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

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

PLAINTIFFS' OPPOSITION TO MOTION FOR PROTECTIVE ORDER RELATED TO NON-RETAINED EXPERTS

COME NOW Plaintiffs and file this Opposition to Motion for Protective Order Related to Non-Retained Experts (Dkt. 281), and in support thereof, Plaintiffs show the Court the following:

I. The Witnesses To Be Deposed Are Non-Retained Experts.

"The distinction between retained and non-retained experts should be interpreted in a common sense manner." *Diamond Consortium, Inc. v. Mankookian*, No. 4:16-CV-00094-ALM, 2017 WL 2936218, at *2 (E.D. Tex. July 10, 2017) (*citing DiSalvatore v. Foretravel, Inc*. No. 9:14-CV-00150-KFG, 2016 WL 7742996, at *2 (E.D. Tex. May 20, 2016).

A retained expert is one who without prior knowledge of the facts giving rise to the litigation is "recruited" to provide expert opinion testimony. *Id*. "A witness is 'specially employed' under Rule 26(a)(2)(B) when 'he has no personal involvement in facts giving rise to the litigation, but is engaged to provide opinion testimony, regardless of whether he is compensated or volunteers." *Id*.

A non-retained expert is a percipient witness to the facts giving rise to the litigation. "A non-retained expert's testimony under Rule 26(a)(2)(C) 'arises not from his enlistment as an expert, but, rather, from his ground-level involvement in the events giving rise to the litigation." *Id*. "The distinguishing characteristic between expert opinions that require a report and those that do not is whether the opinion is based on information the expert witness acquired through percipient observations or whether, as in the case of retained experts, the opinion is based on information provided by others or in a manner other than being a percipient witness to the events at issue." *United States v. Sierra Pac. Indus*., No. CIV-S-09-2445 KJM EFB, 2011 WL 2119078, at *2 (E.D. Cal. May 26, 2011).

"The delineation between a 26(a)(2)(B) expert and a 26(a)(2)(C) expert is whether the expert has first-hand knowledge of [the] case so as to escape the requirement that he submit a full expert report." *Eagle Oil & Gas Co. V. Travelers Prop. Cas. Co. of Am*., 2014 WL 3744976, at *7 (N.D. Tex. July 30, 2014) (*citing Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 6 (1st Cir. 2011). If an expert comes to a case as a stranger and draws opinion from facts supplied by others, in preparation for trial, he reasonably can be viewed as retained or specially employed for that purpose of 26(a)(2)(B). *Downey*, 633 F.3d at 7. But where, as here, the expert is part of the ongoing sequence of events and arrives at his opinion during those events, his opinion testimony is not that of a retained or specially employed expert. *Id*.[1]

[1] Defendants are simply wrong that the non-retained expert designation is limited to "treating physicians." Examples of 26(a)(2)(C) witnesses recognized by federal courts include: an exterminator who treated a bed for bedbugs. *Id*. at 6; a treating physician, Fed. R. Civ. P. 26, adv. comm. notes (2010); a farming equipment sales manager in a trademark dispute. *Deere & Co. V. FIMCO Inc*., 239 F. Supp. 3D 964, 978-981 (W.D. KH. 2017); an environmental testing specialist hired before litigation to determine if a property was polluted. *Saline River Properties, LLC v. Johnson Controls, Inc*., 2011 WL 6031943, at *1 (E.D. Mich. 2011).

"Rule 26(a)(2)(C) addresses the disclosure of expert witnesses who were involved in the events leading up to litigation and may testify both as an expert and as a fact witness." *Diamond Consortium*, 2017 WL 7742996 at *2 (*Citing LaShip, L.L.C. v. Harvard Baker, Inc.*, No. 15-30816, 2017 WL 829503, at *6 (5th Cir. Mar. 1, 2017).

None of the witnesses that Plaintiffs will depose are "specially employed" by Plaintiffs. Plaintiffs have not recruited these witnesses, have not retained these witnesses and have no agreements or plans to do so, and each of them have personal knowledge related to the facts in this litigation.

These witnesses have factual information related to their involvement in events giving rise to this litigation. Indeed, even the Defendants acknowledge "that each of the three doctors may have factual evidence relevant to the Plaintiffs' claims." Dkt. 281, pg. 3. These witnesses are part of the ongoing sequence of events in this case and will arrive at any opinions during those events. These witnesses are not "a stranger" to this case. The witnesses are not being provided information by the Plaintiffs or those associated with the Plaintiffs in order for the witnesses to provide testimony. These are instead percipient witnesses.

Plaintiffs anticipate these witnesses will have knowledge of the Defendants practices during the relevant time period as to whether to allow or deny payments for Lyme treatment. This testimony could also include evidence which is supportive of the allegation of an agreement between the Defendants to deny Lyme treatment in order to reduce the costs of payments related to the treatment of Lyme.

Although the Plaintiffs have not obtained these witnesses testimony these are the topics that Plaintiffs anticipate addressing in the depositions as well as other factual information. It is also anticipated that the witnesses may have reliable opinions related to the treatment of Lyme

disease and any alleged agreement to restrain the treatment of Lyme disease by the Defendants. To be clear, however, Plaintiffs do not have any witness statements or testimony taken by Plaintiffs which would provide information by which to prepare a report (although a report is not required because these are non-retained experts). Further, the witnesses have not cooperated in providing this information to the Plaintiffs. This is simply Plaintiffs best understanding of the topics these witnesses will be questioned about and which could result in some opinion testimony being elicited.

Unlike the *Diamond Consortium* facts, Plaintiff here did not "recruit" any of the non-retained experts. *Diamond Consortium*, 2017 WL 2936218 at *3 ("Defendants recruited him [the expert] to provide expert opinion testimony in this case"). Instead, these are doctors that will be subpoenaed and have not been recruited or provided any information by the Plaintiffs in order to give their testimony. Indeed, even the Defendants in this case admit these non-retained experts have factual knowledge of the relevant facts. To be sure, these non-retained experts have extensive experience with Lyme disease, the denial of payments for Lyme disease treatment and the Defendants' practices regarding payment for treatment during the relevant period. This is on-the-ground knowledge of what was happening during the relevant period of the conspiracy.

In *Diamond Consortium*, the expert was disclosed to testify "about the 'diamond industry, specifically diamond grading standards and practices." (*See* Plaintiff's Motion To Strike The Expert Designation of Martin Rapaport, *The Diamond Consortium, Inc. v. Manookian*, 2017 WL 3125242, No. 4:16-CV-94 (June 9, 2017 E.D. Texas, Sherman Division)). Additionally, he was designated to testify about an article he wrote on "Honest Grading" of diamonds which was published years before the facts in dispute in the *Diamond Consortium* case. In *Diamond*

Consortium there was no indication the proposed expert had any ground level involvement related to the facts of the case. *Id*.

Compare the expert designated in *Diamond Consortium* with the non-retained experts in this case and there is a clear difference in the fact that these non-retained experts have extensive ground level involvement in the facts of the Lyme case which comprise the antitrust and RICO allegations during the relevant period. For example, as identified on the previously submitted disclosures:

> **Dr Danta** was an IDSA panelist but was removed for his opinions on chronic Lyme disease. Dr. Donta has knowledge regarding the inner workings of the IDSA. He 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.
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> **Dr. Burrascano**, one of the world's leading experts on the diagnosis and treatment of Lyme disease, is a founding member of the International Lyme and Associated Diseases Society. He 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
>
> **Dr. Kenneth Liegner** is a Board-Certified Internist with additional training in Pathology and Critical Care Medicine, practicing in Pawling, New York. He has been actively involved in diagnosis and treatment of Lyme disease and related disorders since 1988. He has published articles on Lyme disease in peer-reviewed scientific journals and has presented poster abstracts and talks at national and international conferences on Lyme disease and other tick-borne diseases. He is the author of In the Crucible of Chronic Lyme Disease, a documentational history of the struggle to characterize the nature of Lyme disease in the late 20th and early 21st centuries. He has cared for many persons seriously ill with chronic and neurologic Lyme disease. He 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.

This information clearly identifies these witnesses have on the ground knowledge of facts relevant to the conspiracy claims at issue here during the relevant time period.

II. Under Rule 26 There Is No Expert Report Required For These Witnesses.

Although Rule 26(a)(2)(B) requires retained expert witnesses to provide detailed reports, the same stringent requirement is not required for non-retained experts. Rule 26(a)(2)(C)(ii) requires parties to disclose non-retained experts and only provide "a summary of the facts and opinions to which the witness is expected to testify."

The Advisory Committee Notes make clear that the disclosure required of non-retained experts "is considerably less extensive that the report required" of retained experts. Fed. R. Civ. P. 26(a)(2)(C), Advisory Comm. Note (2010). Indeed, the Notes explain that "[c]ourts must take care against requiring undue detail with regard to Rule 26(a)(2)(C) designations." *Id*.

In order to provide a summary that satisfies Rule 26(a)(2)(C):

> "The disclosing party should provide a brief account that states the main points of the entirety of the anticipated testimony. This does not mean that the disclosures must outline each and every fact to which the non-retained expert will testify or outline the anticipated opinions in great detail. Imposing these types of requirements would make the Rule 26(a)(2)(C) disclosures more onerous than Rule 26(a)(2)(B)'s requirement of a formal expert report. That was certainly not the intent behind the 2010 amendments to the rule. Instead, the court 'must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have."

Hayes v. American Credit Acceptance, LLC, No. 13-2413-RDR, 2014 WL 3927277, at *3 (Aug. 12, 2014 D. Kan.) (footnotes and quotations omitted).

III. There Is No Disclosure Requirement for Non-Retained Experts Prior To Their Depositions.

As a courtesy, the Plaintiffs identified that these witnesses may provide opinion testimony in the course of their deposition and thus they were identified by Plaintiffs as non-retained experts. The witnesses themselves were never made aware they were being designated as such and there is no agreement from the witnesses as to their willingness to be named as such.

There is no requirement in the Court's Scheduling Order that these witnesses be designated at this time or before their deposition. Indeed, at this point these witnesses simply are fact witnesses that *may* have opinion testimony. Until the Plaintiffs take the deposition the Plaintiffs will not know whether they have opinion testimony.

The Court's Discovery Order (Dkt. 81) makes a distinction between a "retained or specially employed" expert and "all other experts." *Id*. (*Compare* 1 (j)c and 1 (J)d). For all other experts, which these witnesses would be as non-retained experts, a report is not required. Instead the Court's Order specifically limits disclosure to "the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them or documents reflecting such information." *Id*. Plaintiffs previously submitted disclosures clearly satisfies this requirement under 26(a)(2)(C)(ii) even though such disclosure is not yet required at this point in time. See Ex. A to Dkt. 281.

The September 13, 2019 deadline to designate expert witnesses (Dkt. 250) has been stayed (Dkt. 265). Accordingly, the new date for designations has not yet occurred and thus a disclosure of the mental impressions and opinions is not yet required. And this is logical given that Plaintiffs must depose the witnesses before Plaintiffs will even know what opinions these witnesses would provide and the basis for them.

Regardless, there is no "unfair surprise" or prejudice to the Defendants in having these witnesses be deposed now as non-retained experts. The Defendants are in just as good a position as the Plaintiffs to determine what these witnesses may say at the deposition and to prepare for that examination. Moreover, the Defendants cannot be prejudiced given the representation by the Plaintiffs in Court on February 5, 2020, that the Defendants can re-examine the witnesses to the extent they have good cause based on some opinion testimony that Plaintiffs may use from these depositions.

IV. Defendants Request That Plaintiffs Be "Barred" From Eliciting Opinion Testimony Is Nonsensical And Is A Prior Restraint On Plaintiffs Ability To Obtain Factual Information Related To The Case.

Defendants request that Plaintiffs "be barred" from seeking opinion testimony from the non-retained expert witnesses that possess factual information and who the Plaintiffs have not supplied information to in order to form an opinion. This is a non-sensical attempt at restraining the truth from being known.

Any opinion testimony – if it is provided – could always be dealt with after it is obtained. But putting prior restraint on plaintiff's counsel during a *discovery* deposition underscores the Defendants simply do not want this testimony to see the light of day and be preserved for a jury to consider.

Indeed, the Defendants suggestion is rife with practical issues as well as being a roadblock to a determination of the truth. For example, are the Defendants proposing that they in their own judgment at the deposition will be the arbiter of what questions will be asked, whether those questions are appropriate, and whether the witness may answer a particular question? Will the Defendants be the judge of what questions *may* elicit an opinion in a witnesses answer versus what is a factual matter and preclude the Plaintiffs from asking a question which although would elicit

factual testimony *may* also result in the witness providing an opinion? Defendants suggestion is unreasonable and contrary to the entire underpinning of the discovery process—it seeks to thwart discovery rather than search for the truth.

The normal course is for the deposition to be taken. If it results in testimony which the Defendants find objectionable then Defendants continue to have redress through the Court without prejudice as this testimony is not being taken live in front of the jury. Instead, it is being preserved—as it must given the age of one of the witnesses—at which point only the admissible portions as determined by this Court will be shown to a jury at a later date before the jury. There simply is no prejudice or harm to the Defendants whereas Defendants suggestion does great prejudice to Plaintiffs by thwarting the discovery process and denying access to the truth.

V. As An Alternative Plaintiffs Can Remove The Designation Of Non-Retained Experts For The Time Being While The Witnesses Are Deposed As Fact Witnesses.

As an alternative to taking these depositions with the understanding that these witnesses are non-retained experts, the Plaintiffs would de-designate the non-retained expert status of these witnesses and simply proceed with their deposition as purely fact witnesses. Thereafter, if information is learned as to their expert opinion testimony, the Plaintiffs will then designate the witnesses as such on a non-retained expert basis and provide the appropriate disclosure at the time required.

The factual information is important and necessary, and the timing is critical. Sam Donta, for example, is 81 years old and his testimony needs to be preserved as soon as possible. That is why the Plaintiffs have asked for Donta's deposition since June 13, 2019. Since this time, Plaintiffs have been trying to obtain this deposition through agreement on scheduling with the Defendants. The Defendants have refused to cooperate in taking this deposition without Plaintiffs providing an expert report—which for the reasons stated is unnecessary.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants Motion for Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th 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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