

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

LISA TORREY, <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 5:17-cv-00190-RWS
	§	
INFECTIOUS DISEASES SOCIETY OF	§	JURY DEMANDED
AMERICA, <i>et al.</i> ,	§	
	§	
Defendants.	§	

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS SUBSTITUTED IME & PLAINTIFFS’  
PROPOSAL FOR ALTERNATIVE IME SUITABLE FOR DIAGNOSING CHRONIC  
LYME DISEASE**

**I. Defendants Provide No Information Why the Court-Appointed IME Is Unavailable. This Raises Substantial Concerns.**

Defendants stated in summary fashion that the Court appointed Independent Medical Examiner (Dr. Liddell) is "unavailable for the task.". Dkt. 277 (pg. 1). There is no evidence provided by the Defendants as to why this Court appointed Independent Medical Examiner (“IME”) is unavailable to perform these duties.

To put some needed perspective on this issues, the IME was chosen by the Court after months of motion practice, Court orders on the issue, conferences between counsel, a hearing, and conferences between the doctors chosen by the Plaintiffs and Defendants to select an appropriate IME. The IME selected by the Court was the doctor recommended by the Defendants and opposed by the Plaintiffs. Now, without any explanation other than the IME is “unavailable for the task,” the Defendants seek to go back to one of the original doctors the Defendants proposed—and who was objected to by Plaintiffs’ doctor as lacking the qualifications to diagnose chronic Lyme disease—and unilaterally select Dr. Goodman as the IME.

Accordingly, the Plaintiffs and the Court are without knowledge as to any of the conversations that the Defendants had with the Court-appointed IME. Plaintiffs and the Court are without knowledge as to the specific reasons that that Court-appointed IME has stated she is no longer capable of performing the tasks. The IME never communicated with the Plaintiffs or Plaintiffs' counsel throughout any of the process including the IME's decision to not proceed as the Court appointed examiner. Instead, this independent examiner communicated directly with counsel for the Defendants. Plaintiffs are unaware when the communication with the IME regarding the doctor being unable to handle the "task" took place with counsel for the Defendants because Defendants have not provided that information.

Given the state of the record, Plaintiffs are concerned that it is possible this IME that was Court-appointed may have been in a position to perform tests on the Plaintiffs and come to a conclusion which was contrary to the Defendants' expectations. Given that there is no evidence, affidavit, or other explanation detailing why this court-appointed IME is being replaced it raises serious concerns when the Defendants now seek to unilaterally select the next IME.

**II. Defendants Failed To Follow The Court's Prior Procedure For Selecting An IME And Instead Unilaterally Selected A Previously Objected To Doctor. The Proposed New IME Was Unilaterally Selected By The Defendants And Was Previously Rejected By The Plaintiffs And Ultimately Not Selected By The Court.**

The Defendants rely upon Dr. Torten (the Defendants' doctor and healthcare advisor) in selecting their proposed new IME for which they seek Court-appointment. Dkt. 277. As the Court will recall, Dr. Torten was not permitted to unilaterally identify the current Court-appointed IME. Rather, per the Court's order, Dr. Torten was required to communicate with the doctor selected by the Plaintiffs (Dr. Maloney) in order to identify between them a doctor that could fulfill the obligations of being an IME. *See* Dkt. 177 at pgs. 91-92.

The Defendants have not followed the Court's approach this time around in attempting to select this new IME for which Defendants seek Court-appointment. Instead, Defendants here have unilaterally relied upon the doctor that they themselves selected (Dr. Torten) to find a purported IME without any consultation with the Plaintiffs or the Plaintiffs' doctor (Dr. Maloney).

Indeed, in selecting the current IME Dr. Torten filed a declaration in May of 2019 in which Dr. Torten specifically states: "I was informed by counsel that the Court did not select me to conduct the exams but that the Court asked that I work with Plaintiffs' medical advisor to agree on a physician to conduct the exams was located in the Eastern District of Texas or, if not possible, in the state of Texas or, if not possible, in the central United States." Dkt. 199-1, pg. 1; *See also* Dkt. 198 (Order of the Court explaining the process to select the IME). Dr. Torten in her May 2019 declaration states she recommended Dr. Edward Goodman as the IME. Dr. Torten declares she spoke with Dr. Maloney about Dr. Goodman and he was not acceptable to Plaintiffs. Dkt. 199-1, pg. 2. Dr. Goodman was rejected by the Plaintiffs because of the reasons stated below and those articulated in the Plaintiffs Response to Defendants' Notice Regarding IME Meet-And-Confer. Defendants now wish to simply unilaterally identify Dr. Goodman who was previously rejected by the Plaintiffs' doctor without even going through the process to select an appropriate IME.<sup>1</sup>

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<sup>1</sup> The defendants in a footnote to their Motion indicate that the Court need not address their Motion to substitute a new IME if the Court bifurcates discovery. Dkt. 277, n. 3. This argument is telling in that it indicates the Defendants true purpose for bifurcation which is to delay all of the discovery so that they can have their motion for summary judgment heard; thus, delaying trial. This argument appears to contradict the Defendants' prior motion for an IME wherein the Defendants specifically sought the IME to establish the Plaintiffs do not have standing. Defendants asserted: "If plaintiffs do not have Lyme disease, they do not have standing." *See* Dkt. 166, pg. 2. The Defendants go on to state in another motion: "Indeed, if the Lyme claimants never suffered from "chronic Lyme disease," then they have suffered no injury (never mind an antitrust injury) and have no standing to further prosecute this suit." Dkt. 154, pg. 7.

**III. Dr. Goodman Is Not Suitable As A Court-Appointed IME. Plaintiffs Are Agreeable To Any Of The Doctors Identified By Dr. Maloney Previously As The Replacement IME.**

Dr. Maloney has previously provided doctors that would be suitable for an IME. Plaintiffs are willing to agree to the doctors that Dr. Maloney has identified and which she conveyed to Dr. Torten. Dr. Goodman was not one these doctors.

Dr. Goodman does not have any formal experience in the diagnoses or treatment of Lyme disease. (*See* Exhibit “A”, Dr. Goodman’s curriculum vitae). In Dr. Goodman’s entire CV, the word “Lyme” does not appear once. *Id.* None of his publications relate to Lyme disease, none of his research relates to Lyme disease, and there is nothing to indicate that Dr. Goodman has ever diagnosed or treated Lyme disease. *Id.*

According to Dr. Goodman’s interviews and press conferences, he is an expert on Ebola, not Lyme disease.<sup>2</sup> Every search of Dr. Goodman finds nothing linking him to any tick-borne disease, Borreliosis or Lyme Disease.

Finally, Dr. Goodman is a Fellow in the IDSA and has been a member of the IDSA since 1979. (*See* Exhibit “A”). He knows the Plaintiffs in this case are suing the IDSA and is inherently biased toward the positions of the IDSA.

**IV. Plaintiffs Propose Dr. John Aucott as the Court-Appointed IME.**

Dr. Maloney recommended Dr. John Aucott, the Director of John Hopkins Lyme Disease Clinical Research Center. Dr. Aucott is an associate professor of medicine at the Johns Hopkins University School of Medicine, an internist and Lyme disease expert, and he is a member of the IDSA.

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<sup>2</sup> <https://time.com/3452341/dallas-ebola-texas-ground-zero/>

While Dr. Aucott does not meet the geographic requirements this Court originally imposed, his credentials and unbiased expertise make up for his location. Since Plaintiffs will be flying from all over the country, Plaintiffs respectfully request this Court allow Dr. Aucott to perform the medical examinations.

If location is an issue, Dr. Maloney recommended also recommend Jonathan S. Forester, MD, who is located within the Eastern District in Pineville, Louisiana. As set forth in Dr. Maloney's original declaration, Dr. Forester is a doctor who diagnoses and treats Lyme disease on a daily basis.

### CONCLUSION

For these reasons the Plaintiffs respectfully request the Court deny Defendants' Motion to Substitute Dr. Goodman as the Court-appointed IME. Plaintiffs further request that Dr. John Aucott or Dr. Jonathan S. Forester be selected as the IME or, alternatively, any of the Doctors previously selected by Dr. Maloney.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of February 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered parties.

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