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U.S. District Court
District of Delaware (Wilmington)
CIVIL DOCKET FOR CASE #: 1:17-cv-01616-LPS-CJB

Guardant Health, Inc. v. Foundation Medicine, Inc.

Assigned to: Judge Leonard P. Stark

Referred to: Judge Christopher J. Burke

Related Cases: [1:17-cv-00607-LPS-CJB](#)

[1:17-cv-00807-LPS-CJB](#)

[1:17-cv-01623-LPS-CJB](#)

Cause: 35:271 Patent Infringement

Date Filed: 11/09/2017

Jury Demand: Both

Nature of Suit: 830 Patent

Jurisdiction: Federal Question

Date Filed	#	Docket Text
04/28/2020	423	<p>ORAL ORDER: The Court, having reviewed Plaintiff Guardant Health, Inc.'s ("Guardant") discovery dispute motion in which it moves to preclude Defendant Foundation Medicine, Inc.'s ("FMI") CEO, Cindy Perettie, from testifying at trial, (the "Motion"), (D.I. 413), and the parties' letter briefs relating thereto, (D.I. 417; D.I. 420), and having heard telephonic argument on April 27, 2020, HEREBY GRANTS Guardant's Motion for the following reasons: (1) On March 19, 2020, FMI served amended initial disclosures adding an additional FMI witness, Ms. Perettie. Guardant requests that the Court preclude Ms. Perettie from testifying at trial, arguing that she should have been earlier disclosed pursuant to Federal Rule of Civil Procedure 26(a)(1)(A). (D.I. 417 at 1) That is an understatement. FMI's disclosure was not only untimely, it was substantially untimely. According to FMI, the need to disclose a new witness who would "describe the company and its mission[,]" (D.I. 420 at 3), was prompted by the October 2019 departure of FMI's Chief Commercial Officer ("COO"), Thomas Civik, who, prior to his departure, was going to cover this ground at trial, (id. at 1). However, FMI did not move to disclose a new witness then, or in a few weeks after Mr. Civik's departure. Instead, it claims that it needed to wait an additional three months, until January 2020, when a replacement COO was hired. Did it amend its disclosures then? No. Instead, according to FMI, this new hire simply prompted it to BEGIN a "thorough process" to decide whom it should designate, a process that took between two and three additional months to conclude, culminating in the March 19, 2020 amended disclosures that identified Ms. Perettie (who has been with FMI since February 2019). (Id.) All of this delay occurred while the case was then in its late stages, heading toward trial. "Untimely" does not do this "process" justice. (2) The Pennypack factors militate in favor of Guardant's request. It is true that the second and third Pennypack factors probably lean in favor of FMI. The Court is not sure exactly what new discovery would be required as to Ms. Perettie, but it assumes that because the trial is now not set to occur until November 2020, that discovery could occur without displacing the trial date. (That said, adding any additional discovery to an already heavily-litigated case that is still undergoing additional depositions and document production well after the close of fact discovery, during the COVID-19 crisis, is not without challenge.). (See, e.g., D.I. 414 at 3-7) However, though the Pennypack factors may be very forgiving, they are not a sieve. And indeed, the remaining factors go against FMI. The first Pennypack factor, which considers surprise or prejudice, would clearly go Guardant's way, as Guardant was undoubtedly surprised to see FMI's CEO named on FMI's initial disclosures for the first time in March 2020 (for all of the reasons set out above) and would be prejudiced to have</p>

to respond to that disclosure at this late stage. With respect to the fourth Pennypack factor, while the Court would not use the term "bad faith," this is the second time that the Court has found that FMI made late disclosures in violation of Rule 26(a)(1)(A) (and Ms. Perettie is the fourth witness that FMI has untimely disclosed). (See D.I. 263); see *Integra LifeScis. Corp. v. HyperBranch Med. Tech., Inc.*, Civil Action No. 15-819-LPS-CJB, 2018 WL 3814614, at *3 (D. Del. Mar. 23, 2018). The Court has to infer that FMI made a knowing decision to take months and months to disclose a new witness, well after the fact discovery cutoff, presumably thinking that such delay would be countenanced. And the fifth Pennypack factor favors Guardant. FMI acknowledges that Ms. Perettie will not be testifying about the "technical issues at the heart of this litigation or offering expert testimony." (D.I. 420 at 2) While testimony describing the company "and its mission" will no doubt be helpful in this case, FMI has two current employees (a Director of Product Development Informatics and Systems Integration and a Vice President of Finance) listed on its disclosures (as well as former employees who held high-level positions) who could address this topic at trial. (D.I. 417 at 3; D.I. 420 at 1); (3) Accordingly, the Court finds that the Pennypack factors weigh in favor of grant of Guardant's Motion. Ordered by Judge Christopher J. Burke on 4/28/2020. (mlc) (Entered: 04/28/2020)

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