

Dr. Torten and Dr. Maloney (the physician advising Plaintiffs) were not able to agree on a physician to conduct the IMEs, with Dr. Torten recommending six infectious diseases specialists located in North Texas and Dr. Maloney recommending six physicians, but not one located in Texas and for the most part, not infectious diseases specialists. In late August 2019, the Court appointed Dr. Liddell, who Dr. Torten had in May 2019 stated was available to conduct the IMEs in June and July 2019.

Moving Defendants' counsel learned after the Court appointed Dr. Liddell that Dr. Liddell was unavailable and unwilling to perform the sixteen IMEs the Court had ordered. To avoid running into these same issues with a substitute examiner, counsel for Moving Defendants spoke with some of the other physicians identified during the Torten-Maloney discussions who are conveniently located, board-certified infectious disease specialists (*i.e.*, those physicians that met the requirements identified by the Court on pages 6 and 7 of its order regarding the IMEs). Counsel found one physician, Dr. Edward Goodman, who both met these requirements *and* is willing and able to perform the IMEs.

Plaintiffs do not have any valid objections to Dr. Goodman's substitution: Counsel has had no conversations with Dr. Liddell (only with her representatives); the motion to substitute is procedurally proper; and there is no evidence in the record regarding the qualifications or availability of the physicians Plaintiffs propose for a second time—not one of which is located in Texas.

I. Counsel for Moving Defendants have communicated with Dr. Liddell only through her representatives

After Dr. Liddell was selected to perform the IMEs, counsel for Moving Defendants reached out to her office and shared the news regarding her appointment.² Thereafter, Dr. Liddell's

² Declaration of Alvin Dunn, attached as **Exhibit A** ("Dunn Dec."); Declaration of Michael J. Tuteur, attached as **Exhibit B** ("Tuteur Dec.").

office manager (and later, her in-house counsel) informed counsel that Dr. Liddell was unable and unwilling to perform the IMEs.³ Contrary to Plaintiffs' argument in their response, Moving Defendants and their counsel have not had direct communications with Dr. Liddell and have absolutely no indication from Dr. Liddell or anyone associated with her practice that she would "come to a conclusion which was contrary to the Defendants' expectations." (Docket No. 283 at 2.)⁴ Moving Defendants have no indication of what Dr. Liddell's conclusions would be if she were to conduct the exams.

II. Additional negotiations are unwarranted and would be futile

Plaintiffs argue next that substitution would be improper because Dr. Torten and Dr. Maloney have not engaged in another round of negotiations. (Docket No. 283 at 3.) But the Federal Rules do not require this sort of negotiation; the Court did not request further negotiations; and there is no reason to suspect that a second effort would be more fruitful than the first. Plaintiffs are simply trying to erect additional roadblocks in the hope of avoiding the IMEs altogether. Identifying a suitable substitute to perform the IMEs should not be complicated or time-consuming. The Court's Order provides the necessary guidance: The physician needs to be a conveniently located, board-certified infectious disease specialist. (SEALED Docket No. 244 at 6-7.) There is no basis for additional futile negotiations by the parties' medical advisors.

III. Dr. Goodman was identified previously, is qualified, ready, and willing, and should be appointed

Finally, Plaintiffs argue that Dr. Goodman is not qualified to conduct the exam and ask the Court to appoint instead Dr. Aucott or Dr. Forester,⁵ both of whom the Court rejected last summer

³ Dunn. Dec., Ex. A at ¶¶6-7.

⁴ Dunn Dec., Ex. A, at ¶¶3-7; Tuteur Dec., Ex. B at ¶4.

⁵ Plaintiffs identified Dr. Forester as one of their treating physicians. (Docket No. 199-2 at 6.)

due to their location and/or qualifications. However, the Court only has evidence of Dr. Goodman's qualifications and ability to serve; there is no evidence to support Plaintiffs' request.

Dr. Goodman's qualifications are firmly established by the evidence on file. In May 2019, Dr. Torten submitted a sworn declaration establishing that Dr. Goodman is a board-certified infectious disease specialist located in Dallas who is "well-qualified to conduct the exams[.]" (Docket No. 199-1 at 3 ¶11; *see also* SEALED Docket No. 244 at 6 – 7.) With the motion to substitute, Moving Defendants submitted Dr. Goodman's CV and declaration. (Docket No. 277-1.) Dr. Goodman's CV confirms that he has extensive experience as an infectious disease specialist. (Docket No. 277-1 at 3 – 8.) The declaration provides further details regarding Dr. Goodman's experience with Lyme disease and that he is "ready, willing, and able to conduct the IMEs, should the Court appoint [him] to perform those examinations." (Docket No. 277-1 at 2 ¶12.)

By contrast, there is no evidence in the record regarding the credentials or availability for Drs. Aucott and Forester. Dr. Maloney's declaration does not even mention these physicians by name and certainly does not establish either doctor's qualifications to perform the IMEs. (Docket No. 200-1.) Plaintiffs have submitted no additional evidence, and the record is completely devoid of anything regarding each physician's training, board-certification, and medical practice. In fact, there is no evidence that these physicians are even aware of the Court's order or the obligations associated with conducting the IMEs, let alone whether they are ready or willing to assume those obligations.

Of course, even if Drs. Aucott and Forester were qualified and willing to perform the IMEs, they are both still unacceptable due to their location. Dr. Aucott's medical practice is near Baltimore, Maryland, 1200 miles from the venue Plaintiffs chose for this lawsuit. (*See* SEALED

Docket No. 244 at 6 (rejecting the proposed physicians located on the east coast).⁶ Dr. Forester practices in Pineville, Louisiana, which is 200 miles from New Orleans, where the closest major airport is located. Selecting a physician in such a remote location would increase the cost, time, and hassle required for the sixteen Plaintiffs to travel for the examinations.

The record establishes that Dr. Goodman is qualified, conveniently located, and willing to conduct the IMEs, and there is no such evidence to support the appointment of Dr. Aucott or Dr. Forester. The Court should enter an order substituting Dr. Goodman to perform the IMEs.

Conclusion

For the reasons set forth above and in Moving Defendants' (1) Motion for Independent Medical Examinations of those Plaintiffs Who Claim to Have Lyme Disease ([Docket No. 154](#)); (2) Reply in Support of the Motion for Independent Medical Examinations ([Docket No. 166](#)); (3) Notice Regarding IME Meet-and-Confer ([Docket No. 199](#)); and (4) both supplements to the Motion for Independent Medical Examinations ([Docket No. 179](#) and [Docket No. 194](#)), Moving Defendants request that the Court appoint Dr. Edward Goodman to conduct the IMEs ordered by the Court in its Order dated August 21, 2019. (SEALED Docket No. 244).

⁶ The Court's requirement that the physician conducting the IMEs be conveniently located is consistent with the general rule that IMEs should occur in the forum chosen by plaintiffs for their suit, which ensures that an examining physician is available to testify at trial. *Ornelas v. S. Tire Mart, LLC*, 292 F.R.D. 388, 400 (S.D. Tex. 2013).

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Respectfully Submitted,

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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 24th day of February, 2020.

/s/ R. Casey Low
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