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' REPLY TO PLAINTIFFS' OPPOSITION IN RESPONSE TO MOTION FOR PROTECTIVE ORDER REGARDING PLAINTIFFS' PROPOSED DEPOSITIONS OF THEIR DESIGNATED EXPERTS

Pursuant to Fed. R. Civ. P. 26(a) and (c), Defendants[1] hereby file this Reply in further support of their Motion for Protective Order Regarding Plaintiffs' Proposed Depositions of Their Designated Experts ("Motion," Dkt. 281).

I. Plaintiffs' "Non-Retained Experts" Are Retained Experts Obligated To Provide a Report Before Their Depositions

Plaintiffs' Response in opposition to the Motion ("Opp.," Dkt. 284) for the most part sets forth accurately the legal standards for distinguishing between a retained expert (who is obligated

[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 brought this motion. The Court has entered Orders staying all case deadlines for the three Defendants that have reached settlements with Plaintiffs. On February 24, 2020, Defendant Anthem, Inc. filed a Joint Sealed Motion to Stay All Deadlines and Notice of Settlement. Accordingly, Defendant Anthem is not a party to this Reply.

to provide a report) and a non-retained expert (who is obligated to provide a more limited disclosure).[2] However, in order to make the conclusory assertion that each non-retained expert is merely "a percipient witness to the facts giving rise to the litigation," Opp. at 2, and that "[t]hese witnesses have factual information related to their involvement in events giving rise to this litigation," Opp. at 3, Plaintiffs ignore their own Expert Disclosures, which state that Plaintiffs anticipate eliciting from each witness core expert opinion testimony—not fact witness testimony.

Plaintiffs' about-face is not credible. If each non-retained expert were merely a fact witness, Plaintiffs would not have identified each as an expert witness and would not have disclosed for each expert witness core expert opinion testimony that Plaintiffs expert to obtain—and that requires a report from each expert prior to the expert's deposition.

According to Plaintiffs' Expert Disclosures (made before Defendants challenged Plaintiffs' effort to depose their expert witnesses without provided a report), each of the three experts Plaintiffs now seek to depose "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," and Plaintiffs believe that each expert "will offer opinions regarding all these issues." *See* Excerpts from Plaintiffs' Designation of Experts (January 29, 2019), attached as Exhibit A to Defendants' Motion. Plaintiffs describe expert opinion testimony that is far from the testimony

[2] Contrary to Plaintiffs' assertion, Opp. at n.1, Defendants never claimed that non-retained experts must be treating physicians but merely pointed out what the Advisory Committee Notes and case law make clear, which is that most non-retained experts are treating physicians. *See* Motion at 4.

that a percipient witness to the facts giving rise to the litigation would provide—and that under a straightforward application of the governing legal standards requires a report before the expert's deposition. Plaintiffs do not even attempt to explain how an opinion regarding the generalized diagnosis and treatment of a hypothetical case of alleged chronic Lyme disease could be based on the expert's "ground-level involvement in the events giving rise to the litigation." *Diamond Consortium, Inc. v. Manookian*, No. 4:16-CV-00094, 2017 WL 2936218, *3 (E.D. Tex. July 10, 2017); *See* Transcript of Scheduling Conference (February 5, 2020) at 32:21-22.

Plaintiffs also do not address the clear holding of *Diamond Consortium* and other cases that an expert may be required to submit a report even if the expert is not retained and does not have a compensation agreement but merely volunteers,[3] do not address Rule 26's provisions that protect communications between attorneys and potential experts, and do not address Rule 26's requirement that an expert deposition may be conducted "only after the report is provided." Fed. R. Civ. P. 26(b)(4)(A).

Plaintiffs cannot avoid providing the required expert reports by asserting that they have not done the basic work the rules require when a party seeks to introduce expert opinion testimony. *See* Opp. at 3-4 (Plaintiffs assert they have not recruited their expert witnesses or obtained statements or information from them). Under Rule 26, parties seeking to introduce expert opinion testimony must first provide an expert report, which requires that parties approach their proposed experts on their own—and not through depositions, which the rules make clear are conducted after the proposed expert provides an expert report. Permitting parties to use depositions to recruit their

[3] *See Tolan v. Cotton*, No. CIV. A. H-09-1324, 2015 WL 5332171, at *1 (S.D. Tex. Sept. 14, 2015) (An expert must provide a report 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 simply volunteers.") (citations omitted).

proposed experts would be inefficient and impose undue burdens on the potential experts and on opposing parties.

Plaintiffs now assert that their proposed experts have "on-the-ground knowledge" of Lyme disease, denial of payments, and Defendants' practices regarding payment for treatment. Opp. at 4. But on-the-ground knowledge means "ground-level involvement in the events giving rise to the litigation," *Diamond Consortium*, 2017 WL 2936218 at *3, which in this case for these proposed experts would be knowledge of a particular Plaintiff's alleged Lyme disease and knowledge of an Insurance Defendant's alleged denial of payment for a particular Plaintiff's alleged Lyme disease treatment. *See also Lindsay v. Houseworth*, 3:16CV33, 2017 WL 4413041 (N.D. Miss. Oct. 4, 2017) (physician expert was specially employed where proposed testimony regarding general medical standard of care for defendant's treatment of plaintiff exceeded expert's personal knowledge from his own treatment of plaintiff). But Plaintiffs have acknowledged that their proposed experts have only generalized knowledge, because not one of their proposed non-retained experts is a treating physician who was on the ground with any Plaintiff. *See* Transcript of Scheduling Conference (February 5, 2020) at 32:21-22.

II. Restricting an Initial Deposition of Each Potential Expert Witness To Factual Testimony Is Consistent With the Federal Rules and Not a "Prior Restraint"

Plaintiffs complain that Defendants are seeking to impose "A Prior Restraint On Plaintiffs [sic] Ability To Obtain Factual Information Related To The Case," Opp. at 8-9, but in the next breath suggest that they would withdraw their Expert Designations and depose each witness solely as a fact witness. Opp. at 9. Plaintiffs thus admit that they have created themselves the problem Defendants' motion seeks to address.

Defendants seek no restraints on Plaintiffs' ability to obtain relevant testimony, but Plaintiffs should be required to follow the federal rules when eliciting such testimony. To the

extent that Plaintiffs seek factual testimony, they are free to seek to elicit such testimony at a deposition. But if Plaintiffs seek the expert opinion testimony that their Expert Disclosures state they expect each proposed expert to provide, each such expert must provide the expert report required by Rule 26(a)(2)(B); Defendants are entitled to depose each such expert; and Plaintiffs must provide each expert's report before the expert's deposition. Fed. R. Civ. P. 26(b)(4)(A). Barring Plaintiffs from eliciting such expert opinion testimony at the expert's initial deposition does not prevent Plaintiffs from obtaining expert opinion testimony from the proposed expert—all they need to do is ask the expert and have the expert prepare the written report required by Rule 26(a)(2)(B). Defendants do not seek to interfere in any way with those communications.

CONCLUSION

For the reasons stated above and in Defendants Motion, the Court should issue a protective order to require (1) that Plaintiffs, before seeking to elicit expert opinion testimony from their non-retained expert witnesses, first provide a written report that complies with Rule 26(a)(2)(B), and (2) that Plaintiffs, if they seek to depose a non-retained expert before providing an expert report, be barred from seeking to elicit expert opinion testimony at the deposition.

Dated: February 26, 2020 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 26th day of February, 2020.

/s/ *R. Casey Low*
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