

EXHIBIT B

1 P R O C E E D I N G S

2 THE COURT: Mrs. Schroeder, if you would,
3 call the case for us.

4 THE CLERK: Docket No. 5:17-cv-190, Lisa
5 Torrey, et al., vs. Infectious Diseases Society of
6 America, et al.

7 THE COURT: Announcements for the record.

8 MR. EGDORF: Gene Egdorf for the
9 plaintiffs, Your Honor, along with Daniel Dutko, Ryan
10 Higgins and Lance Lee.

11 THE COURT: Good afternoon.

12 MR. TUTEUR: Good afternoon, Your Honor.
13 Michael Tuteur from Foley & Lardner with my partner
14 Eileen Ridley representing Anthem.

15 MR. CHASSMAN: Hello, Your Honor. Pete
16 Chassman on behalf of HCSC.

17 MR. DUNN: Your Honor, Alvin Dunn from
18 Pillsbury Winthrop Shaw Pittman representing IDSA and
19 the defendant doctors.

20 MR. JONES: Your Honor, Mike Jones for
21 United Healthcare here with Mr. Ben Holt.

22 MS. DOAN: Your Honor, Jennifer Doan
23 together with Earl Austin and Randy Roeser. We
24 represent Aetna.

25 MS. DONNELL: Sarah Donnell for Blue

1 Shield Blue Shield Association.

2 MR. FEE: Brendan Fee from Morgan Lewis
3 for Cigna.

4 MR. LAW: Good afternoon, Your Honor.
5 Alan Law for Kaiser Permanente.

6 MR. TERRY: And Will Terry for HCSC.

7 THE COURT: Okay. Anyone else?

8 All right. Very well. Let me begin by
9 saying welcome to you-all and thank you for being here.
10 We are set for a status conference in this case and for
11 argument on a number of motions set forth in the order
12 setting the hearing, the plaintiffs' motion for
13 extension of time to replead, the plaintiffs' motion to
14 compel, the plaintiffs' motion to continue, defendants'
15 motion to compel deposition dates and damages
16 computations, a motion for independent medical
17 examination, and the defendant doctors' renewed motion
18 to dismiss for lack of personal jurisdiction.

19 I want to make a couple of preliminary
20 comments before we get to the motions. And let me begin
21 by saying our court reporter today is Christy Sievert.
22 And Christy probably doesn't know many of you-all, so I
23 would ask for purposes of a good, clean record that
24 you-all introduce yourselves before speaking.

25 I've spent a good deal of time in the last

1 few days reviewing the docket in this case and the
2 various filings that have been made by the parties in
3 the case subsequent to the scheduling conference that we
4 had 11 months ago, in addition to, obviously, the
5 motions set for hearing today.

6 At the risk of stating the obvious, it
7 seems like the cart has gotten a little bit into the
8 ditch in this case, and that may stem from a number of
9 reasons or causes. It could be the parties' discovery
10 disputes that have occurred. It may result from the
11 failure of the plaintiffs to file an amended complaint.
12 It could be the disagreement about the four-year period
13 that was discussed at the scheduling conference with
14 respect to when the -- for purposes of discovery.

15 And I acknowledge it could be the Court's
16 delay in getting the ruling out on the motions to
17 dismiss. As I said, the scheduling conference was in
18 April. We did set very quickly the hearing on the
19 motion to dismiss. All of that got briefed in
20 relatively quick fashion, and we had the hearing fairly
21 quickly. But it was some months later before we got the
22 Court's order on that motion to dismiss out. So I'm the
23 first to acknowledge that the Court may have been
24 somewhat responsible for the case getting a little bit
25 into the ditch.

1 What I would like to do is ask each side
2 to give me a little overview about how we got where we
3 are and where we're going. I would like you to tell me
4 what discovery has been sought from the other side, what
5 has been provided by the other side, what discovery has
6 been sought from you, and what you have provided. And I
7 would like for you to be as specific about that as you
8 possibly can.

9 I want to know from the plaintiffs how
10 long it will take to get an amended complaint on file.
11 I know that a motion to continue has been filed by the
12 plaintiffs. I'm interested in the plaintiffs' thoughts
13 and the defendants' thoughts as to when the case
14 reasonably can be ready, assuming we get to that stage.

15 And I don't have any preconceived ideas
16 about how long you-all want to speak. I'm happy to hear
17 whoever on the plaintiffs' side wants to speak and one
18 or more or all of the defendants. I am well familiar
19 with the advocacy skills of a lot of lawyers in this
20 courtroom. I am not looking for advocacy. I am looking
21 for a neutral presentation about how we got where we are
22 and where we're going. All right. There will be plenty
23 of time when we get to the motions. So I'm looking for
24 a fairly straightforward neutral presentation about
25 what's been sought, what you've provided, what you

1 believe the other side owes you, and be as specific as
2 you can.

3 Whoever wants to speak for the plaintiffs.

4 MR. EGDORF: If it may, Your Honor, Gene
5 Egdorf. If it's all right with you, Your Honor, I'll
6 begin, and then I'll probably turn it over to Mr. Dutko
7 because he can tell you a little bit more about the
8 specifics. But since I just know enough to be
9 dangerous, perhaps I can probably be the most neutral
10 person from our side.

11 I certainly would agree with the Court's
12 characterization that we found ourself in the -- in the
13 ditch. And, you know, at least from our perspective,
14 Your Honor, I think in terms of what we've asked for,
15 you know, it's set forth in the motion to compel that I
16 know you reviewed. And we're primarily stuck on this
17 four-year issue that has caused the problem, and -- you
18 know, and I think, you know, I, somewhat on our side,
19 take the blame for that, because I know it's been almost
20 a year. But if the Court recalls, the defendants said:
21 Hey, we think you're going to dismiss this case, we
22 shouldn't have to go back and look at 40 years' worth of
23 stuff. And so I proposed the compromise of let's just
24 do it four years for now subject to the ruling on the
25 motion to dismiss.

1 THE COURT: I reviewed the transcript
2 yesterday, Mr. Egdorf. You don't need to remind me.

3 MR. EGDORF: So we have been pushing on
4 that four-year issue quite a bit, and, obviously, the
5 defendants have disagreed. They say there should be a
6 different order. And so that's kind of caused us a
7 problem because we see this a little bit like tobacco or
8 asbestos, that, you know, the crime goes back a whole
9 lot of years; the -- the result of it happened later.
10 That's why we need to go back. Just like in tobacco,
11 they had to go to the '50s and '60s and '70s. We think
12 we need to go back into the 1980s. And we think if we
13 have that information and had gotten that information,
14 we would have already been able to replead and all those
15 things.

16 I think the -- therefore, I think the
17 ditch analogy that you used really stems from what are
18 we going to be allowed to get from the defendant and not
19 get. If we get -- if they have to go back more than
20 four years, depending how long that takes them, I think
21 we can file an amended complaint within 30 days, at the
22 most.

23 THE COURT: From today?

24 MR. EGDORF: From when -- 30 days from
25 whenever we get the documents that we're seeking that

1 you might allow us to have, the documents we think we
2 should have had a long time ago.

3 And so I don't know what the volume is
4 going to be of that production. I don't know,
5 obviously, if you're going to order that or not. You
6 know, I think -- I think, obviously, without getting
7 those documents it's going to be really difficult to
8 replead because we're going to be stuck with the
9 information that we have been provided to date, and
10 that's where that comes from.

11 THE COURT: Can you tell me what you've
12 been provided to date, or do you want to rely on
13 Mr. Dutko?

14 MR. EGDORF: I probably ought to let
15 Mr. Dutko talk about that in more detail about what
16 we've gotten. I'll just say, generally, we haven't
17 gotten anything back more than the four years. And so
18 that's the biggest impediment. But he can talk about
19 the specifics.

20 THE COURT: Okay.

21 MR. DUTKO: Good morning, Your Honor.
22 Good afternoon. Daniel Dutko, D-u-t-k-o, on behalf of
23 the plaintiffs. I will leave the advocacy for now, and
24 I'll just discuss what has been produced and what we
25 need produced.

1 I will tell you on behalf of the
2 plaintiffs we have gone out of our way to produce
3 medical records going back to childhood from when some
4 of these people contracted Lyme disease. We have
5 produced more than 4,000 pages of medical records
6 throughout the course of the discovery. We continue to
7 supplement as we find new documents or new documents are
8 acquired. We provided authorizations to all the
9 defendants, along with a list of every single doctor
10 that any of our clients could remember so that they
11 could use those authorizations -- and they have been --
12 to subpoena documents.

13 We provided all of the documents we could
14 find on our own that are referenced in the complaints.
15 For example, deposition transcripts, we've, I believe,
16 produced three separate deposition transcripts of
17 defendant doctors. We've produced discovery related to
18 testimony in front of Congress. We've produced any sort
19 of Lyme policies that we could find.

20 We have gone out of our way, Your Honor,
21 just to try to produce everything we could not limited
22 to any time frame at all. Any documents that our
23 clients have and that we have seen, we have produced.
24 We have not withheld any documentation.

25 Now, the question as to what we were

1 asking and what they have sent, to our eyes, Your Honor,
2 they have sent little more than documentation that we
3 could find on the internet. They've sent their Lyme
4 policies. They've sent the updated Lyme policies.
5 They've sent correspondence between organizations within
6 the insurance companies saying this is our Lyme policy,
7 let's update the Lyme policy.

8 What they did not send and what they
9 refused to send, even within the four years, are the
10 documents set forth in the letters that we sent out
11 during the discovery phase, September 5th of 2018. And
12 this includes very important documents such as
13 communications between the defendants related to Lyme
14 disease -- as you can imagine, that is very important
15 considering we have an antitrust standard setting
16 case -- communications between the defendants and the
17 medical boards. And I will tell you on that note --

18 THE COURT: Yeah, and what was -- so what
19 was the basis of not producing that first group of
20 documents?

21 MR. DUTKO: Well, that's the confusing
22 part, Your Honor, because what happened was they didn't
23 produce them. We sent the letter saying here's our
24 requests for production outlining specific documents we
25 needed. They waited 30 days, and then they produced --

1 they sent us a letter saying that this court doesn't
2 have written discovery requests for production, so we
3 don't have to produce that. And then when we called
4 them out on that, some of them started sending letters
5 saying, well, we couldn't find them anyway.

6 But to my eye, Your Honor, with the four
7 years issue, they have provided absolutely no basis for
8 why they won't produce those documents. And just so the
9 Court is aware so the Court doesn't think we have been
10 sitting on our hands, we have subpoenaed third-party
11 subpoenas to the medical boards of the states in which
12 we believe the defendants reported doctors. Almost all
13 of them have told us that there are statutes within the
14 states which are privacy statutes which they will not be
15 able to provide us.

16 We have Wisconsin, and a few other states
17 provided us some documentation. But for the most part,
18 the documents we need to establish that they reported
19 doctors to the medical boards, because we know they
20 have, is -- are documents in their possession.

21 And so even though we know they're in
22 their possession, they won't give them to us. We have
23 tried to third-party subpoena those documents from
24 medical boards, but as you can imagine, medical boards
25 being state governmental entities, they have tried to

1 quash those and have refused to produce them.

2 Your Honor, we have also sought
3 information for people who have been denied coverage for
4 Lyme disease. And if I could give you an example, Your
5 Honor, of what's been going on -- and I'm not -- I'm
6 not -- this isn't advocacy. This is pure fact. For
7 example, I'll read you Cigna's -- we sent Cigna an
8 interrogatory, and there were requests for production
9 that are nearly identical, and we asked, "Every person
10 who was denied insurance coverage for you for treatment
11 of Lyme disease." Their response was, subject to pages
12 and pages of objections, of course, "Cigna responds that
13 to the best of its knowledge at this time, Cigna did not
14 deny insurance coverage for treatment of Lyme disease to
15 any plaintiff in this case."

16 Now, as you can hear, there's a
17 disconnect. We didn't ask for denial of coverage of the
18 plaintiffs. We asked for denial of insurance coverage
19 of anybody so we can determine the people they are
20 improperly denying insurance coverage after 28 days of
21 Lyme treatment. And that goes to the heart of our case.

22 So even within the four-year window, they
23 won't even answer a question as to people they have
24 denied insurance coverage for for Lyme disease. None of
25 them would.

1 And so I'm not -- there are many lawyers
2 on this side. And as the Court is aware, you read all
3 of the documents. At any point did the Court see any
4 reference to specific documents they produced that
5 complied with our requests? You would think if they had
6 those documents, they would say to the Court, the first
7 thing they would say is: We've produced these
8 documents, here they are. Instead, they just make
9 statements -- and, I'm sorry, I'm getting into advocacy,
10 but they just --

11 THE COURT: I think you are a little bit.

12 MR. DUTKO: Okay. Well, I'll just --

13 THE COURT: Let me ask you this: Have
14 you ever sent any requests under the e-discovery order?

15 MR. DUTKO: You mean for -- you mean for
16 e-mails?

17 THE COURT: Yes.

18 MR. DUTKO: No, because by the time we
19 got to the point where we were going to send e-discovery
20 requests, we realized that not only had they not
21 produced anything, we already filed our motion to
22 compel, and they refused to produce anything beyond four
23 years. So until we get a ruling on the four years, the
24 e-discovery makes no sense. If they're not giving us
25 any documents, they're not going to give us any

1 e-documents.

2 THE COURT: Yeah, but, I mean -- okay.

3 So here we are 11 months after the scheduling
4 conference, and you haven't submitted an e-discovery
5 request? Is that what you're telling me?

6 MR. DUTKO: Your Honor, we --

7 THE COURT: Yes or no?

8 MR. DUTKO: That is correct.

9 THE COURT: Okay.

10 MR. DUTKO: And I completely own that
11 fact. But the reason why that is so is because we would
12 be in front of this court on an e-discovery motion to
13 compel. We know that the defendants have attempted in
14 the last five years, five to seven years to try to clean
15 up their act and to try to avoid people appealing Lyme
16 treatment. There is nothing in the last four years that
17 leads us to the conspiracy that is going on. So for us
18 to send e-discovery that is limited to four years makes
19 no sense. We need a ruling on the Court's four-year
20 ruling before we can send e-discovery.

21 And so we filed our motion to compel on
22 the four years, knowing that if we got a ruling on that,
23 then we could send e-discovery. But until then, it
24 would just be a futile effort.

25 They did file a motion to compel our

1 e-mails, but I believe we have worked that out.

2 THE COURT: Right. Yeah, I understand
3 y'all had resolved that.

4 MR. DUTKO: Yes, Your Honor.

5 THE COURT: Okay. Tell me a little bit
6 about the deposition issue.

7 MR. DUTKO: Your Honor, the deposition
8 issue is -- and I'm -- through advocacy or just straight
9 up?

10 THE COURT: Straight up.

11 MR. DUTKO: All right. Straight up, the
12 deposition issue is confusing because we have no problem
13 presenting our clients for deposition. They sent a
14 letter saying we want depositions within this time
15 frame, December to May. They sent a follow-up letter I
16 think a week and a half later, and said you didn't give
17 it to us. And then they noticed depos of our clients.

18 And in the letter when they noticed the
19 depos, they said we can work with you on dates. We
20 immediately responded and said these dates don't work.
21 Will you work with us? We will provide you dates by
22 December, I think, 10th, within your time frame, within
23 the time frame you requested, that we will provide you
24 all of the plaintiffs' depositions within your time
25 frame so you can depose them.

1 They immediately responded back and said,
2 no, we have to have the depositions immediately. We
3 have to have them on our time frame, not the time frame
4 we gave you just a few days ago.

5 And so we're not trying to prevent them
6 from taking plaintiffs' depositions. As a matter of
7 fact, we want them to take plaintiffs' depositions.
8 There's no reason not to. We just feel like the only
9 reason they're making that argument is so that they can
10 come in front of the Court and say we haven't presented
11 them for deposition.

12 But as the Court can see from the
13 briefing, we sent them a letter saying we will send you
14 dates. They said no.

15 And then the depositions they noticed were
16 for one on the East Coast, the next day on the West
17 Coast, and then the next day in Minnesota. It was
18 impossible for us to comply with them, and they knew
19 that. It's basically -- I'm advocating. But it's
20 basically gamesmanship, to be honest with you, Your
21 Honor, because we're willing to provide those dates.

22 THE COURT: What about there was some --
23 I read in the filings there was some refusal to make the
24 witnesses available unless there was an agreement as to
25 the four years.

1 MR. EGDORF: If I may, Your Honor, there
2 were actually -- there were two issues that we raised.
3 One was about the four years, and I'll come back to that
4 in just a second.

5 The primary issue we raised is we give --
6 we were going to present these folks. They were saying
7 they still needed more documents, and we're getting
8 documents. It was clear that they were trying to take
9 these folks more than one time. And so the reason the
10 depositions are not going forward at the time,
11 primarily, is because we said if you're not going to
12 agree that you only get one stab at them, we're not
13 going to present them. And it was only recently that
14 they agreed and said, all right, we'll do it one time,
15 and we have to get leave of court to do it a second
16 time. And that was just part of the meet-and-confer
17 process we just had. So that was one issue.

18 The second issue that got raised was kind
19 of a goose/gander, if you will, of if we only get four
20 years of discovery, then why do you only -- why should
21 you get more than four years of discovery. We don't
22 think you should be asking questions outside the four
23 years.

24 We knew that was something that was going
25 to be coming up today, and so that's kind of where we

1 are with that issue, is we think whatever rule we have
2 for discovery, it should go both ways.

3 THE COURT: All right. Anything else on
4 behalf of the plaintiffs?

5 MR. DUTKO: Just to address those issues,
6 that's all we have. I mean, we obviously have some
7 arguments on the motions.

8 THE COURT: Oh, yeah, certainly. No,
9 we'll get to that.

10 All right. Who wants to be heard from?
11 Mr. Jones.

12 MR. JONES: Yes, Your Honor, if it please
13 the Court.

14 My name is Mike Jones, I represent United
15 Healthcare in this case.

16 Your Honor, I'll try to address the
17 questions you asked and try to do that, as hard as it
18 may be, without advocacy.

19 With regard to where we stand on the
20 discovery that we have sought and received from the
21 plaintiffs, we have sought the depositions of the
22 plaintiffs. The Court then asked, well, how did that
23 break down? I think it broke down over two items that
24 could not be agreed to ahead of the deposition.

25 The first item was that the plaintiffs

1 demanded that the defendants agreed that no subsequent
2 depositions could be taken. Now, the agreement that was
3 sought was more than just, well, if we need a subsequent
4 deposition, we'll go to the Court, we'll ask for the
5 Court's permission to do that. It was an agreement that
6 we couldn't even do that, which the defendants objected
7 to.

8 The second part of it really dealt with
9 the four-year period, because they said that if we took
10 the depositions, we had to agree before the depositions
11 started that we would not ask any questions about
12 anything that went on prior to the four years. Not to
13 argue the point, but just to say our position was some
14 of these people may have been diagnosed and had Lyme
15 disease before four years, it was a waste of time not to
16 do that. It was due to those reasons that the
17 depositions did not move forward and negotiations did
18 not continue.

19 We have sought e-mail discovery. We have
20 sought document discovery. And, in fact, are getting
21 some, but we have put out discovery to get production of
22 documents from treating physicians. We have sought
23 damages discovery, but we have received no damages
24 discovery. We have not received any disclosures
25 required by the rules with regard to any type of

1 disclosures with regard to damages theories, damages
2 amounts or anything like that.

3 We have received very little, even factual
4 basis for that. For example, we have sought
5 out-of-pocket travel expenses that might be related to
6 damages, and only three plaintiffs have produced any
7 documents on that subject. We have sought information
8 on out-of-pocket medical expenses, and there are ten
9 plaintiffs that have produced no documents on that
10 subject. We have sought information concerning
11 out-of-pocket expenses related to seeking medical
12 treatment. No plaintiff produced any additional
13 documents on that.

14 And we have sought documents on lost
15 wages, and as basic as -- as best we can tell, for the
16 purposes of just the facts, Your Honor, we have not been
17 able to locate any documents whatsoever on that subject.

18 So with regard to damages types of
19 discovery, we clearly have sought that, and clearly, as
20 we can see, other than the specifics I just gave you,
21 there's been no discussion of information on that.

22 Obviously, there's other discovery that
23 needs to be done. We have -- we have tried, but not
24 completed it all, seeking depositions of treating
25 physicians. At this point, we received no expert

1 reports whatever from the other side. At this point, we
2 have not finished the document discovery from the
3 treating physicians. And of course, as the Court well
4 knows, you have pending before you our seeking IMEs with
5 regard to these plaintiffs.

6 That would be my bare factual rendition of
7 where we stand on the discovery that we sought and what
8 we have received.

9 Now, with regard to what we have provided,
10 Your Honor, we have provided -- and I think I'll make
11 this as a factual statement on behalf of all the
12 defendants. Keep in mind, this is based upon -- this is
13 not a factual representation I can make to the Court;
14 this is a hearsay statement that I understand from
15 having talked to the defendants. And that is the
16 defendants think they have gone back and produced all
17 the discovery documents for the four-year period.

18 Now, what I can do to add a little bit of
19 detail to this, at least for my client, is give you more
20 detail in that regard and tell you how my client has
21 looked at its obligation.

22 And if it could, Your Honor, may I
23 approach the Court.

24 THE COURT: Yes, please.

25 MR. JONES: Being somewhat old-fashioned,

1 I'll just hand out -- I'll just provide this handout and
2 tell you what we -- with regard to exactly -- again,
3 just merely factual -- what has United Healthcare done
4 as far as affirmative discovery? We have provided
5 initial disclosures in this case which we have served on
6 June 28, 2018. We provided additional disclosures on
7 July 13, 2018, which included 748 pages of documents.
8 It included claims reports, policy, policy committee
9 meeting minutes, and related documents. We further
10 complied with local Rule CV-34(c) by reference to
11 specific Bates numbers.

12 We also responded to the plaintiffs'
13 common interrogatories, numbers 1 through 10. We did
14 that on October 1, 2018. We provided complete answers,
15 including a report of a revocation of a doctor's
16 clinical privileges due to inappropriate treatment and
17 diagnosis. A statement that United responded to
18 requests for information from the Maine Bureau of
19 Insurance regarding insurance coverage of Lyme disease,
20 and a statement that United found no evidence of
21 payments to defendants doctors or communications with
22 defendants related to Lyme.

23 And then further, we provided rebuttal
24 expert reports on March 1, 2019, as set forth there.
25 Now, I want to be totally transparent with the Court

1 about our expert reports. Obviously, these are rebuttal
2 expert reports that were rebutting reports that had not
3 been given to us. So that severely hampers what you can
4 do as far as expert report. But in compliance with the
5 Court orders, we tried to do what we reasonably could
6 do, and that's the responses in detail of United
7 Healthcare. I would have to let other counsel get into
8 that kind of detail with what -- with regard to what
9 their clients have done.

10 Having said that, I do just reiterate that
11 I believe, and I'll give anybody an opportunity to jump
12 up if they would like to, I believe they would all agree
13 with me that with regard to the four-year period, the
14 defendants think they have complied.

15 MR. TUTEUR: And may I say -- Michael
16 Tuteur for Anthem. Very briefly.

17 I agree entirely with Mr. Jones. I did
18 just want to say that, you know, a fundamental issue in
19 this case is the allegation that these defendants paid
20 large sums of money -- that's a statement from the
21 complaint -- to the IDSA and the IDSA doctors, that they
22 communicated amongst themselves, and that they reported
23 these doctors to the medical boards. And I can say on
24 behalf of Anthem, that we looked for precisely those
25 things, whether any payments went to any of the

1 defendant doctor -- plaintiff -- defendant doctors,
2 excuse me, or to the IDSA during relevant period.

3 THE COURT: The four years.

4 MR. TUTEUR: The four-year period. There
5 is none. So they may be unhappy as to what they
6 received, but there is none.

7 We looked for reports to medical boards,
8 which they say we know exist. To the best of my
9 recollection, if there's one, I think that may be it.
10 There just is no evidence of the allegations that the
11 plaintiffs have been making here that they say we know
12 to be true. We've looked; it doesn't exist.

13 The communications between and among the
14 insurance companies about the treatment of Lyme disease
15 and the decision to deny for medical reasons long-term
16 antibiotic therapy -- which all of these insurers
17 believe is not medically necessary, and is, in fact,
18 dangerous -- we've looked for those documents. Not an
19 e-mail because they never promulgated an e-mail request.
20 But we looked for non-e-mail communications among and
21 between the defendants on behalf of Anthem; they do not
22 exist. So I can state --

23 THE COURT: So what would that be?
24 Correspondence?

25 MR. TUTEUR: Correspondence or, you know,

1 minutes from some kind of a meeting or -- I mean, any
2 kind of non-e-mail communication that set out policies
3 that were communicated amongst one another, because,
4 again, as they say, it's a conspiracy case, so that
5 these communications, some kind of agreement would be
6 needed.

7 So we have looked for the documents that
8 they say we haven't produced. Most importantly, these
9 payments, because without the payments -- and I'm
10 getting into advocacy here, and I apologize. But
11 without the payments, there's no explanation as to why
12 the IDSA doctors would do what it is alleged that they
13 have done. But there aren't any.

14 THE COURT: How many documents did your
15 client produce?

16 MR. TUTEUR: I think -- we produced I
17 think about 1,000, 2,000 pages.

18 THE COURT: And what was that primarily
19 composed of?

20 MR. TUTEUR: So, again, it relates to --
21 they're correct, we did produce Lyme disease policies,
22 but we also produced the minutes that established how
23 the policies were created. I think we have some --
24 well, we looked for documents relating to the treatment
25 of any individual plaintiff. And any that existed,

1 we've produced. There are only a few plaintiffs who
2 have any Anthem coverage at all. So we produced those
3 as well.

4 And I'm sorry to say, I don't have a
5 detailed listing of what it is. But we didn't withhold
6 anything relating to the individual plaintiffs. We
7 didn't withhold anything, although they didn't exist, on
8 payments or communications or any of these other -- the
9 reporting to medical boards. We didn't -- we didn't
10 withhold any of that or object to any of that, Your
11 Honor.

12 MR. DUTKO: May I address that?

13 THE COURT: You may.

14 MR. DUTKO: Your Honor, as you recall
15 from the motion to dismiss phase, the timeline of events
16 that occurred in this case that we set forth in our
17 complaint as the Court put in the order, is that in the
18 early 1990s, the insurance -- these insurance defendants
19 decided that they were tired of paying so much money for
20 the treatment of Lyme disease. We have the deposition
21 transcript of a vice president from one of those
22 insurance defendants setting forth how the insurance
23 companies decided that they wanted to cut antibiotics
24 because they were too expensive. And because of that,
25 they created this arbitrary guideline of 28 days.

1 In 1992, by 1992, all of these defendants
2 had adopted that policy. By the mid '90s, they began to
3 pay a group of researchers, that turned out to be the
4 IDSA panelists, large sums of money so they could
5 enforce those guidelines. By 2000, those researchers
6 then created the IDSA guidelines. And by 2006, they
7 used those guidelines again.

8 There is nothing in our complaint related
9 to allegations of conspiracy within the last four years.
10 They know that. This is like tobacco saying, guess
11 what? We looked for documents for the last four years,
12 and we can't find any documents saying that we know
13 nicotine is bad. Well, because there were not documents
14 for four years. So it's disingenuous for them to stand
15 up here --

16 THE COURT: I get the point.

17 MR. DUTKO: Okay. And as for the
18 documents that they did produce, Your Honor, if the
19 Court were to look at them, when they have the documents
20 related to pages and pages, as they say, of documents,
21 what they did was they had the Lyme policy, and then
22 they had the studies that were relied on created by the
23 IDSA doctors behind that. So there's hundreds of pages
24 of studies that you could find on the internet, that we
25 all have.

1 They identified in this thing that was
2 handed to us a moment ago claims reports, policies,
3 policy committee meetings minutes and related documents.
4 You know what we don't see in there is we don't see
5 anyone that was denied Lyme coverage. We don't see
6 anyone that appealed Lyme coverage. We don't see any
7 documents related to the treatment of Lyme disease, or
8 we don't see any documents in there related to cutting
9 off people after 28 days. The documents they produced
10 are exactly the documents they wanted to produce because
11 they know those documents are documents anyone can find
12 on the internet.

13 And so while we have gone out of our way
14 to produce medical records relating -- going back to
15 childhood, they then come in here and say we've produced
16 748 pages of documents, the majority of which are
17 documents that we could look for, I could search right
18 now on the internet and find them. And so even with the
19 four years, they still haven't complied with this
20 court's order.

21 MR. JONES: Your Honor, moving forward to
22 your next question, which was, I believe, how long will
23 it take to get this case ready for trial, where do we
24 stand in that regard, which I think was the Court's
25 final question. Obviously, there are things that need

1 to be done before that can happen. And on behalf of the
2 defendants, we thank Your Honor for this status
3 conference so that we can discuss them.

4 I would apologize to the Court. I know
5 our briefing on the motion to continuance may be a
6 little less than clear. That's because sometimes our
7 position on this issue is a little less than clear with
8 all the defendants. I think I can tell you now that for
9 a clear majority, with the exception of maybe one or two
10 defendants, our position is this: That there's going to
11 have to be a reset, and that probably the fastest we
12 could get it ready to try is by October, something like
13 that. And I think that's the majority of the
14 defendants' positions. There are one or two that I
15 don't think would agree with that statement.

16 THE COURT: That's actually what the
17 plaintiffs had asked for, is it not?

18 MR. DUTKO: Yes, Your Honor.

19 MR. JONES: So that's the response from
20 the majority of the defendants to that question.

21 THE COURT: Thank you, Mr. Jones.

22 MR. JONES: With regard to the things --

23 MR. EGDORF: If I may make one comment on
24 that.

25 THE COURT: Certainly.

1 MR. EGDORF: We did ask for October, of
2 course. That's what we filed a couple of months ago,
3 and we were hoping we were going to get some guidance on
4 getting these documents. So I don't know if October
5 still necessarily works or not. Again, it's going to
6 kind of, in part, depend on how the Court sees ruling on
7 all these other discovery issues, but certainly October
8 is what we originally asked for a couple of months ago.

9 THE COURT: Thank you.

10 MR. EGDORF: You're very welcome.

11 MR. JONES: With regard to the answer to
12 that question, though, I would, again, state without
13 getting into argument about it, that I think there are
14 some issues that the Court is going to give us direction
15 on today that very much do play a role in this. The
16 first one the Court has already brought up, when are we
17 going to get an amended complaint.

18 The second one would be, you know, the
19 dispositive motion issue. You know, another court hears
20 this in every case, but in this particular case, there
21 is a great need for a dispositive motion practice. We
22 would like it as early as we could. It will have an
23 effect on the trial and the trial date.

24 THE COURT: Are you talking about summary
25 judgment, or are you talking --

1 MR. JONES: Summary judgment. I know the
2 Court is going to hear the motion to dismiss with regard
3 to certain defendants, but that's what I'm speaking of,
4 Your Honor.

5 THE COURT: And my view of that,
6 Mr. Jones, is like any other case, as soon as discovery
7 is closed and the defendant can get its summary judgment
8 motion on file, you know, we'll get it teed up and ruled
9 on. I mean, as a practical matter, I regret to say that
10 often, just because of other pressing business, we don't
11 get to that as quickly as I wish we did. That is a fact
12 of life for us. It's not out of design or intention;
13 it's just a fact of life. We often do not get to them
14 until, you know, relatively shortly before our pretrial
15 conference. And I do sometimes a little better than
16 that, but I have struggled with that for four years.

17 MR. JONES: I understand, Your Honor. I
18 also understand the reasons for that, and I apologize
19 for the request.

20 THE COURT: No, I think it's perfectly
21 reasonable. All I'm saying is, as soon as discovery
22 closes, get it on file, let's don't ask for extensions
23 of time, let's -- you know, let's get it teed up, and
24 I'll get it ruled on.

25 MR. JONES: And then, finally, Your

1 Honor --

2 THE COURT: And it certainly may narrow
3 the case even if it only does it on the eve of trial.

4 MR. JONES: I understand.

5 And then, finally Your Honor, as you go
6 through the motion practice today, there are two huge
7 issues that the Court is going to have to address.
8 Again, I'm not going to argue them. I would star them
9 for you. And that is, what do we do about the time
10 period of discovery? What's really relevant? What do
11 we really -- how far do we really need to go back to
12 bring forward evidence that's going to really be likely
13 to lead to something that would be admissible in a
14 courtroom and that the jury would need to make a
15 decision?

16 THE COURT: At the end of the day, the
17 plaintiff should be allowed an opportunity to try to
18 prove its case, Mr. Jones. You do agree with that,
19 right?

20 MR. JONES: Certainly.

21 THE COURT: So how does the Court go
22 about managing that process? We do have claims that
23 relate back many decades. And, you know, I know you are
24 not satisfied with the complaint as it stands at this
25 point. I am not satisfied with the complaint as it

1 stands at this point. I am not happy that the
2 plaintiffs have not gotten their amended complaint on
3 file. The dragging of time that has occurred in
4 11 months while that has been left unattended has
5 created major obstacles.

6 At the same time, documents are going to
7 have to be produced going back beyond four years. Now,
8 Ms. Doan, you were the one at the scheduling conference.
9 If you want to speak to this, who argued vociferously as
10 I recall, for a four-year pause, so to speak, to let us
11 get through the dispositive motion hearing and a ruling
12 on that, and then, you know, we'll figure out where we
13 go from there. Would you like to address that?

14 MS. DOAN: I'm happy to, Your Honor. I
15 know that Mr. Tuteur is going to address it in more
16 detail. I think that the four years, Your Honor, at the
17 time was because that was the statute of limitations on
18 these claims. And so if they discover something from
19 50 years ago, say, those statutes have all run.

20 THE COURT: No, I'm talking about the
21 compromise agreement that was discussed at the
22 scheduling conference. I reviewed the transcript
23 yesterday, Ms. Doan. Have you looked at it?

24 MS. DOAN: I have not, Your Honor.

25 THE COURT: Well, I commend it to you.

1 My reading of that transcript was you made several
2 requests that we have a period of time while the
3 discovery -- while the dispositive motions were getting
4 fully briefed, and that the defendants would not have to
5 go back 20 or 15 or 30 years, or whatever was going to
6 be necessary to search for documents, and that a
7 reasonable period of time associated with the statute of
8 limitations of four years was acceptable.

9 MS. DOAN: That's what I recall, Your
10 Honor.

11 THE COURT: Yeah. And the plaintiffs
12 agreed to that.

13 MS. DOAN: And we did that, Your Honor.

14 THE COURT: But it's my understanding
15 that a number of defendants have taken the position that
16 the Court has ruled that only four years of documents
17 should be produced.

18 MS. DOAN: So I believe for Aetna, Your
19 Honor, we have produced even more than that. I know
20 that Mr. Austin has the details on that specifically,
21 but I believe we have produced correspondence.

22 THE COURT: You have -- you have not
23 taken the position that only four years of documents
24 need to be searched for?

25 MS. DOAN: That has not been our position

1 on the meet and confers, Your Honor, with the
2 plaintiffs. I think the position was how much more
3 would you like to see. I mean, we have produced a
4 number of documents in this case.

5 THE COURT: You have searched back beyond
6 four years?

7 MS. DOAN: I believe that Aetna has.
8 Mr. Austin has got the details on that, Your Honor, but
9 I believe that we have searched -- I believe we
10 produced -- our client has produced some documents
11 beyond --

12 THE COURT: I just want to make sure I
13 understand, Ms. Doan. You're not taking the position
14 today that you believe only four years of documents
15 should be -- should be produced?

16 MS. DOAN: So just to make sure we're --
17 I know we have different positions, Your Honor, at the
18 table. I think for Aetna we have produced some
19 documents beyond four years, is my understanding, Your
20 Honor. But for the group as a whole, since that was the
21 statute of limitations, that is why we offered the four
22 years to see if there was even anything in that four
23 years.

24 So, for example, I think our -- I can't
25 remember exactly what we said -- I don't -- the

1 transcript, I have not read before today. But if there
2 was something 50 years ago that somebody said, they
3 can't recover on it anyway, I think, was the issue here.
4 So that would be fruitless --

5 THE COURT: But wouldn't that be an
6 argument for another day?

7 MS. DOAN: It might be an argument for
8 another day, Your Honor. It's just extremely expensive
9 to have years and years of -- some companies --

10 THE COURT: Let's come up with some
11 reasonable compromise.

12 MS. DOAN: And we did offer that to them
13 on the meet and confer before we came in here, Your
14 Honor. I mean, it's --

15 THE COURT: What did you offer?

16 MS. DOAN: I believe we asked them if
17 they would have wanted to have five years, six years,
18 seven years, what was the limit here. Did you want to
19 go back to 2010. That would have been acceptable. And
20 there was no movement at all on the plaintiffs' side. I
21 mean, they wanted to go back decades. And that is a lot
22 of money and time for the issues here, Your Honor.

23 THE COURT: And I totally understand
24 that, and I am completely open to resolving that issue.

25 MS. DOAN: Yeah.

1 THE COURT: I mean, I agree with you. I
2 mean, I think we -- you know, we have to be sensitive to
3 the needs of the case and whether, you know, the
4 discovery requests are proportionate to that. So I'm
5 sensitive to that, but that's a discussion that's going
6 to have to be had.

7 MS. DOAN: We did try to have that on the
8 meet and confer with the other side, Your Honor, and we
9 did offer, I think, all the way back to -- I can't
10 remember if it was seven years or we offered all the way
11 back to 2010.

12 MR. LEE: It was six years, Your Honor.

13 MS. DOAN: I mean, we can offer all the
14 way back to 2010, Your Honor, if that would resolve the
15 issue. I know that they're -- I don't know that certain
16 clients' companies would have anything more than what
17 they've already produced. But that's definitely
18 something that the -- that I believe Mr. Tuteur is going
19 to address that the parties could do. We're not
20 sticking it four years, pound sand, that's what the
21 Court ruled. I don't think we've ever said --

22 THE COURT: That's been represented to
23 me.

24 MS. DOAN: Aetna has never said that,
25 Your Honor.

1 THE COURT: That's fair enough. Thank
2 you.

3 MS. DOAN: Yes, I know we have not.

4 MR. TUTEUR: Your Honor, I do want to be
5 clear, and I think we took the Court at its word in the
6 discovery order that said that discovery for the
7 defendants would be limited to the four years. And
8 while we have looked a little ways back -- and this is
9 Anthem now -- we have not produced documents that are
10 more than four years because the Court's order said
11 quite expressly four years.

12 That said, we completely agree with what
13 Ms. Doan just said, that there can be a reasonable
14 period beyond the statute of limitations. I think where
15 the challenge has been is that so far in the meet and
16 confers and in the papers, the plaintiffs have said we
17 have to go back to 1992. This court -- and I'm getting
18 into advocacy and I'm going to --

19 THE COURT: A little latitude.

20 MR. TUTEUR: This court has found that
21 there's not evidence of fraudulent concealment. They
22 had not pled it, as they must, and, in fact, as they
23 must in advance, not after discovery.

24 So an approach, which I have not proposed
25 at the moment to the plaintiffs but I would like to

1 throw it out there is, as the Court is probably now
2 aware, there are these 2006 IDSA guidelines. There was
3 a 2006 investigation by Attorney General Blumenthal.
4 That investigation led to a 2008 settlement which led to
5 the creation of an independent review panel overseen by
6 Attorney General Blumenthal actually run by some folks
7 here in Texas. The -- the completely independent
8 doctors were an ombudsman from Texas.

9 They then spend two years looking at the
10 2006 IDSA guidelines, and in 2010 they issued a report.
11 Now, significantly, that -- and there was public
12 comment. There was the attorney general's involvement,
13 all of that. And in 2010 they came out with a report,
14 and that report ratified unanimously the 2006 guidelines
15 as being medically appropriate.

16 And then Attorney General Blumenthal said,
17 "Appreciate the report," and he said he would review it
18 and see what further steps he would take. He never took
19 any further steps.

20 Now, it seems to me, seems to us, that a
21 reasonable break point is -- is then.

22 THE COURT: '06?

23 MR. TUTEUR: '10. Because '10, you've
24 got the review panel, you've got the attorney general's
25 investigation. This is completely open and notorious.

1 Everybody knows about it. It's in the public record.
2 They're published in medical journals. All of that.
3 There's no concealment here that could possibly extend
4 back.

5 And so if we're looking at a reasonable
6 period -- and on behalf of Anthem, I would like to say,
7 you know -- and I know I said this at our last hearing.
8 You know, Anthem is a company that grew by accretion and
9 every --

10 THE COURT: As I said, I read the
11 transcript yesterday.

12 MR. TUTEUR: And every -- every two more
13 years or three more years, you've got another legacy
14 computer system from some acquired company which we
15 would have to then, you know, sort of unbutton, figure
16 out how to get to the materials from those days, see
17 whether we can spin it up again. I mean, it's very,
18 very expensive.

19 So I suggest -- and, again, I apologize
20 for not raising this with the plaintiffs. But 2010,
21 that's -- that's almost ten years from now. So ten
22 years back. It's seven years back from the date of the
23 complaint, so it's well beyond the statute of
24 limitations.

25 This court has already ruled that they

1 have failed to plead with particularity any fraudulent
2 concealment allegations. So why you should be able to
3 go back as Mr. Dutko suggests, let's go back to the
4 '90s, let's go back to the aughts. Let's go back -- I
5 mean, they can say it's tobacco, but a single paragraph
6 in a complaint that says, "We believe the defendants
7 fraudulently concealed," is not -- as this court has
8 already ruled, is not sufficient to say, okay, let's
9 just open up the old file drawers that are up at Iron
10 Mountain until we find something that we like. It's
11 just not.

12 So we're not opposed to an extension of
13 the period, but I do think, as this court has already
14 indicated, every year that goes by is a multiplying
15 factor of the costs that it is for our clients.

16 THE COURT: I'm sensitive to that.

17 MR. TUTEUR: So that's a proposal that we
18 would suggest. And, again, I think with the -- I'm
19 sorry, Your Honor, go right ahead.

20 THE COURT: Oh, no, go ahead.

21 MR. TUTEUR: I was just going to say that
22 seems to us to be a reasonable marker, because you've
23 got the attorney general, you know, who started this
24 investigation followed by a review panel. Once we get
25 past that, if we -- if Anthem and the rest of us all

1 continued to secretly conspire amongst ourselves, you
2 know, and said, oh, the hell with that, we're going to
3 keep doing what we're doing, or whatever, then more
4 power to them. But you can't argue today that this
5 whole body of discussions, "the Lyme wars," as they call
6 them, hasn't been fully ferreted through 2010; it was.

7 So that, to us, would be a reasonable
8 break point. It's 2.5 years beyond the statute of
9 limitations. It's not taking us back into these legacy
10 systems. It is, actually, but only a bit. And we're
11 prepared to do that. And I know having spoken with the
12 other defendants, we're prepared to do that, and they're
13 prepared to do that as well.

14 THE COURT: Okay. Who else on the
15 defense want to speak about discovery timeline?
16 Anything, generally.

17 MR. CHASSMAN: Pete Chassman on behalf of
18 HCSC. I can just say briefly --

19 THE COURT: Mr. Chassman, would you go to
20 the podium, please.

21 MR. CHASSMAN: Pete Chassman on behalf of
22 HCSC.

23 I can say that Mr. Tuteur's representation
24 is reasonably representative of HCSC's position and
25 history as well.

1 One other thing I'll tack on that's
2 unrelated to that, on the list of things that we still
3 need from plaintiffs is e-mail. It's true that we
4 reached an agreement as we got closer to the hearing
5 about the scope of the production. We still actually
6 will need the production.

7 THE COURT: Your e-mail? Their e-mail?

8 MR. CHASSMAN: Their e-mail. So we
9 started with -- we propounded e-discovery requests quite
10 some time back. We were unable to reach any sort of an
11 agreement for a while. We filed a motion to compel.
12 There was some subsequent discussion. We agreed to
13 narrow our requests in order to try to put this issue to
14 rest, and what we proposed ultimately was agreeable to
15 the -- to the plaintiffs.

16 The point is just that we reached that
17 agreement, but in terms of things we still actually
18 need, e-mail is on the list. Not to say that we won't
19 get it, but you asked for a complete of list of what's
20 out there.

21 So that's it. Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Chassman.

23 Who else on the defense side?

24 MR. DUNN: Your Honor, very briefly,
25 Alvin Dunn representing IDSA and the defendant doctors.

1 And just to -- for IDSA and the defendant
2 doctors, we produced everything they asked for within
3 the four-year period and -- but it did not include
4 e-mails because they have never asked for e-mails. And
5 they did not challenge us or ask for anything in
6 addition to what we've produced. The only thing they've
7 asked for is beyond the four years. So within the four
8 years, IDSA and the doctors have produced everything
9 that's been requested and everything else that's been --

10 THE COURT: And on the -- on the personal
11 jurisdiction discovery, the plaintiffs never sought to
12 take your clients' depositions; is that correct?

13 MR. DUNN: Correct. We agreed on a
14 schedule that would take it all the way out to -- I
15 proposed December 31st. They said, no, we'll need more
16 time, maybe. We agreed on January 31st. They had
17 plenty of time from the time you entered your order in
18 late September until the end of January, January 31st,
19 and they never asked for a single deposition.

20 And we had one very quick discussion about
21 the written discovery responses, and what I answered a
22 quick question, they said they were satisfied. So they
23 haven't complained about anything with respect to
24 discovery from IDSA and the doctors.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 MS. DONNELL: Your Honor, just quickly
3 for BCBSA, we get lumped in with the insurance
4 defendants because we're the licensing --

5 THE COURT: You're the marketing group,
6 right.

7 MS. DONNELL: We're the licensing
8 organization.

9 So I just wanted to lay the marker down
10 that we've been asked for the, you know, same documents
11 as the -- as the other insurer -- I guess other
12 insurers, but we don't make coverage decisions. So we
13 would haven't denials of coverage or appeals of denials
14 of coverage. And we've responded that way in our
15 interrogatory responses. So just to clarify that one
16 small point for us.

17 Thank you.

18 THE COURT: Thank you.

19 Anybody else? Okay. Mr. Dutko.

20 MR. DUTKO: Can I just address?

21 THE COURT: Please, yes.

22 MR. DUTKO: I would like to point out to
23 the Court, Your Honor, that many of my clients are
24 bedridden. Many of my clients are constantly dealing
25 with aches and pains. And yet the defendants, over and

1 over, send letters: You've got to go get your medical
2 records. We've got to have all your medical records.
3 Go out, talk to your doctors, get your medical records
4 going back to when you had Lyme disease in the 1970s.

5 And yet they stand up here today and they
6 say these multibillion-dollar corporations are going to
7 have a hard time finding documents from before 2010 is a
8 little bit disingenuous. We have gone out of our way on
9 behalf of the plaintiffs -- they have literally wrapped
10 up boxes and taped them to send them to us because
11 they're not sure what they have, trying to find
12 documents, going back to doctors that have retired for
13 many years, knocking on doors to try to get documents.
14 And yet they want to compromise by giving us documents
15 beginning nine years ago before the guidelines were even
16 created. Your Honor, these lawyers --

17 THE COURT: Get to the point.

18 MR. DUTKO: Yes. Your Honor, they
19 know --

20 THE COURT: Quickly get to the point.

21 MR. DUTKO: Yes. Your Honor, they know
22 the compromise is no compromise. They know that the
23 documents that we need to prove our conspiracy occurred
24 in 1990 and on, and they know that any compromise
25 involving 2010 and beyond is going to lead to the fact

1 that they could file summary judgment.

2 THE COURT: Okay. We'll now hear
3 argument in the plaintiffs' motion for extension of time
4 to replead. Who would like to be heard?

5 MR. DUTKO: Yes, Your Honor, Daniel Dutko
6 on behalf of the plaintiffs, Your Honor.

7 Again, the motion for extension of time to
8 replead RICO comes down to the very fact that this
9 court, when it entered the order granting and denying in
10 part the motions to dismiss filed by the insurance
11 defendants, put in there that the plaintiffs should be
12 required to replead RICO within 30 days, because as the
13 Court held, the parties were currently engaged in
14 discovery and we had been conducting discovery for four
15 months.

16 The problem with that, Your Honor, as
17 we've seen here today, is that while the plaintiffs have
18 been engaged in discovery from the beginning of this
19 case, even until now, the defendants in this case have
20 not. The defendants in this case backed off of an
21 agreement in which they agreed to produce documents
22 beyond four years, which they represented to this court
23 that they would produce those documents.

24 And when this court issued its ruling
25 saying we had 30 days to replead, we immediately reached

1 out to the defendants' counsel and said please produce
2 documents that are responsive to our requests and
3 responsive to the Court's disclosures and additional
4 disclosures beyond the four years beginning with our
5 conspiracy, and they refused to do so. They also
6 refused to produce documents within the four years that
7 would allow us the opportunity to replead RICO.

8 Your Honor, as the Court held, we are
9 entitled to go forward on our antitrust claim, and the
10 antitrust claim, Your Honor, allows us, should allow us
11 to conduct discovery beyond four years and well into the
12 '90s when they were conducting this conspiracy and
13 creating these guidelines.

14 We are asking for the same documents in
15 antitrust that we would be asking for in RICO. It is no
16 detriment for the -- for the defendants in this case to
17 allow us to proceed on a RICO claim, along with our
18 antitrust claim, and then to address the issue after
19 discovery is over. There is no -- there's nothing bad
20 that can happen to them. It's the same documents we
21 would request.

22 And further --

23 THE COURT: Don't you have to have facts
24 supporting a RICO allegation before you file the
25 complaint?

1 MR. DUTKO: Your Honor, respectfully,
2 there are numerous facts outlined in our complaint. In
3 fact, there are deposition transcripts from some of the
4 insurance defendants. There are deposition transcripts
5 from the IDSA panelists. There are outlines -- there
6 are documents that -- provided by Congress in which
7 people testified at Congress.

8 We set forth, I think 70, 80 pages of
9 information setting forth a conspiracy that they have
10 engaged in since early 1990. Your Honor, this isn't a
11 case in which we have simply alleged RICO like a state
12 court case and just hope to get by. Your Honor, there
13 are numerous, numerous allegations that we believe meet
14 the pleadings requirements under RICO, under 9(b).

15 But, Your Honor, not only that, but there
16 is a relaxed pleading standard in this state -- within
17 the Fifth Circuit that allows us to move forward if we
18 can establish that all the documents are in the
19 defendants' possession. We have made that allegation.
20 That is bared out here today with evidence of the fact
21 that they refused to produce documents beyond four
22 years.

23 Doesn't the Court think that if they
24 had -- if their words, no documents setting forth the
25 allegations in plaintiffs' complaint, that all of the

1 defendants would have made a search of that, come before
2 the Court and said: There are no documents. We've gone
3 all the way back to 1990, and there's nothing that
4 establishes any RICO, we should get out of this case.

5 There is a reason we have spent the last
6 better part of a year fighting over a four-year
7 form-over-substance argument, because the defendants in
8 this case know that once we get our hands on the
9 documents, in which they paid the IDSA panelists, in
10 which they reported doctors to insurance boards, in
11 which they denied insurance coverage beyond 28 days, in
12 which they created arbitrary guidelines, once we have
13 those documents, we will be able to meet our RICO
14 requirement.

15 And that's exactly what the relaxed
16 pleading standards says. It says you are allowed to
17 make allegations enough to get over a prima facie case.
18 And we believe we've done that. We believe there are
19 plenty of allegations in there, including deposition
20 transcripts -- and I've gone through that, Your Honor --
21 including their guidelines. And so we have made more --
22 we have presented more than enough in our complaint
23 specifically to get past the relaxed pleadings, but we
24 believe enough for RICO.

25 And so --

1 THE COURT: Are you arguing the motion to
2 dismiss again?

3 MR. DUTKO: Well, based on your
4 question --

5 THE COURT: Because I've ruled on the
6 motion to dismiss.

7 MR. DUTKO: Based on your question, Your
8 Honor, I felt like I had to give --

9 THE COURT: I guess I'm more curious
10 about why you haven't filed your amended complaint.

11 MR. DUTKO: The reason why we haven't
12 filed our amended complaint, Your Honor, is because the
13 defendants refused to produce any documents. The basis
14 that the Court gave for allowing us 30 days to replead
15 RICO was that the defendants have been engaged in the
16 discovery process for the last four months. And when we
17 looked at the discovery process and realized that they
18 had not, we immediately filed a motion asking for more
19 time until they engaged in the discovery process.

20 THE COURT: When was that motion filed?

21 MR. DUTKO: May I, Your Honor?

22 THE COURT: Yes.

23 MR. DUTKO: That was filed on
24 October 22nd of 2018, Your Honor. And September 27th
25 was when this Court issued its order. So less than

1 30 days later, Your Honor.

2 THE COURT: Okay.

3 MR. DUTKO: And so we are not sitting on
4 our hands. We're not doing nothing. We're trying to
5 engage in the discovery process and comply with
6 everything that they are requesting from us. We
7 expected them to do the same.

8 And so when they didn't do that, Your
9 Honor -- and, Your Honor, we heard the counsel stand up
10 here and say: When can we have dispositive motions
11 heard? And so, basically, what the defendants want to
12 do is, they want to get a ruling on the motion to
13 dismiss. That doesn't go their way. Then they don't
14 produce any documents. Then they come in front of the
15 Court and say: Guess what, there are no documents to
16 prove their case. When can we have our summary judgment
17 heard?

18 Well, that's not the way litigation --

19 THE COURT: Anything else on the motion
20 for extension of time?

21 MR. DUTKO: No, Your Honor.

22 THE COURT: Thank you.

23 MR. TUTEUR: Your Honor, Michael Tuteur
24 for Anthem and for the defendants. I am going to be
25 very brief. I have a deck that I could hand up to the

1 Court.

2 THE COURT: Please do.

3 MR. TUTEUR: I am going to go through it
4 very quickly because I think that the Court has actually
5 addressed nearly every issue that we've got.

6 Has this come up? There we go. Thank
7 you.

8 So let me -- before we get to the deck --
9 and I think to some extent I may really skip through it
10 really quickly -- I mean, what we have heard from the
11 plaintiffs is that there are events that occurred in
12 1992 and 1994 and sometime in 2000 in which there's some
13 depositions and there's some complaints. This is, with
14 all respect, really ancient history for purposes of a
15 litigation.

16 This court ruled already the statute of
17 limitation is what it is. They had failed to prove
18 with -- plead with particularity either their RICO
19 claims or their fraudulent concealment claims. So that
20 means that the -- that the issues that we're going to
21 deal with are those that occurred in the four years
22 immediately preceding the filing of the complaint. As
23 I've said, and I'm not going to repeat, we're prepared
24 to go back a reasonable period.

25 Mr. Dutko is wrong to say, with all

1 respect, that if we knew that there weren't any of these
2 things, my client would reach back and look to see
3 whether there were any such documents. This is a
4 tremendous effort to do that. I will say that there are
5 some of the defendants, and they can speak here, who
6 did, in fact, look for the key issue, which is these
7 payments to the -- to the doctors that are alleged over
8 and over again in the complaint.

9 But allegations aren't facts. Allegations
10 aren't proof. And so far those defendants who have
11 looked have been unable to find these so-called "large
12 payments." And I know that Mr. Dunn can speak for the
13 doctors, and they would also say they have received no
14 large payments.

15 So the fact is that this conspiracy theory
16 is based on a fiction. They wish it to be tobacco.
17 They wish it to be asbestos. It isn't those things.
18 And the record of recent events doesn't bear it out.
19 And at least with respect to some of the defendants who
20 were able to go back into their payment systems, they
21 don't bear out in any way, shape or form this
22 allegation.

23 Now, it is not form over substance to say
24 that we should not have to go back to the beginning of
25 time to look for -- to look for these documents. This

1 is -- I put it up on the -- on the screen, Your Honor,
2 that this is your own words. And you've obviously read
3 them recently. They have failed to put forward, as they
4 were required to do, the newspaper details of RICO, of
5 the fraud, of the mail fraud, of the wire fraud that
6 they allege.

7 And here, again, is your language from the
8 fraudulent concealment, which they are required to act
9 with diligence, and you noted that, that they must act
10 with diligence to look for appropriate facts to support
11 their claims. And under 9(b), it's an exception to Rule
12 8, you are required to have those facts. You just can't
13 go fishing around.

14 They sent out third-party discovery. It's
15 true that some of the medical boards, apparently, said
16 that for privacy reasons they were unwilling to produce
17 documents. But we know that others weren't. And there
18 were some disciplinary matters, but you could count them
19 on your hand, Your Honor. This is hardly a situation of
20 a wholesale effort by the insurance companies to
21 discipline through, I should add, independent state
22 medical boards. How is it they are part of the
23 conspiracy as well? They're not the insurance
24 companies. They're not IDSA.

25 So you asked Mr. Dutko when did they file

1 their motion. Well, they filed their motion for
2 extension of time on October 22nd. They didn't actually
3 move to compel any documents until November 1st, more
4 than 30 days after Your Honor had entered the decision.

5 And I should note that the plaintiffs are
6 being a bit disingenuous here about the failure to
7 comply with discovery. When Your Honor wrote what you
8 did in the end of September, the discovery that you were
9 referring to was perforce for four years, because that's
10 what you had ordered; that's what was in your order.
11 And so the four months of discovery that you had allowed
12 the plaintiffs to take was for that four-year period,
13 and you expected them to use that in the next 30 days to
14 write up an amended complaint.

15 I can't look into your mind, Your Honor,
16 and I don't know, but had you meant to say in the next
17 30 days I expect everybody to open their files back to
18 1992 and then give me an amended complaint at the end of
19 those 30 days, I think you would have said that. You
20 didn't. I mean, that period, I assume, was for the
21 drafting, of the sort of culling four months and then
22 issuing an amended complaint.

23 Again, I'm not going to go through it,
24 your discovery order, you know, was clear on its face.
25 We complied with it. We're open to expanding it. But

1 we did feel that we were acting in compliance with your
2 court's order in the discovery order of May 11, that the
3 four-year time period -- and let me add, it applies to
4 the defendants, not to the plaintiffs. You said the
5 defendants. You meant the defendants, I assume.

6 THE COURT: There's actually a footnote
7 in the order.

8 MR. TUTEUR: There is. Exactly.
9 Exactly, Your Honor.

10 And you've commented on the e-discovery
11 order. That came out on August 8, 2018. Within a week
12 we promulgated search terms. It has taken until a week
13 ago for the plaintiffs to agree on a meet and confer --
14 and a motion that we had to file, I should add, for them
15 to finally agree on the search terms that we had asked
16 for. And we changed them and we limited them and we cut
17 them and we did a bunch of things, and they stonewalled
18 us on every term. But we, unlike the plaintiffs, who
19 have never given us search terms, we did within the
20 first week after this court's order, and we have yet to
21 receive a single e-mail.

22 And I've heard already that we never
23 received a damages calculations. You don't need the
24 defendants' discovery to give us a damages calculations.
25 The damages are peculiarly in their control. When we

1 asked for it under -- it's not even -- it's part of the
2 initial disclosures. We never got it. We asked for it,
3 and they said that's expert stuff.

4 Said, well, I really don't think so. But,
5 I mean, some of this stuff is not expert stuff. "Well,
6 you'll get it when you hear from our experts."

7 Well, the expert deadline comes and goes.
8 They don't submit any expert report. They don't
9 designate any retained expert except one, and that's on
10 the amount of attorneys' fees that would be charged.
11 There is no Lyme expert, no economic expert, no Sherman
12 Act expert, no conspiracy expert, nothing. And
13 certainly no damages expert.

14 So there we are. "Where's your damages
15 calculation?" "You wait until our expert is there."
16 The expert then comes and goes. No expert. Still no
17 damages calculations.

18 I mean, we don't know if this case could
19 be settled, Your Honor, but we certainly can't settle it
20 unless we have an idea of what it is that they think the
21 damages are in this case. And that's entirely on them.
22 It's not on us. They can't say we didn't give
23 documents. They should be able to give us that.

24 They have yet to make any named plaintiff
25 available for deposition. You heard about the issues

1 that were there. And I point out that I was really
2 struck -- as somebody from Boston, we don't have this in
3 our discovery orders. Maybe we should. But Your Honor
4 has issued standing orders that say no excuses. If
5 you're unhappy with what they've produced, that is not
6 an excuse to, for example, not give us an expert report,
7 not to give us a damages calculation, not to give us an
8 amended complaint. They have no excuses for failing to
9 engage in meaningful discovery.

10 So just to be clear, these are the
11 documents that we didn't produce. We did not produce
12 payments from insurance companies to the defendant
13 doctors. We did not produce receipts of payments. We
14 did not produce complaints by insurance companies to
15 state medical boards. And we didn't produce
16 communications between and among the insurance companies
17 in any scheme. And the reason is such documents don't
18 exist. This conspiracy is a conspiracy looking for
19 facts.

20 I've cited some cases at the end of the
21 deck. I will leave them for Your Honor. You know them
22 well. Again, diligence is required. Proportionality is
23 required in discovery.

24 And, finally, the plaintiffs' cases don't
25 stand for the principle if you get open-ended discovery

1 beyond the statute of limitation. These are the cases
2 that they have cited. In every single one, the request
3 that the plaintiffs make or the movant makes for
4 extended discovery is actually rejected, and some
5 shorter period is imposed by the Court.

6 And that's what we're really doing, trying
7 to suggest here is let's find a reasonable period of
8 time. That's what all of these cases -- I mean, you
9 look at the Glenn v. Williams case that they cite over
10 and over again. Ten years is an inordinate length of
11 time. Three years is a reasonable time says that court.

12 The Doss case, 13 months more than the
13 statute of limitations. That's reasonable.

14 The Jackson case says we're not going to
15 go beyond when the plaintiffs started their employment.
16 There's a claim that the discrimination went back years.
17 The Court says we'll start when you start. And the same
18 for the DAC case.

19 So here is the relevant history that I set
20 out for you before, Your Honor. This is the guidelines,
21 the review panel, and the final report of the
22 independent Lyme disease panel. And I quoted from
23 Wikipedia. I know it's a -- it's a somewhat suspect
24 source. But I think actually this pretty accurately
25 says what happened, which was that this independent

1 panel overseen by the attorney general, run by nonIDSA
2 people, reviewed the 2006 guidelines word for word and
3 concluded unanimously that the 2006 guidelines, the ones
4 that they claim are such conspiratorial or whatever,
5 were correct, medically correct, scientifically correct.

6 THE COURT: Can you tell me when the
7 process that led to the '06 guidelines began?

8 MR. TUTEUR: Well, I mean, I guess maybe
9 I should back up a minute. Guidelines by medical
10 societies, including the IDSA, began to be issued in the
11 '90s in every learned society. You know, the plaintiffs
12 have acted as if these guidelines stand in a vacuum.
13 The IDSA alone, Mr. Dunn could tell us, would have put
14 out dozens and dozen of clinical guidelines. So has the
15 American Institute of Neurology and radiology and so
16 forth. Guidelines themselves are part and parcel of
17 modern medicine.

18 So the very first set of guidelines that
19 the IDSA puts out regarding Lyme is an informal set of
20 guidelines that start in the '90s. There is a 2000
21 guidelines that the IDSA puts out regarding Lyme
22 disease. And in 2006, there is -- because there's a --
23 they had an arbitrary rule that said every five years
24 you should -- which is no longer, they don't follow this
25 rule anymore. But that every five years you should

1 update your guidelines with the latest medical research.
2 So that happened, you know, in 2005 to 2006 for the 2006
3 guidelines.

4 There is, and this is public, the IDSA,
5 the neurology learned society and the rheumatology
6 learned society are actively working on the next set of
7 guidelines. Public comment. Open -- open debate. And,
8 in fact, it's likely that they'll be published within --
9 a draft will be published this month.

10 So I say that only to say that the fact of
11 the creation of guidelines, there's nothing special
12 about it other than that this was thought to be standard
13 of care beginning in the '90s. And the 2006 guidelines,
14 you know, it depends on what you want to say, there was
15 a 2000 guidelines and the ones before them. But it was
16 roughly from 2005 to 2006, Attorney General Blumenthal
17 immediately opened this investigation, and in 2008, the
18 review panel completely reviewed the guidelines and
19 reaffirmed them in whole.

20 So, you know, it seems to us that 2010,
21 which is when the review panel finishes its work,
22 Blumenthal says, okay, my investigation is closed, that
23 that's a reasonable period to start with. Because as I
24 said, every year that goes back is a lot more money for
25 our clients, and nobody can claim -- you've already held

1 that -- that they have not pled fraudulent concealment.
2 So if everything that I just mentioned is known to the
3 public, how possibly would it make sense to go back
4 beyond 2010?

5 If the conspiracy has been able to be kept
6 going so that people are continuing to be hurt, some
7 actions must have occurred. You know, it can't be that
8 payments back in 1992 to six doctors have somehow
9 managed to be so powerful that even today in 2019,
10 without any payments in between, because we haven't
11 found any payments in between, somehow that has the
12 power to keep thousands and thousands of doctors, who
13 could make money giving this treatment, keep them from
14 doing it. It's strange credulity, Your Honor, because
15 it isn't true.

16 But anyway, we strongly urge the Court not
17 to take us back to 1992 or 2000 or 2005. It's very
18 costly. It's not proportional. And if there's no RICO
19 pled and if there's no fraudulent concealment pled, then
20 it's just really a question of some reasonable period
21 before 2017 -- I mean, I'm sorry -- 2013 when the
22 statute of limitations runs, so that you can catch some
23 of the stuff that might lead to admissible evidence
24 within the statute of limitations. And we're prepared
25 to do that, but we would -- we would hope that the Court

1 would not force the defendants to go further than that.

2 THE COURT: Thank you.

3 MR. TUTEUR: Thank you.

4 MR. LEE: Your Honor.

5 THE COURT: Yes.

6 MR. LEE: Could I clarify a point?

7 THE COURT: Yes.

8 MR. LEE: I was going -- Lance Lee on
9 behalf of the plaintiffs.

10 I was going to deal with the e-mail issue
11 before we got it resolved, and I wanted to clarify
12 something that Mr. Tuteur just said. We had the meet
13 and confer on the e-mail issue, their request to us,
14 sometime -- I don't know the exact date, but it was
15 sometime in December. And at the conclusion of that
16 meet and confer, we requested that they send us narrow
17 terms. They never did that until after they filed their
18 motion to compel.

19 So I don't believe that he intended to
20 represent that we didn't continue anything further. So
21 I wanted to make that clarification. Once we got the
22 narrowed terms, we were able to take that issue off the
23 Court's plate. And I believe that we've actually made
24 our first production from one of our plaintiffs so far.

25 The second point I want to make is kind of

1 in response to what counsel just said about the
2 Blumenthal investigation. Something triggered Senator
3 Blumenthal's investigation in Connecticut when he was
4 attorney general in the early 2000s. They're not even
5 wanting to give us the information that that Senator
6 Blumenthal had that triggered his investigation.

7 So I think that it goes to the point of a
8 reasonable period of time. Well, it's a reasonable
9 period of time to go back to 2010 when the investigation
10 was closed, but it was not reasonable to go back to
11 2002, 2003, when the investigation was opened. I think
12 that the information that was contained in the
13 investigation that Senator Blumenthal had, at the time
14 AG Blumenthal, is something that's clearly we should be
15 entitled to. And so I just wanted to make that point as
16 well.

17 THE COURT: Thank you, Mr. Lee.

18 MR. DUTKO: Nothing further, Your Honor.

19 THE COURT: Nothing further from you?

20 MR. DUTKO: From the plaintiffs on that
21 issue.

22 THE COURT: Okay.

23 MR. TUTEUR: I don't mean to take issue
24 with Mr. Lee, but, in fact, we put out the search terms,
25 and then there was a meet and confer, actually back in

1 September, I think, where you rejected our search terms
2 and said come back with narrower ones. And then we did
3 come back with narrower ones, and then you rejected
4 those. And then we had some more discussion. I just
5 don't want it to be left with the Court that we
6 somehow -- I mean, I made the statement, so I don't want
7 you to think I'm mis- --

8 THE COURT: I understand. Let me suggest
9 this. Is it -- I know the parties had agreed that
10 dealing with the first three motions all at once made
11 the most sense in terms of efficiency. Has everybody
12 said everything they want to say with respect to all
13 three of those motions?

14 MR. DUTKO: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. TUTEUR: Yes, Your Honor. Thank you.

17 THE COURT: All right. Good. Before we
18 take up the fourth motion, let's take a short recess.

19 (Recess taken, 3:23 p.m. to 3:38 p.m.)

20 THE COURT: Okay. I think the next motion
21 which we've touched on at various points, and may have
22 adequately covered, but if not, I'm happy to hear
23 anything the parties want to present on them, is the
24 defendants' motion to compel the deposition dates and
25 damages computations.

1 MS. DOAN: Your Honor, before we take
2 that up, you asked me some specific questions about
3 Aetna, and I wanted to make sure we were clear on the
4 record, because Mr. Austin and I conferred during the
5 break. We did go back in the neighborhood of about
6 20 years looking for the payments that the plaintiffs
7 were specifically looking for. We did find one payment.
8 We did produce that payment. It looks like that is on
9 the edge of the four years. I just didn't want you to
10 think we had produced -- I can't remember if I said
11 searched for or produced, but we had searched back for
12 in the neighborhood of about 20 years looking for
13 documents.

14 THE COURT: Thank you.

15 MS. DOAN: Thank you, Your Honor.

16 MR. CHASSMAN: Your Honor, Pete Chassman
17 speaking on behalf of all of the defendants on this
18 motion.

19 THE COURT: Okay.

20 MR. CHASSMAN: We have a slide deck which
21 has been handed up to you and also appears on the
22 screen.

23 THE COURT: All right.

24 MR. CHASSAM: All right. And you are
25 correct that we have covered a lot of the material for

1 this motion, so I am going to streamline it. But if
2 there's something, obviously, you'll ask me I'm sure.

3 Just to give you just a little history, we
4 asked the plaintiffs about a preliminary set of
5 plaintiffs. There are, I think, about 25 plaintiffs in
6 this case. And so we started by asking about
7 depositions of 11 plaintiffs. It was -- it's true that
8 we were not certain that we had gotten the complete
9 document production from the plaintiffs at that time,
10 but we recognized that we needed to get this case going
11 because a lot of time was passing by and things were not
12 happening.

13 So we went through the plaintiffs and the
14 productions and said, okay, these are 11 who we think we
15 can take right now, give us -- please give us some dates
16 in December and January. And that's when we were met
17 with the conditions that have already been presented to
18 you.

19 One was that we would never in any
20 circumstance seek a second deposition. And just so it's
21 clear for the Court, we understand that if we sought a
22 deposition -- took an initial deposition and then wanted
23 another subsequent deposition of a plaintiff, that would
24 be at our peril, we would -- you know, we might have to
25 approach the Court for that. But we were not in a

1 position to say that we never would approach the Court.

2 All right. I just want that to be clear for the Court.

3 The second thing was that -- the second
4 condition was you won't ask any questions going back
5 more than four years, and that all really collapses down
6 to this four-year issue, which I am not going to
7 reargue. We disagreed with that.

8 Where we are today, as it -- as it stands,
9 the issue about coming back for a second deposition, we
10 were able to agree on some language that went into the
11 joint report to the Court about seeking leave if we
12 wanted to get a subsequent deposition. So I think that
13 issue has been resolved.

14 But there does still seem to be an issue
15 about the four-year issue and how it applies to
16 depositions. We were told, well, if you want to take
17 the plaintiffs' depositions, you have to agree now that
18 we can take the defendants' depositions going back an
19 unlimited amount of time. And I think that's all part
20 and parcel of the four-year issue that it seems you're
21 going to resolve on their motion to compel.

22 But what I will say here is that on these
23 depositions, first of all, I think we're going to need
24 some clear instruction from the Court on the four-year
25 issue, and specifically how it would apply to

1 depositions, because I don't think we want to find
2 ourselves back in front of the Court. I think we need
3 to take care of that in an efficient way so we can get
4 the show on the road.

5 The other thing I want to mention is that
6 that was a preliminary set of 11 plaintiffs. We do
7 intend to seek depositions of the remaining plaintiffs.
8 It's just that those are the ones that are right -- the
9 ones where we actually served notices and have not been
10 able to make any progress in getting deposition dates
11 without conditions that were unacceptable to the
12 defendants.

13 So that's what I have to say about the
14 depositions.

15 THE COURT: Okay.

16 MR. CHASSAM: All right. So let's move
17 on to the damages computations and so forth.

18 So if we go back to November of 2017,
19 that's when the complaint was filed. We're talking, you
20 know, almost a year and a half ago. And in the
21 complaint there were allegations about injuries that
22 plaintiffs suffered and, you know, different types of
23 financial harms that the plaintiffs say they suffered.

24 Paragraph 133, Ms. Torrey said she was
25 force to spend hundreds of thousands of dollars for

1 treatments. Paragraph 135, Ms. Hanneken lost her
2 career, her family, and her home to foreclosure, et
3 cetera. So they've certainly put up the parade of
4 horribles in the complaint as to a range of harms for
5 which they may seek redress in this case.

6 So in the Court's docket control order,
7 standard language, "A complete computation of any
8 category of damages claimed by any party to the action,"
9 et cetera, "making available for inspection and copying
10 under Rule 34, the documents or other evidentiary
11 material on which such computation is based, including
12 materials bearing on the nature and extent of injuries
13 suffered."

14 So that was the Court's order. And this
15 disclosure was due 85 days after the scheduling
16 conference, which would have made it due July 13th of
17 2018. So we're talking, I don't know, eight or
18 nine months ago.

19 So here's what we got. "Plaintiffs seek
20 all damages recoverable by law" -- I'm not going to read
21 the whole thing to you, but it mentions actual damages,
22 lost wages, out-of-pocket expenses for travel,
23 out-of-pocket expenses relating to medical treatment, et
24 cetera. And it also says, well, you know, we'll
25 supplement as more medical records and bills and so

1 forth and receipts become available. "A computation of
2 plaintiffs damages to be created by plaintiffs' economic
3 experts in compliance with the deadline to designate
4 experts."

5 Well, what I can tell you is that we -- I
6 actually had someone on our team go back and search
7 through the plaintiffs' production in this case, and I
8 can't say that our search was infallible, but I can say
9 one of my colleagues spent about two days going through
10 their production. And, you know, here's what I can tell
11 you based on that is that as far as out-of-pocket travel
12 expenses, only three plaintiffs produced anything, as
13 best we can tell. Mr. Jones mentioned this.

14 Out-of-pocket medical expenses, we have
15 identified ten plaintiffs for whom we have not found any
16 documents on this subject. Out-of-pocket expenses seek
17 related to seeking medical treatment, while we're not
18 completely sure what that is, we don't think we found
19 anything on that. And lost wages, we couldn't locate
20 any supporting documents.

21 Just taking a step back, it seems to me
22 that when you look at their disclosure back in July,
23 they didn't -- they didn't provide a computation, and it
24 seems pretty clear in the rule -- or I'm sorry -- in
25 your discovery order that a complete computation of any

1 category of damages is required.

2 Now, there's nothing that I can think of
3 from the defendants that would hold up the plaintiffs.
4 That seems to be their big response is, well, we haven't
5 given them discovery. But these plaintiffs filed a
6 complaint, said they suffered all sorts of harms,
7 identified some categories of harms, but didn't provide
8 the computation. And it seems to me that their dispute
9 is with the requirement, and they simply haven't
10 complied with it.

11 So in their response to our motion to
12 compel, this is now December 26th, this is plaintiffs'
13 representations to the Court. They say, "More
14 importantly, plaintiffs' expert designations and expert
15 reports are not due until January 29th of 2019. It is
16 in no way prejudicial for plaintiffs to supplement its
17 disclosures with a complete damages computation when
18 plaintiffs designate their experts."

19 Well, we disagree with that statement
20 because it is prejudicial. There's a reason why that
21 disclosure is in the order, and it's so that we can get
22 an idea of what they're seeking. A reasonable
23 computation, if they think that their expenses continue,
24 we get that. It's not that we would try to preclude
25 them from adding another bill, you know, it's things

1 have accumulated since the time of their computation.
2 But we have nothing that would constitute a computation
3 in what they gave us.

4 And these disclosure requirements were
5 there for a reason, to provide fair notice to the other
6 side. But even if you accept their position of
7 December 26th, we got to January 29th and that's when
8 the actual expert reports were due. And as one of my
9 colleagues mentioned earlier, we didn't get a disclosure
10 of any damages expert on behalf of the plaintiffs. They
11 identified, I think it was an employee of the
12 plaintiffs' law firm who would testify about I think
13 appropriateness of attorneys' fees or the amount of
14 attorneys' fees. And that's really a completely
15 separate issue. No damages expert and no damages expert
16 report.

17 So even if you, you know, accepted their
18 position as kind of kicking the can down the road that
19 it wouldn't have been prejudicial for us to wait until
20 late January to find out what they're really seeking,
21 well, you know, that was -- that was a month and a half
22 ago and we still didn't get anything. And, you know,
23 it's easy to say, well, you know, it could be medical
24 expenses, it could be lost wages, but we really need to
25 have a good understanding of what it is that they're

1 seeking.

2 Standing here today, I don't have an idea
3 of the order of magnitude of what they're seeking and
4 whether all plaintiffs are seeking lost wages, certain
5 ones are. This person who claims that she lost her
6 house to foreclosure, are they going to claim that we're
7 on the hook for that? We just don't know. And so it is
8 prejudicial to us, and as we see it, there is no valid
9 excuse why the plaintiffs couldn't have done it.

10 They stated to you that they were very,
11 very complete in producing all their documents, they did
12 everything they could. They have not when it comes to
13 damages; I can tell you that. I mean, maybe they're
14 going to rely on just what they have produced already
15 they told us, well, you know, we have to go back and
16 look for some documents and things. They represented to
17 the Court they'd have them produced by March 29th;
18 although, you really should have your ducks in a row
19 before you file a case like this. We're still waiting.

20 So the report that I gave you, I believe,
21 is current as of today. And so at this point, you know,
22 we'd ask the Court to compel the plaintiffs to get us
23 the rest of those damages documents immediately and to
24 provide us a proper computation of damages, of course,
25 subject to some supplementation for the passage of time

1 and additional accumulation of expenses. We need that
2 right away. I mean, we'd ask to get that, you know,
3 within a couple of weeks, and we don't see any reason
4 why the plaintiffs can't -- couldn't have and can't give
5 that to us now.

6 THE COURT: Thank you.

7 MR. CHASSMAN: Thank you, Your Honor.

8 MR. DUTKO: May I respond?

9 THE COURT: Yes.

10 MR. DUTKO: Your Honor, I believe we've
11 addressed the issue with plaintiffs' depositions. We're
12 willing to produce plaintiffs for depositions.

13 THE COURT: How quickly?

14 MR. DUTKO: Within the next --

15 THE COURT: Thirty days?

16 MR. DUTKO: We can produce some
17 plaintiffs within the next 30 days, Your Honor.

18 THE COURT: All right. How about the
19 documents, when can the documents be produced?

20 MR. DUTKO: We can produce the documents
21 within the next 30 days as well.

22 THE COURT: Well, the documents will need
23 to be produced before the deposition, I think.

24 MR. DUTKO: Yes, Your Honor, we can
25 produce them within the next two weeks.

1 THE COURT: All right. Very well.

2 MR. DUTKO: So, I mean, I think that
3 addresses all the issues.

4 THE COURT: Yeah, what about the damages
5 calculation?

6 MR. DUTKO: Your Honor, the damages
7 calculation is an issue that is a little bit tricky in
8 the sense that we have fraudulent concealment pled with
9 respect to our statute of limitations for all of
10 plaintiffs. We have asked for leave to replead that.
11 Obviously, our damages calculation is vastly different
12 if we have fraudulent concealment and we're allowed to
13 proceed with a damages model going back to the entire
14 lives as opposed to four years. And so, Your Honor, we
15 were just waiting to seek guidance with respect to the
16 Court.

17 THE COURT: How long would it take you to
18 provide a damages assessment at this point in the case
19 without the other lengthy year period of time involved?
20 Could you do that within 30 days?

21 MR. DUTKO: Yes, Your Honor.

22 THE COURT: All right. Very well.
23 Anything else?

24 MR. DUTKO: No, Your Honor.

25 THE COURT: Okay. Next motion.

1 MR. CHASSAM: May I respond briefly?

2 THE COURT: You may.

3 MR. CHASSAM: I'll just add that this
4 contingency that plaintiffs' counsel has mentioned with
5 regard to, you know --

6 THE COURT: Damage.

7 MR. CHASSMAN: -- damages computation,
8 first of all, it's the first we've heard of it. And
9 second of all, again, it really doesn't have anything to
10 do with what the defendants have produced or will
11 produce. And, you know, my thought is if they want to
12 give it to us for both -- for both periods, they can do
13 it and should be in a position to do it now. They're
14 the ones who are in possession of all the records.

15 Thank you, Your Honor.

16 THE COURT: All right. What do you say
17 to that, Mr. Dutko?

18 MR. DUTKO: Again, Your Honor, we asked
19 for more time to replead fraudulent concealment based on
20 the fact that they haven't produced documents. And if
21 we had the documents to properly plead fraudulent
22 concealment, then we could plead that and then get --
23 the damages computation would be vastly different. And
24 so that was just simply the holdup, Your Honor, we were
25 seeking leave. When we -- it got time closer to the

1 expert designation, we filed a continuance 30 days
2 before that asking for more time so that we could get
3 more time to do that, Your Honor. We understand that we
4 need to keep the case moving, and we apologize to the
5 Court, Your Honor.

6 THE COURT: Well, I guess my question is,
7 Mr. Chassman suggested maybe you could produce damages
8 information for both periods of time; in other words,
9 the case as it exists today and then the longer period
10 of time.

11 MR. DUTKO: Yes. And we have been
12 producing those documents as they come in. Obviously,
13 some documents are much more difficult since they -- you
14 know, they may not exist. You know, they weren't aware
15 at the time in the '80s if they were traveling to
16 Arizona to seek treatment that they needed to keep a
17 receipt from the Hilton. And so those documents are
18 harder to get because the plaintiffs don't have them.
19 We have to try to seek them from outside sources. And
20 so that's been a little bit of a holdup in seeking the
21 documents.

22 THE COURT: I understand.

23 Mr. Chassman.

24 MR. CHASSAM: Your Honor, I think your
25 question to Mr. Dutko was about documents going back.

1 And just to be clear, you know, if they're alleging
2 damages going back, the computation going back is
3 especially what we want. I mean, just so it's clear for
4 the Court that, you know, they're in possession of the
5 information that would underlie that, or should be.
6 That's all.

7 THE COURT: All right.

8 MR. CHASSMAN: Thank you.

9 MR. DUTKO: Computation within two weeks,
10 Your Honor.

11 THE COURT: That solves it. Thank you.

12 Next motion relates to the independent
13 medical examination.

14 MS. RIDLEY: Thank you, Your Honor.

15 Eileen Ridley with Foley & Lardner on behalf of Anthem
16 and on behalf of the defendant group.

17 I understand, Your Honor, you've read
18 through all the papers. I don't -- I'll be very brief
19 to highlight the issue.

20 The plaintiffs' position appears to be an
21 argument that this is not a personal injury case. Quite
22 frankly, we would love some clarity as to what they
23 think this case is. It's fairly unclear. But I would
24 note that the cases that we have cited that support IMEs
25 note that they are not all, quote/unquote, personal

1 injury cases. We have discrimination cases. We even
2 have an instance where somebody was making themselves --
3 or saying they were not available for deposition because
4 they were medically unable to do so.

5 In this case, they have made allegations
6 that have put the medical condition of the plaintiffs at
7 issue, i.e., whether or not they have Lyme disease.
8 It's both at issue as to whether or not they're part of
9 the claimed Lyme market. It's also at issue on the
10 allegations of the complaint. And we've directed the
11 Court to paragraph 147 of the complaint.

12 Notably, that paragraph specifically says
13 that plaintiffs, among other things, are looking at
14 issues regarding being forced to pay for treatments,
15 debilitating illnesses, and issues regarding claims
16 about suffering long-term complications and being forced
17 to continue to pay future medical costs for treatment.

18 In the Ellis case, those very same sort of
19 allegations, coming from this district, was the basis
20 upon which the Court granted the IME, noting that there
21 is good cause for it, that there was, in fact -- the
22 medical condition was, in fact, in controversy, and
23 noting that in the Eastern District, the standard by
24 which to determine whether or not an IME should be
25 granted is actually liberally construed.

1 We believe we hit all of those elements
2 here and ask the Court to grant our motion.

3 THE COURT: Thank you.

4 MR. HIGGINS: Your Honor, Ryan Higgins on
5 behalf of the plaintiffs.

6 What we're seeking here, and the Court
7 made clear in the order on the motion to dismiss, is
8 economic damages. And that's at the order of page 18 to
9 20. What the defendants need to do to get an IME in
10 order to establish it under Rule 35 is to show that
11 there's good cause.

12 THE COURT: Doesn't it matter whether
13 your client, whether the plaintiff, or plaintiffs, has
14 Lyme disease?

15 MR. HIGGINS: I'll answer that directly,
16 I don't think it does, Your Honor, because here's why.
17 We've alleged that these plaintiffs, after they were
18 diagnosed with Lyme disease, then go out into the market
19 to get treatment for Lyme disease. And our -- and our
20 market that we have alleged is the treatment of Lyme
21 disease. They go out, they pay their own money after
22 the diagnosis. At the time, none of the defendants
23 challenged that diagnosis. So our individual plaintiffs
24 go out, obtain care, pay for that themselves, and but
25 for the conspiracy, they would have been reimbursed for

1 those expenses. So to answer it directly, no, I don't
2 think that that matters in this instance.

3 But to get to -- to even get to that
4 point, what the defendants would need to show under
5 Rule 35 is specific instances in which they have good
6 cause for each individual, each one of these 28
7 plaintiffs to have an IME. Instead, they asked for a
8 blanket IME without establishing anything, even simple
9 stuff -- it wouldn't get them there, but even simple
10 stuff, for example, were these tests -- was this
11 two-tiered test already done for these 28 plaintiffs
12 already? They don't address that at all. And they have
13 all the medical information. They don't address --

14 THE COURT: When you say they have all
15 the medical information, what do you mean?

16 MR. HIGGINS: At the very beginning of
17 this case, we had our plaintiffs sign consent forms that
18 they can go out and get whatever they want.

19 THE COURT: Of their -- of their own
20 personal records?

21 MR. HIGGINS: Exactly. And they have
22 done that. Just shortly before this motion was filed,
23 there was a flurry of subpoenas to medical providers and
24 to doctors themselves asking, actually, for a lot more
25 than just our plaintiffs' medical records. If you look

1 at the subpoenas, they're asking the doctors themselves
2 who they've treated, what sort of treatments they've
3 provided. That's not the issue that we're here for
4 today, but just to put some color on what these
5 subpoenas look like.

6 But with respect to all of these
7 plaintiffs, they have not done anything to establish
8 good cause. They have not established were the results
9 that they're looking at, were they inaccurate? They
10 have not put forth any evidence in front of the Court to
11 establish that type of thing. Were the clinical
12 evaluations that were done incorrect?

13 So all that we have is we know that all 28
14 of these plaintiffs were diagnosed with Lyme disease.
15 They then go out, they obtain treatment, they pay for it
16 themselves. At the time, paying it for themselves. And
17 but for the conspiracy, they would have been reimbursed
18 for those payments.

19 So that's just dealing with good cause,
20 which I don't think that they've established under
21 Rule 35. And then if you look at the time, the place,
22 and the manner under Rule 35 that needs to be
23 established by the defendants, they failed to establish
24 this, too, because to begin with, the two-tiered test --
25 and I'll repeat this, the only time I'm doing this

1 hopefully -- they haven't established who has or has not
2 received the same tests that they want to give now in
3 2019 that these plaintiffs have been living with for
4 their entire lives, this particular disease. So they
5 need to establish that just to get past that issue.

6 The other thing with respect to this
7 two-tiered test, we point the Court to various studies
8 which show that it's about as accurate as a coin -- a
9 coin flip. Now, there is some discrepancy as to whether
10 that is at the beginning of the disease, whether it's
11 about 50 percent accurate, or whether as the disease
12 progresses.

13 But the four medical records that they put
14 before the Court, the only argument that they have with
15 respect to those is these plaintiffs at first did not
16 show that they had Lyme disease and now they're claiming
17 that they do, or that their doctor is claiming that they
18 do.

19 Well, that is completely consistent not
20 only with the studies that we have establi -- that we
21 have put in front of the Court, but also in front of --
22 but also the studies that the defendants put in front of
23 the Court, which is oftentimes a patient comes in, if
24 it's early in the disease and they get tested, they will
25 show negative for Lyme disease, and then later on, they

1 can in certain instances test positive for that disease.

2 But an important point with -- that these
3 studies made clear is if a patient receives antibiotics
4 in that early phase, sometimes even in later stages of
5 the disease, it will never show up under this two-tiered
6 test because the antibodies will not show up because
7 they received early antibiotic treatment. And that's
8 Footnote 5, Your Honor, to -- to our response, that
9 study that I'm referring to.

10 And then the CDC, which the defendants
11 referenced, and which has a quote that I would -- I
12 would like to let Your Honor know about, it says, "It's
13 possible for someone who is infected with Lyme to test
14 negative because some people who receive antibiotics may
15 not develop antibodies or may only develop them at
16 levels too low to detect."

17 The other thing, moving to a -- to a
18 different part of this, so I don't think they've
19 established good cause. I don't think the time manner
20 is correct. They also asked for their -- their medical
21 provider to be able to provide multiple tests. And in
22 that instance, basically, they're asking for carte
23 blanche from Your Honor to say that they can go and do
24 multiple IMEs, which just isn't appropriate in any
25 instance.

1 They also asked for a "full systems check"
2 on behalf of their doctor of all these plaintiffs. I
3 personally don't know what that is. I raised it in the
4 opposition brief, and it wasn't dealt with on reply as
5 far as I can see.

6 So with that said, Your Honor, under
7 Rule 35, I don't think they get there with respect to
8 what they have put into evidence and what they have
9 alleged. If you have any questions on any of that, I
10 would like to address those now if possible.

11 THE COURT: I don't.

12 MR. HIGGINS: Thank you, Your Honor.

13 THE COURT: Ms. Ridley.

14 MS. RIDLEY: Thank you, Your Honor.

15 The plaintiffs argue that they're just
16 seeking economic damages but economic damages related to
17 Lyme treatment. And if you look at the Ellis case,
18 again, from this district, the Court notes in that
19 instance that the defendant -- that plaintiff was
20 seeking examinations -- or excuse me -- defendants were
21 seeking the examinations because plaintiffs had been
22 seen by treating physicians and several of the treating
23 physicians had recommended future treatment.

24 That's exactly what we have here. We have
25 allegations seeking economic damages related to future

1 treatment. In that case, the Court recognized that it
2 was appropriate to do an IME. Noting, by the way, that
3 good cause is met when, in fact, the plaintiff's medical
4 condition is put in controversy. That is what we have
5 here.

6 THE COURT: Have you reviewed these
7 tests, the two-tiered tests that have been produced in
8 the -- presumably produced in the plaintiffs' medical
9 records up to this point?

10 MS. RIDLEY: Well, in the medical
11 records, as you can imagine, there are some -- a variety
12 of what's in the medical records. But as we have shown
13 the Court, there are instances, quite frankly, where the
14 medical records indicate that the plaintiff in question
15 had been tested and, in fact, found to have a negative
16 result. And yet they go to a different doctor -- they
17 could have several doctors saying you don't have Lyme,
18 and they suddenly go to a different doctor and suddenly
19 they say they have Lyme. There is, in fact, a
20 controversy of whether or not they have Lyme. It is at
21 issue.

22 Well, what's also interesting is --

23 THE COURT: So the answer to my question
24 is, yes, you have reviewed that for each of the persons
25 for whom you are requesting an IME?

1 MS. RIDLEY: Yes. And I will also note
2 there are still some documents coming, so I cannot tell
3 you that it's been an exhaustive look. I will note that
4 the tests recommended by our physician who's doing the
5 IME are recognized by both the NIH and the CDC. They're
6 within the medical community's recognition.

7 The Court's question about doesn't it
8 matter whether plaintiff has Lyme disease, in our -- in
9 our position, the defendants' position, of course it
10 matters. It matters because that's a central issue of
11 this case. If they don't have Lyme disease, they can't
12 be in the alleged Lyme market, and they certainly
13 wouldn't be able to seek claims for treatment for Lyme
14 if they don't have Lyme disease.

15 Counsel also argues, well, you can get
16 this from the medical records. I would note that under
17 the Ornelis case, the fact that some information might
18 be from other sources is not sufficient to avoid an IME.
19 An IME is different than medical records.

20 And importantly, the one last thing I
21 would note, the argument that these tests, according to
22 counsel, can't predict Lyme in early instances, none of
23 these plaintiffs are early instances. We're at the late
24 stage here. And so the tests that we're talking about
25 have notably very accurate relevancy.

1 I would finally argue that the strictures
2 regarding the IME, we've not asked for multiple IMEs.
3 We've asked for one IME with regard to each plaintiff.
4 We have explained when and where. We have given
5 available dates. We have even said we would be
6 accommodating to the plaintiffs who wished to be
7 elsewhere. It is -- we are not asking for anything
8 beyond what Rule 35 permits, and we believe we've met
9 each of the requirements.

10 THE COURT: Thank you.

11 Ms. Ridley, I am going to grant your
12 motion, in part. But here's what I'm going to ask you
13 to do. I need you to submit with particularity the
14 reason you believe with respect to each person you are
15 requesting an IME on, what the basis for the request is.
16 And, for example, I want specific information filed
17 under seal that demonstrates why you believe an IME --
18 IME is necessary with respect to that particular
19 plaintiff. Obviously, you'll file that under seal. And
20 I would like that done within seven days.

21 So for each of the persons for whom you
22 seek an IME, I want a short narrative of why good cause
23 has been demonstrated. If you get back and you don't
24 think you've got good cause for every one of them, let
25 me know that. And if you don't have a complete set of

1 the medical records yet in order to demonstrate that
2 good cause, let me know that, too, and we will deal with
3 that.

4 Now, on the assumption that the Court is
5 going to order IMEs with respect to at least some of
6 those plaintiffs, I am going to also ask the parties to
7 meet and confer on a person who can serve as a
8 court-appointed independent medical examiner. And the
9 way I propose to do that is the physician who is
10 assisting your side of the case, Ms. Ridley, is
11 Dr. Torten?

12 MS. RIDLEY: Yes, Your Honor.

13 THE COURT: Let's have Dr. Torten have a
14 conversation with whoever is providing medical advice to
15 the plaintiffs, and let's see whether Dr. Torten and
16 whoever that person is can agree on an independent
17 medical examiner to conduct these -- these IMEs. I
18 would like all of that to occur, if possible, within the
19 next two weeks.

20 Any concern about the timing on that from
21 the plaintiffs' perspective?

22 MR. HIGGINS: No, Your Honor.

23 THE COURT: All right. Obviously, it's
24 going to depend in some degree on where that person is
25 located. I would prefer that person be in the Eastern

1 District, and if not in the Eastern District, in the
2 state of Texas, and if not in the state of Texas,
3 centrally located within the United States. The degree
4 to which it will be difficult to get an agreement
5 between these two physicians I think may lead somewhat
6 to where that person might be located, but my preference
7 would be centrally located. And let's see if we can
8 have that done, as I said, within a couple of weeks.

9 And then you get, if you would,
10 Ms. Ridley, your specific detailed information to me
11 within seven days, and I'll take a look at that.

12 The defendants shall be responsible for
13 the cost of the IME. And travel expenses, lodging,
14 things of that nature of the plaintiffs will be shared
15 equally between the sides.

16 Any questions about that, Ms. Ridley?

17 MS. RIDLEY: No, Your Honor. Thank you.

18 THE COURT: Mr. Higgins, any questions?

19 MR. HIGGINS: Yes, Your Honor. When you
20 say shared --

21 THE COURT: Go to the podium.

22 MR. HIGGINS: Pardon me.

23 Just a real quick point. Where you say
24 shared equally between the sides, is that with respect
25 to the medical examiner or the plaintiff --

1 THE COURT: No, no, with respect to the
2 plaintiffs.

3 MR. HIGGINS: Thank you, Your Honor.

4 THE COURT: Okay. Anything further we
5 need to address in terms of argument? I'm going to have
6 some --

7 MR. DUNN: The doctors' renewed motion.

8 THE COURT: Oh, yes. Sorry, yes.

9 MR. DUNN: And, Your Honor, we have a
10 short deck. Your Honor, Alvin Dunn, representing IDSA
11 and the doctor defendants, but this motion is brought
12 only by the doctor defendants. Your Honor, we do have a
13 short deck.

14 Your Honor, in your order you gave the --
15 you dismissed the RICO claims, you dismissed the
16 fraudulent inducement claims, but you have the
17 plaintiffs to allege additional facts establishing
18 specific personal jurisdiction of the doctors and you
19 gave plaintiffs personal jurisdiction discovery. But
20 the doctors have fully participated in that discovery,
21 but there have been no additional facts establishing
22 specific personal jurisdiction.

23 Your Honor, in your order you recognized
24 that there's a different standard under the Sherman Act.
25 The Sherman Act does not provide for a nationwide

1 service of process over individual antitrust defendants.
2 It does over corporations. But unlike RICO, it does not
3 over individuals, and you recognized that. And you
4 recognized in your order that the plaintiffs need to
5 show specific personal jurisdiction, but they haven't
6 done that.

7 Your Honor, the standard in the Fifth
8 Circuit, it really -- it requires a nexus between the
9 contacts that the plaintiffs and the defendant
10 individuals have had with each other that give rise to
11 the cause of action. Sufficient nexus, it's been
12 defined here, but the Fifth Circuit -- and I'm assuming
13 you're familiar with the cases.

14 Your Honor, no facts showing nexus between
15 any doctors' Texas contacts and any plaintiffs' claims.
16 No plaintiff alleges any contact with any doctor in
17 Texas. Nowhere. No plaintiff alleges hearing or
18 reading any communication from any doctor in Texas. No
19 plaintiff alleges any injuries caused by anything that
20 any doctor did that had any connection to Texas.
21 There's been no facts shown with respect to drawing a
22 connection between any doctors' contacts and the state
23 of Texas.

24 So, Your Honor, here's the evidence.
25 Dr. Halperin, yes, he's visited Texas, but his

1 professional visits, he swore in sworn interrogatory
2 responses, he swore that neither professional visit
3 concerned Lyme disease. He also said he visits for
4 personal reasons.

5 But here's what the plaintiffs say. "It's
6 clear the only reason Halperin visits Texas is to spread
7 the false claim that chronic Lyme disease does not exist
8 and all Lyme disease can be cured with short-term
9 antibiotics." That's just their words, Your Honor, in
10 their pleading. There's no document. There's no
11 affidavit. And they haven't even pled it in a complaint
12 or an amended complaint.

13 And, Your Honor, it's the same for
14 Dr. Wormser, he has no contacts with Texas that have
15 anything to do with Lyme disease. The plaintiffs turn
16 it around and they say because he is a Lyme expert,
17 anytime he says anything anywhere, it must be because
18 he's trying to spread false information about Lyme
19 disease in Texas. No facts support that, none at all,
20 Your Honor.

21 The same thing with Dr. Dattwyler. He
22 swears he has no connections with Texas that have
23 anything to do with Lyme disease.

24 And, Your Honor, even the doctors that
25 have some connections with Texas where they might have

1 spoken about Lyme disease, like Dr. Sigal, he came more
2 than 14 years ago to speak to a group of
3 rheumatologists, and he said: Yes, I believe I remember
4 speaking with them about Lyme disease 14 years ago.

5 Your Honor, that's not a nexus between
6 that contact and any plaintiffs' claim. Nobody has come
7 to the Court and presented evidence on the plaintiffs'
8 side that says: I heard Dr. Sigal say things that were
9 false about Lyme disease that caused my injury, that
10 caused me to be denied treatment, whatever their claims
11 are. They have no evidence that any doctor has any
12 connection with them in Texas regarding their claims.

13 Your Honor, they're going to get up here
14 and say this motion is premature, but, Your Honor, it's
15 not. First of all, you haven't ruled on whether they're
16 allowed to replead the RICO claims. If you don't allow
17 them to replead their RICO claims, this motion is very
18 timely. And only antitrust claims are in the case, and
19 they need to --

20 THE COURT: It's not really timely,
21 though, until the Court rules on the RICO motions,
22 correct?

23 MR. DUNN: Well, but, Your Honor, you --
24 you dismissed the RICO claims. They've been gone for --

25 THE COURT: On the -- on the amended

1 complaint.

2 MR. DUNN: Right. But, Your Honor, if
3 you -- if you do -- even if you give them leave to
4 replead, they've already told you they don't have the
5 facts. They have to go find the facts to replead. So,
6 Your Honor, since late September there have been no RICO
7 claims with a live pleading in the case. They've told
8 you that they need more facts. You're going to either
9 say you don't get the chance to do that and you can't
10 replead, or you may give them the chance to do that.

11 Pending that time while they're looking
12 for facts, there's still no pled RICO claims, and the
13 doctors should not be in the case because there's no
14 jurisdiction over them on the antitrust claims. The
15 only claims still in the case, until they get the facts,
16 which they haven't gotten and they've told you they
17 don't have, and everybody on this side of the room has
18 also told you they've looked for them and haven't found
19 them, they have no facts.

20 So they've said that the burden is on them
21 to find these facts and properly replead facts. Under
22 those circumstances, Your Honor, I think it would be
23 quite just not to keep the doctors in the case pending
24 their effort to find the facts and their promise that
25 they're going to replead. It would really be just to

1 dismiss the doctors at this point. If they find the
2 facts and replead, then if that survives another motion
3 to dismiss, look at that under the RICO jurisdictional
4 standards and see if they can come back in. But pending
5 that, the doctors should be out, Your Honor.

6 THE COURT: Thank you.

7 MR. LEE: As you so often do, you hit the
8 nail on the head with the question about whether this is
9 premature or not. We believe that it is in the first
10 instance. The scenario, as Mr. Dunn would have it play
11 out, is problematic, Your Honor, because let's say that
12 you do allow us an opportunity to replead based on
13 whatever you determine on the four-year discovery issue,
14 in his world he would have you go ahead and dismiss them
15 now because technically there is not a RICO claim. If
16 we're able to sufficiently plead RICO at some later time
17 that you provide us with, then we would have to
18 potentially come back, add them in, reserve them, get
19 them on track with discovery, and it would further delay
20 the conclusion of this litigation, that I think we all
21 agree has gotten into the ditch and needs to be moved
22 along further.

23 So I think that a short period of time in
24 which the Court is going to decide the issue of RICO and
25 if we're going to be able to amend, then we provide that

1 amendment, and then I'm sure that we're going to have
2 briefing on whether that pleading is sufficient for
3 purposes of Rule 9, then I don't see any prejudice to
4 these individual doctor defendants in letting that take
5 place.

6 So I think that the better course would be
7 to either deny this motion without prejudice to refileing
8 or forgo resolution until such time as the Court finally
9 resolves the issue of RICO.

10 THE COURT: Thank you, Mr. Lee.

11 MR. LEE: If I could make one other
12 comment, Your Honor. Mr. Dunn said that on the
13 four-year issue -- and these -- all these motions
14 overlap in some way except for the IME motion. He said
15 that the defendants have looked for these documents, but
16 they've all said unequivocally that they don't exist. I
17 think it's very important to point out they don't exist
18 for the four years that they have presently looked for
19 them. That's not to say that they don't exist for the
20 longer period of time.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. DUNN: Your Honor, one thing real
24 quick.

25 THE COURT: Yes.

1 MR. DUNN: Your Honor, plaintiffs have
2 just admitted that if there's no RICO claims, there's no
3 jurisdiction over the doctors. I think they have not
4 even raised one bit of argument that you have personal
5 specific jurisdiction over the doctors under the
6 antitrust claims.

7 And, Your Honor, with respect to
8 prejudice, I would argue that the right thing to do is
9 let the doctors out, create a very short time frame if
10 you're going to give the plaintiffs the chance to
11 replead RICO to do that, and then that will be decided
12 very quickly. If they can do it and they can meet the
13 jurisdictional standards there, then it will be very
14 quick; they would not be prejudiced if they can bring
15 the doctors in. But in the interim, the doctors should
16 be dismissed, Your Honor.

17 THE COURT: Thank you, Mr. Dunn.

18 Anything else that anybody wants to say on
19 the defense side of the case?

20 Anything else the plaintiffs want to say?

21 MR. EGDORF: No, Your Honor.

22 THE COURT: All right. Mr. Dunn, I am
23 going to hold your motion in abeyance. I am going to
24 give the plaintiffs 14 days to file an amended
25 complaint.

1 In the meantime, I want the parties to
2 meet and confer beginning as soon as we recess regarding
3 a reasonable amount of time back to which documents
4 should be searched for. I've heard the arguments, you
5 know, I know what four years is. I know what
6 20 years -- I'm not sure 2010 is an argument that was
7 well presented this afternoon. I'm not sure what's
8 right.

9 I can choose a number, certainly, but
10 you-all know much more about your clients and much more
11 on the defense side and much more about your case on the
12 plaintiffs side. If you-all can try to negotiate with
13 each other in good faith and resolve this, it is going
14 to require some movement on both sides. If anything has
15 been demonstrated today, you-all are going to have to
16 work together to get this case ready for trial, assuming
17 we get that far.

18 But the type of motions and the argument
19 and the inability to work together and resolve disputes
20 really does rival anything I've seen in four years in
21 this case. And I'm embarrassed and somewhat ashamed to
22 have to tell you-all that. You-all have got to work
23 together.

24 When the depositions are taken, I want the
25 parties to be very mindful of CV 30, local Rule CV 30.

1 There are very few permitted objections that may be
2 appropriately lodged. If either party, either side
3 going forward in the next 30 days, 60 days, 90 days,
4 120 days feels the need for a status conference, all you
5 have to do is file a notice on the docket, and we'll set
6 it. So if there is difficulty getting along with the
7 other side and someone is taking the position that you
8 think violates an order the Court has previously issued,
9 file a notice, and we'll set a hearing.

10 Now, you-all should try to resolve what a
11 reasonable amount of time should be that the defendant
12 should have to search for documents. With respect to
13 the plaintiffs, I think whatever the -- if the
14 plaintiffs have not produced all of their documents,
15 they need to, going back to the beginning of time.
16 That's quite clear to me.

17 On the defense side, you-all -- as I've
18 said, when we recess I want you-all to begin the process
19 of meeting and conferring and coming up with a period of
20 time back to which the defendant should be required to
21 look for records and produce them that is reasonable.
22 Within seven days you should notify me whether you have
23 been able to reach agreement. I want the discussion to
24 begin today.

25 I recognize on the defense side you-all

1 will have to visit with your clients and understand what
2 particular concerns they may have. You-all won't be
3 able to reach agreement. Otherwise, I would keep you
4 here until midnight. But I know that's not going to be
5 productive, and I know you have to consult with your
6 clients. So within seven days let me know if you can
7 agree. If you cannot, let me know what your competing
8 proposals are, and I will decide.

9 Any questions about any of that?

10 MR. LEE: Your Honor, I have a question,
11 if I may.

12 THE COURT: Yes.

13 MR. LEE: So that we don't have to bother
14 the Court again once this issue about the time period is
15 dealt with or resolved, you mentioned Rule 18 -- or
16 local Rule 30 on the depositions.

17 THE COURT: Correct.

18 MR. LEE: I guess I am asking for
19 guidance from you. Does that rule still apply in full
20 force, or does it -- is it potentially limited by the
21 agreement that we either reach or that the Court
22 imposes?

23 THE COURT: Yes, potentially. But what
24 my particular concern was the refusal to make the
25 plaintiffs available for deposition and limiting any

1 questions to only what's occurred in the last four
2 years. It's not a proper objection.

3 MR. LEE: I understand, Your Honor. But
4 so when depositions do take place, they will be limited
5 by whatever time limitation you put forth?

6 THE COURT: When the depositions of
7 defendants' representatives take place, yes, they will
8 be limited by whatever you-all can agree to, which I
9 encourage you to work together to, you know, control
10 your destiny, or what I decide.

11 MR. LEE: Okay. That's what I wanted to
12 hear. Thank you.

13 MR. TUTEUR: I just want to make clear so
14 we don't -- with respect to the plaintiffs?

15 THE COURT: The plaintiffs' depositions
16 shall be unlimited in time.

17 MR. TUTEUR: Thank you, Your Honor.

18 THE COURT: The only objection that may
19 be lodged in the depositions of the plaintiffs is
20 "objection to form" or "objection to leading."

21 MR. TUTEUR: Understood.

22 THE COURT: Or an instruction to the
23 witness not to answer because the question potentially
24 violates the privilege.

25 MR. TUTEUR: But just to be -- the

1 goose/gander issue is you have not accepted that. The
2 defendants are limited in time to whatever we agree on
3 or whether -- if the Court has to impose it.

4 THE COURT: Correct.

5 MR. TUTEUR: The plaintiffs, we can go
6 back as far as needed?

7 THE COURT: That's absolutely right.

8 MR. TUTEUR: Thank you, Your Honor.

9 THE COURT: And whatever -- I mean, when
10 we get to the point when the depositions are going to be
11 taken, you know, to the extent that's a recurring
12 problem, we can get that teed up a time or two and get
13 it resolved and we'll have a practice for the rest of
14 the case.

15 So I do think it's part of this discussion
16 about what a reasonable amount of time the defendants
17 should be required to -- what is a reasonable amount of
18 time the defendants should be required to search for and
19 produce documents is a question about timing and how
20 quickly those can get produced, because I'd like to see
21 this case get back on track.

22 We're going to leave it -- I mean,
23 obviously, I think it goes without saying the case won't
24 be tried in June, but I think in the meantime, what I
25 would prefer you-all to do is to work together to get

1 some of this discovery taken care of, and then we'll get
2 it back on track with the schedule. And at that point,
3 I'll order you-all to meet and confer again on the
4 remaining deadlines that need to be resolved.

5 What other questions? Anybody on the
6 defense side? The plaintiffs' side?

7 Thank you-all for being here.

8 (Hearing adjourned at 4:29 p.m.)

9

10

11

CERTIFICATION

12 I HEREBY CERTIFY that the foregoing is a
13 true and correct transcript from the stenographic notes
14 of the proceedings in the above-entitled matter to the
15 best of my ability.

16

17

18 /s/ Christy Sievert

March 18, 2019

19 CHRISTY R. SIEVERT, CSR, RPR

20 Deputy Official Court Reporter

21 State of Texas No.: 8172

22 Expiration Date: 4/30/21

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