EXHIBIT A

TORREY v. IDSA

Case No. 5:17-cv-00190-RWS
United States District Court
Eastern District of Texas

Defendants' Responses to Plaintiffs' Motion for Extension of Time, Motion to Compel and Motion to Continue Trial Date

March 11, 2019

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Failure to Plead with Particularity

***Memorandum Opinion and Order,* Sept. 27, 2018 (Dkt. 114)**

"Plaintiffs' allegations [regarding RICO]… fall short of providing the 'newspaper' details regarding the communications and payments between Defendants. Plaintiffs do not allege facts specifying each Defendants' contributions to the fraud." (Op. at 28)

"Plaintiffs have not filed an amended complaint since the filing of the instant motions and the parties have been engaged in discovery for four months now." (Op. at 30)

Fraudulent Concealment Fails Under Rule 9(b)

Memorandum Opinion and Order, Sept. 27, 2018 (Dkt. 114)

"[A] plaintiff may invoke the ***fraudulent concealment*** doctrine only by proving two elements: first, that the defendants ***concealed*** the conduct complained of, and second, that the plaintiff failed, ***despite the exercise of due diligence*** on his part, to discover the facts that form the basis for his claim." (Op. at 34) (Emphasis added, quotations and citations omitted.)

"Similar to the deficiencies in stating their RICO claims, Plaintiffs ***have not alleged facts with particularity*** under the Rule 9(b) heightened pleading standard that would justify tolling the limitations for fraudulent concealment…. [E]ven if Plaintiffs had adequately pleaded that Defendants fraudulently concealed their actions, they do not allege any facts in their Complaint that would support an inference that ***Plaintiffs exercised due diligence*** to discover these actions." (Op. at 34-35) (Emphasis added)

Plaintiffs Failed to Act with Diligence

FACT: Plaintiffs had 30 days – until October 29, 2018 – to replead their RICO and fraudulent concealment allegations.

FACT: Plaintiffs waited until October 22, 2018 – one week before the deadline – to file their motion to extend time to replead their allegations. Without any new basis, Plaintiffs now seek discovery **back to 1992** – plus an additional 30 days to replead once they are satisfied with the discovery.

FACT: Plaintiffs waited until November 1, 2018 – ***after*** this Court's deadline – to file their motion to compel discovery.

Plaintiffs were required to have a factual basis to plead RICO in their Complaint – but admit in their papers that they have none. They cannot use tardy discovery to rummage for a factual basis they never had.

Defendants' 4-Year Discovery Obligation

***Discovery Order,* May 11, 2018 (Dkt. 81)**

"With regard to the disclosure obligations set forth in this paragraph, as well as with regard to **all other discovery obligations of Defendants**, **Defendants' discovery obligations** are limited to a **4-year time period commencing on the date of the filing of the Complaint** in this cause and going back from that date a period of 4 years, until further order of the Court." (Order at 4) (Emphasis added.)

FACT: The Discovery Order limits Defendants' discovery obligations to 4 years before the date of the Complaint: **November 10, 2013**.

FACT: The Discovery Order's 4-year limitation applies **only to the Defendants**, not to the Plaintiffs. This is because the **Statute of Limitations** only applies to the **Defendants' actions**.

Plaintiffs Failed to Act with Diligence

***Agreed E-Discovery Order,* August 8, 2018 (Dkt. 113)**

"General ESI production requests under [FRCP] 34 and 45, or compliance with a mandatory order of this court, **shall not include e-mail** or other forms of electronic correspondence… To obtain email, **parties must propound specific e-mail production requests**." (Order at ¶6.) (Emphasis added.)

FACT: Within a week of this Order, Defendants propounded search terms. Despite numerous meet & confers requested by Defendants, **Plaintiffs refused to agree on search terms** until March 2019.

FACT: Plaintiffs have **never** propounded e-mail search terms on Defendants.

FACT: Nor have Plaintiffs: (a) provided **any** damages calculations; (b) served **any** expert report; (c) made **any** named plaintiff available for deposition; or (d) noticed **any** depositions in their own behalf.

Plaintiffs Failed to Act with Diligence

***Discovery Order,* May 11, 2018 (Dkt. 81)**

10. **No Excuses.** A party is not excused from the requirements of this Discovery Order because it has not fully completed its investigation of the case, or **because it challenges the sufficiency of another party's disclosures**, or because another party has not made its disclosures. (Emphasis added.)

Plaintiffs have no excuses for failing to engage in meaningful discovery.

Defendants Have Not "Refused to Cooperate" in the Discovery Process

Discovery Order, May 11, 2018 (Dkt. 81)

"3. **Additional Disclosures.** Within eighty-five (85) days after the Scheduling Conference [i.e., July 13, 2018, each party] shall provide to every other party … an initial production…of all documents…"

FACT: On July 13, 2018, each of the Defendants complied with the Discovery Order by producing **all relevant, responsive non-email documents** for the 4-year period set forth in the Order.

FACT: Contrary to Plaintiffs' claims, Defendants did not just produce "Lyme disease policies…" Rather, Defendants made a substantive production of documents relevant to this case, including materials relating to patient care, scholarly articles, internal medical policy minutes, etc.

Defendants Have Not "Refused to Cooperate" in the Discovery Process

What Defendants did **not** produce are any documents that purport to show:

- **Payments from insurance companies** to the defendant doctors or IDSA
- **Receipts of payments** by the IDSA or defendant doctors from insurance companies
- **Complaints by insurance companies and/or IDSA to state medical boards** seeking discipline of so-called "Lyme-literate" physicians
- **Communications between and among the insurance companies and/or IDSA** to further any "scheme" to deny patients long-term antibiotic therapy

Such documents do not exist.

Relevant Cases and Principles

Diligence is Required

Kelly v. Syria Shell Petroleum, 213 F.3d 841 (5th Cir. 2000)

"Considering Appellants' failure to diligently seek discovery and their concomitant failure to allege specific facts crucial to immunity which demonstrated a need for discovery, the district court did *not* abuse its discretion by *not* allowing Appellants to conduct such discovery prior to ruling on dismissal." (*Id.* at 851.) (Emphasis in original.)

Relevant Cases and Principles

Proportionality

Samsung Elecs. Amer. v. Yang Kun Chung, 321 F.R.D. 250, 284 (N.D. Tex. 2017)

"Under Rule 26(b)(1), discoverable matter must be both relevant **and proportional** to the needs of the case…. A court can – and must – limit proposed discovery that it determines is not proportional to the needs of the case." (*Id.* at 284)

Miranda v. Ponce Fed'l Bank, 948 F.2d 41 (1st Cir. 1991)

"Civil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device." (*Id.* at 44) "It cannot be used as a … panacea to redress every instance of man's inhumanity to man, or as a terrible swift sword capable of righting all the wrongs of a troubled world." (*Id.* at 49.)

Relevant Cases and Principles

Plaintiffs' Cases Do Not Stand for Open-Ended Discovery Beyond the Statute of Limitations

Glenn v. Williams, 209 F.R.D. 279 (D.D.C. 2002)

> ***"Ten years is an inordinate length of time***…Thus, in order to establish a pattern of discrimination, ***three years*** is a ***reasonable*** time in which to allow discovery." (*Id.* at 282.) (Emphasis added.)

Doss v. City of Kerrville, 2012 WL 13029588 (W.D. Tex. Feb. 13, 2012)

> Discovery extended only 13 months beyond the statute of limitations.

Jackson v. Wilson Welding Svce, 2011 WL 5024360 (E.D. La. Oct. 20, 2011)

> Discovery back to 2005 rejected. "Here, Plaintiffs began their employment … in June 2008…. Thus, discovery of Defendants' annual net profit is reasonably limited to 2008 through 2011." (*Id.* at *4.)

DAC Surgical Partners v. United Healthcare, 2014 WL 585750 (S.D. Tex. Feb. 14, 2014)

> Subpoenas' time frame back to 2003 is rejected for all but one entity; all others extend only to date of the entity's formation.

Relevant History

November 1, 2006: IDSA publishes its 2006 Lyme Disease Guidelines

Clinical Infectious Diseases, Volume 43, Issue 9, 1 November 2006, Pages 1089–1134, https://doi.org/10.1086/508667

November 2006: Attorney General Blumenthal commences antitrust investigation into IDSA Guidelines

May 2008: AG Blumenthal and IDSA agree on the formation of an independent review panel, overseen by AG, to review IDSA Guidelines.

"Attorney General's Investigation Reveals Flawed Lyme Disease Guideline Process, IDSA Agrees to Reassess Guidelines, Install Independent Arbiter." *Connecticut Attorney General's Office Press Release*. May 1, 2008.

April 2010: Final Report of Independent Lyme Disease Panel

https://www.idsociety.org/globalassets/idsa/topics-of-interest/lyme/idsalymediseasefinalreport.pdf

"In 2010, [the] eight-member independent review panel unanimously agreed that the original 2006 guideline recommendations were 'medically and scientifically justified' in the light of the evidence. The committee did not change any of the earlier recommendations but did alter some of the language in an executive summary of the findings. Blumenthal said he would review the final report."
https://en.wikipedia.org/wiki/Richard_Blumenthal

November 2017: Plaintiffs file their Complaint