IN THE UNITED STATES DISTRICT COURT
FOR THE 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

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION[1]

Plaintiffs' Response[2] largely avoids the arguments Defendants make in their Motion to Dismiss Plaintiffs' Amended Complaint. For example, the Response makes no attempt to argue that Plaintiffs exercised reasonable diligence to timely discover facts supporting their claims, which this Court held Plaintiffs must show to allege fraudulent concealment. The Response also ignores Defendants' argument that Plaintiffs' scaled-back antitrust claim must be dismissed because the Amended Complaint fails to plausibly allege an actionable conspiracy. Instead, Plaintiffs merely copy and paste sections from their response to Defendants' prior motion to dismiss pertaining to arguments that were not raised in this Motion.

When Plaintiffs do attempt to respond to Defendants' arguments, they repeatedly argue that everything they need to plead proper RICO and antitrust claims is in Defendants' possession and that Defendants have refused to respond to Plaintiffs' discovery requests. But the Court denied Plaintiffs' request for an open-ended extension and ordered Plaintiffs to file their Amended Complaint by March 25—with the discovery they had conducted to that point.

Plaintiffs' bald assertion that essential facts are in Defendants' possession confirms that Plaintiffs lack sufficient facts to support their RICO and antitrust claims. Indeed, Plaintiffs have admitted yet again that they cannot meet Rule 9(b)'s particularity requirements based on the few facts they have alleged. Accordingly, in order to salvage their dismissed RICO claims and fraudulent concealment allegations, Plaintiffs must demonstrate (1) a relaxed pleading standard should apply and (2) they meet such a relaxed standard. They have done neither. Further, by

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[1] All references used herein are the same as in the Motion, Docket No. 192 ("Mot."). Defendants incorporate by reference, as if set forth fully herein, the legal standards and arguments set forth in that Motion.

[2] Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, Docket No. 196 ("Resp.").

amending their complaint to remove critical allegations regarding an unlawful agreement between the Insurance Defendants and the IDSA Panelists, Plaintiffs have fatally undermined their antitrust claims. As a result, Plaintiffs' First Amended Complaint should be dismissed with prejudice, or, at a minimum, Plaintiffs' failure to allege due diligence to support fraudulent concealment tolling of the statutes of limitations should limit Plaintiffs' damages claims to the four years prior to the filing of the Original Complaint.

ARGUMENT

I. Plaintiffs' RICO Claims Should Be Dismissed

Defendants' Motion identified three fundamental and independently dispositive flaws in Plaintiffs' repled RICO claims: (1) Plaintiffs removed key allegations that previously underpinned their RICO claims; (2) Plaintiffs are not entitled to a relaxed pleading standard; and (3) even under a relaxed pleading standard, Plaintiffs' amended RICO allegations fall short. Mot. at 5-11. Plaintiffs do not even respond to two of these points, and their argument for the application of a relaxed pleading standard fails to demonstrate they exercised the required diligence.

A. The Response Fails to Salvage Plaintiffs' Rule 8(a) Pleading Deficiencies

As Defendants' Motion demonstrated, the Court relied upon specific allegations in the Original Complaint of an agreement between the Insurance Defendants and the IDSA Panelists to hold that Plaintiffs adequately pled a RICO enterprise under Rule 8(a). *See* Mot. at 5-6, Mem. Op. at 14, 18-19, Am. Compl. ¶¶ 49, 56, 88. Those allegations are now missing.

Plaintiffs respond by falsely claiming that they only removed the word "large" when describing alleged payments to the IDSA Panelists and then attempt to save their deficient RICO claims by pointing to (1) Dr. Sigal's testimony that he received compensation from unidentified insurance companies to review files in 1996; (2) the Connecticut Attorney General's report that "several" unnamed IDSA Panelists had "financial interests" in unnamed insurance companies; and

(3) Dr. Burrascano's statement that "some" doctors "are known to have received large consulting fees from insurance companies." Resp. at 11-13.

These allegations are not sufficient to allege a RICO enterprise under Rule 8(a). First, Plaintiffs do not allege that Dr. Sigal agreed with any insurance company, let alone any Insurance Defendant, to write false and arbitrary IDSA Lyme disease guidelines in 2000 or in 2006. Dr. Sigal was not an author or reviewer of the IDSA 2000 Lyme disease guidelines and was not an author, but was only a reviewer, of the 2006 IDSA Lyme disease guidelines.[3]

Second, there is no allegation that the Connecticut Attorney General found an agreement between any insurance company and any author of the 2000 or 2006 IDSA Lyme disease guidelines, much less a payment from an Insurance Defendant to an IDSA Panelist pursuant to a consulting arrangement related to Lyme disease.

Third, Dr. Burrascano's testimony, which he gave in 1993, likewise does not support a plausible inference of an agreement between any insurance company and any author of the 2000 or 2006 IDSA Lyme disease guidelines and does not name any insurance company that paid—or any doctor who received—"large consulting fees."

As such, the assertions of an agreement between the Insurance Defendants and the IDSA Panelists to commit a RICO fraud have been removed from the Amended Complaint—still without

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[3] *Compare* Wormser et al., Practice Guidelines for the Treatment of Lyme Disease, 31 *Clinical Infectious Diseases* Suppl. 1, 1-14 (2000) *available at* https://academic.oup.com/cid/article-pdf/31/Supplement_1/S1/20902715/31-Supplement_1-S1.pdf (last visited April 27, 2019) *with* Wormser et al., The Clinical Assessment, Treatment, and Prevention of Lyme Disease, Human Granulocytic Anaplasmosis, and Babesiosis: Clinical Practice Guidelines by the Infectious Diseases Society of America, 43 *Clinical Infectious Diseases* 9, 1089-1134 (Nov. 1, 2006) *available at* https://academic.oup.com/cid/article/43/9/1089/422463 (last visited April 27, 2019). *See also Brand Coupon Network, L.L.C. v. Catalina Marketing Corp.*, 748 F.3d 631, 635 (5th Cir. 2014) (noting that in addition to the pleadings and their attachments, "[t]he court may also consider documents attached to either a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff's claims").

explanation from Plaintiffs. The general, conclusory allegations that remain fail to plead a RICO enterprise under Rule 8(a). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (to survive a motion to dismiss, plaintiffs must allege facts sufficient to "nudge" allegations of a conspiracy "across the line from conceivable to plausible"); *Elliott v. Foufas*, 867 F.2d 877 (5th Cir. 1989) (affirming dismissal of RICO claim based on plaintiff's conclusory allegations).

B. Plaintiffs Are Not Entitled to a Relaxed Pleading Standard

Plaintiffs concede that in order to benefit from a relaxed pleading standard for their RICO claims, they must demonstrate they have exercised diligence. *See* Resp. at 16-18. Plaintiffs therefore assert that they "have done everything they can to obtain documents of payments to IDSA Panelists and correspondence to medical boards." Resp. at 16. Yet Plaintiffs do not even attempt to explain why they failed to respond to the motion to quash filed by the Texas Board or why they failed to seek to discover whether any of the Insurance Defendants reported Dr. Hope McIntyre to the Maryland State Board of Physicians. *See* Mot. at 4.

Plaintiffs instead complain that they lack the information they need to allege their RICO claims because Defendants have failed to fulfill their discovery obligations. Plaintiffs simply rehash disputes that the Court resolved when it flatly denied Plaintiffs' request for an open-ended extension to file an amended complaint and ordered Plaintiffs to file their amended complaint by March 25—without conducting further discovery. Plaintiffs are well-aware that Defendants complied with all of their discovery obligations as of that date and continue to do so.[4] Plaintiffs' attempt to re-argue their discovery motions does not demonstrate the diligence required to benefit

[4] Plaintiffs have only themselves to blame for their failure to serve email requests on Defendants. Although Plaintiffs now assert that they have "asked for the [email] custodians several times," Resp. at 17, they did not request Defendants' email custodians until April 11, 2019 (*see* Email Correspondence Discussing Custodians dated April 11, 2019, attached as Exhibit A), and as of this filing, all Defendants have provided their email custodians to Plaintiffs' attorneys.

from a relaxed pleading standard. *Sealed Appellant I v. Sealed Appellee I*, 156 F. App'x 630, 634 (5th Cir. 2005).

C. Plaintiffs Fail To Allege Proper RICO Claims Even Under a Relaxed Pleading Standard

Relaxed pleading "must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997). As Defendants demonstrated, Plaintiffs' conspiracy claims fail to pass muster even under a relaxed pleading standard because Plaintiffs fail to allege in non-conclsuory terms the basic facts of the alleged RICO offense. *See* Mot at 10-11; *Paup v. Texas*, No. 6:16-CV-417-RWS-KNM, 2017 WL 9289648, at *13 n.16 (E.D. Tex. Jan. 31, 2017); *United States ex rel. King v. Alcon Labs., Inc.,* 232 F.R.D. 568, 572 (N.D. Tex. 2005); *United States ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 673, 688 (W.D. Tex. 2006).

Again, Plaintiffs fail to respond to this argument. The Court should therefore dismiss Plaintiffs' RICO claims with prejudice. *See Bates & Company, Inc. v. Hosokawa Micron International, Inc.*, No. 1:04-CV-475, 2005 WL 8160608, at *1 (E.D. Tex. Mar. 29, 2005) (granting motion to dismiss counterclaim with prejudice where "Defendant has not even responded to Plaintiffs' motion to dismiss with any statutory or case law authority that supports its allegations that it is entitled to the relief [requested]").

II. Plaintiffs Do Not Respond to Defendants' Argument That They Failed to Allege Concerted Action in Connection with Their Antitrust Claims

Defendants did not argue in their Motion, for example, that the Amended Complaint failed to allege antitrust injury or that it failed to allege a relevant market—although Defendants continue to believe that these defects are still present and may assert them at the summary judgment stage, if necessary. Instead, Defendants made a single, focused argument regarding Plaintiffs' amended antitrust claims: The allegations from the Original Complaint that the Court relied upon to find

that the Original Complaint adequately alleged Defendants had agreed to restrain trade are no longer in the Amended Complaint. *See* Mot. at 5-6. Because those allegations have been removed, Plaintiffs no longer allege facts suggesting a "'conscious commitment to a common scheme designed to achieve an unlawful objective.'" Mem. Op. at 18 (quoting *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 372-73 (5th Cir. 2014)).

Plaintiffs in their Response ignore completely the argument Defendants actually made to dismiss the antitrust claims in Plaintiffs' Amended Complaint. Instead, Plaintiffs merely reproduce—almost verbatim—twenty-seven paragraphs from their Response to Insurance Defendants' Motion to Dismiss Plaintiffs' Complaint (Dkt. 60, April 17, 2018; *compare* Resp. at 2-11 *with* Dkt. 60 at 26-36[5]) and continue to rely upon inapposite, superseded authority.[6] Even worse, the sections Plaintiffs copied from their prior Response in large part address arguments that Defendants made in their motion to dismiss Plaintiffs' Original Complaint but that Defendants did not repeat in their motion to dismiss Plaintiffs' Amended Complaint—such as failure to plead antitrust injury and relevant market.

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[5] Plaintiffs did change the references from "Complaint" to "Amended Complaint" but in many instances failed to cite accurately the Amended Complaint. *See, e.g.*, Resp. at 5 (citing ¶ 82 of the Amended Complaint to support the allegation "the IDSA guidelines are not meant to be mandatory, but the Insurance Defendants, the IDSA, and the IDSA Panelists enforce the IDSA guidelines as if they are mandatory" when ¶ 82 instead alleges that "Plaintiffs have detailed the communications and who sent the communications above and based upon information and belief that these payments were made through the mail," with reference to a relaxed pleading standard for Plaintiffs' RICO claims).

[6] For example, Plaintiffs rely on *Ancar v. Sara Plasma*, 964 F.2d 465 (5th Cir. 1992)—a pre-*Twombly* case involving a pro se plaintiff proceeding under the *in forma pauperis* statute—and *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962)—a summary judgment case—as the principal legal support for their argument.

Where, as here, Plaintiffs fail to respond to Defendants' arguments or defend their antitrust claims as pled, their claims should be dismissed with prejudice. *See Bates*, 2005 WL 8160608, at *1.

III. Plaintiffs' Response Fails to Address Reasonable Diligence or to Otherwise Establish Fraudulent Concealment

Defendants demonstrated in their Motion that Plaintiffs' fraudulent concealment allegations should be dismissed because Plaintiffs (1) do not allege any concealment at all by Defendants, (2) fail to plead Defendants' supposed fraud with sufficient particularity, and (3) fail to allege that *Plaintiffs* exercised diligence in investigating their claims against Defendants.

Yet again, Plaintiffs simply ignore Defendants' arguments, and, in the case of the failure to allege Plaintiffs' due diligence to discover their claims, ignore this Court's Order. Plaintiffs repeat their assertions that Defendants fraudulently deny the existence of chronic Lyme disease, but they point to no allegations that Defendants concealed anything, and they entirely fail to address their efforts, if any, to discover the supposed fraud.

Indeed, the last word on Plaintiffs' due diligence remains this Court's statement that Plaintiffs "do not allege any facts . . . that would support an inference that Plaintiffs exercised due diligence to discover these actions." Mem. Op. at 35. As such, Plaintiffs' fraudulent concealment allegations fail, and Plaintiffs' claims, if any remain, should be limited to the four years prior to the filing of Plaintiffs' Original Complaint. *See Carney v. United States*, No. 3:99-CV-1989-M, 2003 WL 21653853 (N.D. Tex. Mar. 31, 2003) (granting motion to dismiss and rejecting plaintiff's fraudulent concealment argument).

IV. Plaintiffs' Response Does Not Cure Their Statutes of Limitations Problem

Significantly, without fraudulent concealment to toll the statutes of limitations, each Plaintiff must allege "some injurious act actually occurring during the limitations period." *Kaiser*

Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1053 (5th Cir. 1982) (quotations omitted). Even where a continuing violation exception applies, *see* Mem. Op. at 32, damages occurring within the limitations period caused by an act outside the limitations period will not toll the statute of limitations. *Kaiser Alum.*, 677 F.2d at 1053.

Plaintiffs assert that the Court has already considered and rejected Defendants' statutes of limitations argument. In their prior motion to dismiss, Defendants did seek dismissal based on the statutes of limitations, but they sought a blanket dismissal of all claims, for all Plaintiffs, under both the RICO Act and the Sherman Act. Dkt. No. 37 at 36-39. In denying the request for a blanket dismissal, the Court identified allegations in the Original Complaint related to "three specific instances of overt, anticompetitive action occurring within four years from the time of filing the Complaint" for three particular Plaintiffs. Mem. Op. at 33. Defendants now seek dismissal based on the statutes of limitations only of the twenty-one Plaintiffs who have not alleged a single anticompetitive action within the four-year period. That issue has never been addressed by the Court.

To avoid dismissal of those twenty-one Plaintiffs, Plaintiffs argue only that "[a]ll Plaintiffs in this case are repeatedly harmed by Defendants every time they are denied coverage for their chronic Lyme disease, every time they have to travel to find a doctor to treat their chronic Lyme disease, and every time they have to pay out-of-pocket for long-term antibiotic treatment." Resp. at 22. But aside from the three Plaintiffs noted above, the Amended Complaint fails to allege any of those things or any other "specific instances of overt, anticompetitive action" related to the other twenty-one Plaintiffs occurring on or after November 10, 2013. Mem. Op. at 33. Moreover, Plaintiffs' vague arguments regarding repeated harm cannot reset a limitations period. *See Rx.com, Inc. v. Medco Health Solutions, Inc.*, No. 5:04-CV-227-DF, 2008 WL 11449354, at *8 (E.D. Tex.

Mar. 11, 2008) (quoting Areeda, Hovenkamp & Blair, Antitrust Law 320 at 214 (2d ed. 2000)), *aff'd* 322 F. App'x. 394 (5th Cir. 2009). And in any event, the statute of limitations inquiry is plaintiff-specific, and thus the Amended Complaint must allege individualized facts sufficient to toll the statute for each plaintiff. *See Verde v. Stoneridge, Inc.*, No. 6:14-CV-225, 2016 WL 9022449, at *9 (E.D. Tex. Nov. 7, 2016). Having utterly failed to do so here, the claims of all Plaintiffs, except Plaintiffs Hanneken, Fuller, and Moriera, are time-barred and should be dismissed.

V. Plaintiffs Still Do Not Allege That Dr. Steere Participated in Any Alleged Conspiracy

Plaintiffs do not deny that they removed from their Original Complaint the only allegation that Dr. Steere was paid by the Insurance Defendants and do not assert that they have alleged that the Insurance Defendants entered into an unlawful agreement with Dr. Steere. Plaintiffs argue only that Dr. Steere was one of many IDSA Panelists who received a CID from the Connecticut Attorney General. Yet the Connecticut Attorney General never asserted—and now Plaintiffs no longer allege—that Dr. Steere joined with the Insurance Defendants in any agreement.[7]

Without an allegation that Dr. Steere entered into an unlawful agreement—or was paid anything for any purpose by an Insurance Defendant—all claims against Dr. Steere should be

[7] The Connecticut Attorney General said in his press release regarding the settlement with IDSA that "[t]he IDSA's 2006 Lyme disease guideline panel undercut its credibility by allowing individuals with financial interests -- in drug companies, Lyme disease diagnostic tests, patents and consulting arrangements with insurance companies -- to exclude divergent medical evidence and opinion." Press Release, Office of the Attorney General of the State of Connecticut, Attorney General's Investigation Reveals Flawed Lyme Disease Guideline Process, IDSA Agrees to Reassess Guidelines, Install Independent Arbiter (May 1, 2008), attached as Exhibit B. There is no assertion that Dr. Steere had undisclosed financial interests of any type and, moreover, no assertion that Dr. Steere or even the IDSA panelists generally entered into an anticompetitive agreement with any insurance companies.

dismissed. *See Vendever LLC v. Intermetic Mfg. Ltd.*, No. 3:11-CV-201-B, 2011 WL 4346324, at *7-8 (N.D. Tex. Sept. 16, 2011).

CONCLUSION

For the reasons stated herein, Defendants request that the Court dismiss all counts of Plaintiffs' First Amended Complaint with prejudice. If Plaintiffs' RICO claims are dismissed but their antitrust claims survive, the IDSA Panelists request that the Court grant their pending motion to dismiss for lack of personal jurisdiction, which the Court has held in abeyance.

Respectfully submitted,

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Dated: May 1, 2019

CERTIFICATE OF SERVICE

I, Casey Low, hereby certify that on the 1st of May, 2019, the foregoing Reply in Further Support of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint 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*
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