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.*,	§	JURY DEMANDED
	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT

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COME NOW Plaintiffs LISA TORREY, KATHRYN KOCUREK Individually and on behalf of the Estate of J. DAVID KOCUREK, PH.D., AMY HANNEKEN, JANE POWELL, CAROL FISCH, JOHN VALERIO, individually and as Next Friend of CHRISTOPHER VALERIO, 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 the Motion to Dismiss Plaintiffs' Amended Complaint filed by Defendants and Plaintiffs show the Court as follows:

INTRODUCTION

Facing production of documents going back to 1998, Defendants filed another Motion to Dismiss, even though the allegations in Plaintiffs' First Amended Complaint are stronger than the allegations in Plaintiffs' Original Complaint.

All the allegations related to Plaintiffs' antitrust allegations in Plaintiffs' First Amended Complaint are identical to the allegations in Plaintiffs' Original Complaint. (Docket #1 and Docket #186). These are the same allegations this Court relied on in holding: "Plaintiffs have sufficiently alleged a claim of monopolization under § 2 of the Sherman Act." (Docket #114 at 22).

As to Plaintiffs' RICO claims, Defendants incorrectly assert that Plaintiffs removed allegations of the Insurance Defendants paying the IDSA Panelists large sums of money and in return the IDSA Panelists created and enforced arbitrary guidelines. To the contrary, Plaintiffs' First Amended Complaint not only alleges that the Insurance Defendants paid large sums of money

to the IDSA Panelists (Docket #186, ¶¶ 55 and 135) but relies on evidence establishing the Insurance Defendants paid the IDSA Panelists large sums of money in return for the IDSA Panelists creating and enforcing arbitrary Lyme disease guidelines. (Docket #186, ¶¶ 49-60 and 135).

Defendants know that all the evidence setting forth payments from the Insurance Defendants to the IDSA Panelists is in the exclusive possession of Defendants. As a result, Defendants have done everything they can to avoid producing evidence of payments. Defendants told this Court they would produce documents beyond four years if the Court ruled on Plaintiffs' favor on the motions to dismiss. That occurred, but the production did not. Plaintiffs were forced to file motions compelling production.

Defendants refuse to produce documents related to payments to the IDSA Panelists and reporting doctors to medical boards even though these documents are in Defendants' exclusive control. Defendants then argue that Plaintiffs' case should be dismissed, because Plaintiffs do not allege specifics about payments to the IDSA Panelists. Defendants' deliberate refusal to engage in discovery and produce documents in their possession should not be rewarded.

To date, Defendants still have not produced any documents beyond four years and the documents Defendants produced within the four years do not comply with the Court's discovery orders.

ARGUMENT & AUTHORITIES

I. Plaintiffs' Allegations Are Sufficient to State a Viable Antitrust Claim

Antitrust claims are subject to the notice-pleading standard of Federal Rule of Civil Procedure 8(a)(2), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Midwest Gas Servs., Inc. v. Indiana Gas Co.*, 317 F.3d 703, 710 (7th Cir. 2003); *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711

F.2d 989, 995 (11th Cir. 1983). Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Id*.

Both in and following *Twombly*, the Supreme Court re-affirmed this "notice pleading" standard of Rule 8. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.") (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) ("Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.") (quoting *Twombly* and *Conley*).

The Fifth Circuit explained that "antitrust allegations are liberally construed." *Ancar v. Sara Plasma, Inc*., 964 F.2d 465, 468 (5th Cir. 1992). Antitrust cases are large and complex, and the defendant controls the evidence, quick dismissals should be avoided and "summary procedures should be used sparingly." *Poller v. Columbia Broadcasting Sys., Inc*., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); *Quality Foods de Centro Am.*, 711 F.2d at 995. This is particularly true in an antitrust suit, like this one, where the proof and details of the alleged conspiracy are largely in the hands of the alleged co-conspirators. *See Poller* , 368 U.S. at 473, .

A. Plaintiffs' Amended Complaint Sets Forth a Detailed Antitrust Claim

Even though antitrust claims only require a short and plain statement of the claim showing Plaintiffs are entitled to relief, Plaintiffs' Amended Complaint sets forth their antitrust allegations in detail. (Docket #186, ¶¶ 105-130). In addition to the factual allegations throughout the Amended Complaint, Plaintiffs' Amended Complaint has ten (10) pages of antitrust allegations against Defendants. *Id*. These allegations include detailed facts and even cite case law. *Id*.

Plaintiffs' antitrust claims are rooted in Defendants' standard setting anti-competitive activity. (Docket #186, ¶¶ 105-130). Many courts, including the United States Supreme Court, have warned that standard setting can be "rife with opportunities for anti-competitive activity" and have found standard setting violations in cases with anti-competitive activity. *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel* Corp., 456 U.S. 556, 571 (1982).

B. Plaintiffs' Amended Complaint Alleges Facts Establishing the Insurance Defendants Violated Antitrust Laws and Plaintiffs' Damages Were Caused by the Insurance Defendants' Violations of the Sherman Act

"To sufficiently plead causation, a plaintiff must allege that the defendant violated the antitrust laws, that the defendant's alleged violation had a tendency to injure the plaintiff's business or property, and that the plaintiff suffered a decline in its business or property not shown to be attributable to other causes." *Andrx Pharm., Inc. v. Biovail Corp. Intern*., 256 F.3d 799, 808 (D.C. Cir. 2001) (internal quotation marks and citation omitted). "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

The development of treatment guidelines is analogous to standard-setting. *See* Richard Wolfram, *Connecticut Attorney General Investigation and Settlement Highlights Possible Applicability of Antitrust Standard Setting Law to the Development of Clinical Practice Guidelines*, 22 ANTITRUST HEALTH CARE CHRON. 8 (2008); *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 169 (D.D.C. 2004); *see also* Tammy Asher, *Unprecedented Antitrust Investigation into the Lyme Disease Treatment Guidelines Development Process*, 46 GONZ. L. REV. 117, 135 (2011). When standard-setting guidelines are unfairly enforced and effectively mandatory then they violate Section 1 of the Sherman Act. *See Allied Tube & Conduit Corp. v. Indian Head, Inc*., 486 U.S. 492, 501 n.6, 108 S. Ct. 1931, 1937, 100 L. Ed. 2d 497 (1988); *see*

also ABA Section of Antitrust Law, ANTITRUST AND ASSOCIATIONS HANDBOOK 1 (2009) at 147 (stating that "[p]articipation in a standards program should be voluntary").

Treatment guidelines create potential antitrust issues if they become mandatory and restrict clinical discretion, thereby limiting or eliminating patient choice. *Allied Tube & Conduit Corp.*, 486 U.S. at 501. Moreover, the standard-setting process can be abused when members of the standard-setting organization seek to create standards that economically benefit their organizations. *Id.*

As set forth in Plaintiffs' Amended Complaint, 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. (Docket #186, ¶¶ 82 and 110-112). Therefore, the IDSA Guidelines have the effect of becoming the standard of care in the medical community. *Id.* As a result of the Defendants in this case, state medical boards use the IDSA Guidelines as the only standard of care when investigating and sanctioning doctors who do not conform to the IDSA guidelines. *Id*. The enforcement of the IDSA guidelines has reduced the Lyme disease treatment market, because many doctors are reluctant to diagnose or treat chronic Lyme disease patients. This is so, in part, because they do not want to become the subject of an investigation by their state board of medical examiners. *Id*. The restraint on the Lyme disease treatment market is so great that state legislatures and Congress have taken action to try to reduce the effects of these now mandatory guidelines. *Id*.

When analyzing whether the conduct imposes an unreasonable restraint on competition, "the finder of fact must . . . tak[e] into account a variety of facts, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *see also Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

As set forth in Plaintiffs' Amended Complaint, the Insurance Defendants, the IDSA panelists, and the IDSA violated Section One of the Sherman Act by conspiring to unreasonably restrain trade in the relevant market - the treatment of Lyme disease. (Docket #186, ¶¶ 105-130). They conspired to unreasonably restrain trade in many ways including by blocking the appointment of physicians with divergent views to the IDSA Lyme disease panel and refusing to accept or meaningfully consider the existence of chronic Lyme disease, by excluding physicians with differing opinions from participating in its panel and suppressing scientific evidence, by denying the existence of chronic Lyme disease and condemning the use of long-term antibiotics, by citing the IDSA Guidelines in their insurance coverage plans to deny or limit treatment costs associated with chronic Lyme disease; and by claiming the costly long-term treatments are "experimental" or "not evidence-based." *Id*.

It is clear Plaintiffs' Amended Complaint sets forth facts establishing the Defendants violated the standard-setting antitrust laws of Section One of the Sherman Act. Equally clear is the fact Plaintiffs' Amended Complaint sufficiently sets forth how the Defendants' violation of Section 1 of the Sherman Act caused Plaintiffs' antitrust injuries. (Docket #186, ¶¶ 105-130). Specifically, as a result of treating the IDSA guidelines as mandatory, the Insurance Defendants deny coverage for chronic Lyme disease even though there is overwhelming evidence that short-term antibiotic treatment does not cure every Lyme patient. *Id*. This caused Plaintiffs to incur out-of-pocket medical expenses and travel expenses to find medical treatment. *Id*.

The Defendants' treatment of the IDSA guidelines as mandatory allows the Insurance Defendants to punish doctors treating chronic Lyme disease by reporting them to medical boards and trying to strip them of their medical licenses. *Id*. This caused Plaintiffs to suffer out-of-pocket travel expenses in searching for doctors in other states and countries that would treat their chronic Lyme disease. *Id*.

Plaintiffs' Amended Complaint clearly sets forth facts and allegations establishing that the Insurance Defendants' violation of Section 1 of the Sherman Act and caused an antitrust injury.

C. Plaintiffs' Amended Complaint Sets Forth an Antitrust Injury

The Fifth Circuit distinguishes between antitrust injury and injury to competition and holds injury to competition need not be pleaded for a plaintiff's antitrust claim to survive a motion to dismiss. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.,* 123 F.3d 301, 305 (5th Cir. 1997); *Walker v. U-Haul Co.,* 747 F.2d 1011, 1016 (5th Cir.1984); *Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co.*, CIV.A. 10-00124, 2010 WL 3488244, at *12 (E.D. La. Aug. 26, 2010) (holding "Injury to competition, on the other hand, while often a necessary component to substantive liability, need not be pleaded for a plaintiff's antitrust claims to survive a motion to dismiss.").

All that is required to survive a motion to dismiss is pleading an antitrust injury. *Id*. An antitrust injury exists when (1) the injury was of the type antitrust laws were intended to prevent, and (2) that the injury "flows" or was caused by that which makes the defendant's conduct unlawful. *Brunswick Corp. v. Pueblo Bowl-OMat, Inc*., 429 U.S. 477, 488-89 (1977). As set forth above, treating the IDSA guidelines as mandatory is a violation of Section One of the Sherman Act and as long as Plaintiffs' damages bear a close relationship to the alleged antitrust violation, Plaintiffs have properly plead an antitrust injury. *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486, 1492–93 (11th Cir.1985). Plaintiffs' Amended Complaint sets forth how their injuries bear a very close relationship to Defendants' antitrust violations. (Docket #186 ¶¶ 122-125 & 131-139).

Plaintiffs recognize that some jurisdictions require Plaintiffs to plead a reduction of competition in the market in general and not mere injury to their own positions. *See, e.g., McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811–12 (9th Cir.1988); *Rutman Wine Co. v. E. & J.*

Gallo Winery, 829 F.2d 729, 734 (1987); *Calculators Haw., Inc. v. Brandt, Inc*., 724 F.2d 1332, 1338 (9th Cir.1983). Even with this heightened standard, Plaintiffs' Amended Complaint meets the pleading requirement.

"Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects upon competition within that market." *Oltz v. St. Peter's Cmty. Hosp*., 861 F.2d 1440, 1446 (9th Cir. 1988). Plaintiffs' Amended Complaint establishes that Defendants' actions have resulted in a reduction of competition in the Lyme disease treatment market. (Docket #186 ¶¶ 110-117).

Plaintiffs Amended Complaint sets forth several ways in which a reduction in competition has occurred as a result of Defendants' violation of the standard-setting antitrust laws of Section One of the Sherman Act. Specifically, Defendants' violations of the Sherman Act led to the reduction (to almost none) of the number of doctors who treat chronic Lyme disease. (Docket #186 ¶ 118). The Insurance Defendants violation of the Sherman Act also reduced the competition in the Lyme disease treatment market because there are few, if any, insurance companies willing to cover treatment of chronic Lyme disease. *Id*.

Plaintiffs Amended Complaint sets forth facts properly alleging an antitrust injury and an injury to competition.

D. Plaintiffs Properly Plead a Relevant Market

Courts in the Fifth Circuit recognize that "market definition is a deeply fact-intensive inquiry that generally cannot be resolved at the motion to dismiss stage." *Vaughn Med. Equip. Repair Serv., L.L.C.,* No. 10-00124, 2010 WL 3488244, at *19. *Accord Todd v. Exxon Corp*., 275 F.3d 191, 199-200 (2d Cir. 2001) ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market."); *T&T Geotechnical, Inc. v. Union Pacific Resources Co*., 944 F. Supp. 1317, 1323 (N.D. Tex. 1996)

("[P]roper market definition requires a factual inquiry into the commercial realities faced by consumers"); *Creative Copier Servs. v. Xerox Corp*., 344 F. Supp. 858, 863 (D. Conn. 2004) (because market definition is "deeply fact-intensive inquiry, courts are hesitant to grant motions to dismiss for failure to plead the relevant product market").

Plaintiffs' Amended Complaint alleges the Lyme disease treatment market in the United States. (Docket #186 ¶¶ 118-123). This market is relevant and proper in an antitrust case. For example, in *Wilk v. Am. Med. Ass'n*, the court held that a nationwide market for "the treatment of musculoskeletal problems" was a relevant and proper antitrust market. *See Wilk v. Am. Med. Ass'n*, 671 F. Supp. 1465, 1478 (N.D. Ill. 1987), aff'd, 895 F.2d 352 (7th Cir. 1990) (holding "The relevant market was the provision of health care services to the American public on a nationwide basis, particularly for the treatment of musculoskeletal problems.").

Many other courts have determined that markets similar to the market asserted by Plaintiffs in this case are relevant and acceptable in an antitrust case. *Weiss v. York Hosp*., 745 F.2d 786, 827 (3d Cir. 1984) (holding that nationwide "inpatient hospital health care" was a relevant market in an antitrust case); *Oltz*, 861 F.2d at 1447 (holding "anesthesia services" is a relevant market in antitrust case); *Leyba v. Renger*, 874 F. Supp. 1229, 1238 (D.N.M. 1994) (holding nationwide "hospital-based osteopathic anesthesiology" is a relevant market in antitrust case).

E. Plaintiffs' Amended Complaint Properly Alleges All Elements of Section Two of the Sherman Act

Section Two of the Sherman Act specifically prohibits monopolizing or attempting to monopolize, any part of interstate or foreign commerce. 15 U.S.C. § 2 (2006). In *United States v. Grinnell Corp*., the United States Supreme Court declared that monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp*., 384 U.S.

563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966). A legal entity can monopolize interstate commerce by excluding competitors from a market but "to be condemned as exclusionary, a monopolist's act must have 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers." *Rambus Inc. v. FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (2001)); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition.").

A standard-setting organization can obtain monopoly power by allowing members with an economic interest in restraining competition to bias its standard-setting process. *Allied Tube & Conduit Corp.*, 486 U.S. at 501. Plaintiffs allege in their Amended Complaint that the Insurance Defendants, the IDSA, and the IDSA panelists have all of the monopoly power and biased the Lyme treatment Guideline development process by unlawfully monopolizing the treatment of Lyme disease. (Docket #186 ¶ 173). They did this by excluding certain medical treatments, such as long-term antibiotic treatment, and denying the existence of chronic Lyme disease. *Id.* This bias has allowed the Insurance Defendants, the IDSA, and the IDSA panelists to eliminate consumer choice in the Lyme disease treatment market and exclude competing doctors. *Id*. These competing doctors include doctors who clinically diagnose and treat chronic Lyme disease and those who seek insurance coverage for their patients with chronic Lyme disease. *Id*. The Insurance Defendants, the IDSA, and the IDSA panelists also unlawfully monopolize the treatment of Lyme disease by allowing medical boards to investigate and sanction doctors who do not follow the IDSA Guidelines. *Id*.

As long as Defendants "participate" in the Lyme disease treatment market, they can be held liable under Section Two of the Sherman Act. *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 335 (5th Cir. 2015). As set forth in Plaintiffs' Amended

Complaint, Defendants did more than participate in the Lyme disease treatment market, they dominate the Lyme disease treatment market. (Docket #186 ¶¶ 40-91 & 165-166).

Plaintiffs' Amended Complaint also alleges that the Insurance Defendants clearly compete in the Lyme disease treatment market and that the Insurance Defendants engaged in predatory and exclusionary conduct. (Docket #186 ¶¶ 167-172). Plaintiffs' Amended Complaint satisfies the pleading requirements of Section Two of the Sherman Act. *Grinnell Corp*., 384 U.S. at 570.

II. Relaxed Pleadings Required for Plaintiffs' Rico Allegations—All Documents Exclusively in Defendants' Possession and Control

Four things are clear: 1) the Insurance Defendants paid large sums of money to the IDSA Panelists to create and enforce arbitrary Lyme disease guidelines; 2) Defendants improperly enforce the arbitrary guidelines as strict rules by reporting doctors to medical boards and denying insurance coverage; 3) the documents proving this are exclusively in the possession of Defendants; and 4) Defendants do not want to produce these documents.

Defendants argue that Plaintiffs' RICO allegations should be dismissed, because Plaintiffs' Amended Complaint removed the word "large" when describing the payments made by the Insurance Defendants to the IDSA Panelists. What Defendants ignore is that instead of just saying the payments made by the Insurance Defendants were large, Plaintiffs' Amended Complaint showed the payments were large by presenting unrefuted evidence and testimony.

Plaintiffs' Amended Complaint relies on the deposition testimony of Dr. Leonard Sigal (Docket #186 ¶¶ 53-54). Sigal, one of the IDSA Panelists, testified that in 1996 he was paid $560 an hour by most of the Insurance Defendants[1] to review files related to Lyme disease:

> Q. What insurance companies have you reviewed for with regard to Lyme disease?

[1] http://www2.lymenet.org/domino/law.nsf/34bb600f91c4b4a9852565070004d48a/9d925dad11e6c2c28525651d000abd32?OpenDocument page 11, line 23 – page 12, line 8.

> A. Prudential, Aetna, Blue Cross Blue Shield. Something called Anthem. Met Life, or Met Health[2], I guess, Metro Health[3]. Whatever it's called. I believe that's it.
>
> Q. And have payments from these insurance companies been made directly to you in your name?
>
> A. Yes.[4]

When discussing how much he was paid by the Insurance Defendants, Dr. Sigal quipped that the money "would pay for a lot of college tuition, actually".[5] The evidence of payments made from the Insurance Defendants to Dr. Sigal is solely in the possession of Dr. Sigal and the Insurance Defendants. This is also true of the evidence discovered by the Connecticut AG's office of payments from the Insurance Defendants to the rest of the IDSA panelists.

Plaintiffs' First Amended Complaint relies on the investigation conducted by the Connecticut AG, Richard "Dick" Blumenthal (now Senator Blumenthal), into the IDSA Guidelines. (Docket #186 ¶¶ 50-52 and 93-95). During the investigation, the Connecticut AG's office served Civil Investigative Demands (CID) on the IDSA Panelists and most of the Insurance Defendants, including UnitedHealth, Cigna, Aetna, Anthem, and Anthem Blue Cross[6]. The CIDs to the Insurance Defendants asked for any compensation paid by the Insurance Defendants to the IDSA Panelists (including Defendants Wormser, Dattwyler, Halprin, Shapiro, and Steere) from August 1, 1998 to July 31, 2007.[7] The Insurance Defendants and IDSA Panelists responded to these CIDs and AG Blumenthal concluded: "several of the most powerful IDSA panelists had

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[2] In 1995, UnitedHealth acquired both MetraHealth Companies Inc. and Metropolitan Life Insurance Company.

[3] *Id.*

[4] http://www2.lymenet.org/domino/law.nsf/34bb600f91c4b4a9852565070004d48a/9d925dad11e6c2c28525651d000abd32?OpenDocument page 142, lines 5-14.

[5] *See* Pamela Weintraub, Cure Unknown, Inside the Lyme Epidemic, page 306, St. Martin's Griffin, 2008.

[6] *See* Exhibit "A".

[7] *Id*.

undisclosed financial interests in insurance companies including 'consulting arrangements with insurance companies'".[8]

This is confirmed by the testimony of Dr. Joseph Burrascano, Jr. before the Senate Committee on Labor & Human Resources, as is set forth in Plaintiffs' Amended Complaint. (Docket #186 ¶ 55). Dr. Burrascano, an internationally known infectious disease specialist, testified about his personal experiences trying to treat Lyme disease and why the IDSA Panelists opposed his use of long-term antibiotics:

> Some of them are known to have received large consulting fees from insurance companies to advise the companies to curtail coverage for any additional therapy beyond the arbitrary 30-day course.[9]

Plaintiffs' Amended Complaint presents clear evidence of the payments made to the IDSA Panelists by the Insurance Defendants. Nowhere in Defendants' Motion do Defendants ever dispute that large consulting fees were paid from the Insurance Defendants to the IDSA Panelists. Instead, Defendants argue that Plaintiffs' Amended Complaint should be dismissed because Plaintiffs fail to specifically identify any payments. Defendants ignore the fact that **all** evidence of the payments made to the IDSA Panelists from the Insurance Defendants are in the sole possession of the Defendants.

A. All Evidence of Payments Exclusively in Defendants' Possession

Throughout this lawsuit, Defendants have refused to produce documents solely in their possession and then yell that Plaintiffs do not have the information contained in the documents they refuse to produce. Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is no different.

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[8] http://www.empirestatelymediseaseassociation.org/Archives/CTAGPressReleaseIDSAResponse.htm

[9] https://archive.org/stream/lymediseasediagn00unit/lymediseasediagn00unit_djvu.txt

Plaintiffs sent subpoenas to the Office of the Attorney General for the State of Connecticut requesting the documents and information obtained during their investigation into the IDSA, the Insurance Defendants, and the IDSA Panelists. The Connecticut AG's office produced the CIDs sent to the Defendants but not the responses because documents and information acquired were returned to the Defendants:

> The documents were subpoenaed or furnished voluntarily to the Connecticut Office of the Attorney General ("CTOAG") in connection with an antitrust investigation. Pursuant to Conn. Gen. Stat. § 35-42(c)(l) & (2), such documents are held in the custody of the CT-OAG, shall not be available to the public, and shall be returned to the person who produced or furnished the documents upon the termination of the CT-OAG's investigation. The majority of the documents obtained in connection with the CT-OAG's antitrust investigation of the Infectious Diseases Society of America were returned at the termination of the investigation.[10]

According to the Connecticut AG's office, all of the documents related to payments to the IDSA Panelists are in the exclusive possession of Defendants. Defendants argue that Plaintiffs never explain why they are unable to allege facts regarding specific payments. Plaintiffs have made it abundantly clear that the only reason Plaintiffs cannot provide specific evidence of payments is because Defendants refuse to produce evidence of payments in their exclusive possession.

Defendants refuse to identify any third parties in possession of evidence of payments between the Insurance Defendants and the IDSA Panelists. If payments were made from the Insurance Defendants to the IDSA Panelists, who would have possession of documents evidencing these payments other than Defendants?

B. Rule 9(b) Pleadings Standards Should Be Relaxed

Rule 9(b) requires a party to plead "circumstances constituting fraud . . . with particularity." FED. R. CIV. P. 9(b). The Rule does not require a party to muster all its evidence or detail every

[10] *See* Exhibit "B".

fact associated with the claim, but only requires they reasonably identify the "who, what, when, where and how" of any acts of fraud alleged in the complaint. *See ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002).

Courts within the Fifth Circuit hold that the heightened pleading standards of Rule 9(b) should be relaxed "upon a showing by the plaintiff that he or she is unable, without pretrial discovery, 'to obtain essential information' peculiarly in the possession of the defendant." *Schouest v. Medtronic, Inc*., 13 F. Supp. 3d 692, 709 (S.D. Tex. 2014) (citing *Freitas v. Wells Fargo Home Mortg., Inc*., 703 F.3d 436 (8th Cir.2013); *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir.2009); *U.S. ex rel. Bennett v. Medtronic, In*c., 747 F.Supp.2d 745, 768 (S.D.Tex.2010); *U.S. ex rel. Rafizadeh v. Cont'l Common, Inc.*, 553 F.3d 869, 873 (5th Cir. 2008).

Plaintiffs' Amended Complaint sets forth how the Insurance Defendants paid the IDSA Panelists (who drafted and published the IDSA guidelines) money to create guidelines claiming chronic Lyme disease does not exist and claiming long-term antibiotic treatment is never necessary to treat Lyme disease. (Docket #186 ¶¶ 40-60, 67-78, and 83-88). Defendants have exclusive possession of the documents establishing the dates these payments were made, who made the payments, the location of the payments, the amounts of the payments, and the contents included with the payments. Defendants have exclusive possession of the communications between the Insurance Defendants and the IDSA panelists related to the panelists' testimony as well as exclusive possession of the facts and documents establishing the dates the panelists were paid, the location of the payments, the amounts of the payments, and the information included with the payments.

Plaintiffs' Amended Complaint also sets forth how the Insurance Defendants sent confidential, or anonymous, complaints to medical boards all over the country, reporting doctors who treat chronic Lyme disease. (Docket #186 ¶¶ 67-70). Plaintiffs' Amended Complaint

establishes that the Insurance Defendants make complaints to medical boards anonymously. (Docket #186 ¶¶ 68-73). If they are not anonymous, the medical boards refuse to disclose the identities of Insurance Defendants due to state privacy laws. (Docket #186 ¶¶ 71-72). Either way, Defendants have exclusive possession of the communications sent to medical boards including complaints, allegations, and documents setting forth any alleged violations. *Id.*

Because the Defendants have exclusive possession of the facts and documents establishing their fraudulent and conspiratorial actions, Rule 9(b)'s particularity requirement should be relaxed and Plaintiffs should be allowed to move forward with their RICO claims. *See Nelson v. Monroe Regional Medical Ctr*., 925 F.2d 1555, 1567 n. 7 (7th Cir.), cert. denied, 502 U.S. 903, 112 S.Ct. 285, 116 L.Ed.2d 236 (1991); s*ee also, Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir.1993); *Davis v. Coopers & Lybrand*, 787 F.Supp. 787, 793 (N.D.Ill.1992).

C. Plaintiffs Exercised Due Diligence

Plaintiffs have done everything they can to obtain documents of payments to IDSA Panelists and correspondence to medical boards.

On May 11, 2018, this Court signed the Agreed Discovery Order requiring Defendants to serve on Plaintiffs their Additional Disclosures. (Docket #81). This Order required the parties to include copies of all documents "that are relevant to the pleaded claims or defenses involved in this action" within eighty-five days. *Id*. Defendants refused to produce documents relevant to the claims pleaded in this case. (Docket #138). Instead, Defendants produced only those documents the Defendants wanted to produce relating to their Lyme policies. *Id*.

On September 5, 2018, Plaintiffs sent letters to all Defendants outlining their failure to produce all relevant documents, much less anything meaningful. (Docket #138, Exhibit "A"). Plaintiffs attached to their letters sample formal requests for productions that are unnecessary under the Court's voluntary disclosure provisions contained in the Local Rules. *Id*.

The Defendants waited exactly thirty days to respond to these sample requests for production and refused to produce any documents. (Docket #138, Exhibit "B"). Instead, the Defendants sent letters claiming that this Court does not allow "targeted requests for production" only "voluntary" responses to the Additional Disclosures. *Id*. Defendants ignored the fact that Defendants' discovery responses were not "voluntary", but rather, required by the Court's Local Rules.

Defendants also refused to produce any documents beyond four years. Defendants took the position they did not need to respond to discovery beyond four years in direct contradiction to agreement Defendants entered into with the Court. Defendants told the Court they would produce documents beyond four years after the Court ruled on the motions to dismiss. After this Court ruled on the motions to dismiss, Defendants ignored their agreement and Plaintiffs were forced to file a Motion to Compel Discovery. On April 9, 2019, this Court entered an order granting Plaintiffs' Motion. (Docket #190).

Defendants argue Plaintiffs' failure to send e-discovery shows lack of due diligence. What Defendants ignore is that there are two reasons Plaintiffs did not send e-discovery: 1) Defendants still have not identified the proper custodians; and 2) with Defendants refusing to produce documents beyond four years, e-discovery was not meaningful.

The e-discovery order requires Defendants to identify their custodians of record for e-discovery purposes. (Docket #112). Plaintiffs' counsel has asked for the custodians several times and to date, Blue Cross Blue Shield Association is the only Defendant who has provided its custodians.[11] Blue Cross Blue Shield Association identified its custodians on April 19, 2019.[12]

[11] See Exhibit "C"

[12] *Id.*

More importantly, the documents Plaintiffs need to properly meet the 9(b) pleading requirements are documents during the period the IDSA guidelines were created and enforced. (Docket #186). This period includes the 1990's and 2000's. *Id*. Defendants know that e-discovery for the last four years is not sufficient for Plaintiffs to meet their 9(b) pleading requirements, that is why Defendants agreed to produce documents during those years.

Defendants' claims as to Plaintiffs' lack of diligence stem from Defendants' refusal to engage in meaningful and proper discovery. The only reason why Plaintiffs are unable to plead specific facts as required by RICO, is due to Defendants' refusal to produce documents required by this Court.

III. <u>Fraudulent Concealment</u>

The Fifth Circuit has long held that fraudulent concealment tolls the statute of limitations for an antitrust claim. *In re Beef Indus. Antitrust Litig*., 600 F.2d 1148, 1169 (5th Cir. 1979); *Battle v. Liberty Nat. Life Ins. Co*., 493 F.2d 39, 52 (5th Cir. 1974). "To avail himself of this doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim." *In re Beef Indus. Antitrust Liti*g., 600 F.2d at 1169. Further, the "acts of concealment" need not "be independent of the conspiracy" in order for the tolling to apply. *State of Texas v. Allan Constr. Co*., 851 F.2d 1526, 1532 (5th Cir. 1988) (stating that this "may make it easier to prove fraudulent concealment in antitrust cases"); *see also In re Catfish Antitrust Litig*., 826 F. Supp. 1019, 1031 (5th Cir. 1993).

Fraudulent concealment also tolls the statute of limitations for a RICO claim. *Klehr v. A.O. Smith Corp*., 521 U.S. 179, 188, 117 S. Ct. 1984, 1990, 138 L. Ed. 2d 373 (1997).

As set forth in Plaintiffs' Amended Complaint, the Defendants have spent the last few decades, since the early 1990's, fraudulently and improperly denying the existence of chronic

Lyme disease. (Docket #186 ¶¶ 83-88 and 92-98). This is true even though the Defendants know there is overwhelming evidence to support the existence of chronic Lyme disease. *Id*. Dr. Allen Steere, one of the IDSA Panelists, acknowledged in 1994 that chronic Lyme disease existed: "It has become increasingly apparent that the Lyme disease spirochete, *Borrelia burgorferi*, may persist in some patients for years."[13]

Despite the overwhelming evidence of the existence of chronic Lyme disease, Defendants do everything they can to prevent anyone from finding out that chronic Lyme disease exists and not all Lyme patients are cured by a short course of antibiotics. (Docket #186 ¶¶ 83-88 and 92-98). Defendants are still fraudulently concealing the existence of chronic Lyme disease. In this lawsuit, Defendants called chronic Lyme disease a "conspiracy theory".

Defendants report doctors to medical boards who treat chronic Lyme disease, deny insurance coverage for any treatment beyond short-term antibiotic treatment, and refuse to provide insurance coverage for long-term antibiotics. (Docket #186 ¶¶ 83-88 and 92-98). Defendants do this to conceal the existence of chronic Lyme disease. In fact, the current IDSA guidelines claim that chronic Lyme disease does not exist and there is no treatment failure for any Lyme patient who receives short-term antibiotics.[14] Defendants conceal the fact that treatment failure exists for every medical condition, especially those requiring treatment with antibiotics.[15] For example, the guideline for treating pneumonia is a short course of antibiotic treatment.[16] However, twenty-one percent (21%) of all pneumonia patients treated with a short course of antibiotic treatment experience treatment failure and require a longer course of antibiotic treatment.[17] Syphilis, which

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[13] *See* Exhibit "D".

[14] https://academic.oup.com/cid/article/43/9/1089/422463

[15] https://www.ncbi.nlm.nih.gov/pubmed/19596109

[16] https://www.medscape.org/viewarticle/536011

[17] https://www.medscape.com/viewarticle/880408#vp_1

like Lyme disease is also a bacterial spirochetal infection, is treated with a short course of antibiotics. However, Syphilis has a treatment failure rate of between fifteen and twenty-one percent (15% - 21%).[18] When there is treatment failure, Syphilis requires a longer course of antibiotic treatment.[19]

Defendants have perpetrated a fraud on the American people. Defendants claim there is no chronic Lyme disease, there is no treatment failure for Lyme disease after short-term antibiotics and claim that any doctor treating chronic Lyme disease should lose her license. The Defendants knew these claims were false and were were more concerned about saving money than saving lives. Plaintiffs properly plead fraudulent concealment and the statute of limitations on Plaintiffs' claims should be tolled. *In re Beef Indus. Antitrust Litig*., 600 F.2d at 1169; *Battle*, 493 F.2d at 52; *Klehr*, 521 U.S. at 188.

IV. Plaintiffs' Claims Are Not Time-Barred

Defendants make an identical statute of limitations argument that was already rejected by this Court: "it is evident that Plaintiffs have sufficiently alleged at least some acts that occurred within the statute of limitations that would preclude the Court from granting a blanket dismissal on the basis of Plaintiffs' claims being time barred." (Docket #114). The allegations of Plaintiffs' harm in Plaintiffs' Original Complaint is identical to the allegations of Plaintiffs' harm in Plaintiffs' Amended Complaint. (Docket #1 and Docket #186). The Court has already decided this issue. Therefore, it need not consider it again.

A defendant may not raise an affirmative defense on a motion to dismiss unless the defense appears "clearly on the face of the complaint." *Irwin v. Country Coach, Inc.*, 2006 WL 278267, at * 5 (E.D. Tex. Feb, 3, 2006) (citing *White v. Padgett*, 475 F.2d 79, 82 (5th Cir. 1973)); *Accord*

[18] https://www.medscape.com/viewarticle/473422

[19] https://www.cdc.gov/std/tg2015/syphilis.htm

Camp v. RCW & Co., 2007 WL 1306841, at * 9 (S.D. Tex. May 3, 2007). A limitations defense does not appear on the face of the complaint unless the complaint specifically states the date of the alleged wrong. *Irwin*, 2006 WL 278267, at * 4. In summary, "Plaintiffs are not required to plead around affirmative defenses." *Id*. at * 5. Nothing in the Federal Rules of Civil Procedure requires a plaintiff to predict and pre-emptively assert arguments against affirmative defense as part of their pleadings. *Jaso v. The Coca Cola Co.*, 435 F. App'x 346, 351 (5th Cir. 2011) (citing *Jones v. Block*, 549 U.S. 199, 216 (2007); *Davis v. Ind. State Police*, 541 F.3d 760 (7th Cir. 2008); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 466 (4th Cir. 2007)).

A limitation defense does not appear on the face of Plaintiffs' Amended Complaint since this is an ongoing conspiracy still happening today. Many of the Plaintiffs in this case were harmed by the Defendants in the last four (4) years. For example, Plaintiff Amy Hanneken was harmed by the Insurance Defendants in 2014, less than four years from the date this lawsuit was filed. (Docket #186 ¶ 136). Likewise, Rosetta Fuller was harmed in 2016, Adriana Moreira was harmed in 2016, and David Kocurek died as a result of Lyme disease in 2016. (Docket #186 ¶ 141). This defeats Defendants' statute of limitations argument.

Additionally, the statute of limitations is tolled because this is a continuing conspiracy. The four-year statute of limitations for an antitrust action begins to run when a defendant commits an act that injures a plaintiff. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc*., 677 F.2d 1045, 1051 (5th Cir. 1982). An antitrust cause of action can "accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy or, in the absence of an antitrust conspiracy, commits an act that by its very nature is a continuing antitrust violation." *Kaiser Aluminum*, 677 F.2d at 1051; *Accord Poster Exchange, Inc. v. Nat. Screen Serv*., 517 F.2d 117, 126 (5th Cir. 1975); *O'Dell v. General Motors Corp*., 122 F. Supp. 2d 721, 726 - 27 (E.D. Tex. 2000). As explained by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*:

> In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages cause by that act and . . . as to those damages, the statute of limitations runs from the commission of the act.

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971).

Likewise, Plaintiffs RICO claim is tolled by the Insurance Defendants' continuing conspiracy. *Kaiser Aluminum*, 677 F.2d at 1051. *Klehr*, 521 U.S. at 188 (recognizing RICO's statute of limitations runs from the most recent predicate act).

All 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. (Docket #186 ¶¶ 133-141). Therefore, the statute of limitations is tolled, and Plaintiffs' claims are not time-barred. *Astoria Entm't, Inc. v. Edwards*, 159 F. Supp. 2d 303, 316 (E.D. La. 2001), aff'd, 57 Fed. Appx. 211 (5th Cir. 2003).

V. Claims Against Allen Steere

Defendants argue that Plaintiffs' Amended Complaint fails to establish that Allen Steere was paid by the Insurance Defendants and he should be dismissed. Setting aside all the other allegations against Allen Steere that preclude dismissal, Defendants are incorrect. Plaintiffs' Amended Complaint sets forth that Allen Steere was one of the IDSA Panelists singled out by the Connecticut AG's office and sent a CID. (Docket #186 ¶¶ 51-52). As a result of Allen Steere's response to the CID, the Connecticut AG's office determined "several of the most powerful IDSA panelists" had undisclosed financial interests in insurance companies including 'consulting arrangements with insurance companies'". *Id.*

Plaintiffs' Amended Complaint also establishes Allen Steere's ongoing role in denying the existence of chronic Lyme disease even though he acknowledged the existence of chronic Lyme disease in 1994. (Docket #186 ¶ 83).

Plaintiffs' claims against Allen Steere should not be dismissed.

CONCLUSION

For the response set forth above, Plaintiffs respectfully request this Court deny Defendants' Motion to Dismiss and allow Plaintiffs' RICO claims to move forward under the relaxed pleadings standards.

Respectfully submitted,

SHRADER & ASSOCIATES, LLP

BY: */s/ Eugene Egdorf*
EUGENE EGDORF
State Bar No. 06479570
3900 Essex Lane, Suite 390,
Houston, TX 77027
(713) 782-0000 phone
(713) 571-9605 fax
E-mail: gene@shraderlaw.com

-and-

BY: */s/ Lance Lee*
LANCE LEE
Texas Bar No. 24004762
5511 Plaza Drive
Texarkana, Texas 75503
Telephone: 903.223.0276
Fax: 903.223.0210
Email: wlancelee@gmail.com

-and-

RUSTY HARDIN & ASSOCIATES, LLP

BY: */s/ Ryan Higgins*
RYAN HIGGINS
State Bar No. 24007362
1401 McKinney St., Suite 2250
Houston, Texas 77010
(713) 652-9000 phone
(713) 652-9800 fax
Email: rhiggins@rustyhardin.com

-and-

RUSTY HARDIN & ASSOCIATES, LLP

BY: */s/ Daniel R. Dutko*
DANIEL R. DUTKO
State Bar No. 24054206
1401 McKinney St., Suite 2250
Houston, Texas 77010
(713) 652-9000 phone
(713) 652-9800 fax
E-mail: ddutko@rustyhardin.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 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.

Ronald C. Low
PILLSBURY WINTHROP SHAW PITTMAN, LLP
401 Congress Avenue, Suite 1700
Austin, TX 78701
-and-
Alvin Dunn
Robert C.K. Boyd
PILLSBURY WINTHROP SHAW PITTMAN, LLP – WASHINGTON
1200 Seventeenth Street, NW
Washington, D.C. 20036

Attorneys for Defendants Infectious Diseases Society of America, Dr. Gary P. Wormser, Dr. Raymond J. Dattwyler, Dr. Eugene Shapiro, Dr. John J. Halperin, Dr. Leonard Sigal, and Dr. Allen Steere

Daniel E. Laytin
Sarah J. Donnell
KIRKLAND & ELLIS, LLP
300 N. LaSalle Street, Suite 2400
Chicago, IL 60654

Attorneys for Defendant Blue Cross and Blue Shield Association

Earl B. Austin
BAKER BOTTS, LLP
30 Rockefeller Plaza
New York, NY 10112-4498
-and-
John B. Lawrence
BAKER BOTTS, LLP
2001 Ross Avenue
Dallas, TX 75201-2980
-and-
Jeffrey R. Roeser
Jennifer H. Doan
HALTOM & DOAN
6500 Summerhill Road, Suite 100
Texarkana, TX 75505

Attorneys for Defendant Aetna, Inc.

Michael J. Tuteur
FOLEY & LARDNER, LLP - BOSTON
111 Huntington Avenue, Suite 2600
Boston, MA 02199
-and-
Eileen R. Ridley
FOLEY & LARDNER, LLP – SAN FRANCISCO
555 California Street, Suite 1700
San Francisco, CA 94104
-and-
Kimberly A. Klinsport
FOLEY & LARDNER – LOS ANGELES
555 South Flower St., Suite 3500
Los Angeles, CA 90071-2411
-and-
Thomas Heatherington
EDISON, MCDOWELL & HEATHERINGTON, LLP
1001 Fannin, Suite 2700
Houston, TX 77002

Attorneys for Defendant Anthem, Inc.

Martin J. Bishop
REED SMITH, LLP - CHICAGO
10 South Wacker Drive, Suite 4000
Chicago, IL 60606
-and-
Debra H. Dermody
William Sheridan
REED SMITH, LLP - PITTSBURGH
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222-2716
-and-
Peter J. Chassman
REED SMITH, LLP - HOUSTON
811 Main Street, Suite 1700
Houston, TX 77002

Attorneys for Defendant Blue Cross and Blue Shield of Texas

R. Brendan Fee
Amy M. Dudash
MORGAN LEWIS BOCKIUS, LLP - PHILADELPHIA
1701 Market Street
Philadelphia, PA 19103
-and-
Crystal Rose Axelrod
MORGAN LEWIS & BOCKIUS, LLP - HOUSTON
1000 Louisiana, Suite 4000
Houston, TX 77002
Attorneys for Defendant Cigna Corporation

Derek S. Davis
COOPER & SCULLY, P.C. – DALLAS
900 Jackson Street, Suite 100
Dallas, TX 75202-4452
-and-
Alan F. Law
COOPER & SCULLY, P.C. – SAN FRANCISCO
505 Sansome Street, Suite 1550
San Francisco, CA 94111
Attorneys for Defendant Kaiser Permanente, Inc.

Blayne R. Thompson
HOGAN LOVELLS US, LLP - HOUSTON
609 Main St., Suite 4200
Houston, TX 77002
-and-
Michael E. Jones
Earl G. Thames, Jr.
POTTER MINTON, PC
110 North College Avenue, Suite 500
Tyler, TX 75702
Attorneys for Defendant United Healthcare Services, Inc. and United Healthcare Group, Incorporated

/s/ Daniel R. Dutko
Daniel R. Dutko