

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

LISA TORREY, et al.,	§	
	§	
Plaintiffs	§	Civil Action No. 5:17-cv-00190-RWS
	§	
v.	§	
	§	
INFECTIOUS DISEASES SOCIETY OF AMERICA, et al.,	§	JURY TRIAL DEMANDED
	§	
Defendants	§	
	§	

NOTICE REGARDING IME MEET-AND-CONFER

Per the Court’s order dated May 10, 2019 [[Doc. 198](#)], Defendants Anthem, Inc., Infectious Disease Society of America, and the Doctor Defendants (collectively “Moving Defendants”) submit this notice regarding their Motion for Independent Medical Examination (“IME”) [[Doc. 154](#)] and the status of the parties’ attempts to agree on an independent medical examiner.

A. Background.

In the motion, Defendants identified Dr. Nina Torten as the proposed independent medical examiner, with the IMEs to take place at her offices located in the Eastern District (4461 Coit Road, Suite 409, Frisco, Texas 75035). [[Doc. 154](#) at 4.] Defendants also provided Dr. Torten’s availability for examinations in the month of March [[Doc. 154-2](#) at 2] and described the scope of the examination as follows:

At a minimum, Moving Defendants expect—and ask this Court to allow—the examiner to take a complete history and physical examination of the individual plaintiff, including a full review of systems, if she believes they are necessary to assess whether the Lyme Claimant is currently suffering from Lyme disease or has had Lyme disease in the past. Dr. Torten will request that, before appearing for the IME, each Lyme Claimant must submit blood and urine samples for testing relevant to Lyme disease – specifically an ELISA and Western Blot test for Lyme disease – to a recognized national FDA-approved testing lab (such as LabCorp or Quest or

another lab approved by Dr. Torten). Moving Defendants request that Dr. Torten be permitted to request other tests she deems appropriate following the exam if necessary to determine whether the Lyme Claimant is currently suffering from Lyme disease or had Lyme disease in the past.

[Doc. 154 at 5.] At the hearing on March 11, 2019, the Court ordered Dr. Torten to “have a conversation with whoever is providing medical advice to the plaintiffs, and let’s see whether [they] can agree on an independent medical examiner to conduct...these IMEs.” [Doc. 177 at 91:4-92:17.]¹ A declaration from Dr. Torten describing her efforts to identify an agreed examiner is filed with this notice as Exhibit A.

B. Dr. Torten and Dr. Maloney have not agreed on an independent medical examiner.

Plaintiffs identified Dr. Elizabeth Maloney as their representative to confer with Dr. Torten on March 22, 2019. [Exhibit C, Email dated March 22, 2019.] Dr. Torten and Dr. Maloney have now exchanged two rounds of recommendations:

March 25, 2019 Recommendations	
Dr. Torten’s Recommendations	Dr. Maloney’s Recommendations
<ol style="list-style-type: none"> 1. Dr. Allison Liddell [Dallas, TX]. Board-Certified Infectious Disease Specialist. 2. Dr. Gebre Tseggay [Dallas, TX]. Board-Certified Infectious Disease Specialist. 3. Dr. Howard Kussman [Plano, TX]. Board-Certified Infectious Disease Specialist. 	<ol style="list-style-type: none"> 1. Dr. Joseph Burrascano [East Hampton, NY]. Retired. Designated by Plaintiffs as an expert; identified as a victim of alleged conspiracy [Exhibit B, Excerpts from Plaintiffs’ Designation of Experts at 3.] 2. Dr. Richard Horowitz [Hyde Park, NY]. Board-Certified Internist. Designated by Plaintiffs as an expert. [Ex. B at 28.] 3. Dr. John Aucott [Lutherville, MD]. Internist, Director of the John Hopkins Lyme Disease Clinical Research Center.

¹ Defendants have not retained Dr. Torten as an expert in this matter and she is not providing medical advice to the Defendants in that capacity; rather she was originally identified as a physician who could perform the IMEs sought by Defendant’s motion. As explained in the motion, counsel for Moving Defendants only communicated with Dr. Torten to determine whether she was willing and able to perform the IMEs and to learn the sort of examinations she would need to perform this task. [Doc. 154 at 5 n.7.]

April 12 and 18, 2019 Recommendations	
Dr. Torten's Recommendations	Dr. Maloney's Recommendations
<p>4. Dr. Edward Goodman [Dallas, TX]. Board-Certified Infectious Disease Specialist.</p> <p>5. Dr. Arpita Sheth [Bedford, TX]. Board-Certified Infectious Disease Specialist.</p> <p>6. Dr. Eliane Haron [Dallas, TX]. Board-Certified Infectious Disease Specialist.</p>	<p>4. Dr. Johnathan Forester [Pineville, LA]. Primary Care Physician. Designated by the Plaintiffs as an expert. [Ex. B at 18.]</p> <p>5. Dr. Torin Gray [Little Rock, AK]. Primary Care Physician.</p> <p>6. Dr. Charles Crist [Ashland, MO]. Primary Care Physician.</p>

Dr. Torten and Dr. Maloney have been unable to agree on an independent medical examiner and are now at an impasse. [Ex. A ¶9.]

C. Defendants request that the Court permit Dr. Torten to conduct the IMEs or select a physician from Dr. Torten's recommendations located in or adjacent to the Eastern District.

1. *Dr. Maloney's recommendations are not located in Texas; are not independent; and are not qualified.*

Dr. Maloney proposed six physicians to conduct the IME but none of those physicians is qualified or is located in Texas (notwithstanding the Court's direction that any IME physician should be in the state of Texas and preferably in the Eastern District).

The general rule, which the Court recognized, is that the IMEs should occur in the forum *chosen by the plaintiffs* for their suit. [Doc. 177 at 91:25 – 92:03]; *see also Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388, 400 (S.D. Tex. 2013) (noting that this rule ensures that the examining physician is available to testify at trial). To assess the testimony by Plaintiffs' experts, Defendants require IMEs and anticipate that the examining physician will need to testify at trial. By definition, this physician will be independent and not under the Defendants' control. To ensure that Defendants are able to call the examining physician to testify, he or she must be in the subpoena power of the Court.

While Courts have found that it is necessary under certain circumstances for an IME to occur elsewhere if “traveling to the examination poses undue burden or hardship,” *Ornelas*, 292 F.R.D. at 400, that is not the case here. Instead, Plaintiffs only want the examinations to be conducted by handpicked physicians, whose approach to Lyme disease is consistent with their beliefs. Indeed, Plaintiffs initially proposed three physicians whom they also previously designated as “non-retained” experts to testify on their behalf (Drs. Burrascano, Horowitz, and Forester).² [Ex..] One of these physicians (Dr. Burrascano) even appears as a putative victim of the “conspiracy” alleged in the Amended Complaint. [Doc. 186 at 9 ¶55.]

Defendants seek IMEs to provide the Court with an *independent* analysis and diagnosis of each individual plaintiff’s illness and treatment. The Dallas/Fort Worth metropolitan area is one of the largest metro areas in the country, with many infectious disease specialists qualified to conduct these exams. There is no reason for these examinations to occur outside the state.

2. *Dr. Torten and her recommended physicians are all qualified to conduct the IME.*

Defendants reassert their original request that Dr. Torten be permitted to conduct the IMEs or, alternatively, that the Court select one Dr. Torten has recommended. As set forth in the motion, Dr. Torten is qualified to conduct the IMEs. [Doc. 154 at 4-5; Doc. 154-1.] Moreover, Dr. Torten testified in her declaration that she is “confident that any one of [her] six recommended physicians—each a trained infectious disease specialist practicing in Plano or Dallas—is well qualified to conduct the exams.” [Ex. A ¶11.] These recommendations are based on each physicians’ background and experience, and Dr. Torten has not discussed the dispute or approaches to Lyme disease with any of the physicians. [Ex. A ¶10.]

² Defendants do not concede that these experts are properly designated under Federal Rule of Civil Procedure 26(a)(2)(C).

Counsel for the Defendants have had no contact with the physicians recommended by Dr. Torten. However, Dr. Torten confirmed recently that Dr. Liddell would be available to conduct the exams in June and July and that Dr. Arpita Sheth would not be available. [Ex. A ¶10.] Dr. Torten is attempting to contact Dr. Edward Goodman but has not attempted to contact the other three physicians she has recommended. *Id.*

Accordingly, Defendants' respectfully request that the Court enter an order permitting Dr. Torten to conduct the IMEs or, alternatively, selecting Dr. Liddell or one of the other physicians (other than Dr. Sheth) Dr. Torten has recommended.

D. Once an independent medical examiner is selected, Defendants can identify the time and place of the examinations.

The Court's May 10 order requested that Defendants identify the "time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it." [Doc. 189 at 2.] The scope of the requested IME is unchanged from the original motion, and Defendants request that the examinations take place at the examining physician's office. However, until an examiner is selected and confirmed by this Court, Defendants are unable to provide the date and times for these examinations (which will require coordination with the Plaintiffs, who live across the country). Accordingly, Defendants respectfully request that they be permitted to identify the date, time, and place for the examinations after the Court has identified the independent medical examiner.

Dated: March 17, 2019

Respectfully Submitted,

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Certificate of Service

I hereby certify that the forgoing will be filed on the Court's CM/ECF system, on April 12, 2019, which will serve a notice of electronic filing on all counsel of records.

/s/ Kimberly A. Klinsport

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4813-1266-1399.3