**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 FOR PROTECTIVE ORDER REGARDING PLAINTIFFS' PROPOSED DEPOSITIONS OF THEIR DESIGNATED EXPERTS

Pursuant to Fed. R. Civ. P. 26(a) and (c), Defendants[1] submit this Motion for Protective Order to require (1) that Plaintiffs, before seeking to elicit expert opinion testimony from Dr. Sam T. Donta, Dr. Joseph J. Burrascano, Jr., or Dr. Kenneth Liegner, first provide a written report that complies with Rule 26(a)(2)(B), and (2) that Plaintiffs, if they seek to depose Dr. Donta, Dr. Burrascano, or Dr. Liegner before providing an expert report, be barred from seeking to elicit expert opinion testimony at the deposition.

[1] Defendants Infectious Diseases Society of America ("IDSA"); Aetna Inc., Anthem, Inc., United Healthcare Services Inc., UnitedHealth Group Incorporated, and Blue Cross and Blue Shield Association; and Dr. Gary P. Wormser, Dr. Raymond J. Dattwyler, Dr. Eugene Shapiro, Dr. John J. Halperin, Dr. Leonard Sigal, and Dr. Allen Steere bring this motion. The Court has entered Orders staying all case deadlines for the three Defendants that have reached settlements with Plaintiffs.

INTRODUCTION

To date, Plaintiffs have designated eight expert witnesses, including six "non-retained" experts to provide expert opinion testimony regarding various aspects of Lyme disease.[2] Under the Court's Agreed Discovery Order (Dkt. 81), each side is limited to five expert witnesses.[3]

Shortly before the Court stayed the case, Plaintiffs informed Defendants that Plaintiffs intended to take the depositions of three of their non-retained experts—Dr. Sam T. Donta; Dr. Joseph J. Burrascano Jr.; and Dr. Kenneth Liegner—without first providing an expert report from any one of these designated experts. Email from E. Egdorf to A. Dunn, et al. (August 29, 2019).

Plaintiffs now contend that they intend to take each doctor's deposition as a fact witness; that they do not know if each doctor has expert opinion testimony to provide; but that they need to take each doctor's deposition in order to make that determination. Plaintiffs state that if any doctor offers expert opinion testimony they wish to use, Plaintiffs would designate the expert at Plaintiffs'

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[2] Plaintiffs designated seven experts on January 29, 2019, the deadline for Plaintiffs to designate experts under the original Docket Control Order. Plaintiffs designated one retained expert—an attorney at Rusty Hardin & Associates, one of the law firms representing Plaintiffs in this case—to provide expert opinion testimony regarding Plaintiffs' attorneys' fees and expenses. Plaintiffs designated six non-retained experts (including Dr. Sam T. Donta, Dr. Joseph J. Burrascano Jr., and Dr. Kenneth Liegner) to provide expert opinion testimony regarding various aspects of Lyme disease. *See* Excerpts from Plaintiffs' Designation of Experts (January 29, 2019) ("Expert Disclosures"), attached as **Exhibit A**. Nearly two months later, Plaintiffs identified a retained expert who would present an expert opinion regarding Plaintiffs' alleged damages.

[3] When Defendants pointed out to Plaintiffs that they had exceeded the five-expert limit, Plaintiffs acknowledged that they had exceeded the limit but blamed Defendants:

> Second, we acknowledge that both sides are limited to 5 testifying experts and further recognize that we listed six non-retained experts. Again, based on the inadequacies of Defendants' discovery responses, document productions and disclosures, Plaintiffs are unable to decide which of these experts are most appropriate for the case. As stated above, once we receive guidance from the Court on the outstanding issues before it, we will be in a better position to make that determination and will amend/supplement our disclosures.

L. Lee letter to J. Doan (February 7, 2019). Plaintiffs have ignored the "No Excuses" provision of the Agreed Discovery Order and to date have not amended their expert disclosures to comply with the five-expert limit.

new expert witness deadline. They nevertheless contend that they would not be obligated to provide an expert report under Rule 26(a)(2)(B) (for a retained or specially employed expert) but instead would provide only a much more limited disclosure under Rule 26(a)(2)(C) (for a non-retained expert). *See* Transcript of Scheduling Conference (February 5, 2020) at ("Transcript") at 34:1-2 (Plaintiffs' counsel states if Plaintiffs designate Dr. Donta as an expert, Plaintiffs would provide a disclosure but "don't have to give a report.").

Defendants acknowledge that each of the three doctors may have factual evidence relevant to Plaintiffs' claims. *See, e.g.*, Amended Complaint (Dkt. 186) ¶ 58 (Plaintiffs allege that Dr. Donta "questioned why the [IDSA] guidelines did not include treatment for patients with chronic Lyme disease").

However, Plaintiffs' assertion that they need to depose each doctor to determine whether he has expert opinion testimony to provide is inconsistent with Plaintiffs' original expert disclosures, in which Plaintiffs stated that they believe that each doctor will present expert opinions related to Lyme disease. For example, Plaintiffs assert that Dr. Liegner

> has expertise regarding chronic Lyme disease, treating chronic Lyme disease, how health insurance companies cover (and do not cover) chronic Lyme disease, retaliation against doctors who treat chronic Lyme disease by health insurance companies, the IDSA guidelines, treatment failure of patients treated with short-term antibiotics, how health insurance companies require doctors to follow only the IDSA guidelines, and the testing for Lyme disease. Plaintiffs believe Dr. Liegner will offer opinions regarding all these issues.

Expert Disclosures at 4-5. Plaintiffs have represented that at least one of these doctors—Dr. Donta—is extremely elderly, which is why they seek to take his deposition as soon as possible.

Defendants bring this motion for a protective order to require (1) that Plaintiffs, before seeking to elicit expert opinion testimony from Dr. Donta, Dr. Burrascano, or Dr. Liegner at a deposition, first provide a written report that complies with Rule 26(a)(2)(B), and (2) that if

Plaintiffs seek to depose Dr. Donta, Dr. Burrascano, or Dr. Liegner before providing an expert report, they be barred from seeking to elicit expert opinion testimony at the deposition.

ARGUMENT

Under Federal Rule of Civil Procedure 26(c), upon an appropriate showing, the court may issue an order prescribing appropriate discovery methods or limiting the scope of discovery by forbidding a party's inquiry into certain matters. Fed. R. Civ. P. 26(c)(1).

Federal Rule of Civil Procedure 26(a)(2)(B) requires "witnesses who are retained or specially employed to provide expert testimony" to submit a detailed written report. Fed. R. Civ. P. 26(a)(2)(B). The 2010 amendments to the Federal Rules provide a narrow exemption from this report requirement: Instead of the written report that a retained or specially employed expert is obligated to provide, a non-retained expert is obligated to provide "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). This exemption is designed to apply to treating physicians:

> A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony.

Fed. R. Civ. P. 26, Advisory Committee Notes at ¶7. *See LaShip, LLC v. Hayward Baker, Inc.*, 296 F.R.D. 475, 480 (E.D. La. 2013) (treating physicians are "the subject of most of the [Rule] 26(a)(2)(C) caselaw") *aff'd*, 680 F. App'x 317 (5th Cir. 2017). However, Plaintiffs do not seek to call Dr. Donta, Dr. Burrascano, or Dr. Liegner as a treating physician. Transcript at 32:21-22 ("THE COURT: Are they treating physicians? MR. EGDORF: Well, they are not for our plaintiffs, Your Honor.").

Where, as here, an expert "does not have ground-level involvement in the events giving rise to the litigation" and bases his expert opinion on his professional training, that person is

considered retained and/or specially employed and must provide a written report – even if he does not have a compensation arrangement with Plaintiffs. *See Diamond Consortium, Inc. v. Manookian*, No. 4:16-CV-00094, 2017 WL 2936218 *3 (E.D. Tex. July 10, 2017).

In *Diamond Consortium*, Defendants asserted that their designated non-retained expert regarding diamond grading was not required to submit a report because Defendants "do not have a compensation agreement with [the expert] and [the expert] did not form his opinions regarding diamond grading in anticipation of litigation, but in the course of his ordinary employment and professional training." *Id.* at *2. This Court disagreed, holding that "courts require a party seeking to avoid producing a full expert report to show the proposed expert is not required to submit a report." *Id.* at *2 (quoting *Eagle Oil & Gas Co. v. Travelers Prop. Cas. Co. of Am.*, No. 7:12-CV-00133, 2014 WL 3744976, at *7 (N.D. Tex. July 30, 2014)). The expert's proposed opinion was "based on his ordinary employment and professional training" and thus he "d[id] not have ground-level involvement in the events giving rise to the litigation." *Id.* at *3. Furthermore, even though the expert was not formally engaged or compensated by Defendants and did not form his opinions in anticipation of litigation, he was required to submit a report in part because "Defendants recruited him to provide expert opinion testimony" in the case. *Id.*

Likewise, Drs. Donta, Burrascano, and Liegner—according to Plaintiffs' original expert designations—are "retained or specially employed" because, for the matters on which they will provide expert opinion testimony, they did not have "ground-level involvement in the events giving rise to the litigation" but instead would base their expert opinions on their professional training and experience. *Id.* Because, according to Plaintiffs' disclosures, each doctor has expertise regarding chronic Lyme disease and related matters based on his professional training

and experience, *see* Expert Disclosures at 2-5, each doctor offering expert testimony on these matters must submit a report.

Plaintiffs assert that they must depose each doctor to determine whether each doctor has expert opinion testimony to offer and that only *after* taking the depositions would Plaintiffs decide whether to designate each doctor as an expert. Plaintiffs also assert that if a doctor provides expert testimony at his deposition and Plaintiffs designate the doctors as their testifying expert, Plaintiffs then would provide only the more limited disclosure required by Rule 26(a)(2)(C)—and would not provide the report required by Rule 26(a)(2)(B). Transcript at 34:1-2.

Plaintiffs' plan has two fundamental flaws. First, depositions are not designed to be used by parties to discover whether witnesses could serve as retained or specially employed experts. The rules contemplate that attorneys would communicate with potential experts well before any expert deposition, and the rules provide protections for such communications. *See* Fed. R. Civ. P. 26(b)(4)(C). The rules also make clear that for a retained or specially employed expert, "the deposition may be conducted only after the report is provided." Fed. R. Civ. P. 26(b)(4)(A).

Second, Plaintiffs cannot assert that they might offer Dr. Donta, Dr. Burrascano, or Dr. Liegner as a non-retained expert when Plaintiffs' expert disclosures describe expert opinions that simply are not based on the doctor's "ground-level involvement in the events giving rise to the litigation" but instead are based on the doctor's professional experience diagnosing and treating Lyme disease. If any one of these doctors would be providing an expert opinion regarding Lyme disease—as set forth in Plaintiffs' disclosures—the doctor must first provide the report required by Rule 26(a)(2)(B).

Accordingly, the Court should issue a protective order to require (1) that Plaintiffs, before seeking to elicit expert opinion testimony from Dr. Donta, Dr. Burrascano, or Dr. Liegner, first

provide a written report that complies with Rule 26(a)(2)(B), and (2) that Plaintiffs, if they seek to depose Dr. Donta, Dr. Burrascano, or Dr. Liegner before providing an expert report, be barred from seeking to elicit expert opinion testimony at the deposition.[4]

Dated: February 12, 2020 Respectfully submitted,

[4] Plaintiffs have not stated that they need to depose any of their three other "non-retained experts" in order to determine whether to designate any such witness as an expert for trial. According to Plaintiffs' Expert Disclosures, however, the subject of each witness's testimony again would be Lyme disease diagnosis and treatment generally, not testimony arising from "ground-level involvement in the events giving rise to the litigation" or the treatment of any particular Plaintiff. Accordingly, for the reasons outlined in this Motion, each of the three additional "non-retained" experts should also be obligated to provide an expert report prior to any deposition.

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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 12th day of February, 2020.

/s/ *R. Casey Low*
R. Casey Low

CERTIFICATE OF CONFERENCE

I hereby certify that I have complied with the meet and confer requirement of Local Rule CV-7(h). Counsel for Defendants have conferred with counsel for Plaintiffs, regarding this Motion. Plaintiffs are opposed to the relief requested in this Motion.

/s/ *Alvin Dunn*
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