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

LISA TORREY, et al.,

Plaintiffs,

v.

INFECTIOUS DISEASES SOCIETY OF AMERICA, et al.,

Defendants.

Civil Action No. 5:17-cv-00190-RWS

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE PLAINTIFFS' NEW MISREPRESENTATION CLAIMS

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INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 9(b), 12(b)(6), and 15(a)(2), Defendants Dr. Gary P. Wormser, Dr. Raymond J. Dattwyler, Dr. Eugene Shapiro, Dr. John J. Halperin, Dr. Leonard Sigal, and Dr. Allen Steere (collectively, the "Doctors"); and the Infectious Diseases Society of America ("IDSA") submit this Motion to Dismiss Plaintiffs' Second Amended Complaint, Dkt. No. 352 ("SAC") or, in the alternative, to strike Plaintiffs' new misrepresentation claims. Defendants request that the Court set a hearing for oral argument on this motion.

Plaintiffs have now filed their third Complaint in this case.

Fact discovery has been completed. Nevertheless, Plaintiffs do not allege a single new fact in their Second Amended Complaint. Instead, they admit yet again that they lack the ability to allege with particularity their wire and mail fraud allegations underlying their RICO claims – much less prove them – and assert they again are entitled to a relaxed pleading standard because they ***still*** need to conduct "meaningful discovery." They also add two new counts for intentional and negligent misrepresentation against IDSA and seek, for the first time, to recover damages for personal injuries and emotional distress, without any new factual allegations in support.

After three years of discovery, Plaintiffs are not entitled to a relaxed pleading standard. The Court has twice before ruled that Plaintiffs failed to plead the wire and mail fraud acts underlying their RICO claims with the particularity required by Rule 9(b), but first allowed Plaintiffs to amend and then allowed Plaintiffs the benefit of a relaxed pleading standard because they needed to uncover the required factual detail in discovery. On their third attempt, Plaintiffs have no further excuse, and their RICO claims now should be dismissed with prejudice. Plaintiffs' antitrust claims also should be dismissed with prejudice because, after discovery, they no longer can allege payments and the reporting of doctors on information and belief. The RICO and antitrust claims should be dismissed with prejudice for the additional reason that Plaintiffs still do

not allege injury to their business or property and allege only personal injuries. Plaintiffs' fraudulent concealment allegations, unchanged from the claims the Court already has dismissed with prejudice, should once again be dismissed with prejudice.

Plaintiffs' brand-new counts – against IDSA only for intentional misrepresentation and negligent misrepresentation – should be dismissed as well. With these new claims, Plaintiffs seek to impose on nonprofit professional membership organizations new tort liabilities that would dramatically expand common law misrepresentation beyond what any state court has previously allowed. Plaintiffs fail to plead these claims, which sound in fraud, with the particularity required by Rule 9(b) by failing to identify or explain that any specific statements in the IDSA Guidelines are false. They also fail to plead that Plaintiffs relied, or that IDSA ever intended them to rely, on such statements to their detriment. Finally, the new damages for personal injury and emotional distress included in these counts cannot be allowed because Plaintiffs expressly disclaimed such damages previously before this Court.

In the alternative, even if Plaintiffs' brand-new misrepresentation claims are properly pled, the Court should strike them because permitting Plaintiffs to add these claims at the end of fact discovery – after the parties have completed liability and damages discovery, including depositions of each Plaintiff – would be highly prejudicial.

STATEMENT OF THE ISSUES TO BE DECIDED BY THE COURT

Whether Plaintiffs' Second Amended Complaint should be dismissed under Federal Civil Rules 9(b) and 12(b)(6) because:

1. Plaintiffs failed to allege facts sufficient to plead a plausible cause of action under the RICO Act; and

2. Plaintiffs failed to allege facts sufficient to plead a plausible cause of action against under the Sherman Act.

3. Plaintiffs failed to plead the elements of intentional misrepresentation or constructive fraud based on negligent misrepresentation; and

4. Plaintiffs' new claims for personal injury and emotional distress damages are barred by the doctrine of judicial estoppel.

In the alternative, whether the Plaintiffs' amendment to add new claims at the end of the fact discovery period should be struck.

BACKGROUND

This case has been pending for over three years. The fact discovery deadline was January 15, 2021. Plaintiffs have not asserted that they have been denied any discovery they have sought.

This case concerns IDSA's Lyme disease guidelines, which were first published in 2000 ("2000 Guidelines") and updated in 2006 ("2006 Guidelines").[1] IDSA is the world's leading professional society of infectious diseases specialists, and the Doctors and the other authors of the IDSA Guidelines are recognized Lyme disease experts. SAC ¶ 102.

Plaintiffs allege that they suffer from so-called "chronic Lyme disease," which describes a broad array of ongoing subjective symptoms – including fatigue, anxiety, migraines, memory loss, and brain fog – that Plaintiffs claim are caused by untreated and/or insufficiently treated Lyme disease. Plaintiffs assert their "chronic Lyme disease" requires long-term antibiotic treatment, including extremely expensive intravenous antibiotics. SAC ¶¶ 30-32.

The Doctors and other experts who wrote the IDSA Lyme disease guidelines disagree. They reviewed the available medical and scientific literature and, consistent with the

[1] Pursuant to Local Rule CV-7(b), cited excerpts of the 2000 Guidelines are attached as Exhibit A, and cited excerpts of the 2006 Guidelines are attached as Exhibit B. The full Guidelines are available at https://academic.oup.com/cid/article/31/Supplement_1/S1/327386 (2000 Guidelines) and https://academic.oup.com/cid/article/43/9/1089/422463 (2006 Guidelines).

overwhelming majority of Lyme disease guidelines published worldwide, concluded that a diagnosis of "chronic Lyme disease" for patients with ongoing subjective symptoms is not warranted and that long-term antibiotic treatment is not effective – and is potentially dangerous. SAC ¶ 46, 73.

However, a scientific disagreement cannot support a federal lawsuit. So Plaintiffs assert that the IDSA Guidelines are not actually the work of the Doctors and the other experts acting on their own. Plaintiffs assert that the guidelines instead were created by major health insurers such as Aetna, Anthem, Cigna, and United (the "Insurance Defendants") as part of a long-term and ongoing conspiracy with the Doctors and IDSA to write fraudulent guidelines so that the Insurance Defendants could save money by denying coverage for treatment of "chronic Lyme disease." SAC ¶ 49.

Plaintiffs have never asserted that the Insurance Defendants entered into an express agreement with the Doctors and IDSA to write fraudulent Lyme disease guidelines. SAC ¶ 38. Rather, Plaintiffs allege that such an agreement must be inferred from the following alleged facts: Beginning in 1995 and continuing for more than twenty years, the Insurance Defendants made substantial payments to each Doctor (1) to review Lyme disease patient files so that the Insurance Defendants could refuse to cover treatment for "chronic Lyme disease"; (2) to promote the allegedly fraudulent IDSA Lyme disease guidelines, which do not support long-term antibiotic treatment; (3) to report doctors who diagnose "chronic Lyme disease" and prescribe long-term antibiotics to medical boards for disciplinary action; and (4) to testify before medical boards against these same doctors. SAC ¶¶ 38-49. Plaintiffs allege that this conspiracy violates both the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Sherman Act.

The Court granted in part Defendants' motion to dismiss Plaintiffs' Original Complaint, holding that Plaintiffs adequately pled their antitrust claims but failed to plead their RICO or fraudulent concealment claims with particularity, as required by Rule 9(b). Dkt. 114 at 22, 30. Instead of ruling on Plaintiffs' argument that they are entitled to a relaxed pleading standard, at that time the Court gave Plaintiffs leave to file an amended complaint, noting that they had been engaging in discovery with Defendants for over four months and might be able to cure the pleading deficiencies. Dkt. 114 at 40.

On March 25, 2019, Plaintiffs filed their First Amended Complaint, in which they admitted that they were unable to plead their RICO claims with particularity but asserted they were entitled to a relaxed pleading standard because the facts supporting Plaintiffs' RICO claims are peculiarly within Defendants' possession and they needed "meaningful discovery" to access them. Dkt. 186 ¶¶ 64, 81. On April 9, 2019, the Court expanded the timeframe for document discovery and ruled on other pending discovery disputes. Dkt. 190.

On February 10, 2020, the Court granted in part and denied in part Defendants' motion to dismiss Plaintiffs' First Amended Complaint. Dkt. 279. The Court dismissed with prejudice Plaintiffs' fraudulent concealment claims. Dkt. 279 at 14. Plaintiffs' RICO claims survived after the Court found that Plaintiffs were entitled to a relaxed pleading standard and as such were excused from pleading with particularity the payments Plaintiffs alleged the Insurance Defendants made to the Doctors and details regarding which Defendants reported doctors to medical boards. Dkt. 279 at 11. The Court held that the factual allegations in the First Amended Complaint supported plausible inferences that the Insurance Defendants conspired with IDSA and the Doctors to restrain trade, such that Plaintiffs had adequately pled their antitrust claims. Dkt. 279 at 12-13.

The fact discovery deadline was January 15, 2021. Dkt. 309 at 3. Plaintiffs now have obtained documents from all Defendants, have deposed IDSA and each Doctor, have deposed two Insurance Defendants, and have had the opportunity to depose the other Insurance Defendants and take nationwide nonparty discovery. Plaintiffs have provided their documents and damages disclosures to Defendants, and Defendants have taken the depositions of Plaintiffs.

During the discovery period, Plaintiffs represented on numerous occasions that they were not seeking recovery for their personal injuries. *See* Plaintiffs' Opp to Motion to Dismiss, Dkt. 60 at 8, 10 ("Plaintiffs' Complaint clearly sets forth that Plaintiffs are not seeking personal injury damages. . . . Plaintiffs do not seek physical pain, mental anguish, pain and suffering, disfigurement, or any other personal injury damages."). Plaintiffs even asserted that their Complaint contained "no allegations that can even be read to infer personal injury claims against any of the Defendants." Dkt. 60, at 10. Plaintiffs' damages disclosures and supporting documents asserted damages only for alleged medical and travel expenses and lost wages.

On January 7, 2021, after completing their last deposition, Plaintiffs filed their Second Amended Complaint, ***which did not add a single new factual allegation.*** Remarkably, Plaintiffs admit that they still are unable to plead fraud with particularity, as required by Rule 9(b): "It is impossible for Plaintiffs to answer the newspaper questions regarding payments to the Doctors until meaningful discovery to [sic] conducted." SAC ¶ 53. And: "It is impossible for Plaintiffs to answer the newspaper questions regarding reports to medical boards made from the Settling Insurance Companies to the medical boards until meaningful discovery to [sic] conducted." SAC ¶ 70. Without acknowledging that they have completed fact discovery, Plaintiffs assert that "[t]he heightened pleading standards of Rule 9(b) should be relaxed 'upon a showing by the plaintiff that he or she is unable, without pretrial discovery, 'to obtain essential information' peculiarly in the possession of the defendant.'" SAC ¶ 52, 69.

Then, even though they did not add a single factual allegation to their Complaint and without even attempting to explain why they are adding new legal theories of recovery more than three years after filing their Original Complaint and at the end of the fact discovery period, Plaintiffs allege against IDSA brand-new counts for intentional misrepresentation and negligent misrepresentation. For each new claim, Plaintiffs now allege personal injuries, making conclusory allegations that they "have suffered physical injuries and emotional distress." SAC ¶¶ 177, 183.

Defendants now move to dismiss Plaintiffs' Second Amended Complaint in its entirety. In the alternative, Defendants move to strike Plaintiffs' new misrepresentation claims.

ARGUMENT

I. Plaintiffs' RICO And Antitrust Claims Must Be Dismissed Because Plaintiffs Have Completed Discovery And Still Cannot Plead The Facts Supporting Their Claims

Plaintiffs still cannot plead their RICO claims with particularity, as required by Federal Rule of Civil Procedure 9(b). They admit this fact in their Second Amended Complaint when they allege that they are entitled to a relaxed pleading standard because (1) all of the evidence of payments from the Insurance Defendants to the Doctors is solely in the possession of Defendants, SAC ¶ 50, and (2) all of the evidence of the Insurance Defendants reporting doctors to medical boards is solely in the possession of the Defendants. SAC ¶ 68.

As Plaintiffs admit, the heightened pleading standards of Rule 9(b) should be relaxed only when Plaintiffs are able to show that they are unable, without pretrial discovery, to obtain essential information that is peculiarly in the possession of Defendants. SAC ¶¶ 52, 69. Plaintiffs allege – yet again – that they need "meaningful discovery" in order to meet Rule 9(b)'s pleading requirements. SAC ¶¶ 53, 70. However, ***the fact discovery period closed on January 15, 2021, and Plaintiffs have had the opportunity to take any discovery they wanted, meaningful or not***.

Because Plaintiffs have admitted that they still cannot meet Rule 9(b)'s pleading requirements, even after conducting years of discovery, their RICO claims must be dismissed with prejudice.

The same alleged payments that form the basis of Plaintiffs' RICO claims also form the basis of Plaintiffs' antitrust claims because, according to Plaintiffs, the payments support an inference that the Insurance Defendants agreed with the Doctors and IDSA to restrain trade in the market for Lyme disease treatment. Yet fact discovery has been completed, and Plaintiffs not only cannot plead the details of the alleged payments with the particularity required by Rule 9(b) – they still cannot even plead the facts supporting the alleged payments – except on information and belief. SAC ¶ 38. Such allegations sufficed early in the case – before Plaintiffs had the benefit of full discovery. However, the allegations now demonstrate that even after Plaintiffs have completed fact discovery, they still are unable to plead the facts supporting their antitrust claims, which should now be dismissed with prejudice.

II. Plaintiffs Lack Standing To Bring Their RICO And Antitrust Claims Because They Do Not Plead Injury To Business or Property

RICO requires that Plaintiffs allege that they have "been injured in [their] business or property by the conduct constituting the [RICO] violation." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *see also* 18 U.S.C. § 1964. The Sherman Act likewise requires that Plaintiffs must have been "injured in [their] business or property by reason of anything forbidden in the antitrust laws.". 15 U.S.C. § 15(a). It is well-established that RICO does not allow Plaintiffs to seek recovery for "personal injuries." *See, e.g., Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001); *Tex. Carpenters Health Ben. Fund v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 671 (E.D. Tex. 1998), *aff'd*, 199 F.3d 788 (5th Cir. 2000). The same rule applies to antitrust claims. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (the requirement of injury to "business or property" works to "exclude personal injuries").

Recognizing that they could not seek recovery for personal injuries under their RICO or antitrust claims, Plaintiffs emphatically represented to the Court earlier in the case – in response to the standing arguments raised by the Insurance Defendants in their motion to dismiss the Original Complaint – that they were asserting "no allegations that can even be read to infer personal injury claims against any of the Defendants." Dkt. 60, at 10. Plaintiffs have now added new claims under which they seek to recover for "physical injuries and emotional distress," which are not recoverable under RICO or the Sherman Act. Plaintiffs thus reveal their true intent regarding the damages they seek, which flow directly from the personal injuries they allege.

Even if Plaintiffs had not added damages claims for physical injuries and emotional distress and one looks only at the damages Plaintiffs assert they seek in their RICO and antitrust claims, Plaintiffs' alleged RICO and antitrust damages still flow from Plaintiffs' personal injuries and therefore are not recoverable injuries to "business or property." That is the holding of *Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556 (6th Cir. 2013), in which the U.S. Court of Appeals for the Sixth Circuit, sitting en banc, looked at this question in greater depth than has any other court – and in a case that is closer to Plaintiffs' claims here than any other case to address this question.

Plaintiffs in *Jackson* alleged that their employer, their employer's third-party claims administrator, and a so-called "cut-off" doctor (who was paid to deny the *Jackson* plaintiffs' disability claims) engaged in a RICO conspiracy to deny benefits for work-related injuries. After an in-depth analysis, the Sixth Circuit concluded that the damages sought by Plaintiffs – such as "lost wages, rehabilitation services, and medical expenses" – do not "constitute an injury to 'business or property' under RICO." *Jackson*, 731 F.3d at 566.

The substance of Plaintiffs' RICO claims here lines up precisely with Plaintiffs' RICO claims in *Jackson.* Here, as in *Jackson,* Plaintiffs allege that they have been denied insurance coverage that would cover their alleged medical expenses, and like in *Jackson,* Plaintiffs seek recovery for alleged lost wages they assert flowed from the denial of benefits. In addition, the policy considerations cited by *Jackson* – a concern about expanding the reach of RICO without a clear indication of Congress's intent to do so – are equally applicable here. *See Jackson,* 731 F.3d at 563-567.

Courts within the Fifth Circuit have dismissed RICO claims seeking damages that, as with Plaintiffs' alleged damages here, flow from personal injuries. *See Hughes v. Tobacco Inst.*, No. No. 1:99-CV-163, 2000 U.S. Dist. LEXIS 7479, at *23-24 (E.D. Tex. May 5, 2000) (RICO claims based only on personal injury damages or "the economic consequences of personal injuries" such as increased health costs dismissed because those consequences "do not qualify as 'injury to business or property'"), *aff'd in relevant part,* 278 F.3d 417, 422 (5th Cir. 2001); *Borksey v. Medtronics, Inc.*, No. CIV. A. 94-2302, 1995 WL 120098, at *3 (E.D. La. Mar. 15, 1995) ("the medical expenses incurred by plaintiffs to remove the pump are so closely tied to their alleged personal injuries caused by the pump that such expenses cannot be recovered under RICO"), *aff'd in relevant part,* 105 F.3d 651 (5th Cir. 1996).

Plaintiffs seek lost wages under RICO as losses to their business or property. SAC ¶ 137, 151, 157, 161 (Plaintiffs' RICO and antitrust injuries include their inability "to work or earn money because of their debilitating illness"). However, claims for lost wages based on physical injuries and disabilities are not recoverable under RICO because "personal injuries and their resulting pecuniary consequences are not an 'injury to business or property.'" *Fisher v. Halliburton,* No. CIV. A. H-05-1731, 2009 WL 5170280, at *5 (S.D. Tex. Dec. 17, 2009); *Gaines v. Texas Tech*

Univ., 965 F. Supp. 886, 890 (N.D. Tex. 1997) (claims for lost opportunity after a personal injury are not compensable under RICO).

Even though the Plaintiffs in *Jackson* raised only RICO claims – not antitrust claims – the same principles apply to Plaintiffs' antitrust claims here because the Sherman Act also limits recovery to injuries to "business or property." As such, Plaintiffs' Sherman Act claims should be dismissed because Plaintiffs seek only damages that flow from their personal injuries and not injuries to "business or property."

III. Plaintiffs' New Misrepresentation Claims Must Be Dismissed

Plaintiffs seek to hold a professional medical society liable in tort for promulgating guidance to medical professionals, despite the fact that no court has ever recognized such a novel and dangerous theory of recovery by disconnected third parties. In so doing, Plaintiffs also have failed to meet even the minimal requirements for pleading their new claims against IDSA for intentional and negligent misrepresentation. First, they have failed to identify predicate representations of verifiable fact, as opposed to generalized medical opinions that are not specific to any particular Plaintiff, and they have failed to explain how any such representations are actually false. Second, Plaintiffs expressly allege that they do not rely on the IDSA Guidelines. Third, Plaintiffs fail to plead the requisite intent in light of the fact that Plaintiffs were expressly not the intended audience for consumption of the IDSA Guidelines. In addition, the new misrepresentation claims seek personal injury and emotional distress damages that Plaintiffs are estopped from seeking under the doctrine of judicial estoppel because Plaintiffs previously disclaimed seeking such damages before this Court.

Plaintiffs' new common law claims should be addressed under Virginia law.[2] The elements of misrepresentation claims under Virginia law are a "false representation of a material fact; made intentionally, in the case of actual fraud, or negligently, in the case of constructive fraud; reliance on that false representation to their detriment; and resulting damage." *Klaiber v. Freemason Assocs., Inc.*, 266 Va. 478, 485 (2003).[3] "A finding of either actual or constructive fraud requires clear and convincing evidence that one has represented as true what is really false, in such a way as to induce a reasonable person to believe it, with the intent that the person will act upon this representation." *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148 (1994). At the pleading stage for actual or constructive fraud, "allegations of fraud in a complaint 'must show, specifically and in detail' all elements of the cause of action at a level which, if believed, would qualify as clear and convincing proof.' Generalized, nonspecific allegations … are insufficient to state a valid claim." *Sweely Holdings LLC v. SunTrust Bank*, 2018 Va. LEXIS 209, *20-21 (Va. 2018).

Plaintiffs' new misrepresentation claims – both for intentional misrepresentation and negligent misrepresentation – are subject to an elevated pleading standard pursuant to Federal Rule of Civil Procedure 9(b), which requires that Plaintiffs "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why

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[2] Under the Texas "most significant relationship" test, Virginia law applies to the common law misrepresentation claims. *See Murthy v. Abbott Laboratories*, 847 F. Supp. 2d 958, 966 (S.D. Tex. 2012) (considering place of injury, place where the conduct occurred, domicile and place of business of the parties, and place where parties' relationship is centered). Because of the disparate locations of the Plaintiffs, the most significant state connected to the claims would be Virginia, where IDSA maintains its headquarters and would be considered to have made its publications.

[3] Virginia does not recognize a claim named "negligent misrepresentation," but the "essence of constructive fraud is negligent misrepresentation," and Plaintiffs' pleading attempts to meet the requirements of a constructive fraud claim based on a negligent misrepresentation. *Richmond Metro. Auth. V. McDevitt Street Bovis Inc.*, 256 Va. 553, 559 (1998).

the statements were fraudulent." *Massey v. EMC Mortg. Corp.*, 546 F. App'x 477, 481 (5th Cir. 2013); *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3D 719, 723-24 (5th Cir. 2003) (applying Rule 9(b) heightened pleading standard to negligent misrepresentation claims when plaintiff's "fraud and negligent misrepresentation claims are based on the same set of alleged facts."). Plaintiffs must also answer the basic "newspaper questions" regarding the who, what, where, when, and how of the alleged misrepresentations. *See Melder v. Morris*, 27 F.3d 1097, 1100 n.5 (5th Cir. 1994).

A. This Court Should Not Recognize Novel Causes Of Action Against A Professional Medical Society For Issuing Voluntary Guidelines

Plaintiffs seek to establish a new cause of action based on state common law for the novel proposition that a professional medical society can be held liable for personal injuries in tort whenever a professional uses its voluntary clinical practice guidelines. Essentially, Plaintiffs ask this Court to hold that any entity that issued voluntary guidelines can be held just as liable as a medical professional who treats the plaintiff for any harm that comes to the plaintiff as a result of the treating medical professional reviewing and using that guidance. This cannot be the law of Virginia or any other state.

To expose medical societies to these new causes of action would cause a sea-change in professional liability and effectively end the issuance voluntary clinical practice guidelines in the medical professions – and across a range of other professions and industries as well. There are good reasons that professional societies are encouraged to set standards and promulgate guidelines to aid the profession in providing the best service and care to the public. *See Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 501 (1988) ("When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased … those private standards can have significant procompetitive advantages."). This Court should not establish a new policy that would expose medical

professional societies to a flood of damages claims and severely disincentivize professional societies from promulgating such guidelines – to the detriment of the general public they seek to benefit.

It is well settled that federal courts should proceed with caution when litigants seek to expand state common law based on novel theories of recovery. The Fifth Circuit has cautioned that even with respect to Texas, a state within its boundaries, "our relationship to the Texas Supreme Court is all but identical to that of a Texas intermediate appellate court. Indeed, if it differs at all, as regards substantive innovation it is weaker instead of stronger than that of such court." *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. 1980). The Fifth Circuit's caution in *Rhynes* is instructive here. In that case, the plaintiff urged the federal court to adopt a new rule that would extend previous Texas products liability law beyond where the Texas legislature and courts had ventured. The Court concluded that it was not the federal court's place to craft new theories of recovery in place of the states themselves:

> We have no assurance whatever that Texas would adopt the product line rule of liability. That rule represents at least a radical extension of Texas product liability theory, at most a shift to a new and additional basis for liability. Neither action is appropriate for us. Whatever the merits or demerits of the proposed new rule, for us to adopt it for Texas would be presumptuous.

Id. Similarly, it would be presumptuous to assume that Virginia would adopt a new theory of liability for misrepresentation that allows a stranger to medical practice guidelines to recover for statements that were not intended for their consumption or even used by them, especially when doing so carries a grave risk of hampering the ability of professional societies to help improve the standard of care across a broad range of fields.

We have found no case, anywhere, that stands for the proposition that a professional medical society issuing voluntary guidelines owes an actionable duty to the unlimited individuals who might be affected by the use of the guidelines. The Court should decline to take this extraordinary step to expand common law misrepresentation claims into a tool to allow private citizens to challenge professional medical guidelines without any direct connection to them.

B. Plaintiffs Do Not Plead Misrepresentations of Fact with Particularity

The Second Amended Complaint fails to explain the specific statements in the IDSA Guidelines that constitute factual misrepresentations. The referenced misrepresentations it does point to are not quotes from the Guidelines but simply paraphrases and inflammatory alterations. For example, Paragraph 74 claims that "the 2006 IDSA Guidelines actually promote the idea that Lyme is a simple, rare illness that is easy to avoid, difficult to acquire, simple to diagnose, and easily treated and cured with 28 days of antibiotics." SAC ¶ 74. Paragraph 89 later puts this phrase in quotations when alleging that this is a "false narrative." However, this quotation was created by Plaintiffs and does not appear anywhere in the IDSA Guidelines. Without specifying the exact statements in the Guidelines that Plaintiffs consider actionable, Plaintiffs wholly fail to take the next requisite step and explain why those particular statements were fraudulent by describing how they were untrue. A statement can be actionable as a misrepresentation only if it "(1) admits to being adjudged true or false in a way that (2) admits of empirical verification." *Hoffman v. L&M Arts*, 838 F.3d 568, 579 (5th Cir. 2016).

The Second Amended Complaint, at its core, alleges only "that a disagreement exists between actual Lyme disease doctors and research doctors," SAC ¶ 116, and that the Guidelines "promote [an] idea" about chronic Lyme disease, SAC ¶ 74, but it does not allege any objectively proven falsehoods are contained therein. "The mere expression of an opinion, however strong and positive the language may be, is no fraud." *McMillion v. Dryvit Sys.*, 262 Va. 463, 471 (2001). While some statements of expert opinion can be actionable as a misrepresentation, this exception applies only when an expert provides a specific, individualized opinion directly to the plaintiff in the context of an actual physician-patient relationship. *Glenn v. Trauben*, 70 Va. Cir. 446, 448 (2004). In *Glenn*, a Virginia court illustrated the difference when it cited the "special relationship between and untrained patient and a licensed physician" and allowed an intentional

misrepresentation claim to proceed against a "physician describing, in his professional opinion, the state of ***his patient's physical condition*** …. This is a situation where medical opinion should be taken as fact, especially ***in light of the relative positions of the parties***." *Id.* (emphasis added). To be clear, only the "***patient*** may rely on that as a statement of fact," not any member of the public who has not been examined or treated by the doctor. *Id.* (emphasis added). Plaintiffs here do not allege, because they cannot, any kind of special relationship with IDSA that would entitle them to treat the IDSA Guidelines as actionable fact.

The IDSA Guidelines set forth explanations of medical research, experiments, and knowledge based on citations to other published studies and clinical trials, not naked assertions of fact. At times, the authors present their opinions regarding how convincing or useful certain tests or treatments are generally. To the extent any such statements could be proven true or false with empirical evidence, it would require identifying the specific statements and identifying the objective falsehoods in the particular studies cited in support of those statements. Plaintiffs do not, and cannot, make such allegations. At best, they cite other studies or statements that have reached different conclusions or formed different opinions, but they do not allege that the studies cited by the IDSA Guidelines do not contain the findings described therein.

C. Plaintiffs Do Not Plead Detrimental Reliance

Plaintiffs do not allege that they actually, personally, relied on the IDSA Guidelines to their detriment. To be actionable, "the false statement must be believed and relied on by the party to whom it is addressed, otherwise, however false or fraudulent the intent, the false statement does not constitute any ground for the rescission of a contract or action for damages." *Alexander v. Kuykendall*, 192 Va. 8, 14 (1951). The element of reliance is common to both intentional fraud and constructive fraud by negligent misrepresentation, and plaintiff must plead specific "reliance by the Plaintiff" in order to state either claim. *Sun Hotel v. Summitbridge* Credit Invs. III, LLC,

86 Va. Cir. 189, 192 (2013) (elements of fraud include "reliance by the Plaintiff"); *Langmaid v. Lee*, 86 Va. Cir. 118, 126 (2013) (elements of constructive fraud by negligent misrepresentation include "reliance by plaintiff"). Plaintiffs allege no such reliance by them personally on any statements made by IDSA, and thus they fail to plead both new misrepresentation counts.

Indeed, Plaintiffs plead that they did ***not*** rely on the IDSA Guidelines but instead sought treatment outside the IDSA Guidelines and that they prefer Lyme disease guidelines issued by ILADS, which they allege recommend more flexible treatments. SAC ¶ 113. These allegations negate reliance. In *Eden v. Wright*, the Virginia Supreme Court held that the plaintiffs could not recover for misrepresentation when they alleged that they did not sell stock because of a false representation that there were restrictions on its sale; rather, they explicitly disbelieved that representation and acted to sell the stock anyway. 265 Va. 398, 406 (2003). Plaintiffs here allege the same failure to rely, and the Second Amended Complaint does not identify any acts taken in detrimental reliance on the IDSA Guidelines by any Plaintiff.

In a similar Seventh Circuit case, a plaintiff brought suit against a medical professional association, claiming that its publications had misled him into seeking care from its members. *Collins v. American Optometric Ass'n*, 693 F.2d 636, 641 (7th Cir. 1982) ("Plaintiff here has consistently failed to specify which AOA documents or publications he allegedly relied upon"). Much like the Plaintiffs, Collins asserted paraphrased representations of the AOA's publications, and "he did not rely on any of defendant's alleged misrepresentations in seeking out any of the optometrists who failed to diagnose his glaucoma." *Id.* Without any indication that any Plaintiff took actions specifically because they believed an actual statement of fact from the professional organization, "as opposed to materials disseminated by other groups," they cannot establish reliance, much less reliance that was the proximate cause of any injury. *Id.* at 641-42.

D. Plaintiffs Do Not Plead That IDSA Intended Plaintiffs To Rely On IDSA Guidelines

Virginia fraud and misrepresentation law requires that a plaintiff plead facts showing that the defendant intended for the ***plaintiff*** to act upon a given misrepresentation to be actionable. *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148 (1994). Publication of the IDSA Guidelines, which are expressly intended only for a professional medical audience, does not satisfy this element with respect Plaintiffs here, who are not medical professionals. *See* Ex. A, 2000 Guidelines Excerpt ("The objective of these practice guidelines is to provide clinicians and other health care practitioners with recommendations for management of cases."); Ex. B, 2006 Guidelines Excerpt ("The guidelines are intended for use by health care providers for patients who either have these infections or may be at risk for them.").

Because the Guidelines on their face destroy Plaintiffs' ability to plead requisite intent, Plaintiffs do not attempt to plead intent but allege only that the misrepresentations eventually, downstream, "harmed the Plaintiffs" and that "IDSA should expect this would occur." SAC ¶¶ 176-77, 181-82. A complaint is deficient when if it "failed to plead that [declarant] knew or had reason to know that [plaintiff] would rely upon [declarant]'s alleged misrepresentations." *Mortarino v. Consultant Eng'g Servs.*, 251 Va. 289, 295 (1996). IDSA is in much the same position as the civil engineer in *Mortarino*, whose conclusions were passed on to a third party plaintiff by his client. Plaintiffs here do not – and could not – allege that IDSA drafted the Guidelines for the use or consumption of Plaintiffs. *Id.* at 292-93 (plaintiff "failed to allege that Bernick made any representation to Mortarino [the third party plaintiff], and, therefore, no cause of action for constructive fraud was stated against Bernick").

E. Plaintiffs' New Misrepresentation Claims Are Barred By Judicial Estoppel

Under the doctrine of judicial estoppel, Plaintiffs cannot assert inconsistent positions in the same lawsuit. In the Fifth Circuit,[4] judicial estoppel applies if (1) the party's position is "clearly inconsistent with the previous one," (2) the court "accepted the previous position," and (3) the inconsistency "must not have been inadvertent." *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004). Plaintiffs' new misrepresentation claims seek damages for "physical injuries and emotional distress," despite Plaintiffs' prior assurances to this Court that they were not seeking any such damages in this action. *See, e.g.*, Dkt. 60, at 8 (Plaintiffs' Opposition to Motion to Dismiss) ("Plaintiffs are not seeking personal injury damages"). And the Court relied on and accepted this position in ruling on the motions to dismiss. Dkt. 114, at 24-25 (Court's Order) ("Plaintiffs specifically disclaim any damages relating to physical pain, mental anguish, pain and suffering, disfigurement or any other personal injury damages"). Finally, this was not an inadvertent mistake. Plaintiffs cannot now assert new and inconsistent claims on the basis of the same set of alleged facts.

The Court need not conclude that Plaintiffs acted in "bad faith" to apply judicial estoppel. Even when the inconsistent party did not have a strategic motive or incentive, a two-and-a half year delay in bringing the "mistake" to the court's attention and which "muddied discovery issues" justified the application of the doctrine. *Engines Sw., Inc. v. Kohler Co.*, 263 F. App'x 411, 414 (5th Cir. 2008). While the doctrine "does not require the party asserting judicial estoppel to demonstrate prejudice or detrimental reliance," there is clear evidence of prejudice supporting dismissal of claims on these grounds as well. If Plaintiffs had asserted their misrepresentation

[4] Federal courts apply their own principles of judicial estoppel, regardless of the underlying substantive law, "because a federal court should have the ability 'to protect itself from manipulation'" *Hall v. GE Plastic Pac. PTE, Ltd.*, 327 F.3d 391, 395 (5th Cir. 2003).

claims at the outset, as they easily could have done, discovery could have addressed issues related to emotional distress and personal injury damages, but such discovery was unnecessary based on the original claims pled by Plaintiffs and Plaintiffs' express disclaimer to the Court regarding the nature of their claims. Permitting Plaintiffs to add misrepresentation claims at the end of fact discovery would substantially prejudice Defendants.

IV. The Court Should Strike Plaintiffs' New Misrepresentation Claims

If the Court does not dismiss Plaintiffs' new misrepresentation claims, the Court should strike those new claims. Plaintiffs should not be permitted to amend to add such late, prejudicial, and futile claims, particularly when the claims easily could have been brought with the Original Complaint. Fed. R. Civ. P. 15(a)(2).

While Plaintiffs did not seek leave to amend because the Court's Docket Control Order allows Plaintiffs to amend their complaint after the fact discovery deadline, Dkt. 309, the Court still should consider whether permitting the amendment to add new claims is appropriate based on the factors that govern the exercise of its discretion to allow a late amendment under Rule 15(a)(2). Leave to amend can be denied based on factors "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

"At some point in time delay on the part of a plaintiff can be procedurally fatal." *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981). Plaintiffs are past the point of no return to amend and add new claims, particularly because the new claims are not based on any new factual revelations in discovery and are simply alternative theories of recovery that could have been alleged at the very start of the case. When the "facts on which the claim of fraud is based were fully known … from the outset of the lawsuit and, indeed, were relied on by him, though under a

different theory, in his original answer," a party cannot amend its pleading 18 months later. *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967) ("that lack of diligence is reason for refusing to permit amendment").

Permitting the late amendment would impose undue prejudice on IDSA and the Doctors. A party may not use late-breaking amendments to "present theories of recovery seriatim to the district court." *Southern Constructors Grp. Inc. v. Dynalectric Co.*, 2 F.3d 606, 612 (5th Cir. 1993). By asserting new theories of recovery and damages after fact discovery has closed on their old theories, Plaintiffs seek to "try a different tack" and are "adding to the already burgeoning dockets of the district courts." *Id.* Moreover, the new claims force the defense to adapt after three years of relying on affirmative disclaimers of any claims for personal injury or emotional distress damages. By its very nature, there is substantial prejudice to the other party because "[i]nserting the defense of fraud in the case on the last day of discovery would have raised new issues, which were not involved in the case during the discovery and were not the subject of [the other party]'s discovery and trial preparation." *Lone Star Steakhouse & Salon Inc. v. Alpha of Virginia Inc.*, 43 F.3d 922, 940 (5th Cir. 1995).

It is far too late for Plaintiffs to add new claims and seek new damages. If the Court does not dismiss Plaintiffs' new misrepresentation claims, it should strike the Second Amended Complaint.

CONCLUSION

For the reasons stated herein, Defendants request that the Court dismiss all counts of Plaintiffs' Second Amended Complaint with prejudice. In the alternative, if the Court does not dismiss Plaintiffs new misrepresentation claims, the Court should strike the Second Amended Complaint.

Dated: January 21, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Casey Low, hereby certify that on the 21st day of January, 2021, the foregoing Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint or, in the Alternative, To Strike Plaintiffs' New Misrepresentation Claims, with exhibits and accompanying Proposed Order, were filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

/s/ *Casey Low*
Casey Low