of a type that may be reasonably relied upon or that is a proper basis for such
20 opinions. Dr. is an oncologist who offers no explanation as to why he is qualified
21 to opine as to the standard of care for a gastroenterologist other than "I have seen many
22 patients with Crohn's." (Decl., ¶ 1.) Dr. does not state whether he had any
23 specific training or expertise in gastroenterology. (*See Mustello v. Berg* (N.Y. App. Div.
24 2007) 44 A.D.3d 1018, 1018-1019 [845 N.Y.S.2d 86, 87-88].) Further, he does not
25 indicate that he familiarized himself with the relevant literature or otherwise set forth
26 how he was, or became, familiar with the applicable standards of care in this specialized
27 area of practice. Dr. does not even assert that he is familiar with the applicable
28 standard of care. His opinions are unreliable.

1 (c) Lack of Foundation. (Ev. Code § 403.) A foundation must be laid tending to support the
2 reliability of the opinion rendered. In the circumstances of this case, Dr. fails to
3 lay the requisite foundation to assert that he has familiarity with the applicable standards
4 of care for a gastroenterologist. (*See Mustello v. Berg* (N.Y. App. Div. 2007) 44 A.D.3d
5 1018, 1018-1019 [845 N.Y.S.2d 86, 87-88].) Further, there is no foundation for his
6 statement that he saw many patients with Crohn's. (Decl., ¶ 1.) He does not state
7 how he knew that patients he was treating had Crohn's because 's expert, Dr.
8 , a gastroenterologist, opines to a reasonable degree of medical certainty that the
9 only way to determine with certainty that a patient has Crohn's disease is to
10 remove a specific segment of their bowel, which is typically not medically necessary.
11 Dr. 's opinion is undisputed. In addition, no foundation is laid to show he has
12 expertise regarding gluten sensitivity or how a physician can distinguish between
13 Crohn's disease and gluten insensitivity.

14 ***Arbitrator's Ruling on Objection 1:***

15 *Sustained:* _____

16 *Overruled:* X

18 **Objection No. 2**

19 **Material Objected To:**

20 Decl., ¶ 1 at 1:19-20: "Over the course of my career I have seen many patients with
21 Crohn's, both as an internist and as a hematologist responsible for infusion therapies administered
22 to these patients.

23 **Grounds for Objection:**

24 (a) Lack of Foundation. (Ev. Code § 403.) Dr. does not state how he knew that
25 patients he was treating had Crohn's disease. 's expert, Dr. , a
26 gastroenterologist, opines to a reasonable degree of medical certainty that the only way
27 to determine with certainty that a patient has Crohn's disease is to remove a specific
28 segment of their bowel, which is typically not medically necessary. Dr. 's opinion

1 is undisputed.

2 **Arbitrator's Ruling on Objection 2:**

3 Sustained: _____

4 Overruled: X

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Objection No. 3

7 **Material Objected To:**

8 Decl., ¶ 18 at 10-11: "He was treated repeatedly for Crohn's without sufficient
9 evidence to support that diagnosis."

10 **Grounds for Objection:**

11 (a) Improper Expert Opinion. (Ev. Code §§ 801, 803.) Dr. is unqualified to opine as
12 to what constitutes sufficient evidence of Crohn's disease. He does not state whether he
13 had any specific training or expertise in gastroenterology or regarding Crohn's disease.
14 Further, he does not indicate that he familiarized himself with the relevant literature or
15 otherwise set forth how he was, or became, familiar with how to diagnose Crohn's
16 disease. His opinions are unreliable.

17 (b) Lack of Foundation. (Ev. Code § 403.) Dr. fails to state what would be sufficient
18 evidence for a diagnosis of Crohn's disease or how he knows what would be sufficient
19 evidence of this diagnosis.

20 **Arbitrator's Ruling on Objection 3:**

21 Sustained: _____

22 Overruled: X

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Objection No. 4

25 **Material Objected To:**

26 Decl., ¶ 19 at 19:17-18: "The care given to Mr. during the course of the
27 thirteen year history falls below the standard of care."
28

1 **Grounds for Objection:**

2 (a) Improper Expert Opinion. (Ev. Code §§ 801, 803.) Dr. 's declaration is not based
3 on matter of a type that may be reasonably relied upon or that is a proper basis for such
4 opinions. Dr. is unqualified to opine on the standard of care of a
5 gastroenterologist. Further, the statement is overbroad – it is incomprehensible that all
6 of 's care fell below the standard of care for thirteen years.

7 (b) Lack of Foundation. (Ev. Code § 403.) Dr. fails to lay the requisite foundation to
8 assert that he has familiarity with the applicable standards of care for a
9 gastroenterologist.

10 ***Arbitrator's Ruling on Objection 4:***

11 *Sustained:* _____

12 *Overruled:* X _____

13
14 **Objection No. 5**

15 **Material Objected To:**

16 Decl., ¶ 19 at 19:20-22: "It is more likely than not that treatment for Crohn's
17 exacerbated Mr. 's condition through side effects of inappropriate medications and by not
18 allowing appropriate dietary interventions and treatments to take place."

19 **Grounds for Objection:**

20 (a) Improper Expert Opinion. (Ev. Code §§ 801, 803.) Dr. 's declaration is not based
21 on matter of a type that may be reasonably relied upon or that is a proper basis for such
22 opinions. Dr. is unqualified to opine on causation and medications related to
23 gastroenterology, Crohn's disease or gluten insensitivity.

24 (b) Lack of Foundation. (Ev. Code § 403.) It is hopelessly vague what "inappropriate
25 medications" were prescribed and what "side effects" they caused. Dr. fails to lay
26 the requisite foundation to assert that he has familiarity with the medications prescribed
27 by a gastroenterologist and their side effects.

28

1 **Arbitrator's Ruling on Objection 5:**

2 Sustained: _____

3 Overruled: X _____

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Objection No. 6

6 **Material Objected To:**

7 Decl., ¶ 19 at 19:22-25: "It is my opinion that had gluten allergen testing been
8 performed early in Mr. _____'s history, a more appropriate treatment plan would have been
9 prescribed and quickly controlled eliminated (sic) the symptoms for which he chronically returned
10 to _____."

11 **Grounds for Objection:**

12 (a) Improper Expert Opinion. (Ev. Code §§ 801, 803.) Dr. _____ is unqualified to opine as
13 a gastroenterologist.

14 (b) Speculative. It is speculative whether a "more appropriate treatment plan would have
15 been prescribed" and whether it would have "quickly controlled [or] eliminated the
16 symptoms."

17 (c) Lack of Foundation. (Ev. Code § 403.) Dr. _____ does not lay the foundation for an
18 appropriate treatment plan.

19 **Arbitrator's Ruling on Objection 6:**

20 Sustained: _____

21 Overruled: X _____

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Objection No. 7

24 **Material Objected To:**

25 Decl., ¶ 20 at 20:4-5: "However, _____ as a system also failed Mr. _____, who
26 for the period of more than a decade was treated for an incorrect and poorly supported diagnosis."

27 **Grounds for Objection:**

28 (a) Improper Expert Opinion. (Ev. Code §§ 801, 803.) Dr. _____ is unqualified to opine as

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a gastroenterologist.

(b) Lack of Foundation. (Ev. Code § 403.) It is hopelessly vague as to what diagnosis was an incorrect and poorly supported diagnosis. Further, Dr. does not lay the foundation for how is qualified to determine the diagnosis was incorrect and poorly supported. Dr. also does not state what would have been required to support the diagnosis.

Arbitrator's Ruling on Objection 7:

Sustained: _____

Overruled: X _____

Objections to Exhibits

Objection No. 8

Material Objected To:

Exhibits B-D

Grounds for Objection:

Judicial notice cannot be taken of any of claimant's exhibits under Evidence Code Section 450, *et seq.* Claimant's request for judicial notice must be denied. Further, no foundation is laid for Exhibits B-D.

Arbitrator's Ruling on Objection 8:

Sustained: _____

Overruled: X _____

Objection No. 9

Material Objected To:

Exhibit D

Grounds for Objection:

Claimant's Exhibit D consists of 2015 medical records that post-date claimant's February 18, 2015 Demand for Arbitration. While denies that these records create triable issues of

1 disputed material fact, also hereby objects to them as irrelevant under Evidence Code section
2 350 and improper in opposition to a summary judgment motion: "A sufficient motion cannot be
3 successfully resisted by counter-declarations which create immaterial factual conflicts outside the
4 scope of the pleadings; counter-declarations are no substitute for amended pleadings." (*AARTS*
5 *Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1065.)

6 **Arbitrator's Ruling on Objection 9:**

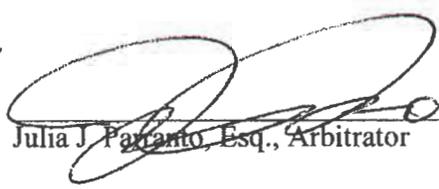
7 Sustained: _____

8 Overruled: X _____

9
10 There being no triable issue of material fact as to any claim asserted by CLAIMANT, due to
11 the statute of limitations having run, the Motion for Summary Judgment shall be and hereby is
12 granted and judgment entered in favor of RESPONDENTS and against CLAIMANT.

13 **Nothing in this arbitration decision prohibits or restricts the enrollee from discussing**
14 **or reporting the underlying facts, results, terms and conditions of this decision to the**
15 **Department of Managed Health Care.**

16 Dated: 10/15, 2015



Julia J. Pantano, Esq., Arbitrator

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