

No. 18-90020-E

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION,
BLUE CROSS BLUE SHIELD ASSOCIATION V. JOSEPH ACKERSON, ET AL.**

On Petition from the United States District Court
For The Northern District of Alabama, Southern Division
Case No. 2:13-cv-20000-RDP

**PROVIDER RESPONDENTS' OPPOSITION TO PETITIONERS'
MOTION FOR LEAVE TO FILE REPLY OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE TO FILE A SURREPLY**

Joe R. Whatley, Jr.
WHATLEY KALLAS, LLP
2001 Park Place North
Suite 1000
Birmingham, AL 35203
205-488-1200

Edith M. Kallas
WHATLEY KALLAS, LLP
1180 Avenue of the Americas
20th Floor
New York, NY 10036
212-447-7060

Additional Counsel Listed on Inside Cover

Patrick J. Sheehan
WHATLEY KALLAS, LLP
60 State Street, 7th Floor
Boston, MA 02109
Tel: (617) 573-5118
Fax: (617) 371-2950
Email: psheehan@whatleykallas.com

W. Tucker Brown
Helen L. Eckinger
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com
heckinger@whatleykallas.com

Henry C. Quillen
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

Deborah J. Winegard
WHATLEY KALLAS, LLP
1068 Virginia Avenue, NE
Atlanta, GA 30306
Tel: (404) 607-8222
Fax: (404) 607-8451
Email: dwinegard@whatleykallas.com

Charles Clinton Hunter
HAYES HUNTER PC
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (281) 768-4731
Fax: (713) 583-7047
Email: chunter@hayeshunterlaw.com

E. Kirk Wood, Jr. – *Local Facilitating
Counsel*
WOOD LAW FIRM LLC
P. O. Box 382434
Birmingham, AL 35238
Tel: (205) 612-0243
Fax: (205) 705-1223
Email: ekirkwood1@bellsouth.net

Dennis Pantazis – *Plaintiffs’ Steering Committee*

Brian Clark – *Discovery Committee*

WIGGINS CHILDS PANTAZIS

FISHER

GOLDFARB

The Kress Building

301 Nineteenth Street North

Birmingham, AL 35203

Tel: (205) 314-0500

Fax: (205) 254-1500

Email: dgp@wcqp.com

bclark@wcqp.com

Aaron S. Podhurst – *Plaintiffs’ Steering Committee*

Peter Prieto – *Chair, Expert Committee*

PODHURST ORSECK, P.A.

One S.E. 3rd Avenue

Suite 2300

Miami, FL 33131

Tel: (305) 358-2800

Fax: (305) 358-2382

Email: apodhurst@podhurst.com

pprieto@podhurst.com

Dennis C. Reich – *Chair, Damages Committee*

REICH & BINSTOCK, LLP

4265 San Felipe, Suite 1000

Houston, TX 77027

Tel: (713) 622-7271

Fax: (713) 623-8724

Email: dreich@rbfirm.net

U.W. Clemon – *Plaintiffs’ Steering Committee*

U. W. Clemon, LLC

5202 Mountain Ridge Parkway

Birmingham, AL 35222

Tel: (205) 837-2898

Email: clemonu@bellsouth.net

Nicholas B. Roth – *Chair, Discovery Committee*

Julia Smeds Roth – *Discovery Committee*

EYSTER KEY TUBB ROTH

MIDDLETON

& ADAMS, LLP

402 East Moulton Street, SE

Decatur, AL 35602

Tel: (256) 353-6761

Fax: (256) 353-6767

Email: nbroth@eysterkey.com

jroth@eysterkey.com

J. Mark White – *Litigation Committee*

Augusta S. Dowd – *Chair, Litigation Committee*

Committee

Linda G. Flippo – *Discovery Committee*

WHITE ARNOLD & DOWD, P.C.

The Massey Building

2025 Third Avenue North, Suite 500

Birmingham, AL 35203

Tel: (205) 323-1888

Fax: (205) 323-8907

Email: mwhite@whitearnolddowd.com

adowd@whitearnolddowd.com

lflippo@whitearnolddowd.com

David A. Balto – *Expert Committee*
THE LAW OFFICES OF DAVID A.
BALTO
1350 I Street, N.W., Suite 850
Washington, DC 20005
Tel: (202) 789-5424
Fax: (202) 589-1819
Email: david.balto@dcantitrustlaw.com

Van Bunch – *Chair, Class Certification
Committee*
BONNETT FAIRBOURN FRIEDMAN &
BALINT, P.C.
2325 E. Camelback Road, Suite 300
Phoenix, AZ 85016
Tel: (602) 274-1100
Fax: (602) 274-1199
Email: vbunch@bffb.com

Joey K. James – *Litigation Committee*
BUNCH & JAMES
P. O. Box 878
Florence, AL 35631
Tel: (256) 764-0095
Fax: (256) 767-5705
Email: joey@bunchandjames.com

Robert J. Axelrod – *Chair, Written
Submissions Committee*
AXELROD & DEAN LLP
830 Third Avenue, 5th Floor
New York, NY 10022
Tel: (646) 448-5263
Fax: (212) 840-8560
Email: rjaxelrod@axelroddean.com

Richard S. Frankowski – *Discovery
Committee*
THE FRANKOWSKI FIRM, LLC
231 22nd Street South, Suite 203
Birmingham, AL 35233
Tel: (205) 390-0399
Fax: (205) 390-1001
Email: richard@frankowskifirm.com

W. Daniel Miles, III – *Written
Submissions Committee*
BEASLEY ALLEN CROW METHVIN
PORTIS
& MILES, P.C.
218 Commerce Street
Montgomery, AL 36104
Tel: (800) 898-2034
Fax: (334) 954-7555
Email: dee.miles@beasleyallen.com

John C. Davis – *Written Submissions Committee*

LAW OFFICE OF JOHN C. DAVIS
623 Beard Street
Tallahassee, FL 32303
Tel: (850) 222-4770
Email: john@johndavislaw.net

Peter H. Burke – *Class Certification Committee*

J. Allen Schreiber – *Litigation Committee*
BURKE HARVEY, LLC
3535 Grandview Parkway
Suite 100
Birmingham, AL 35243
Tel: (205) 930-9091
Fax: (205) 930-9054
Email: pburke@burkeharvey.com
aschreiber@burkeharvey.com

Mark K. Gray – *Discovery Committee*

GRAY & WHITE
713 E. Market Street, Suite 200
Louisville, KY 40202
Tel: (502) 805-1800
Fax: (502) 618-4059
Email: mgray@grayandwhitelaw.com

Michael C. Dodge – *Expert Committee*

GLAST PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254
Tel: (972) 419-7172
Email: mdodge@gpm-law.com

Stephen M. Hansen – *Class Certification Committee*

LAW OFFICE OF STEPHEN M.
HANSEN
1821 Dock Street
Tacoma, WA 98402
Tel: (253) 302-5955
Fax: (253) 301-1147
Email: steve@stephenmhansenlaw.com

Michael E. Gurley, Jr. – *Discovery Committee*

Attorney at Law
24108 Portobello Road
Birmingham, AL 35242
Tel: (205) 908-6512
Email: mgurleyjr@yahoo.com

Harley S. Tropin – *Damages Committee*
Javier A. Lopez – *Discovery Committee*
KOZYAK TROPIN &
THROCKMORTON, P.A.
2525 Ponce De Leon Boulevard, 9th
Floor
Miami, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: hst@kttlaw.com
jal@kttlaw.com

Lynn W. Jinks, III – *Expert Committee*
Christina D. Crow – *Discovery Committee*
JINKS CROW & DICKSON, P.C.
219 North Prairie Street
Union Springs, AL 36089
Tel: (334) 738-4225
Fax: (334) 738-4229
Email: ljinks@jinkslaw.com
ccrow@jinkslaw.com

C. Wes Pittman – *Settlement Committee*
THE PITTMAN FIRM, P.A.
432 McKenzie Avenue
Panama City, FL 32401
Tel: (850) 784-9000
Fax: (850) 763-6787
Email: wes@pittmanfirm.com

Myron C. Penn – *Discovery Committee*
PENN & SEABORN, LLC
53 Highway 110
Post Office Box 5335
Union Springs, AL 36089
Tel: (334) 738-4486
Fax: (334) 738-4432
Email: myronpenn28@hotmail.com

Robert B. Roden – *Litigation Committee*
SHELBY RODEN, LLC
2956 Rhodes Circle
Birmingham, AL 35205
Tel: (205) 933-8383
Fax: (205) 933-8386
Email: rroden@shelbyroden.com

J. Preston Strom, Jr. – *Litigation Committee*
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard, Suite A
Columbia, SC 29204-3905
Tel: (803) 252-4800
Fax: (803) 252-4801
Email: petestrom@stromlaw.com

Gary E. Mason – *Class Certification Committee*
WHITFIELD BRYSON & MASON, LLP
1625 Massachusetts Ave. NW, Suite 605
Washington, DC 20036
Tel: (202) 429-2290
Fax: (202) 640-1160
Email: gmason@wbmlp.com

Thomas V. Bender – *Discovery Committee*
Dirk L. Hubbard
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Tel: (816) 421-0700
Email: tbender@hab-law.com
dhubbard@hab-law.com

Michael L. Murphy – *Discovery
Committee*
BAILEY GLASSER LLP
910 17th Street, NW, Suite 800
Washington, DC 20006
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: mmurphy@baileyglasser.com

Gregory S. Cusimano – *Litigation
Committee*
CUSIMANO, ROBERTS & MILLS, LLC
153 South 9th Street
Gadsden, AL 35901
Phone: (256) 543-0400
Fax: (256) 543-0488
Email: greg@alalawyers.net

Lance Michael Sears
SEARS & SWANSON, P.C.
First Bank Building
2 North Cascade Avenue, Suite 1250
Colorado Springs, CO 80903
Tel: (719) 471-1984
Fax: (719) 577-4356
Email: lance@searsassociates.com

Brian E. Wojtalewicz
WOJTALEWICZ LAW FIRM, LTD.
139 N. Miles Street
Appleton, MN 56208
Tel: (320) 289-2363
Fax: (320) 289-2369
Email: brian@wojtalewiczlawfirm.com

Jessica Dillon
Ray R. Brown
Molly Brown
DILLON & FINDLEY, P.C.
1049 W. 5th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 277-5400
Fax: (907) 277-9896
Email: Jessica@dillonfindley.com
Ray@dillonfindley.com
Molly@dillonfindley.com

Archie C. Lamb, Jr.
ARCHIE LAMB & ASSOCIATES, LLC
301 19th Street North, Suite 585
The Kress Bldg.
Birmingham, AL 35203-3145
(205) 458-1210
Email: alamb@archielamb.com

Cynthia C. Moser
HEIDMAN LAW FIRM
1128 Historic 4th Street
P. O. Box 3086
Sioux City, IA 51101
Tel: (712) 255-8838
Fax (712) 258-6714
Email: Cynthia.Moser@heidmanlaw.com

Paul Lundberg
LUNDBERG LAW, PLC
600 4TH Street, Suite 906
Sioux City, IA 51101
Tel: (712) 234-3030
Fax: (712) 234-3034
Email: paul@lundberglawfirm.com

Gwen Simons
SIMONS & ASSOCIATES LAW, P.A.
P.O. Box 1238
Scarborough, ME 04070-1238
Tel: (207) 205-2045
Fax: (207) 883-7225
Email: gwen@simonsassociateslaw.com

Counsel for Provider Respondents

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Interested Persons. Pursuant to 11th Cir. R. 26.1, Respondents hereby certify that the following is a complete listing of additional persons that have an interest in the outcome of this particular case on appeal.

/s/ Joe R. Whatley, Jr. _____

Joe R. Whatley, Jr.

Attorney for Provider Respondents

1. Jinks, III, Lynn W. (Counsel for Respondent)
2. Lundberg Law, PLC (Counsel for Respondent)
3. Olwan, Ph.D., Dena Z. (Respondent)
4. Snowden, Ph.D., James V. (Respondent)
5. U.S. Imaging Network, LLC (Respondent)
6. Weaver, D.P.M., Benjamin W. (Respondent)

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Corporate Disclosure. Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1- 1, 26.102, and 26.1-3, Provider Respondents respectfully submit this Corporate Disclosure Statement and state as follows:

1. Brain & Spine, LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
2. BreakThrough Physical Therapy, Inc. is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.
3. Bullock County Hospital has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
4. Crenshaw Community Hospital has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
5. Dunn Physical Therapy, Inc. is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.
6. Ear, Nose & Throat Consultants and Hearing Services, P.L.C. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
7. Evergreen Medical Center, LLC is a wholly-owned subsidiary of Gilliard Health Services, Inc. Gilliard Health Services, Inc. has no

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publicly held corporation that owns ten percent or more of its stock.

8. Ferezy Clinic of Chiropractic and Neurology has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
9. Gaspar Physical Therapy, P.C. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
10. Greater Brunswick Physical Therapy, P.A. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
11. Hillside Family Medicine, LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
12. Ivy Creek of Butler, LLC d/b/a Georgiana Medical Center is a wholly-owned subsidiary of Ivy Creek Healthcare. Ivy Creek Healthcare has no publicly held corporation that owns ten percent or more of its stock.
13. Ivy Creek of Elmore, LLC d/b/a Elmore Community Hospital is a wholly-owned subsidiary of Ivy Creek Healthcare. Ivy Creek Healthcare has no publicly held corporation that owns ten percent or more of its stock.
14. Ivy Creek of Tallapoosa, LLC d/b/a Lake Martin Community Hospital

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is a wholly-owned subsidiary of Ivy Creek Healthcare. Ivy Creek Healthcare has no publicly held corporation that owns ten percent or more of its stock.

15. Jackson Medical Center, LLC is a wholly-owned subsidiary of Gilliard Health Services, Inc. Gilliard Health Services, Inc. has no publicly held corporation that owns ten percent or more of its stock.
16. Julie McCormick, M.D., LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
17. Michael Dole, M.D., LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
18. Neuromonitoring Services of America, Inc. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
19. North Jackson Pharmacy, Inc. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
20. Northwest Florida Surgery Center, LLC has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
21. ProRehab, P.C. is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.

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22. Snowden Olwan Psychological Services has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
23. Spine Diagnostic Center of Baton Rouge, Inc. has no parent corporation and no publicly held corporation owns ten percent or more of its stock.
24. Texas Physical Therapy Specialists, LLC is a wholly-owned subsidiary of Confluent Health. Confluent Health has no publicly held corporation that owns ten percent or more of its stock.

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

Attorney for Provider Respondents

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ARGUMENT

The Petitioners ask for leave to file a reply in support of their 1292(b) petition—something that has been allowed just once by this Court since searchable dockets became available eight years ago. Even in that one case, the motion was unopposed and was granted in the same order that denied the 1292(b) petition. *United Servs. Auto. Ass’n v. Bastian*, No. 15-90034 (order filed Feb. 29, 2016).¹ The Petitioners give two reasons, neither of which warrants the extraordinary relief they seek.

First, the Supreme Court decided *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), after the petition was filed, but before the answers were filed. But Rule 28(j) sets out the proper procedure for notifying the Court of supplemental authority, eliminating the need for time-consuming motions, replies, and surreplies every time the law develops. Rule 28(j) is available not just to appellants, but to petitioners as well. *See, e.g., Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (allowing the government to submit a 28(j) letter in a petition for review of a BIA decision); *Coronado v. Holder*, 759 F.3d 977, 982 (9th Cir. 2014) (same); *Spectrum Five LLC v. FCC*, 758 F.3d 254, 263 (D.C. Cir. 2014) (considering

¹ During that time, three petitioners have filed unauthorized reply briefs, which the respondents did not challenge. *SSCTR, LLC v. Jefferson Transp., LLC*, No. 11-90008 (reply filed June 8, 2011); *Chiquita Brands Int’l v. John Doe No. 1*, No. 12-90020 (reply filed Apr. 27, 2012); *Berzain v. Mamani*, No. 14-90018 (reply filed Sept. 15, 2014).

material submitted with a 28(j) letter on a petition for review of an FCC order). The Provider Respondents would not have objected to the filing of a 28(j) letter, had they been asked. And the Petitioners would not be prejudiced by filing a Rule 28(j) letter instead of a reply. The two Respondents' briefs devote a total of six sentences to analysis of *American Express*. In the proposed reply brief, the length of the paragraphs that even mention *American Express*, much less analyze it, is 359 words, about the same as the 350-word limit for a Rule 28(j) letter. Clearly, whatever discussion *American Express* deserves could have been handled through the regular procedure of a 28(j) letter, not the extraordinary procedure of a reply brief.

The Petitioners' second reason for seeking a reply is essentially that they disagree with the Respondents' answers. *See* Motion at 1 ("A short reply brief will also assist the Court in assessing respondents' mistaken contentions that review of the district court's standard of review ruling would require delving into unresolved factual disputes, and their unsustainable claims that immediate review would not materially advance the litigation."). If that were a reason for granting a reply, every 1292(b) petition would have one. Here, this reason is the tail wagging the dog, because arguments unrelated to *American Express* take up more than four fifths of the proposed reply. Asking for a reply just to get another bite at the apple is plainly improper and should not be condoned.

Finally, the three citations in the Petitioners' motion do not support the idea that "Courts have regularly granted similar motions." Motion at 1. Three instances nationwide over the last eleven years do not make a regular practice. Moreover, none of these three cases were similar to this one. In *Kaur v. Things Remembered, Inc.*, 829 F.3d 1117 (9th Cir. 2016), a Rule 23(f) appeal, the proposed reply was meant to correct factual misstatements about the conduct of the petitioner's counsel. In *Lincoln National Life Insurance Co. v. Bezich*, 610 F.3d 448 (7th Cir. 2010), which involved a Class Action Fairness Act petition, the motion was unopposed, and it was granted in the same order that dismissed the petition.² And in *Georgia Power Co. v. NLRB*, 484 F.3d 1288 (11th Cir. 2007), the reply came on an order to show cause why the movant should not be sanctioned, a fact-specific issue for which prejudice could have resulted if the movant could not make all of its arguments. Thus, the Petitioners here have not cited a single instance of a reply in support of a 1292(b) petition being granted over opposition, much less one that is designed primarily to allow further argument on topics already addressed in the petition.

² The Provider Respondents would not object to this Court granting the Petitioners' motion in an order denying their petition, as it did in *Bastian*.

If the Court is nevertheless inclined to grant this extraordinary relief, the Provider Respondents request that they also be allowed to file the attached surreply, which briefly addresses the points made in the reply.

CONCLUSION

The Petitioners' motion to file a reply brief is improper and should be denied. The Court should advise the Petitioners that the proper way to address supplemental authority is through a 28(j) letter. If the Court does allow the Petitioners to file their reply, however, the Provider Respondents request leave to file the attached surreply.

Dated: July 19, 2018

Respectfully submitted,

Edith M. Kallas – *Co-Lead Counsel*
WHATLEY KALLAS, LLP
1180 Avenue of the Americas, 20th Floor
New York, NY 10036
Tel: (212) 447-7060
Fax: (800) 922-4851
Email: ekallas@whatleykallas.com

/s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr. – *Co-Lead Counsel*
W. Tucker Brown
Helen L. Eckinger
WHATLEY KALLAS, LLP
2001 Park Place North
1000 Park Place Tower
Birmingham, AL 35203
Tel: (205) 488-1200
Fax: (800) 922-4851
Email: jwhatley@whatleykallas.com
tbrown@whatleykallas.com
heckinger@whatleykallas.com

Patrick J. Sheehan
WHATLEY KALLAS, LLP
60 State Street, 7th Floor
Boston, MA 02109
Tel: (617) 573-5118
Fax: (617) 371-2950
Email: psheehan@whatleykallas.com

Deborah J. Winegard
WHATLEY KALLAS, LLP
1068 Virginia Avenue, NE
Atlanta, GA 30306
Tel: (404) 607-8222
Fax: (404) 607-8451
Email: dwinegard@whatleykallas.com

Henry C. Quillen
WHATLEY KALLAS, LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
Tel: (603) 294-1591
Fax: (800) 922-4851
Email: hquillen@whatleykallas.com

E. Kirk Wood, Jr. – *Local Facilitating Counsel*
WOOD LAW FIRM LLC
P. O. Box 382434
Birmingham, AL 35238
Tel: (205) 612-0243
Fax: (205) 705-1223
Email: ekirkwood1@bellsouth.net

Charles Clinton Hunter
HAYES HUNTER PC
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (281) 768-4731
Fax: (713) 583-7047
Email: chunter@hayeshunterlaw.com

Aaron S. Podhurst – *Plaintiffs’ Steering Committee*
Peter Prieto – *Chair, Expert Committee*
PODHURST ORSECK, P.A.
One S.E. 3rd Avenue
Suite 2300
Miami, FL 33131
Tel: (305) 358-2800
Fax: (305) 358-2382
Email: apodhurst@podhurst.com
pprieto@podhurst.com

Dennis Pantazis – *Plaintiffs’ Steering Committee*
Brian Clark – *Discovery Committee*
WIGGINS CHILDS PANTAZIS
FISHER
GOLDFARB
The Kress Building
301 Nineteenth Street North
Birmingham, AL 35203
Tel: (205) 314-0500
Fax: (205) 254-1500
Email: dgp@wcqp.com
bclark@wcqp.com

U.W. Clemon – *Plaintiffs’ Steering Committee*
U. W. Clemon, LLC
5202 Mountain Ridge Parkway
Birmingham, AL 35222
Tel: (205) 837-2898
Email: clemonu@bellsouth.net

Dennis C. Reich – *Chair, Damages Committee*
REICH & BINSTOCK, LLP
4265 San Felipe, Suite 1000
Houston, TX 77027
Tel: (713) 622-7271
Fax: (713) 623-8724
Email: dreich@rbfirm.net

J. Mark White – *Litigation Committee*
Augusta S. Dowd – *Chair, Litigation Committee*
Linda G. Flippo – *Discovery Committee*
WHITE ARNOLD & DOWD, P.C.
The Massey Building
2025 Third Avenue North, Suite 500
Birmingham, AL 35203
Tel: (205) 323-1888
Fax: (205) 323-8907
Email: mwhite@whitearnolddowd.com
adowd@whitearnolddowd.com
lflippo@whitearnolddowd.com

Nicholas B. Roth – *Chair, Discovery Committee*

Julia Smeds Roth – *Discovery Committee*

EYSTER KEY TUBB ROTH

MIDDLETON

& ADAMS, LLP

402 East Moulton Street, SE

Decatur, AL 35602

Tel: (256) 353-6761

Fax: (256) 353-6767

Email: nbroth@eysterkey.com

jrth@eysterkey.com

Van Bunch – *Chair, Class Certification Committee*

BONNETT FAIRBOURN FRIEDMAN & BALINT, P.C.

2325 E. Camelback Road, Suite 300

Phoenix, AZ 85016

Tel: (602) 274-1100

Fax: (602) 274-1199

Email: vbunch@bffb.com

David A. Balto – *Expert Committee*

THE LAW OFFICES OF DAVID A.

BALTO

1350 I Street, N.W., Suite 850

Washington, DC 20005

Tel: (202) 789-5424

Fax: (202) 589-1819

Email: david.balto@dcantitrustlaw.com

Robert J. Axelrod – *Chair, Written Submissions Committee*

AXELROD & DEAN LLP

830 Third Avenue, 5th Floor

New York, NY 10022

Tel: (646) 448-5263

Fax: (212) 840-8560

Email: rjaxelrod@axelroddean.com

Joey K. James – *Litigation Committee*

BUNCH & JAMES

P. O. Box 878

Florence, AL 35631

Tel: (256) 764-0095

Fax: (256) 767-5705

Email: joey@bunchandjames.com

W. Daniel Miles, III – *Written Submissions Committee*

BEASLEY ALLEN CROW METHVIN PORTIS

& MILES, P.C.

218 Commerce Street

Montgomery, AL 36104

Tel: (800) 898-2034

Fax: (334) 954-7555

Email: dee.miles@beasleyallen.com

Richard S. Frankowski – *Discovery Committee*

THE FRANKOWSKI FIRM, LLC
231 22nd Street South, Suite 203
Birmingham, AL 35233
Tel: (205) 390-0399
Fax: (205) 390-1001
Email: richard@frankowskifirm.com

Peter H. Burke – *Class Certification Committee*

J. Allen Schreiber – *Litigation Committee*
BURKE HARVEY, LLC
3535 Grandview Parkway
Suite 100
Birmingham, AL 35243
Tel: (205) 930-9091
Fax: (205) 930-9054
Email: pburke@burkeharvey.com
aschreiber@burkeharvey.com

John C. Davis – *Written Submissions Committee*

LAW OFFICE OF JOHN C. DAVIS
623 Beard Street
Tallahassee, FL 32303
Tel: (850) 222-4770
Email: john@johndavislaw.net

Michael C. Dodge – *Expert Committee*

GLAST PHILLIPS & MURRAY, P.C.
14801 Quorum Drive, Suite 500
Dallas, TX 75254
Tel: (972) 419-7172
Email: mdodge@gpm-law.com

Mark K. Gray – *Discovery Committee*

GRAY & WHITE
713 E. Market Street, Suite 200
Louisville, KY 40202
Tel: (502) 805-1800
Fax: (502) 618-4059
Email: mgray@grayandwhitelaw.com

Michael E. Gurley, Jr. – *Discovery Committee*

Attorney at Law
24108 Portobello Road
Birmingham, AL 35242
Tel: (205) 908-6512
Email: mgurleyjr@yahoo.com

Stephen M. Hansen – *Class Certification Committee*

LAW OFFICE OF STEPHEN M. HANSEN
1821 Dock Street
Tacoma, WA 98402
Tel: (253) 302-5955
Fax: (253) 301-1147
Email: steve@stephenmhansenlaw.com

Lynn W. Jinks, III – *Expert Committee*

Christina D. Crow – *Discovery Committee*
JINKS CROW & DICKSON, P.C.
219 North Prairie Street
Union Springs, AL 36089
Tel: (334) 738-4225
Fax: (334) 738-4229
Email: ljinks@jinkslaw.com
ccrow@jinkslaw.com

Harley S. Tropin – *Damages Committee*
Javier A. Lopez – *Discovery Committee*
KOZYAK TROPIN &
THROCKMORTON, P.A.
2525 Ponce De Leon Boulevard, 9th
Floor
Miami, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: hst@kttlaw.com
jal@kttlaw.com

Myron C. Penn – *Discovery Committee*
PENN & SEABORN, LLC
53 Highway 110
Post Office Box 5335
Union Springs, AL 36089
Tel: (334) 738-4486
Fax: (334) 738-4432
Email: myronpenn28@hotmail.com

C. Wes Pittman – *Settlement Committee*
THE PITTMAN FIRM, P.A.
432 McKenzie Avenue
Panama City, FL 32401
Tel: (850) 784-9000
Fax: (850) 763-6787
Email: wes@pittmanfirm.com

J. Preston Strom, Jr. – *Litigation Committee*
STROM LAW FIRM, LLC
2110 N. Beltline Boulevard, Suite A
Columbia, SC 29204-3905
Tel: (803) 252-4800
Fax: (803) 252-4801
Email: petestrom@stromlaw.com

Robert B. Roden – *Litigation Committee*
SHELBY RODEN, LLC
2956 Rhodes Circle
Birmingham, AL 35205
Tel: (205) 933-8383
Fax: (205) 933-8386
Email: rroden@shelbyroden.com

Thomas V. Bender – *Discovery Committee*
Dirk L. Hubbard
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Tel: (816) 421-0700
Email: tbender@hab-law.com
dhubbard@hab-law.com

Gary E. Mason – *Class Certification Committee*
WHITFIELD BRYSON & MASON, LLP
1625 Massachusetts Ave. NW, Suite 605
Washington, DC 20036
Tel: (202) 429-2290
Fax: (202) 640-1160
Email: gmason@wbmlp.com

Gregory S. Cusimano – *Litigation Committee*
CUSIMANO, ROBERTS & MILLS, LLC
153 South 9th Street
Gadsden, AL 35901
Phone: (256) 543-0400
Fax: (256) 543-0488
Email: greg@alalawyers.net

Michael L. Murphy – *Discovery
Committee*
BAILEY GLASSER LLP
910 17th Street, NW, Suite 800
Washington, DC 20006
Tel: (202) 463-2101
Fax: (202) 463-2103
Email: mmurphy@baileyglasser.com

Brian E. Wojtalewicz
WOJTALEWICZ LAW FIRM, LTD.
139 N. Miles Street
Appleton, MN 56208
Tel: (320) 289-2363
Fax: (320) 289-2369
Email: brian@wojtalewiczlawfirm.com

Lance Michael Sears
SEARS & SWANSON, P.C.
First Bank Building
2 North Cascade Avenue, Suite 1250
Colorado Springs, CO 80903
Tel: (719) 471-1984
Fax: (719) 577-4356
Email: lance@searsassociates.com

Archie C. Lamb, Jr.
ARCHIE LAMB & ASSOCIATES, LLC
301 19th Street North, Suite 585
The Kress Bldg.
Birmingham, AL 35203-3145
(205) 458-1210
Email: alamb@archielamb.com

Jessica Dillon
Ray R. Brown
Molly Brown
DILLON & FINDLEY, P.C.
1049 W. 5th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 277-5400
Fax: (907) 277-9896
Email: Jessica@dillonfindley.com
Ray@dillonfindley.com
Molly@dillonfindley.com

Paul Lundberg
LUNDBERG LAW, PLC
600 4TH Street, Suite 906
Sioux City, IA 51101
Tel: (712) 234-3030
Fax: (712) 234-3034
Email: paul@lundberglawfirm.com

Cynthia C. Moser
HEIDMAN LAW FIRM
1128 Historic 4th Street
P. O. Box 3086
Sioux City, IA 51101
Tel: (712) 255-8838
Fax (712) 258-6714
Email: Cynthia.Moser@heidmanlaw.com

Gwen Simons
SIMONS & ASSOCIATES LAW, P.A.
P.O. Box 1238
Scarborough, ME 04070-1238
Tel: (207) 205-2045
Fax: (207) 883-7225
Email: gwen@simonsassociateslaw.com

Attorneys for Provider Respondents

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) because this brief contains 826 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4 and the accompanying documents required by Fed. R. App. P. 5(b)(1)(E).

2. This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type.

Dated: July 19, 2018

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2018, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Joe R. Whatley, Jr. _____

Joe R. Whatley, Jr.