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 DOCTOR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' RICO AND ANTITRUST CLAIMS

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*Pursuant to Local Rule CV-7(b), only "relevant, cited-to excerpts of attached materials" are attached as exhibits to this Motion. In Exhibits 1-4, cited and relevant portions are highlighted.

**Pursuant to the Court's Protective Order in this matter, Exhibit 4 is filed under seal, with a Motion to File Under Seal filed concurrently with this Motion for Summary Judgment.

IDSA AND DOCTOR DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' RICO AND ANTITRUST CLAIMS

Defendants Infectious Diseases Society of America ("IDSA"); and Dr. Gary P. Wormser, Dr. Allen Steere, Dr. Raymond J. Dattwyler, Dr. John J. Halperin, Dr. Eugene Shapiro, and Dr. Leonard Sigal, (collectively, the "Doctors") submit this Motion for Summary Judgment on Plaintiffs' RICO and antitrust claims pursuant to Federal Rule of Civil Procedure 56.

Plaintiffs allege a massive RICO/antitrust conspiracy that was conceived and implemented by Aetna, Anthem, United, and other large health insurance companies (the "Insurance Defendants") to save the Insurance Defendants millions of dollars by denying coverage for the treatment of so-called "chronic Lyme disease." According to Plaintiffs, IDSA and the Doctors do not have a direct role in this scheme and do not benefit directly from it. Instead, they are the servants of the Insurance Defendants, who paid them for more than twenty years to write and promote fraudulent Lyme disease guidelines.

Plaintiffs never had sufficient facts to support their allegations that IDSA and the Doctors actually participated in this wide-ranging RICO and antitrust conspiracy. For that reason, Plaintiffs in their Original Complaint and First Amended Complaint pled those allegations "on information and belief." Plaintiffs asserted they were entitled to a relaxed pleading standard because the facts supporting their claims – especially the alleged payments by the Insurance Defendants to IDSA and all of the Doctors – were peculiarly within Defendants' possession and that Plaintiffs needed "meaningful discovery" to uncover them.

The parties recently completed fact discovery in this long-running case, and Plaintiffs still do not have any facts to support their RICO and antitrust claims. Indeed, Plaintiffs admitted as much when they filed their Second Amended Complaint (Dkt. 352, "SAC"), in which Plaintiffs did not allege a single new fact but claimed yet again that they ***still*** need to conduct "meaningful

discovery" to uncover evidence of the payments that form the basis of their RICO and antitrust claims against IDSA and the Doctors.[1]

IDSA and the Doctors submit with this motion sworn declarations denying that they participated in the RICO and antitrust conspiracy Plaintiffs allege. Under Fifth Circuit precedent, Plaintiffs now must produce "significant probative evidence" demonstrating the existence of genuine issues of material fact in support of each element of their claims. This burden they cannot meet.

Discovery has uncovered only one small payment from one Insurance Defendant to only one Defendant Doctor who actually helped write the Guidelines. Beyond that, the only evidence Plaintiffs offer of the payments to those who actually helped write the Guidelines are hearsay statements about unnamed insurers who made payments of undefined amounts to unknown doctors. Even if admissible – and they are not – such statements cannot permit Plaintiffs to take their RICO and antitrust claims to trial.

Plaintiffs are left with only a few payments made from some of the Insurance Defendants to someone who never drafted the Guidelines – Dr. Leonard Sigal – payments made during the 1990s. Plaintiffs refer to Dr. Sigal as an "IDSA Panelist" who wrote the IDSA Lyme disease guidelines, but this assertion is false. It is undisputed that Dr. Sigal was not a panelist for the 2000 or the 2006 IDSA Lyme disease guidelines. He did not write a single word of either document. He only reviewed a draft of the 2006 IDSA Lyme disease guidelines, and there is no evidence that his comments affected the substance of the document. For these reasons, any payments to Dr.

[1] Indeed, all Plaintiffs added to their Second Amended Complaint were two new legal theories of recovery based on state-law tort claims and new requests for personal injury and emotional distress damages (all without any supporting factual allegations). IDSA and the Doctors have moved to dismiss these new, late-breaking claims, along with Plaintiffs' original RICO and antitrust claims. *See* Dkt. 355.

Sigal are irrelevant.

Because Plaintiffs cannot produce admissible or probative evidence of payments from the Insurance Defendants to IDSA and all of the Doctors to support their RICO and antitrust claims, summary judgment should be entered in favor of Defendants dismissing those claims. And even assuming a conspiracy could be established, Plaintiffs cannot prove the other elements of their RICO and antitrust claims.

Plaintiffs' RICO and antitrust claims fail for two additional independent reasons that apply to both sets of claims. First, Plaintiffs have failed to present evidence of injuries that are recoverable under RICO or antitrust law because all of their damages flow from purely personal injuries – and are not recoverable injuries to business or property. Second, there is no evidence that IDSA and the Doctors have engaged in acts within the statute of limitations period that caused harm to the Plaintiffs.

STATEMENT OF ISSUES TO BE DECIDED BY THE COURT

1. Whether Plaintiffs cannot present significant probative evidence sufficient to survive summary judgment on their RICO claims.

2. Whether Plaintiffs cannot present significant probative evidence sufficient to survive summary judgment on their antitrust claims.

3. Whether Plaintiffs' damages are derivative of personal injuries and are not recoverable injury to business or property under RICO or antitrust law.

4. Whether Plaintiffs' RICO and antitrust claims are untimely with respect to IDSA and the Doctors.

BACKGROUND

IDSA is the world's leading professional society of infectious diseases doctors, scientists, and other healthcare professionals who discover, prevent, and treat some of the world's most

dangerous diseases, including AIDS, influenza, Ebola, Zika, and, more recently, Covid-19. *See* Declaration of Christopher D. Busky, Ex. 5, ("Busky Decl."), at ¶ 3. IDSA seeks to improve healthcare by promoting excellence in patient care, education, research, public health, and disease prevention efforts. *Id.* ¶ 4. It works closely with institutions such as the Centers for Disease Control and Prevention, National Institutes of Health, and World Health Organization. *Id.* ¶ 5.

One of IDSA's functions is to develop voluntary guidelines that make recommendations regarding appropriate care for specific medical conditions. *Id.* ¶ 7. IDSA has guidelines addressing forty-three medical conditions and is currently developing six more guidelines. *Id.* ¶ 8.

The Defendant Doctors, collectively, have more than a hundred years of experience studying and treating various infectious diseases, as well as teaching medical students, residents, and fellows at some of the nation's leading medical schools. Each has dedicated decades to advancing patient and public health and has extensive experience with Lyme disease.

This case concerns Lyme disease guidelines that IDSA developed in 2000 and updated in 2006. Twelve experts, including four of the Doctors named as Defendants, wrote the 2000 Guidelines.[2] Fourteen experts, including the four Defendant Doctors who contributed to the 2000 Guidelines and a fifth Doctor named as a Defendant, wrote the 2006 Guidelines.[3] Dr. Sigal was named as a Defendant but was not an author of either the 2000 Guidelines or the 2006 Guidelines; he simply reviewed a draft of the 2006 Guidelines.[4]

Plaintiffs allege that they suffer from "chronic Lyme disease," a term they use to describe a collection of ongoing subjective symptoms, including fatigue, joint and muscle pain, brain fog,

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[2] Ex. 1, 2000 IDSA Guidelines, p. S1.

[3] Ex. 2, 2006 IDSA Guidelines, p. 1089.

[4] Ex. 2 at 1125. An additional Doctor named as a Defendant who was an author of both the 2000 and 2006 guidelines passed away soon after the lawsuit was filed and has been dismissed with prejudice. Order of Dismissal with Prejudice, Dkt. 121 (Oct. 15, 2018).

and concentration difficulties. Plaintiffs claim that these symptoms are caused by ongoing infection by the bacteria that causes Lyme disease and that they must be treated with long-term antibiotics. SAC ¶¶ 30-32. Both the 2000 and 2006 Guidelines address "chronic Lyme disease" and, based on a thorough review and assessment of the available medical and scientific literature, conclude that (1) a diagnosis of "chronic Lyme disease" for patients with ongoing subjective symptoms is not warranted and (2) long-term antibiotic treatment is not effective – and is potentially dangerous. Ex. 1 at S11-12; Ex. 2 at 1094, 1114-21.

These conclusions are consistent with nearly all other Lyme disease guidelines published by professional societies and government health agencies around the world.[5] Moreover, after their publication, all of the recommendations in the 2006 IDSA Guidelines were reviewed carefully by an expert panel determined to be free of potential conflicts by a leading medical ethicist selected by the Attorney General of Connecticut. That panel unanimously concluded "that no changes or revisions to the 2006 Lyme Guidelines are necessary at this time." Ex. C, 2010 Guidelines Report, at 27.

[5] Ex. C at 28. *See also* https://academic.oup.com/cid/article/51/1/1/297544 ("The recommendations in the 2006 IDSA guidelines are further corroborated by guidelines and statements by other independent bodies from the United States and Europe.); https://www.sciencedirect.com/science/article/pii/S0399077X18306760 ("European and American guidelines shows that, most medical scientific guidelines of good quality agree on the clinical presentations and diagnostic methods of Lyme disease."); https://pulitzercenter.org/reporting/frances-battles-over-lyme-disease-lessons-science-communication ("The IDSA's 2006 guidelines still set the standard for testing and treatment of Lyme (they're currently in revisions,) and are very similar to French testing and treatment guidelines from the same year. IDSA's guidelines have been reviewed by the CDC, and by equivalent boards in France, Switzerland, Canada and the U.K. as recently as 2016, all of which agree with the main recommendations.").

Plaintiffs reject these conclusions. They allege that the IDSA Lyme disease guidelines are the product of a massive, long-term conspiracy created and orchestrated by – and for the benefit of – all of the major health insurance companies in the United States. SAC ¶ 49.

Plaintiffs allege that long before IDSA even considered inviting experts to write Lyme disease guidelines, some patients received treatment for their "chronic Lyme disease," including treatment with long-term antibiotics – and that the Insurance Defendants covered such treatment. SAC ¶ 34. However, Plaintiffs claim that once the Insurance Defendants determined that such treatment is required by at least 60,000 patients per year and costs $1,000 to $50,000 per year, the Insurance Defendants began denying coverage for "chronic Lyme disease" and for antibiotic treatment longer than 28 days. SAC ¶¶ 31, 35-37.

Plaintiffs allege that it was not sufficient for the Insurance Defendants to deny coverage based on their own coverage policies but that they needed the Doctors and IDSA to write fraudulent Lyme disease guidelines that would support the Insurance Defendants' policies. SAC ¶¶ 49, 75-77. Plaintiffs allege that the Insurance Defendants, IDSA, and the Doctors entered into a long-term, ongoing criminal conspiracy for such guidelines in order to deny treatment of chronic Lyme disease – one that continues to this day. *See, e.g.*, SAC ¶¶ 89, 104.

Plaintiffs allege the Insurance Defendants enticed IDSA and the Doctors to participate in their RICO/antitrust conspiracy – and, in particular, to write fraudulent Lyme disease guidelines – by entering into consulting arrangements with the Doctors and making substantial and continuous payments to them to review medical records, report Lyme disease doctors to medical boards, and testify against these doctors before those boards. SAC ¶ 89(b). They allege as well undefined payments to IDSA. SAC ¶ 89(b). These alleged payments from the Insurance Defendants to the Doctors and IDSA (from 1995 to 2017 for most of the Doctors), together with alleged

"communications related to the doctors' responsibilities and findings … from insurance companies," are the centerpiece of Plaintiffs' claims against IDSA and the Doctors. *See, e.g.*, SAC ¶¶ 55, 89. Plaintiffs' entire case rests on allegations that the Insurance Defendants were directing the actions of IDSA and the Doctors – for the benefit of the Insurance Defendants – and keeping them in line through continuous and long-term payments. *See, e.g.*, SAC ¶¶ 38, 45, 49, 54-55, 72, 77, 89, 104-05.

Plaintiffs' allegations of extensive payments and communications from the Insurance Defendants to the Doctors and IDSA led the Court to hold that Plaintiffs in their First Amended Complaint adequately pled their RICO claims, Dkt. 279 at 6-7, 11, and their antitrust claims, Dkt. 279 12-13, 6-7. The Court held as well that details normally required to plead Plaintiffs' RICO claims – including "who paid whom and when the payments occurred" – were peculiarly in Defendants' possession, which entitled Plaintiffs to a relaxed pleading standard and the opportunity to conduct full discovery. Dkt. 279 at 7-11.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs now have obtained the discovery they have been seeking, but it is undisputed that there is no evidence that any Doctor or the IDSA agreed with the Insurance Defendants to participate in a conspiracy to develop fraudulent Lyme disease guidelines:

1. Dr. Gary P. Wormser, Dr. Allen Steere, Dr. Raymond J. Dattwyler, Dr. John J. Halperin. There is no evidence that Dr. Wormser, Dr. Steere, Dr. Dattwyler, or Dr. Halperin or participated in the conspiracy Plaintiffs allege. There is no evidence of any communications between any of them and any Insurance Defendant regarding the IDSA Lyme disease guidelines. There is no evidence that any Insurance Defendant engaged any one of them as a consultant related to Lyme disease or denials of coverage for Lyme disease treatment. There is no evidence that any Insurance Defendant paid any one of them consulting fees related to Lyme disease or to testify

before a medical board related to Lyme disease. Each has submitted a sworn declaration that he had no communications with any Insurance Defendant; took no money from any Insurance Defendant; and wrote the guidelines independent of any influence from any Insurance Defendant. Ex. 6, Declaration of Dr. Gary Wormser, ¶¶ 9, 11-12 ("Wormser Decl."); Ex. 7, Declaration of Dr. Allen Steere, ¶¶ 11-13 ("Steere Decl."); Ex. 8, Declaration of Dr. Raymond Dattwyler, ¶¶ 13-15 ("Dattwyler Decl."); Ex. 9, Declaration of Dr. John Halperin, ¶¶ 10-12 ("Halperin Decl.").

2. Dr. Eugene Shapiro. There is no evidence that Dr. Shapiro participated in the conspiracy Plaintiffs allege. There is no evidence of any communications between Dr. Shapiro and any Insurance Defendant regarding the IDSA Lyme disease guidelines. There is only evidence that a single Insurance Defendant – Anthem – engaged Dr. Shapiro very briefly in 1998-1999 and paid Dr. Shapiro $595 for the limited engagement. There is no evidence that Anthem made any consulting payments to Dr. Shapiro after 1999 and no evidence that any other Insurance Defendant ever engaged Dr. Shapiro as a consultant related to Lyme disease or to testify before medical boards related to Lyme disease. Dr. Shapiro has submitted a sworn declaration that he had no communications with any Insurance Defendant regarding the Lyme disease guidelines; took no money from any Insurance Defendant related to Lyme disease (the single payment was unrelated to writing the guidelines); and wrote the guidelines independently and without influence from any Insurance Defendant. Ex. 10, Declaration of Dr. Eugene Shapiro, ¶¶ 8, 10-11 ("Shapiro Decl.").

3. Dr. Leonard Sigal. There is no evidence that Dr. Sigal participated in the conspiracy Plaintiffs allege. Plaintiffs tout Dr. Sigal as the lynchpin of the alleged RICO and antitrust conspiracy because in the 1990s Dr. Sigal had consulting arrangements with some of the Insurance Defendants to review a handful of patient files related to Lyme disease. SAC ¶ 42-43. Plaintiffs refer to Dr. Sigal as an "IDSA Panelist," implying he wrote the IDSA Lyme disease

guidelines. SAC ¶ 42. Yet the undisputed evidence is that Dr. Sigal was not a panelist for the 2000 or the 2006 IDSA Lyme disease guidelines. Ex. A at S1; Ex. B at 1089. He did not write a single word of either document. He only reviewed a draft of the 2006 IDSA Lyme disease guidelines, and there is no evidence that his comments affected the substance of the document. Ex. B at 1125. There is no evidence of any communications between Dr. Sigal and any Insurance Defendant regarding the IDSA Lyme disease guidelines. There also is no evidence that any Insurance Defendant paid Dr. Sigal to testify before a medical board related to Lyme disease. Dr. Sigal has submitted a sworn declaration that he had no communications with any Insurance Defendant regarding his review of the Lyme disease guidelines; cannot recall being paid for a consulting arrangement with any health insurance company since the 1990s; was not a Panelist for either the 2000 or the 2006 Guidelines; only reviewed the guidelines and made no recommendations for any substantive changes; and reviewed the guidelines independent of any influence from any Insurance Defendant. Ex. 11, Declaration of Dr. Leonard Sigal, ¶¶ 14-19.

4. IDSA. There is no evidence that IDSA participated in the conspiracy Plaintiffs allege. There is no evidence of any communications between IDSA and any Insurance Defendant regarding the IDSA Lyme disease guidelines. There is no evidence that any Insurance Defendant made any payments to IDSA in any way related to Lyme disease. Busky Decl. ¶ 9.

5. Research and Evidence were the Basis for the IDSA Guidelines. It is undisputed that each Doctor has a legitimate basis to support the recommendations in the Guidelines regarding "chronic Lyme disease" and long-term antibiotic treatment: prolonged antibiotic therapy has not proven to be useful for patients with chronic subjective symptoms after administration of recommended treatment regiments for Lyme disease and potentially could harm such patients.

Wormser Decl. ¶ 10, 12; Steere Decl. ¶¶ 13-14; Dattwyler Decl. ¶¶ 15-16; Halperin Decl. ¶¶ 12-13; Shapiro Decl. ¶¶ 11-12; Sigal Decl. ¶ 19.

6. **2010 Report on the IDSA Guidelines.** In 2010, an independent review panel, screened for conflicts of interest by a medical ethicist approved by the Connecticut Attorney General, conducted an exhaustive review of the 2006 Guidelines. Ex. C at 2. The review panel of experts and patients ensured "that all points of view were taken into consideration," and reviewed each and every recommendation in the 2006 Guidelines and their supporting evidence and cited sources. The review panel consulted more than 1000 references relating to Lyme disease; accepted voluminous public comment; and reviewed other Lyme disease guidelines. The review panel confirmed the findings of the IDSA Guidelines:

> The Review Panel finds that the 2006 Lyme Guidelines were based on the highest-quality medical scientific evidence available at the time and are supported by evidence that has been published in more recent years. … In addition to the review by this Panel, the recommendations in the 2006 Lyme Guidelines are further corroborated by guidelines and statements by other independent bodies in the United States and Europe.

Ex. C at 28.

7. There is no evidence that any Doctor or IDSA received income (from any source) derived from the alleged scheme to write fraudulent Lyme disease guidelines and deny coverage for treatment of "chronic Lyme disease" or that any Doctor acted to invest that income back into any enterprise.

8. There is no evidence that any Doctor or IDSA acquired or maintained an interest or control of any enterprise through the alleged scheme to write fraudulent Lyme disease guidelines and deny coverage for treatment of chronic Lyme disease.

9. There is no evidence that Plaintiffs' alleged injuries resulted from either (1) the investment by any Doctor or IDSA of income from the alleged scheme to write fraudulent Lyme

disease guidelines and deny coverage for treatment of "chronic Lyme disease" or (2) the acquisition or maintenance of an interest in or control of an enterprise through the alleged scheme by any Doctor or IDSA. Ex. 4, Plaintiffs' Damages Disclosures (March 25, 2019) (filed under seal pursuant to the Court's Protective Order) ("Damages Disclosures").

10. There is no evidence that any Doctor or IDSA had supervisory involvement in a scheme organized by the Insurance Defendants to write fraudulent Lyme disease guidelines and deny coverage for treatment of chronic Lyme disease. There is no evidence that any Doctor or IDSA controlled the actions of the Insurance Defendants in denying treatment or coverage.

11. There is no evidence of any market shares exceeding 50% in any product market in which IDSA or the Doctors participate or have market share.

12. There is no evidence that any Plaintiff is seeking damages for injuries to the Plaintiff's business or property resulting from the alleged racketeering scheme or injury to competition. Plaintiffs have claimed only their medical expenses, travel expenses, and lost earnings caused due to their inability to work because of their Lyme disease. Ex. 4, Damages Disclosures at 2-20.

13. There is no documented evidence that any Plaintiff was injured by an act of the Doctors or IDSA that occurred after November 10, 2013, within the four-year statute of limitations period prior to the filing of the Complaint.

ARGUMENT

Plaintiffs' RICO and antitrust claims are complex, inter-related, and fall short in many ways, but on summary judgment one issue in this case is straightforward: Plaintiffs allege a grand conspiracy designed and operated by the Insurance Defendants without any evidence that IDSA or the Doctors were ever conspirators. Because Plaintiffs cannot produce the required "significant

probative evidence" that IDSA or any Doctor participated in the conspiracy, summary judgment should be granted on Plaintiffs' RICO and antitrust claims for this reason alone – without the need to delve into the more complex elements of proof required for Plaintiffs to take these claims to trial.

Plaintiffs also lack evidence to support the other elements of their RICO and antitrust claims. In addition, Plaintiffs' alleged damages are not recoverable injury to business or property under RICO or the Sherman Act because they are all derivative of purely personal injuries and illness. Finally, Plaintiffs' claims are barred by the statute of limitations with respect to IDSA and the Doctors.

A. Summary Judgment Standard

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "By its very terms, this standard provides that the mere existence of ***some*** alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no ***genuine*** issue of ***material*** fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Thus, a "plaintiff could not rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint.'" *Id.* (citing *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

Plaintiffs' burden is even more difficult. Because IDSA and the Doctors have submitted sworn denials, "summary judgment is appropriate unless plaintiff can produce significant probative evidence demonstrating the existence of a genuine fact issue." *Parsons v. Ford Motor Co.*, 669 F.2d 308, 313 (5th Cir. 1982).

IDSA and the Doctors are not required to prove a negative. They can meet their burden on summary judgment "by 'showing' – that is, pointing out to the district court – that there is an

absence of evidence to support the nonmoving party's case," especially after the close of fact discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Defendants are "'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of [their] case with respect to which [they have] the burden of proof." *Id.* In the case of statutes like RICO and antitrust that authorize the recovery of treble damages, there is a powerful incentive for plaintiffs to bring frivolous suits seeking a significant windfall, so it is especially important "to inquire into the factual and legal bases of potential claims." *Chapman & Cole v. Itel Container Intern. BV*, 865 F.2d 676, 685 (5th Cir. 1989).

B. Plaintiffs Cannot Present Significant Probative Evidence Of Payments Or Communications Linking IDSA And The Doctors To The Insurance Defendants' RICO Or Antitrust Conspiracy

Plaintiffs brought this case against the nation's largest health insurance companies, alleging that one aspect of their longstanding and open business activities is actually a fraudulent criminal conspiracy (in violation of both RICO and antitrust law) to save the Insurance Defendants millions of dollars by denying coverage for chronic Lyme disease.

Plaintiffs could have – and should have – stopped there. But they did not. They joined IDSA and the Doctors, asserting that the Insurance Defendants brought them into their criminal conspiracy through long-term, ongoing payments to each one of them related to Lyme disease.

Plaintiffs have settled with the Insurance Defendants. Now Plaintiffs seek to proceed to trial against IDSA and the Doctors. Plaintiffs survived dismissal by promising to uncover such payments in discovery and by arguing that the payments they would uncover would support an inference that IDSA and the Doctors joined the Insurance Defendants' conspiracy. Plaintiffs claimed that the payments were both the motive for conspiring and the mechanism by which the agreement was sealed.

To take these remaining Defendants to trial, Plaintiffs must produce significant probative evidence showing IDSA and each Doctor participated in the alleged conspiracy by receiving payments from the Insurance Defendants as compensation for joining the conspiracy. Otherwise, IDSA and the Doctors cannot be liable for a criminal conspiracy that they did not conceive, that they never even discussed with any Insurance Defendant, and that was not designed to benefit them.

Plaintiffs do not even come close to meeting this burden. There is no evidence that IDSA took a penny from any Insurance Defendant related to Lyme disease. There is no evidence that Dr. Wormser took a penny from any Insurance Defendant related to Lyme disease. There is no evidence that Dr. Steere took a penny from any Insurance Defendant related to Lyme disease. There is no evidence that Dr. Dattwyler took a penny from any Insurance Defendant related to Lyme disease. There is no evidence that Dr. Halperin took a penny from any Insurance Defendant related to Lyme disease.[6] The same holds true for communications – there is no evidence that any of these Defendants had any communications with any Insurance Defendant regarding the IDSA Lyme disease guidelines. Thus, there is no evidence that could even suggest an inference that any of these Defendants participated in the conspiracy Plaintiffs allege.

That leaves two Defendant Doctors.

Dr. Shapiro had a single, short-term consulting arrangement with one Insurance Defendant related to Lyme disease. He was paid $595 for his services in early 1999 – and nothing after that. Dr. Shapiro – like IDSA and the other Doctors – never had any communications with any Insurance Defendant regarding the IDSA Lyme disease guidelines. As such, there is absolutely no evidence

[6] All of the Doctors treat Lyme disease patients and other patients, and their medical practices may have received from some of the Insurance Defendants payments for providing medical care to patients.

that Dr. Shapiro participated in the alleged conspiracy. Accepting one small payment for a short assignment from a single Insurance Defendant in 1999 – and absolutely nothing since – cannot be the "significant probative evidence" required to support an inference that Dr. Shapiro joined the conspiracy conceived of and operated by the Insurance Defendants.

Finally, there is Dr. Sigal, who did have some limited consulting arrangements with some of the Insurance Defendants. Try as they might, Plaintiffs cannot change Dr. Sigal's role with respect to the 2000 and 2006 Guidelines. Dr. Sigal had absolutely no involvement at all with the 2000 Guidelines, which is when the IDSA Guidelines first made the recommendations regarding "chronic Lyme disease" and long-term antibiotic treatment that Plaintiffs assert are fraudulent. For the 2006 Guidelines – which did not materially change those recommendations from 2000 – Dr. Sigal only reviewed a draft. Again, he was not on the panel and did not write a single word. Payments from the Insurance Defendants to Dr. Sigal are irrelevant – and cannot be the "significant probative evidence" required to support an inference that Dr. Sigal participated in the alleged conspiracy.

To the extent Plaintiffs rely on a press release from the Connecticut Attorney General and testimony before Congress from Dr. Joseph Burrascano, these statements do not create a genuine factual dispute because they do not identify a single Doctor, a single Insurance Defendant, or a single consulting arrangement or payment. SAC ¶¶ 41, 44. Moreover, the press release and Congressional testimony are both inadmissible hearsay and therefore cannot be considered in ruling on summary judgment. Fed. R. Civ. P. 56(c)(2) (requiring summary judgment facts be presented "in a form that would be admissible in evidence"); *see also, e.g., Cruz v. Aramark Servs.*, 213 Fed. App'x 329, 332 (5th Cir. 2007) (holding investigative reports from an agency were hearsay and therefore incompetent summary judgment evidence); *In re Oil Spill by the Oil Rig*

Deepwater Horizon, MDL No. 2179, 2012 WL 425164, at *2 (E.D. La. Feb. 9, 2012) (excluding congressional testimony because it does not fall under Federal Rule of Evidence 803(8) Public Records exception); *Fat Butter, Ltd. v. BBVA USA Bancshares, Inc.*, No. 4:09-cv-3053, 2010 WL 11646900, at *8 (S.D. Tex. Apr. 13, 2010) (excluding press releases by Minnesota Attorney General).

All told, Plaintiffs have not produced the evidence they promised linking IDSA and the Doctors to the conspiracy they claim was orchestrated by Insurance Defendants. Discovery simply has not uncovered "significant probative evidence" to support the inferences on which Plaintiffs' claims depend. This deficiency dooms all of Plaintiffs' RICO claims, which require evidence of such a conspiracy in order to be viable, as well as their antitrust claims, which rely entirely on concerted action in a conspiracy to restrain trade or seek a joint monopoly. No further analysis is required.

C. Plaintiffs Cannot Set Forth Probative Evidence To Support Each Common Or Specific Element Of Their RICO Claims

RICO claims are extremely complex, and Plaintiffs must produce significant probative evidence to support multiple elements of the four separate RICO claims they assert. We address below the many ways in which Plaintiffs cannot meet RICO's many requirements – as we must.

Again, as described above, it is not necessary for the Court to address each technical element of Plaintiffs' four separate RICO claims because all of their RICO claims fail for one reason: Plaintiffs cannot produce significant probative evidence to show the IDSA or any one of the Doctors actually participated in the criminal conspiracy Plaintiffs allege. However, in addition, Plaintiffs cannot produce evidence in support of other key RICO requirements.

1. Plaintiffs Lack Evidence To Prove The Common Elements Of Their RICO Claims

Plaintiffs allege four separate RICO claims, but each claim requires that Plaintiffs establish three "common elements": (1) That the Doctors and IDSA participated in predicate "racketeering activity" by committing the crimes of wire fraud or mail fraud; (2) that the predicate racketeering activity of the Doctors and IDSA, if it occurred, was part of a "pattern" of long-term, organized conduct rather than isolated events; and (3) that the Doctors and IDSA used a requisite RICO "enterprise." If Plaintiffs cannot produce sufficient probative evidence to support ***any one*** of these elements, ***all four*** of their RICO claims fail.

i. There Is No Evidence That The Doctors Or IDSA Engaged In Predicate Racketeering Acts Of Wire Fraud Or Mail Fraud

Plaintiffs have no significant probative evidence to prove the underlying racketeering activity they allege – wire fraud and mail fraud. *See* SAC ¶ 134. The elements of mail fraud are (1) an intent to defraud, (2) a "scheme or artifice to defraud," (3) use of mails (or interstate wires) by the defendant "for the purpose of executing such scheme or artifice," (4) actual injury to the business or property of the plaintiff. 18 U.S.C. §§ 1341, 1343; *Landry v. Air Line Pilots Ass'n Intern. AFL-CIO*, 901 F.2d 404, 428 (5th Cir. 1990).

Plaintiffs cannot prove a "scheme or artifice" to defraud or the intent to defraud. Without evidence of payments to IDSA and each Doctor, Plaintiffs cannot demonstrate that any other acts taken by IDSA or the Doctors were in furtherance of the fraudulent scheme or that they were intended to defraud. *Zervas v. Faulkner*, 861 F.2d 823, 836-37 (5th Cir. 1988) (finding no participation in a conspiracy when defendants did not receive the alleged "kickbacks" from the scheme).

A "scheme to defraud" must also have the purpose "to obtain something of value, such as money." *U.S. v. Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992). Plaintiffs present no evidence that

any Doctor or IDSA ever received anything of value from the purported scheme, nor can they demonstrate that any Doctor or IDSA entered into the alleged scheme intending to make money from the scheme itself.

ii. Plaintiffs Cannot Set Forth Probative Evidence To Prove a Pattern of Racketeering Activity

Plaintiffs must prove that IDSA and the Doctors engaged in a "pattern of racketeering activity" by committing acts of wire and mail fraud that all "were aimed at achieving a single goal." *Landry v. Air Line Pilots Ass'n Intern. AFL-CIO*, 901 F.2d 404, 433 (5th Cir. 1990). There is no RICO "pattern" when, instead of an unlawful objective, "alleged RICO predicate acts are part and parcel of a single, otherwise lawful transaction." *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996). Plaintiffs cannot set forth any probative evidence to show that IDSA's and the Doctors' actions in publishing educational materials about an infectious disease – an indisputably legitimate undertaking – instead was ongoing criminal activity that constituted a pattern of racketeering. Plaintiffs also cannot set forth probative evidence – as they must – to demonstrate that the IDSA guidelines were designed to facilitate the alleged criminal acts of the Insurance Defendants, rather than that they just discussed the same disease that was the object of the Insurance Defendants' separate alleged conspiracy. *Heller Fin., Inc. v. Grammco Computer Sales, Inc.*, 71 F.3d 518, 525 (5th Cir. 1996) (requiring "more than an articulable factual nexus" to show a related pattern of criminal activity).

iii. Plaintiffs Cannot Establish A RICO Enterprise

Plaintiffs lack probative evidence to establish a RICO enterprise, as required for each of their RICO claims. *See* 18 U.S.C. §§ 1961(4), 1962. This Court previously held that Plaintiffs' allegations of an antitrust agreement satisfied the requirement for "relationships among those associated with the enterprise." Dkt. 114 at 26 (referring to discussion of antitrust agreement in

Section I.C). But Plaintiffs have no evidence of an agreement or of payments sufficient to infer an agreement.

Moreover, Plaintiffs have no evidence of an enterprise, which must include a "decision making structure, whether hierarchical or consensual." *Shaffer v. Williams*, 794 F.2d 1030, 1032 (5th Cir. 1986). Plaintiffs have no evidence that acts of the Insurance Defendants, IDSA, and Doctors were coordinated or directed through such a mechanism. *Clark v. Nat'l Equities Holdings, Inc.*, 558 F. Supp. 2d 692, 697 (E.D. Tex. 2007), *aff'd sub nom. Clark v. Douglas*, No. 06-40364, 2008 WL 58774 (5th Cir. Jan. 4, 2008) (holding there is no "unified decision-making structure" when only two of a dozen defendants actually worked together to implement a fraudulent scheme).

2. Plaintiffs Lack Evidence To Support Specific Elements Of Their Separate RICO Claims

Plaintiffs also lack evidence to support specific elements of their separate RICO claims.

i. Plaintiffs' § 1962(a) Claim Fails Because IDSA And The Doctors Had No Income From The Alleged Scheme And Did Not Invest Such Income

Plaintiffs' Section 1962(a) claim requires that Plaintiffs produce evidence that Defendants derived income from a pattern of racketeering activity and used part of that income to acquire an interest in or to operate the enterprise. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000).

Plaintiffs allege that "the Settling Insurance Companies used the money it [sic] gained from not treating chronic Lyme patients … to compensate IDSA Panelists." SAC ¶ 140. However, the only evidence of payments by the Insurance Defendants to an actual member of the IDSA Lyme disease guideline panel is a single payment to Dr. Shapiro in 1999, which cannot constitute income to Dr. Shapiro from a scheme that could not have been in effect before IDSA published its first Lyme disease guidelines in 2000.

ii. Plaintiffs' § 1962(a) and 1962(b) Claims Lack a Nexus With Plaintiffs' Damages

"Under subsections (a) and (b), there must be a nexus between the claimed RICO violations and the injury suffered by the plaintiff." *Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995). Plaintiffs have no evidence that their alleged damages are linked to the violations described in their § 1962(a) (investment) or § 1962(b)[7] (control) claims.

Under § 1962(a), damages "must flow from the use or investment of racketeering income," not from the underlying predicate acts alleged. *Parker & Parsley Pet. Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992). Plaintiffs seek damages for "out-of-pocket travel expenses, out-of-pocket expenses related to seeking medical treatment, and out-of-pocket medical expenses," Ex. 4, Damages Disclosures at 2, which do not flow from the "use or investment" of the alleged racketeering income earned by the Insurance Defendants. *Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 929 (5th Cir. 2002) ("Nolen's alleged injury stems solely from Nucentrix's assessment and collection of late fees, not from Nucentrix's use or investment of those fees."); *Abraham v. Singh*, 480 F.3d 352, 356-57 (5th Cir. 2007). Even showing that IDSA or the Doctors made money from the alleged scheme – and they did not – would not suffice. *Turner v. Union Planters Bank of S. Mississippi*, 974 F. Supp. 890, 894 (S.D. Miss. 1997) ("It is not sufficient to merely show that a defendant invested or used the income derived from its pattern of racketeering activity to facilitate its own general operations and that the continuing operation of the enterprise injured the plaintiffs.").

[7] 15 U.S.C. § 1962(b) makes it unlawful for any person to "acquire or maintain" an interest or control of an enterprise through a pattern of racketeering activity.

iii. Plaintiffs' § 1962(c) Claim Fails Because IDSA And The Doctors Had No Supervisory Involvement In The Alleged Scheme

Under Section 1962(c), Plaintiffs must show that IDSA and the Doctors not only participated in the alleged conspiracy but also had "some part in the ***operation or management*** of the enterprise itself." *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 551 (5th Cir. 2012), *as revised* (Jan. 12, 2012) (emphasis added); *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) ("in the context of the phrase 'to conduct ... [an] enterprise's affairs,' the word indicates some degree of direction").

Plaintiffs have no evidence that IDSA or the Doctors had any control over the alleged scheme, which they specifically allege was masterminded by the Insurance Defendants. SAC ¶ 77. Not even evidence of payments to the Doctors or IDSA – and there is none – would suffice to meet this requirement. *Davis-Lynch*, 667 F.3d at 551 ("[r]eceiving funds or materials on its own, without more, does not show that [defendants] actually operated the scheme to obtain those funds or materials").

iv. Plaintiffs' § 1962(d) Claim Fails Because There Is No Evidence Of Knowing Participation In A RICO Conspiracy

"A person cannot be held liable for a RICO conspiracy 'merely by evidence that he associated with other … conspirators or by evidence that places the defendant in a climate of activity that reeks of something foul.'" *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 239 (5th Cir. 2010). The declarations submitted by the Doctors establish that they did not communicate with Insurers regarding any conspiracy by the Insurers to deny coverage to Plaintiffs, and thus were "simply unaware" of the underlying criminal conduct that is the basis of the RICO conspiracy. *Chaney*, 595 F.3d at 239. Because the Doctors and IDSA were ignorant of any alleged conspiracy to commit criminal acts, summary judgment is appropriate.

In addition, this claim must fail because there is no viable claim under the predicate RICO provisions, as described above, and thus there can be no conspiracy to violate those provisions. *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 203 (5th Cir. 2015) ("Since [plaintiff] failed to properly plead a claim under §§ 1962(a), (b), or (c), it correspondingly failed to properly plead a claim under § 1962(d).").

D. Plaintiffs Lack Significant Probative Evidence To Support Their Antitrust Claims

If Plaintiffs' RICO claims – which allege that IDSA and the Doctors joined a criminal enterprise to save the Insurance Defendants millions of dollars – are not far-fetched enough, Plaintiffs double-down by alleging that IDSA and the Doctors conspired with the Insurance Defendants to limit competition in the bizarre "market" for Lyme disease treatment. It is difficult to know where to begin.[8]

Plaintiffs bear a heavy burden in pursuing an antitrust claim: "To survive a motion for summary judgment … [Plaintiffs] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently … in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." *Matsushita Elec. Indus. Co, Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Here all of the evidence – from the sworn declarations of IDSA and the Doctors to the documents produced in discovery to the deposition testimony – demonstrates that IDSA and the Doctors acted independently from the Insurance Defendants to write the Lyme disease guidelines. There was no conspiracy, and there was no action to limit competition in an actual antitrust market.

[8] Typically, antitrust plaintiffs argue that defendants conspire to limit competition in a market in order to drive out competitors and make more money in that market. Here, Plaintiffs allege that the Doctors and IDSA sought to limit treatment for chronic Lyme disease but, not to expand their own revenues in any way by providing alternative treatments for Lyme disease.

1. Plaintiffs Have No Evidence That IDSA Or The Doctors Agreed With The Insurance Defendants To Restrain Trade

Plaintiffs cannot meet their burden to produce probative evidence that IDSA and the Doctors agreed with the Insurance Defendants to restrain trade. *Marucci Sports LLC v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 374 (5th Cir. 2014) (an antitrust conspiracy requires proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective"). This lack of evidence dooms all of Plaintiffs' antitrust claims. *Stewart Glass & Mirror, Inc. v. USA Glas, Inc.*, 17 F.Supp.2d 649, 657 (5th Cir. 1998) "[I]f there is not sufficient evidence of a conspiracy to support a Section 1 claim, then there is not sufficient evidence of a conspiracy to support a Section 2 claim [under a theory of joint monopolization].").

The only evidence is that the Doctors who wrote the Guidelines acted independently – and never communicated with the Insurance Defendants regarding the Guidelines. *See* Undisputed Facts ¶¶ 1-4. There is no evidence of an agreement, much less one to restrain trade, that would make any economic sense. *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 272 (5th Cir. 2008) (dismissing alleged conspiracy among standard setting organizations when there was no evidence proffered of the alleged financial incentives to conspire actually being paid to the members); *Spectators' Commun. Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001) (requiring summary judgment evidence that a conspirator who "lacks a direct interest in precluding competition" must be "enticed or coerced into knowingly curtailing competition" by providing them with incentives that made participation "economically plausible").

2. Plaintiffs Cannot Produce Evidence That IDSA And The Doctors Acted To Restrain Trade In An Antitrust Relevant Market

For each theory of antitrust recovery, Plaintiffs allege anticompetitive effects in the same two "relevant markets": The market for the "treatment of chronic Lyme disease" and the market for insurers to provide "coverage for such treatment." Dkt. 114 at 20. But Plaintiffs have no

evidence to show that these "markets" are relevant antitrust product markets, which are defined based on the interchangeability of products and competition amongst brands. *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 626 (5th Cir. 2002).

The IDSA Guidelines are not a product; they are available for free to anyone, including the doctors who are their intended audience. There is "no authority indicating that antitrust law concerns itself with competition in the provision of free services." *Kinderstart.com LLC v. Google, Inc.*, No. C 06-2057, 2007 WL 831806, *5 (N.D. Cal. Mar. 16, 2007). And the proliferation of other guidelines for the treatment of Lyme disease, including guidelines from ILADS that Plaintiffs specifically prefer, as well as from other medical societies and international bodies, illustrates that the existence of the IDSA Guidelines does not prevent any other organization from issuing its own guidelines – putting aside the question of whether treatment guidelines "compete" with each other. *See* Ex. 3, at 2 (listing six different Lyme disease guidelines). As such, there is no evidence that IDSA or the Doctors acted to restrain competition in any market Plaintiffs allege.

3. Plaintiffs Cannot Produce Evidence That IDSA Or The Doctors Jointly Controlled a Monopoly Share Of Any Product Market

Plaintiffs allege that IDSA and the Doctors conspired to monopolize the markets for "treatment of chronic Lyme disease" and for the insurance coverage for Lyme disease. Of course IDSA and the Doctors are not insurance companies and do not compete in the insurance coverage market. To the extent the IDSA Guidelines recommend to doctors certain treatments for Lyme disease, however, Plaintiffs can present no evidence that the IDSA Guidelines function in any way as a "monopoly" as required under the Sherman Act.

A monopolization claim will fail on summary judgment if Plaintiffs cannot allege a market share of "at least fifty percent," and "it is doubtful whether 60 or 64 percent would be enough." *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984). Plaintiffs can

present no evidence to reach these thresholds. To the contrary, there are a plethora of guidelines, recommendations, and suggestions for how to treat Lyme disease, and nothing prevents a doctor from reading and relying on all of them. *See* Ex. 3, at 2.

4. Plaintiffs Have No Evidence That IDSA And The Doctors Engaged In Predatory Or Exclusionary Conduct In Restraint Of Trade

For their Section 2 monopolization claims, Plaintiffs must prove (assuming monopoly power or a dangerous probability thereof could be proven) that IDSA and the Doctors engaged in "predatory" or "exclusionary" conduct, which involves "the creation or maintenance of monopoly by means other than the competition on the merits." *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999). For their Section 1 conspiracy claims, Plaintiffs must prove that IDSA and the Doctors engaged in an "***unreasonable*** restraint" on competition. *Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). The Court must use the "rule of reason," weighing beneficial value of the "safety standards" against potential unreasonable harm to competition in general. *Consolidated Metal Prod., Inc. v. Am. Petrol. Inst.*, 846 F.2d 284, 292-94 (5th Cir. 1988); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

It is well settled that setting forth professional guidance that is voluntary on its face is not an unreasonable restraint of trade. *Consolidated Metal*, 846 F.2d at 296. The Fifth Circuit discourages treble damages actions (like this one) that are nothing more than disagreements with the recommendations set forth in voluntary guidelines:

> We have found it 'axiomatic' that a standard setting organization must exclude some products, and such exclusions are not themselves antitrust violations. To hold otherwise would stifle the beneficial functions of such organizations, as fear of treble damages and judicial second-guessing would discourage the establishment of useful industry standards.

Golden Bridge, 547 F.3d at 273 (internal citations omitted). The fact that Plaintiffs or others might disagree with the IDSA Guidelines is of no matter. *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 57 (1st Cir. 1999) ("Merely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as 'unreasonable' under the Sherman Act.") (citing *Consolidated Metal*, 846 F.2d at 294). It likewise makes no difference if most doctors rely on the IDSA Guidelines. *Schachar v. Am. Acad. Of Ophthalmology, Inc.*, 870 F.2d 397, 398 (7th Cir. 1989) (granting summary judgment for medical society that had "no authority over hospitals, insurers, state medical societies or licensing boards").

E. Plaintiffs' Damages Are Derivative Of Their Personal Injuries And Are Not Recoverable Under RICO Or Antitrust Law

Both RICO and antitrust claims allow Plaintiffs to recover only for injuries to their business or property and do not allow Plaintiffs to seek recovery for "personal injuries." *See, e.g., Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Moreover, financial or economic harms that are purely derivative of personal injuries are not recoverable under RICO or antitrust. *See Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556 (6th Cir. 2013) (en banc).

In *Jackson*, the Sixth Circuit concluded that the exact types of damages sought by Plaintiffs here – "lost wages, rehabilitation services, and medical expenses" that resulted from denials of insurance coverage for medical treatment – do not "constitute an injury to 'business or property' under RICO." *Jackson*, 731 F.3d at 566. The same conclusion was upheld earlier by the Fifth Circuit. *See Hughes v. Tobacco Inst.*, No. No. 1:99-CV-163, 2000 U.S. Dist. LEXIS 7479, at *23-24 (E.D. Tex. May 5, 2000) (RICO claims based only on personal injury damages or "the economic consequences of personal injuries" such as increased health costs dismissed because those consequences "do not qualify as 'injury to business or property'"), *aff'd in relevant part*, 278 F.3d

417, 422 (5th Cir. 2001); *Borksey v. Medtronics, Inc.*, No. CIV. A. 94-2302, 1995 WL 120098, at *3 (E.D. La. Mar. 15, 1995) ("the medical expenses incurred by plaintiffs to remove the pump are so closely tied to their alleged personal injuries caused by the pump that such expenses cannot be recovered under RICO"), *aff'd in relevant part,* 105 F.3d 651 (5th Cir. 1996).

Plaintiffs' alleged damages are all derivative of their alleged Lyme disease, whether treated or untreated. Ex. 4, Damages Disclosures at 2-22 (alleging losses for "medical expenses" or costs "related to seeking medical treatment" and alleging that expenses "will continue … until [their] chronic Lyme disease is cured or becomes manageable"). Plaintiffs' claims for lost wages likewise are derivative of their alleged Lyme disease because Plaintiffs assert that Lyme disease is the reason they ceased working or changed employment. *See* SAC ¶¶ 137, 151, 157, 161 (Plaintiffs' RICO and antitrust injuries include their inability "to work or earn money because of their debilitating illness"); Ex. 4, Damages Disclosures at 2-20 (lost wages are "due to Lyme disease" or "complications" from Lyme disease).

F. Plaintiffs' Claims Are Barred By The Statute of Limitations

Plaintiffs' RICO and antitrust claims also fail because Plaintiffs cannot show any new, harmful acts by IDSA or the Doctors within the four-year statute of limitations for both RICO and antitrust claims. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987).

The Court dismissed Plaintiffs' fraudulent concealment allegations as to both antitrust and RICO claims (but gave Plaintiffs leave to replead), Dkt. 114 at 34-35, and then dismissed those allegations with prejudice. Dkt. 279 at 14. Accordingly, Plaintiffs can only recover for RICO or antitrust claims that accrued after November 10, 2013 (four years before filing) and cannot recover for any injuries suffered earlier. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189–90 (1997) ("But, as in antitrust cases, the plaintiff cannot use an independent, new predicate act as a bootstrap to

recover for injuries caused by other earlier predicate acts that took place outside the limitations period.").

Plaintiffs allege new injurious acts within the limitations period when they assert they were "denied coverage for chronic Lyme disease treatment." Dkt. 114 at 32. However, ***only the Insurance Defendants made those denials***. Plaintiffs have no evidence of any new, injurious act of the ***Doctors*** or ***IDSA*** within the limitations period, and the claims against them must be dismissed.

The Doctors and IDSA cannot be held liable for injuries that arise solely from new denials of coverage by Insurance Defendants, even if those denials happened within the limitations period, because there is no evidence that they were involved in those denials. And IDSA and the Doctors cannot be held liable for any damages that are merely a continuation of harm allegedly suffered as a result of publication of the 2000 and 2006 IDSA Guidelines because those publications occurred outside the limitations period.

The rules for accrual of antitrust and RICO claims are materially identical for Plaintiffs' claims. *Astoria Entm't, Inc. v. Edwards*, 159 F. Supp. 2d 303, 327 (E.D. La. 2001) ("accrual analysis under RICO is substantially similar to that discussed in the antitrust context"). For antitrust claims, "each overt act that is part of the violation and that injures the plaintiff … starts the statutory period running again … But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Klehr*, 521 U.S. at 189. The same basic "separate accrual" analysis applies to RICO claims. *Love v. Nat'l Med. Enterprises*, 230 F.3d 765, 773-75 (5th Cir. 2000).

These rules require Plaintiffs to present evidence that ***IDSA and the Doctors*** committed an overt act causing them harm within the limitations period. Plaintiffs cannot save their claims

against IDSA and the Doctors by showing that they suffered the effects of the original purported harmful acts or that agreements were "still in existence during the limitations period." Dkt. 114 at 33 (citing *Delta Produce, L.P. v. H.E. Butt Grocery Co.*, 2013 WL 12121118, at *3 (W.D. Tex. Jan. 17, 2013). Plaintiffs must prove "some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975).

In *Poster*, the plaintiff had shown that one defendant (National Screen) committed an injurious act (foreclosing plaintiff's access to supplies) within the limitations period. However, it had not shown the same with respect to another defendant (Columbia). On summary judgment, the Fifth Circuit held that, with respect to Columbia, if the plaintiff "is unable to present a triable issue of fact as to the occurrence of any specific act or word denying to it access to Columbia's posters for distribution during the statutory period, then it may record no damages, and judgment should be entered against it." *Poster*, 517 F.2d 117, 129 (5th Cir. 1975). The Insurance Defendants may be in the position of the first defendant in *Poster* if they made improper denials of insurance coverage within the limitations period that caused harm to a Plaintiff. But the Doctors and IDSA are in the position of the second defendant in *Poster*, which did not take any "specific act" within the limitations period that caused harm to a Plaintiff and was dismissed on summary judgment.

Here, the alleged injurious actions Plaintiffs allege IDSA and the Doctors committed occurred in 2000 and 2006 when the IDSA Guidelines were published. Now that discovery is complete, Plaintiffs cannot present any evidence of any acts within the limitations period by IDSA or the Doctors that caused them harm. Any harms that they allege flow from the Guidelines or their continued existence are simply the effects of the IDSA Guidelines remaining in existence and thus can present no timely, actionable claims against IDSA or the Doctors.

CONCLUSION

For the foregoing reasons, summary judgment should be granted and all of Plaintiffs' RICO and antitrust claims must be dismissed with prejudice. IDSA and the Doctors respectfully request a hearing for oral argument on this Motion.

Dated: February 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE AND AUTHORITY TO FILE EXHIBIT UNDER SEAL

I hereby certify that on February 3, 2021, the foregoing Motion for Summary Judgment on Plaintiffs' RICO and Antitrust Claims, with accompanying exhibits and Proposed Order, was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Pursuant to Local Rule CV-5(a)(7), the below-listed counsel were served with a copy of this document and its attachments, including exhibits filed under seal, via e-mail attachment on February 3, 2021. Exhibit 4, the March 25, 2019 Damages Disclosures of Plaintiffs, was filed under seal pursuant to the authorization of the Court in its Protective Order, Dkt. 80, ¶ 4, because it was designated as CONFIDENTIAL by Plaintiffs.

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