UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

LISA TORREY, et al.,

Plaintiffs,

v.

INFECTIOUS DISEASES SOCIETY OF AMERICA, et al.,

Defendants.

Civil Action No. 5:17-cv-00190-RWS

DEFENDANTS DR. GARY P. WORMSER, DR. RAYMOND J. DATTWYLER, DR. EUGENE SHAPIRO, DR. JOHN J. HALPERIN, DR. LEONARD SIGAL, AND DR. ALLEN STEERE'S REPLY IN FURTHER SUPPORT OF THEIR RENEWED MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. The Court Dismissed Plaintiffs' RICO Claims 2

II. The Court Lacks Specific Personal Jurisdiction over the Doctors 3

A. Plaintiffs Ignore the Fifth Circuit Nexus Requirement 3

B. Plaintiffs Misrepresent the Doctors' Contacts with Texas 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Bustos v. Lennon,
538 F. App'x 565 (5th Cir. 2013) 6

Clemens v. McNamee,
615 F.3d 374 (5th Cir. 2010) 4, 9

Felch v. Transportes Lar-Mex SA DE CV,
92 F.3d 320 (5th Cir. 1996) 9

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 4

ITL Int'l, Inc. v. Constenla, S.A.,
669 F.3d 493 (5th Cir. 2012) 6

L.G. Motorsports, Inc. v. NGMCO, Inc.,
No. 4:11CV112, 2012 WL 718594 (E.D. Tex. Mar. 6, 2012) 5

Lansing Trade Group, LLC v. 3B Biofuels GmbH & Co., KG,
612 F. Supp. 2d 813 (S.D. Tex. 2009) 6

Mink v. AAAA Dev. LLC,
190 F.3d 333 (5th Cir. 1999) 6

Thompson v. Chrysler Motors Corp.,
755 F.2d 1162 (5th Cir. 1985) 4

Wein Air Alaska, Inc. v. Brandt,
195 F.3d 208 (5th Cir. 1999) 3

Wilson v. Belin,
20 F.3d 644 (5th Cir. 1994) 9

Rules and Regulations

Federal Rules of Civil Procedure
Rule 12(b)(2) 1

Local Rules
Rule CV-7 1

INTRODUCTION[1]

Pursuant to Fed. R. Civ. P. 12(b)(2) and Local Rule CV-7, Defendants Dr. Gary P. Wormser, Dr. Raymond J. Dattwyler, Dr. Eugene Shapiro, Dr. John J. Halperin, Dr. Leonard Sigal, and Dr. Allen Steere (collectively, the "Doctors") submit this Reply in Further Support of Their Renewed Motion to Dismiss all claims against them for lack of personal jurisdiction.

Plaintiffs' Response to Defendants' Renewed Motion ("Response," Docket No 158) rests on conclusory assertions that because each Doctor has experience with Lyme disease, each visit by a Doctor to Texas was to make fraudulent statements regarding Lyme disease. Yet this argument does not come close to establishing specific personal jurisdiction over the Doctors, for three reasons.

First, Plaintiffs never alleged in their Complaint that any Doctor made fraudulent statements regarding Lyme disease in Texas and submitted with their Response no actual evidence of any alleged fraudulent statements regarding Lyme disease in Texas, even though the Doctors provided complete responses to Plaintiffs' jurisdictional discovery requests and were available for jurisdictional depositions, which Plaintiffs did not take. Plaintiffs' assumption that the Doctors must have lied about Lyme disease when in Texas is not evidence.

Second, the evidence in the record regarding the Doctors' few Texas contacts—for the most part sworn responses to Plaintiffs' interrogatories—provides absolutely no support for Plaintiffs' jurisdictional claims. Rather, most of the Doctors did not even discuss Lyme disease on their few professional visits to Texas.

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[1] All references used herein are the same as in the Doctors' Renewed Motion, Docket No. 151 ("Renewed Motion"). The Doctors incorporate by reference, as if set forth fully herein, the legal standards and arguments set forth in their Renewed Motion.

Third, even if Plaintiffs' unsupported and incendiary assertions that the Doctors lied about Lyme disease in Texas are taken as true (though they cannot be), Plaintiffs cannot—and make no attempt to—show the required connection between any Doctor's alleged wrongful conduct in Texas and their alleged antitrust injuries. As such, the Court does not have specific personal jurisdiction over any Doctor and should dismiss all of the Doctors.

ARGUMENT

I. The Court Dismissed Plaintiffs' RICO Claims

In its Memorandum Opinion and Order ("Opinion") dated September 27, 2018, Docket No. 114, the Court dismissed Plaintiffs' RICO and fraudulent concealment claims and gave Plaintiffs leave to replead those claims within thirty days and leave to conduct jurisdictional discovery of the Doctors. One hundred and forty-seven days later, after receiving complete responses from each Doctor to their written jurisdictional discovery requests but taking not one jurisdictional deposition of a Doctor, Plaintiffs filed a Response in which they admit yet again that they lack the facts necessary to replead their RICO and fraudulent concealment claims—facts they should have had before filing the original Complaint. Plaintiffs now seek to keep the Doctors in this case and require them to participate in burdensome discovery based on claims that they have admitted they do not have the facts to plead.

Only antitrust claims remain, and as the Court has noted, the legal requirement to establish personal jurisdiction over the Doctors for antitrust claims is more demanding. *See* Opinion, Docket No. 114 at 38. Plaintiffs argue the Renewed Motion is "premature," Response at 3, but there is no reason to keep the Doctors in the case waiting for an amendment that Plaintiffs have admitted they cannot file.

II. The Court Lacks Specific Personal Jurisdiction over the Doctors

Plaintiffs must demonstrate that the Court has specific personal jurisdiction over the Doctors but cannot do so because they cannot show the required nexus between any Doctor's sparse contacts with Texas and any Plaintiff's alleged injuries.

A. Plaintiffs Ignore the Fifth Circuit Nexus Requirement

Plaintiffs assert that each Doctor has purposefully availed himself of Texas because "[a] defendant 'purposefully avails' himself of the privilege of conducting activities in a state by making false representations there." Response at 5-6 (quoting *Wein Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999). But this statement seriously distorts the holding of *Wein Air,* which based a finding of personal jurisdiction on *direct contacts—including several personal visits*—by the nonresident defendant *with the plaintiff in Texas* and that formed the basis for plaintiff's fraud and contract claims regarding a pending business deal. *See Wein Air*, 195 F.3d at 210. In fact, that plaintiff premised personal jurisdiction upon the defendant's "letters, faxes, and phone calls to [the plaintiff in] Texas . . . whose contents contained fraudulent misrepresentations and promises and whose contents failed to disclose material information." *Id.* at 212. These contacts induced the plaintiff's detrimental reliance on the defendant's lies and omissions "in the hope that finally the [pending] deal would close"—*i.e.*, they actually gave rise to "intentional tort causes of action." *Id.* at 213-14.

Here, Plaintiffs do not even allege that any Doctor ever communicated with any Plaintiff in Texas, that any Doctor's contact with Texas directly affected any Plaintiff in any way, or that any Doctor did any work on the IDSA Lyme disease guidelines while in Texas. Plaintiffs assert—but with absolutely no actual evidence—that Doctors visit Texas to make false statements regarding Lyme disease. But Plaintiffs do not even attempt to connect any alleged false statement made in Texas (for which there is no evidence) to any Plaintiff's alleged antitrust injury.

Plaintiffs thus fail to demonstrate the "sufficient nexus" that the Fifth Circuit requires "between the [Doctors'] contacts with the forum and the [Plaintiffs'] cause of action." *Clemens v. McNamee*, 615 F.3d 374, 378-79 (5th Cir. 2010) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)); *see also Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1172 (5th Cir. 1985) ("Even a single purposeful contact is sufficient to satisfy the due process requirement of minimum contacts *when the cause of action arises from the contact*.") (quotations omitted, emphasis added).

The actual evidence contains nothing to indicate that any Doctor had a contact with Texas that caused antitrust injury to any Plaintiff:

- **Dr. Dattwyler** visited Texas just three times for professional purposes and researches Lyme disease. There is no evidence that Dr. Dattwyler's limited contacts with Texas had any connection with the IDSA Lyme disease guidelines or with any Plaintiff's alleged antitrust injury.

- **Dr. Halperin** recalls two professional visits to Texas, neither of which involved Lyme disease. Plaintiffs do not allege that either Texas visit had any connection with the IDSA Lyme disease guidelines or with any Plaintiff's alleged antitrust injury. Plaintiffs' reference to Dr. Halperin's appearance on Katie Couric's television show—which was not filmed in Texas—illustrates just how far Plaintiffs must stretch to attempt to establish personal jurisdiction over the Doctors.

- **Dr. Shapiro** has been hired by law firms involved with several Texas-based lawsuits, but as explained further below, only one case related to Lyme disease, and it is not clear that the case was filed in Texas. There is no evidence that any Plaintiff's antitrust injuries resulted from this contact or from Dr. Shapiro's visits to Texas over seventeen years ago, and there is no evidence that Dr. Shapiro's few Texas contacts had any connection with the IDSA Guidelines.

- **Dr. Sigal** visited Texas on four occasions, most recently in 2004, not one of which had anything to do with the IDSA Guidelines or Plaintiffs' alleged injuries. And there can be no assertion that Dr. Sigal's 2001 comments to the New York Times or his alleged love "to be quoted in the press" constituted contacts with Texas that caused any Plaintiff's antitrust injuries. Response at 8.

- **Dr. Steere** has visited Texas on occasion for professional purposes, but Plaintiffs allege nothing to show that their injuries result from these visits. Moreover, Plaintiffs make no attempt to explain how Dr. Steere's "mineral rights in Texas" or the Wikipedia page

describing him caused their antitrust injuries. Nor do they explain how his limited Texas contacts relate to the IDSA Guidelines.

- **Dr. Wormser** has had hardly any professional contact with Texas at all—two visits for studies he was conducting, unrelated to Lyme disease and the IDSA Guidelines. His comments regarding President Bush to the Washington Post, which of course is not a Texas publication, can have no connection with Plaintiffs' alleged antitrust injuries.

The Doctors' limited contacts with Texas, which have no connection with any Plaintiff's alleged antitrust injuries, come nowhere close to the contacts that courts in this Circuit require to assert specific personal jurisdiction over nonresident defendants. Merely having some contact with Texas that is incidentally related to Lyme disease is not a contact that connects a Plaintiff's alleged antitrust injury to a Doctor's contact with Texas.

L.G. Motorsports, Inc. v. NGMCO, Inc., No. 4:11CV112, 2012 WL 718594 (E.D. Tex. Mar. 6, 2012), was an antitrust suit brought by a Texas corporation against various companies related to car racing and one individual, Doug Fehan. In support of specific personal jurisdiction, the plaintiff claimed that Fehan had "personally executed and implemented the anti-competitive practices" at issue, was the "architect of the conspiracy in restraint of trade that was intended to cause injury to the plaintiff in Texas," was aware that the plaintiff was based in Texas, and had visited Texas on four occasions for unrelated reasons. *Id* at *3 (quotations omitted). The court held that the facts did not demonstrate "that Fehan's alleged conspiracy purposefully targeted this specific plaintiff in Texas" and that the plaintiff failed to show "any connection between the alleged anti-competitive agreements and Texas[.]" *Id.* at *3-4.

Just as in *L.G. Motorsports*, the Doctors here directed no action towards Plaintiffs in Texas and had no communications with Plaintiffs in Texas—indeed, they had no knowledge that the Plaintiffs existed at all. There as here, Plaintiffs have shown no connection between the alleged antitrust conspiracy regarding the IDSA Guidelines and Defendants' Texas contacts. *See id.* at *4;

see also Lansing Trade Group, LLC v. 3B Biofuels GmbH & Co., KG, 612 F. Supp. 2d 813, 822 (S.D. Tex. 2009) (communications from an outside party to an in-state plaintiff, including phone calls, mailings, related to the performance of an out-of-state agreement are not sufficient to support personal jurisdiction without more); *ITL Int'l, Inc. v. Constenla, S.A.*, 669 F.3d 493, 500 (5th Cir. 2012) (no personal jurisdiction where the parties contracted and partly performed their contractual duties in-state, because their dispute concerned general contract issues that had only superficial connection to Defendant's contacts with the forum).

In short, even if the Doctors made the false representations that Plaintiffs allege, there is still no indication that Plaintiffs' alleged injuries from the IDSA guidelines "arise[] out of or result[] from" the Doctors' few professional visits to Texas. *Bustos v. Lennon*, 538 F. App'x 565, 567 (5th Cir. 2013) (citation omitted). Without this second half of the equation, Plaintiffs cannot establish specific personal jurisdiction over any Doctor.[2]

It is not surprising that Plaintiffs make no attempt to demonstrate how any Doctor's contacts with Texas caused any Plaintiff's antitrust injuries because Plaintiffs themselves do not have the contacts with Texas they alleged in their Complaint. Plaintiffs ignore completely the evidence that lead Plaintiff Lisa Torrey moved to California months before filing the Complaint, despite her (false) allegation that she is "a citizen of the State of Texas."[3] Complaint ¶ 1.

B. Plaintiffs Misrepresent the Doctors' Contacts with Texas

In discussing each Doctor's limited contacts with Texas, Plaintiffs recite their conclusory

[2] Plaintiffs never argue—nor could they—that the Court could assert general personal jurisdiction over any Doctor, which would require far more numerous and consistent contacts with Texas. See *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (discussing "continuous and systematic" contacts standard).

[3] The only other Texas Plaintiff, Kathryn Kocurek, was and apparently still is a resident of the Northern District of Texas, not a resident of the Eastern District of Texas. *See* Renewed Motion at 5 n.4.

mantra: Because each Doctor is known for his Lyme disease research, "it is clear" that the Doctors infrequently visited Texas to "spread[] the false claims that chronic Lyme disease does not exist." *See* Response at 6-9. Plaintiffs' problem is that they do not have any evidence to support these claims, as they have now acknowledged repeatedly in their requests for more time to attempt to replead their RICO claims.

Plaintiffs state that Dr. Halperin visits Texas "3-5 weekends per year," and then assert that "[i]t is clear that the only reason Halperin visits Texas is to spread the false claim that chronic Lyme disease does not exist, and all Lyme disease can be cured with short-term antibiotics." Response at 7. Plaintiffs completely ignore that Dr. Halperin's visits to Texas are personal visits—to see his son and daughter-in-law in Houston. *See* Renewed Motion, Ex. C, at 5-6. There is no evidence that Dr. Halperin discussed Lyme disease on these visits. It is just an assertion that Plaintiffs have made up.

Plaintiffs argue that because "[Dr.] Wormser's field of study is Lyme disease, the evidence clearly establishes that he visited Texas for 'professional activities' to spread false information about the existence of Lyme disease in Texas and treatment of Lyme disease." Response at 9. Yet there is absolutely no evidence that Dr. Wormser's two visits long ago had anything to do with Lyme disease. The only evidence—Dr. Wormser's discovery responses, unchallenged by Plaintiffs (who never bothered to take the deposition of Dr. Wormser or any other Doctor, all of whom were available for jurisdictional depositions)—is that neither visit to Texas by Dr. Wormser was related to Lyme disease, the IDSA guidelines, or Plaintiffs' claims. *See* Renewed Motion, Ex. A at 5-6. Likewise, there is no evidence that Dr. Dattwyler has ever visited Texas for any purpose related to Lyme disease. The actual evidence, unchallenged by Plaintiffs, is that Dr. Dattwyler's few Texas visits were not related to Lyme disease. *See* Renewed Motion, Ex. B at 5-6.

Plaintiffs argue that because Dr. Steere is credited with discovering Lyme disease and on occasion visits Texas and gives talks concerning Lyme disease, he "clearly visits Texas every five years to 'speak at medical conferences' about Lyme disease and spread the false claim that chronic Lyme disease does not exist and all Lyme disease can be cured with short-term antibiotics." Response at 9. Yet again, Plaintiffs have made up facts to attempt to keep the Doctors in this case. There is nothing in Dr. Steere's Wikipedia entry, the only support cited by Plaintiffs for their false claims, that Dr. Steere ever visited Texas, much less that he spoke about Lyme disease in Texas. Similarly, there is also no evidence that Dr. Sigal ever made any false statements regarding Lyme disease in Texas.

Regarding Dr. Shapiro, Plaintiffs assert that "many of [his] Texas cases involved Lyme disease." Response at 6, Ex. B. But the deposition transcript cited by Plaintiffs does not support this assertion. In his testimony, Dr. Shapiro recalled just one case related to Lyme disease, but there is nothing to indicate whether that case was pending in Texas or whether it was even a filed case. Response, Ex. B, 10:28-11:14. Plaintiffs submit no evidence to contradict Dr. Shapiro's discovery responses that his work for Texas-based attorneys ended more than ten years ago and, moreover, that he never traveled to Texas for that work. Renewed Motion, Ex. D at 7. Yet again, Plaintiffs have made up facts.

Plaintiffs assert that "the jurisdictional allegations set forth in [their] Complaint must be taken as true and any conflicts in the evidence must be resolved in favor of Plaintiffs." Response at 4. These principles do not help Plaintiffs here. The allegations Plaintiffs make in their Response are not in their Complaint and therefore should not be taken as true, and there are no conflicts in the evidence because Plaintiffs have not submitted any evidence—such as affidavits—in support of their assertions. *See Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994) ("[O]n a motion to dismiss

for lack of jurisdiction, uncontroverted allegations *in the plaintiff's complaint* must be taken as true, and conflicts *between the facts contained in the parties' affidavits* must be resolved in the plaintiff's favor.") (emphasis added). Here, however, there are no evidentiary conflicts to resolve.[4]

Ultimately, Plaintiffs' false, unsupported allegations do not establish specific personal jurisdiction because they do not show the required nexus between the Doctors' Texas contacts—in some places, decades old—and Plaintiffs' alleged injuries.

CONCLUSION

The Doctors' jurisdictional discovery responses address and allay the Court's concerns regarding "visit[s to] Texas for professional purposes during the relevant time periods" that prompted the Court to allow jurisdictional discovery in the first place. Opinion, Docket No. 114 at 38. That evidence reveals no "sufficient nexus between the [Doctors'] contacts with the forum and the [Plaintiffs'] cause of action." *Clemens*, 615 F.3d at 378-79. Accordingly, there is no basis for personal jurisdiction, and due process requires dismissing Plaintiffs' claims against the Doctors.

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[4] If the Court disagrees and believes there are facts to weigh (and here there are not because Plaintiffs present no facts), the Court should hold an evidentiary hearing and apply a preponderance of the evidence standard. *See Felch v. Transportes Lar-Mex SA DE CV*, 92 F.3d 320, 326 (5th Cir. 1996) (discussing standard of proof for personal jurisdiction in the context of an evidentiary hearing).

Dated: February 28, 2019

Respectfully submitted:

/s/ *Casey Low*

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CERTIFICATE OF SERVICE

I, Casey Low, hereby certify that on the 28th of February, 2019, the foregoing Defendants Dr. Gary P. Wormser, Dr. Raymond J. Dattwyler, Dr. Eugene Shapiro, Dr. John J. Halperin, Dr. Leonard Sigal, and Dr. Allen Steere's Reply in Further Support of Their Renewed Motion to Dismiss for Lack of Personal Jurisdiction with exhibits and accompanying Proposed Order were filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

/s/ *Casey Low*
Casey Low