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

IDSA AND THE DOCTOR DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PENDING RESOLUTION OF MOTIONS TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Plaintiffs' actions since filing their Response to Defendants' Motion to Stay (Dkt. 365) indicate that the parties should not push forward with discovery and other pretrial activities until the Court rules on Defendants' motion for summary judgment (Dkt. 357) and motions to dismiss or to strike (Dkt. 355, 363).

First, in their Response to Defendants' summary judgment motion (Dkt. 373), Plaintiffs admitted that they have no evidence of the large consulting fees that they alleged the Insurance Defendants paid to the Doctors and that formed the foundation of their RICO and antitrust claims. Dkt. 373 at 1. As a result, Plaintiffs promised to dismiss their RICO claims against IDSA and the Doctors. Plaintiffs also promised to dismiss their antitrust claims against the Doctors – but not against IDSA. While Plaintiffs attempt to cling to their antitrust claims, those claims rest on the same alleged payments that Plaintiffs finally acknowledge were not made. They should be dismissed with prejudice. At the very least, expert discovery (which for antitrust claims typically

is complex and extensive)[1] and pretrial activities regarding those remaining claims should not go forward until the Court rules on the pending motions.

Second, Plaintiffs have agreed – and the Court has ordered – that the parties' deadlines for designating expert witnesses and providing expert reports should be set after the hearing on Defendants' pending motions, which is set for April 8, 2021. Dkt. 374, Dkt. 376.

Third, Plaintiffs have agreed – and the Court has ordered – that the Independent Medical Exams will be stayed until the Court has ruled on the pending motions. Dkt. 374, Dkt. 376.

Fourth, Plaintiffs have demonstrated no interest in moving forward with the extensive additional discovery that would be required if Plaintiffs' new misrepresentation have been properly pled.

Plaintiffs filed their new misrepresentation claims over two months ago and were obligated at that point to provide new damages computations, additional documents relevant to their new claims and new damages, and supplemented responses to Defendants' interrogatories. To date, no Plaintiff has done so. IDSA's counsel, starting at a meet-and-confer telephone conference on January 27, 2021, and continuing through follow-up emails, has repeatedly asked Plaintiffs' attorneys when Plaintiffs would provide supplemental discovery responses related to their new

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[1] *See, e.g.*, *Castro v. Sanofi Pasteur Inc.*, No. 11-7178, 2017 U.S. Dist. LEXIS 174708, at *12 (D.N.J. Oct. 20, 2017) (antitrust cases depend on "extensive expert testimony"); *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 316 (2d Cir. 2009) ("Due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial, even in a non-class action involving an individual plaintiff.").

Indeed, long before filing their new misrepresentation claims, Plaintiffs designated three retained experts; six "non-retained experts"; and hundreds of "medical providers and physicians who provided medical care and/or treatment to Plaintiffs" as expert witnesses in this case. In response to Defendants' Motion for Protective Order Regarding Plaintiffs' Proposed Depositions of Their Proposed Experts (Dkt. 281), Plaintiffs withdrew all of their expert designations. Dkt. 302.

claims – which Plaintiffs should provide before Defendants re-take each Plaintiff's deposition – but to no avail.

Plaintiffs assert falsely (1) that "[a]dditional discovery for Plaintiffs' newer claims is minimal, if any" and (2) that "almost all discovery is completed. All fact depositions are completed." Dkt. 365 at 2, 3. Plaintiffs' new claims – which should have been brought at the beginning of the case – allege for the first time harm caused by the alleged failure of hundreds of doctors to diagnose and treat Plaintiffs' "chronic Lyme disease." (Plaintiffs' original RICO and antitrust claims alleged harm caused by the Insurance Defendants' refusal to pay for Plaintiffs' long-term antibiotics to treat their "chronic Lyme disease.") Plaintiffs' new claims allege for the first time physical injuries and emotional distress.

Re-doing fact discovery alone related to Plaintiffs' new claims would be extensive and extremely burdensome. Plaintiffs have yet to identify which doctors allegedly were misled by the IDSA Lyme disease guidelines and which failed to diagnose and treat their "chronic Lyme disease"; when such failures occurred; and how and the extent to which such failures caused Plaintiffs' physical injuries and emotional distress. For each Plaintiff, it is likely that there would be multiple, even dozens such doctors.

Lead Plaintiff Lisa Torrey alone alleged in Plaintiffs' Original Complaint – and in each of three subsequent amended complaints – that she "visited more than 36 doctors before she was properly diagnosed with Lyme disease." Orig. Compl. ¶ 133; FAC (Dkt. 186) ¶ 134, SAC (Dkt. 352) ¶ 123, TAC (Dkt. 377) ¶ 123. She previously alleged damages limited to the alleged injury to her business or property, which arose only once the Insurance Defendants refused to pay for her treatment for "chronic Lyme disease," forcing her to pay for her own treatment.

For Ms. Torrey's new misrepresentation claims against IDSA, she now alleges injuries that occurred far earlier – when she saw the first of her thirty-six doctors who failed to diagnose and treat her alleged "chronic Lyme disease" because they were misled by the allegedly fraudulent IDSA Lyme disease guidelines. To give IDSA the opportunity to defend against these new claims, discovery would need to focus on those thirty-six doctors; what they relied upon in reaching their determinations regarding Ms. Torrey; and the alleged physical injuries and emotional distress Ms. Torrey suffered as a result of the failure of each of those thirty-six doctors to diagnose and treat her "chronic Lyme disease." And Ms. Torrey is just one of twenty-one Plaintiffs raising new misrepresentation claims.

Plaintiffs' new misrepresentation claims also would require extensive additional expert discovery, and IDSA also might request that Plaintiffs submit to a physical and/or mental examination – in addition to the IMEs already ordered by the Court.

It is as if we would be starting a brand-new case.

Putting it all together, no additional fact discovery, no expert discovery, and no pretrial activities should proceed until the Court rules on Defendants' pending motion for summary judgment and motion to dismiss or strike. No matter the outcome of Defendants' pending motions, the Court should decide those motions before the parties launch back into time-consuming and expensive – and possibly unnecessary – fact and expert discovery and pretrial preparation.

There is no question that the Court has full discretion to issue a stay. *Butowsky v. Folkenflik*, No. 4:18-cv-442-ALM-CMC, 2019 WL 6701629, at *3 (E.D. Tex. Jan. 9, 2019). Plaintiffs are wrong that a stay is warranted only if the dispositive motions are a "slam dunk." Dkt. 365 at 3. Defendants are not requesting a stay at the very outset of litigation, as did the defendant in the case Plaintiffs rely on. *See Health Choice Group, LLC v. Bayer Corp.*, No. 5:17CV126-

RWS-CMC, 2018 WL 5728515, at *3 (E.D. Tex. Apr. 25, 2018) (assessing the burden of a stay was "speculative" because of the early stage of the case).

This case is much closer to *Fujita v. U.S.*, where the Fifth Circuit affirmed a stay after a motion for summary judgment was filed on the grounds that the plaintiff failed to produce the necessary evidence to support his claims by the end of the discovery deadline. *Fujita v. U.S.*, 416 Fed. App'x 400, 403 (5th Cir. 2011); *see also Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1030 (5th Cir. 1983) ("[A] district judge may exercise his discretion to prevent the plaintiff from burdening the defendants with a needless round of discovery.").

In this case and at this juncture, the grounds for a stay are overwhelming.

Dated: March 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, the foregoing Reply in Support of Motion to Stay Pending Resolution of Motion to Dismiss and Motion for Summary Judgment was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ *R. Casey Low*
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