IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

LISA TORREY, *et al*.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 5:17-cv-00190-RWS
	§	
INFECTIOUS DISEASES SOCIETY OF AMERICA, *et al.*,	§	
	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO ANTHEM, INC., IDSA, AND THE DOCTOR DEFENDANTS' MOTION FOR INDEPENDENT MEDICAL EXAMINATIONS

COME NOW Plaintiffs LISA TORREY, KATHRYN KOCUREK Individually and on behalf of the Estate of J. DAVID KOCUREK, PH.D., LANA BARNES Individually and on behalf of the Estate of AL BARNES, AMY HANNEKEN, JANE POWELL, CAROL FISCH, JOHN VALERIO, STEVEN WARD, RANDY SYKES, BRIENNA REED, ROSETTA FULLER, ADRIANA MONTEIRO MOREIRA, JESSICA MCKINNIE, KRISTINE WOODARD, GAIL MEADS, DR. MICHAEL FUNDENBERGER, GAYLE CLARKE, ALLISON LYNN CARUANA, CHLOE LOHMEYER, MAX SHINDLER, TAWNYA DAWN SMITH, Individually and as Next Friend of MONET PITRE, MIKE PEACHER, Individually and as Next Friend of ASHLEIGH PEACHER, ALARIE BOWERMAN, Individually and as Next Friend of ELISA BOWERMAN, EMORY BOWERMAN, and ANAIS BOWERMAN, on behalf of themselves and for all other members of the class herein, and file this Response to Anthem, Inc., the Infectious Diseases Society of America ("IDSA"), and Dr. Gary Wormser, Dr. Raymond J. Dattwyler, Dr. Eugene Shapiro, Dr. John J. Halperin, Dr. Leonard Sigal, and Dr. Allen Steere (collectively, the "Doctor Defendants")'s Motion

for Independent Medical Examinations of Those Plaintiffs Who Claim to Have Lyme Disease (Docket No. 154), and in support thereof, show the Court the following:

I.

ARGUMENT & AUTHORITIES

Defendants' request for an Independent Medical Examination ("IME") fails given the mental or physical health of Plaintiffs is not "in controversy." Defendants cannot show "good cause" for an IME as required under Federal Rule of Civil Procedure 35.

A. The standard for a Rule 35 IME.

Under Rule 35, the Court may order an IME if the movant demonstrates that: (1) a party's medical condition is in controversy; (2) there is good cause for the examination; *and* (3) there is a suitably licensed or certified examiner.[1]

Rule 35 "requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of 'in controversy' and 'good cause' which requirements, as the Court of Appeals in this case itself recognized, are necessarily related." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964).

B. Contrary to Defendants' assertion, the Court has found there are no personal injury damages as part of the lawsuit.

Defendants have misconstrued Plaintiffs' allegations before. In their Motion(s) to Dismiss, Defendants also argued that Plaintiffs' injuries are personal injury damages arising out of

[1] The Fifth Circuit has identified three requirements before a court may order an IME: "(1) the party's physical or mental condition must be in controversy; (2) the expert must be either a physician or a psychologist; and (3) good cause must be shown." *Acosta v. Tenneco Oil. Co*., 913 F.2d 205, 208 (5th Cir. 1990).

complications from Lyme disease. The Court rejected this argument in its opinion. *See* Docket No. 114. The Court held:

> Defendants' arguments that Plaintiffs' injuries are personal injury damages arising out of complications from Lyme disease miss the mark. Docket No. 37 at 23–24. Plaintiffs do not allege that the Insurance Defendants acted in a tortious or negligent way, directly causing the medical injuries which led to Plaintiffs' medical expenses. Docket No. 60 at 19. In fact, Plaintiffs specifically disclaim any damages relating to physical pain, mental anguish, pain and suffering, disfigurement or any other personal injury damages caused by their Lyme disease. *Id*. at 17. Instead, Plaintiffs seek damages for out-of-pocket travel expenses, out-of-pocket expenses to pay for antibiotics and lost wages—concrete financial expenses that Plaintiffs have incurred as a result of being denied treatment and insurance coverage for chronic Lyme disease due to Defendants' alleged racketeering activities. *Id*. at 18–20.

Docket No. 114 at 24-25.

C. This case is about allegations related to RICO and to the conspiracy to unreasonably restrain the treatment of Lyme under the Antitrust laws.

Defendants' contention that the physical health of Plaintiffs is in controversy is not part of the allegations in the Complaint and Defendants have provided no evidence which would show it is part of the lawsuit. Instead, the allegations relate to Defendants' conspiracy to "unreasonably restrain the treatment of Lyme disease by enforcing the IDSA guidelines as a mandatory standard of care for the benefit of their own economic benefit…[Plaintiffs] have been unable to find doctors to treat chronic Lyme disease and have incurred out-of-pocket medical expenses and travel expenses to find treatment." Docket No. 114 at 14.

Defendants wish to make whether a Plaintiff has or had Lyme disease a matter of relevance in the lawsuit, but it is not relevant to the decision of whether Defendants conspired to violate the antitrust laws as alleged, nor is it relevant to damages.

Defendants have produced *no evidence* that the treatment of Plaintiffs was denied by Defendants because Plaintiffs purportedly did not have Lyme. Not even Defendants have put this issue "in controversy."

Defendants' after-the-fact maneuvering to position their denial of coverage as being a result of Plaintiffs purportedly not having Lyme disease or no damages from Lyme disease is simply a lawyer-driven litigation strategy for the purposes of this lawsuit. It was never communicated to Plaintiffs by Defendants that they did not have Lyme disease and that is why coverage was being denied.

Indeed, had Defendants communicated this to Plaintiffs, it would have allowed Plaintiffs (and individuals across the country who have been denied coverage by Defendants) to contest and seek redress through the federal law designed to adjudicate these issues—ERISA. This is not that case.

Moreover, even if it were relevant, that is not enough to satisfy the "good cause" requirement under Rule 35. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964) (Rule 35's "in controversy" and "good cause" requirements are not satisfied by showing "mere relevance to the case."); *In re Oil Spill by Oil Rig DEEPWATER HORIZON,* MDL No. 2179, 2012 WL 607971, at *3 (E.D. La. Feb. 24, 2012) (same).

> Rather, what is required is "an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." Whether these requirements are met necessarily depends on the particular facts of the case and the scope of the examination sought.

Id. (citations omitted) (quoting *Schlagenhauf*, 379 U.S. at 118).

Finally, Defendants' reference to the individual physicians of Plaintiffs being identified as experts was consistent with disclosure rules. The disclosure does not put whether Plaintiffs have Lyme "in controversy."

Specifically, the physicians are providing the medical records in the process of being subpoenaed by Defendants. Presumably, the physicians' testimony may be necessary, for

example, to interpret the records produced, to testify as to whether they in fact recommended certain treatment which was denied and which Plaintiffs were subsequently forced to seek on their own dime, and various other issues in relation to the factual nature of Plaintiffs' claims, which includes the economic damages sought by Plaintiffs.

Indeed, in communications with Defendants in connection with the issue of the disclosure of the physicians, Plaintiffs' counsel made clear these physicians were fact witnesses identified out of an abundance of caution to preclude Defendants' argument they could not give factual testimony. Exhibit 1 (Feb. 7, 2019 letter from Mr. Lee to Ms. Doan). The disclosure of the physicians does not change the pleading or allegations in Plaintiffs' Complaint.

D. Defendants are able to obtain the information they seek through far less intrusive means such as the medical records which are available to Defendants.

At the beginning of the case, Plaintiffs executed consent forms to allow Defendants to obtain their medical records. Shortly before and after Defendants filed this Motion for IMEs, Defendants sent a flurry of subpoenas seeking the medical records of Plaintiffs.[2]

These medical records document any of the medical issues Defendants desire to subpoena. There is no restriction on the executed consent for medical records. Although not relevant to this case, whether or not Plaintiffs had Lyme would be documented in their medical records. Rather than review these medical records, Defendants seek the invasive, onerous and unnecessary request for an IME.

[2] Incredibly, Defendants are seeking from Plaintiffs' ***doctors*** not only Plaintiffs' own medical records, but the ***doctors'*** information as well. This includes such items as "complaints made to state medical boards or similar authority," "[all] financial information [showing] revenues and profits from treating Lyme disease patients," "any malpractice claim or inquiry," and "all substances that YOU prescribe or dispense or cause to be prescribed or dispensed, to a patient for treatment of chronic Lyme disease." This is a scare tactic aimed at the providers of care to the Lyme community by Defendants, who are known to target and retaliate against doctors that treat Lyme disease. This is not simply a discovery subpoena.

Defendants are able to obtain the information through less intrusive means than drawing blood to obtain the information they seek. Thus, good cause is not satisfied.

E. The time, place, manner, conditions, and scope of the IME are not satisfied as required under Rule 35.

Rule 35 requires Defendants to "specify the time, place, manner, conditions, and scope of the examination." In this regard, Defendants' request illustrates the use of a flawed procedure and an overbroad and onerous examination which fails to satisfy Rule 35.

First, the Lyme disease tests proposed by Defendants are notoriously unreliable.[3] Even relying on conservative estimates, the two-tier Western Blot and ELISA tests fail to diagnose Lyme disease in half of all patients tested.[4] The Western Blot and ELISA tests require multiple tests to obtain a positive reading given the number of false negatives the tests generate.[5]

The IME will not be independent, as Defendants will seek to use their medical doctor for a particular test which is universally recognized as unreliable and wildly inaccurate based on a single blood draw. The number of false negatives would require many blood draws over various periods of time in order to rule out the false negatives. Accordingly, reliance on the medical records of Plaintiffs, which are available for the time they have had the disease, is the most accurate measure as to whether they have Lyme.[6]

Second, Defendants also ask that their chosen doctor be authorized by the Court to perform any "***other tests she deems appropriate following the exam***…." Docket No. 154 at 4 (emphasis added). This would allow Defendants to have multiple IMEs for each Plaintiff without ever having

[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2078675/

[4] *Id.*

[5] https://www.ncbi.nlm.nih.gov/pubmed/10068589/

[6] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4441761/

to comply with Rule 35 or show good cause for these additional tests. Defendants do not specify the extent of the "physical examination" they are requesting this Court to authorize or explain why it is necessary to diagnose Lyme. *Id.*

Third, Defendants request the Court authorize Defendants' chosen doctor to perform a "full review of the systems" without explaining what this is and why it is necessary. *Id.*

Fourth, there is no reliable "suitably licensed or certified examiner" in the field of Lyme testing. Given the universally recognized unreliability and limitations of the Western Blot and ELISA tests, any doctor relying solely on these tests cannot be suitably licensed or a certified examiner. The only way to determine whether a person has Lyme disease is an ongoing examination by the patient's treating physicians.[7]

Regardless, none of this is "in controversy" and there has not been "good cause" shown for an IME in this Antitrust and RICO case.

II.

CONCLUSION

For these reasons, Plaintiffs respectfully request this Court deny the Motion of Anthem, Inc., the Infectious Diseases Society of America, and the Doctor Defendants for Independent Medical Examinations of Those Plaintiffs Who Claim to Have Lyme Disease.

[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4441761/

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered parties.

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