

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

GUARDANT HEALTH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 17-1616 (LPS) (CJB)
	)	
FOUNDATION MEDICINE, INC.,	)	
	)	
Defendant.	)	

**FOUNDATION MEDICINE, INC.’S OBJECTIONS TO THE COURT’S  
OCTOBER 16, 2020 ORDER SCHEDULING TRIAL  
BEGINNING NOVEMBER 30, 2020**

Defendant Foundation Medicine, Inc. (“FMI”) hereby objects to the Court’s October 16, 2020 Memorandum Order (D.I. 487, the “Order”) scheduling this case for a jury trial in this Court on November 30, 2020, as permitted by the Order.<sup>1</sup> FMI understands and appreciates the enormous challenges facing the Court as it attempts to keep its dockets moving towards trial while Covid-19 continues to cause a significant disruption in most parts of the United States and the world. FMI, however, continues to believe that this complex case cannot be tried adequately, fairly, and safely during these unprecedented times, and that FMI’s due process rights would be violated if trial proceeds on November 30. For these reasons, FMI respectfully states (and renews) the following specific grounds for objection:

1. FMI maintains that the ongoing nationwide Covid-19 health situation makes it impossible for the Court to conduct a safe and fair jury trial in the courtroom as soon as November 30, 2020, even in view of the Court’s Order and the Jury Trial Restart Guidelines. Although FMI

---

<sup>1</sup> See Order at 6 (“The parties may state and preserve objections to the decisions reflected in this Order and with respect to any other details the Court considers as to how the trial will be conducted.”).

understands the Court's reluctance to delay this case into 2021 given the stage of this case and the Court's substantial docket, the schedule disruptions caused by Covid-19 do not provide cause to proceed with this case at the present time. FMI is principally a healthcare company and it believes that the health risks associated with proceeding with a jury trial in the courtroom on November 30, 2020 far outweigh any benefits of efficiency or expediency. Moreover, the health risks translate into a heightened risk of a mistrial should trial need to be discontinued due to the spread of Covid-19, either in the Wilmington area or among the trial participants directly.

If anything, the pandemic has been getting worse recently, as evidenced by case counts. Daily reports indicate that Covid-19 infection rates have been increasing across the country, with recent case counts representing "an increase of 30 percent from the average two weeks earlier." *See* "Covid in the U.S.: Latest Map and Case Count," New York Times, *available at* <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states> (accessed Oct. 18, 2020). In Massachusetts, where most of the FMI trial team, the FMI client representative who will attend trial, and many of FMI's witnesses reside, cases are also increasing. *See id.* (8% increase in cases, 17% increase in deaths over the last 14 days). Health experts have predicted that the Covid-19 pandemic will worsen over the next several weeks, inclusive of the date set for trial. *See* "10 states reported their highest single-day coronavirus case counts last week," CNN (Oct. 19, 2020), *available at* <https://www.cnn.com/2020/10/19/health/us-coronavirus-monday/index.html> ("Covid-19 cases continue to soar across the country and one top infectious disease expert warned Americans that the next few months will be the 'darkest of the pandemic.'").

More than half of the 12-member FMI trial team cannot travel to Delaware under these circumstances due to personal health considerations, family health considerations, or personal assessments of health risks posed by Covid-19. Although the Court's Order contemplates remote

participation, at least some of the trial team, including lead counsel, will have to travel to Delaware and will have no choice but to operate in groups indoors in close quarters for long hours. Furthermore, although FMI appreciates the Court's offer to permit members of the trial team to examine witnesses or make arguments remotely, such remote participation would be inherently prejudicial where jurors might resent certain counsel appearing remotely while the jurors must appear in person. For precisely these reasons, numerous other parties, and judges in this District, have agreed to postpone upcoming jury trials out of concern for the safety of counsel, witnesses, jurors, and our respective communities at large. *See, e.g., Sprint Communications Company, L.P. v. Charter Communications, Inc.*, C.A. No. 17-cv-1734, D.I. 545 (D. Del. Sept. 2, 2020) (noting that trial would involve lawyers coming in from other states and agreeing to continue trial over the objections of the plaintiff because, *inter alia*, it would not have been "prudent to make the first civil jury trial in Delaware be one in which the risk from the nature of the case . . . is at the maximum"); *Sunoco Partners Mktg. & Terminals LP v. Powder Springs Logistics, LLC et al.*, C.A. No. 17-1390, D.I. 616 (D. Del. Oct. 13, 2020) (continuing trial after parties agreed that Nov. 30, 2020 trial date was infeasible in part due to health concerns for attorney in high-risk category).

2. FMI further objects on the grounds that empaneling a fair and representative jury in the present public health environment will be difficult or impossible (particularly given the limited time set for trial in this case), thereby endangering FMI's due process rights. The Court's Jury Trial Restart Guidelines appropriately contemplate that prospective jurors will be asked to complete a "COVID-19-specific questionnaire" before serving. Also, jurors will be asked "COVID-19 screening questions" as part of the voir dire process. As a result, it is highly likely that certain classes of jurors – e.g., older jurors or others who are in high-risk categories – will be excluded from serving altogether. *See, e.g., United States v. Shaw*, C.A. No. 4-20-cr-00012, 2020

WL 3216494, at \*2 (D. Utah June 15, 2020) (continuing a jury trial because, inter alia, “there is a significantly reduced ability to obtain an adequate spectrum of jurors” due to the pandemic); In re: Court Operations Under the Exigent Circumstances Created by COVID-19 (D. Conn. May 19, 2020) (expressing concern about “the Court’s reduced ability to obtain an adequate spectrum of prospective jurors” for the same reason); *see also* COVID-19 General Order 20-9 (E.D. La. June 26, 2020) (same). Consequently, jury selection necessarily will be biased in favor of individuals or groups who are less risk-averse to, or less at risk from, COVID-19, either due to age, race, sex, access to healthcare, or pre-existing health conditions. Indeed, these factors will bias the jury pool both in terms of those who will opt to serve in response to their summons in the first place (as opposed to those who opt to defer service in the ordinary course), and in terms of those who will appear as summonsed, but be excused during voir dire.<sup>2</sup> Any resulting jury could be so unrepresentative of the community that it would violate FMI’s due process rights. *See, e.g., United States v. Sullivan*, No. 3:20-cr-00337-WHO-1, 2020 WL 5944433, at \*9 (N.D. Cal. Oct. 7, 2020) (granting defendant’s discovery request for information related to grand juror selection in light of defendant’s potential due process claim “that the disproportionate impact of the pandemic on certain demographic groups may have deprived him of a grand jury drawn from a fair cross section of the community”); *United States v. Williams*, No. 20-55, 2020 U.S. Dist. LEXIS 142030, at \*24 (E.D. La. Aug. 10, 2020) (noting defendant’s “concern[] that the COVID-19 pandemic and its disproportionate impact upon African Americans unfairly impacted the process utilized by the Clerk’s Office in summoning (and excusing) grand jurors,” and granting discovery request because

---

<sup>2</sup> These concerns are compounded by the fact that the Court may need more than two alternates, given the elevated risk that individual jurors will not be able to complete the trial. Further, Guardant has indicated that it is proposing only five days for trial, notwithstanding the additional time that jury selection together with dealing with partially remote technology undoubtedly will take, further implicating FMI’s due process concerns.

juror selection issues could potentially violate due process rights under the Fifth and/or Sixth Amendments).

3. By requiring all witnesses to testify remotely, a necessary and appropriate requirement if the trial does proceed in these circumstances, the jury's ability to fully and fairly make credibility determinations will be impaired. *See ResCap Liquidating Tr. v. Primary Residential Mortg., Inc. (In re RFC & ResCap Liquidating Tr. Action)*, 444 F. Supp. 3d 967, 972 (D. Minn. 2020) (recognizing that "[i]f this were a jury trial, the Court's concerns about clarity would perhaps be heightened," and then holding that "as this is a bench trial, the Court is confident it will adequately understand Dr. McCrary's testimony, even through videoconference technology"); *Flores v. Town of Islip*, No. 18-CV-3549 (GRB)(ST), 2020 U.S. Dist. LEXIS 159252, at \*6 (E.D.N.Y. Sep. 1, 2020) ("As a nonjury trial is required by the statute, the issues of prejudice that could arise in the jury context are simply absent."). Although the Federal Rules of Civil Procedure contemplate the possibility that "[f]or good cause in compelling circumstances" the court may permit remote testimony, the rules recognize that taking such steps is the exception not the norm, and that such steps limit the ability of the fact-finder to assess witness credibility. *See* FED. R. CIV. P. 43(a) and Advisory Committee's Note to 1996 Amendment ("The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition."). As explained in FMI's previous submissions, although all trials involve issues of credibility, the substantial credibility issues involved in this case relating to the conduct and conflicting testimony and documents of Guardant's founders, including the alleged spoliation of evidence, make this case a

particularly poor test case to proceed to trial with fully remote testimony. By requiring the trial to proceed in this fashion, FMI's right to due process may be compromised.

4. FMI also objects because the specific circumstances of this case do not require a rush to trial regardless of the health and safety risks. Neither FMI nor Guardant would suffer prejudice were trial continued. Guardant did not seek preliminary injunctive relief in this case. Guardant has shown little difficulty in calculating the damages it believes it has suffered under both a lost profits and reasonable royalty theory (as evidenced by the dollar figures specified in Guardant's damages expert reports). Any request for a permanent injunction would be improper here in any event because cancer patients and their doctors benefit tremendously from having both FMI's and Guardant's liquid biopsy tests on the market – especially since the respective tests screen for different sets of cancer genes. On the other hand, if Guardant is going to press its request for a permanent injunction against a critical cancer diagnostic tool, the public policy implications are all the more reason to make sure that FMI is afforded its best defense from a fully functioning counsel team and due process rights in a representative jury at the liability stage of the trial.

In sum, trying this case in these circumstances poses a risk to the health and safety of all the trial participants. There is also a substantial risk that the “self-selecting” nature of trying to empanel a representative jury in these circumstances and the all-remote format will unduly impact the outcome of the trial. In accordance with the Order, FMI further reserves the right to renew these objections and state additional objections to the jury selection and trial process, including at the scheduled pretrial conference, during the jury selection process and/or during and after trial, as appropriate.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/ Karen Jacobs*

---

Karen Jacobs (#2881)  
Jeremy A. Tigan (#5239)  
1201 North Market Street  
P.O. Box 1347  
Wilmington, DE 19899  
(302) 658-9200  
kjacobs@mnat.com  
jtigan@mnat.com

*Attorneys for Foundation Medicine, Inc.*

OF COUNSEL:

Eric J. Marandett  
G. Mark Edgerton  
Sophie F. Wang  
Diane Seol  
John C. Calhoun  
Xing-Yin Ni  
CHOATE HALL & STEWART LLP  
Two International Place  
Boston, MA 02110  
(617) 248-5000

October 19, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on October 19, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on October 19, 2020, upon the following in the manner indicated:

Joseph J. Farnan, Jr.  
Michael J. Farnan  
Brian E. Farnan  
FARNAN LLP  
919 North Market Street, 12th Floor  
Wilmington, DE 19801  
*Attorneys for Plaintiff Guardant Health, Inc.*

*VIA ELECTRONIC MAIL*

Edward R. Reines  
Derek C. Walter  
Christopher M. Pistritto  
WEIL, GOTSHAL & MANGES LLP  
201 Redwood Shores Parkway  
Redwood Shores, CA 94065  
*Attorneys for Plaintiff Guardant Health, Inc.*

*VIA ELECTRONIC MAIL*

Justin L. Constant  
Doug W. McClellan  
WEIL, GOTSHAL & MANGES LLP  
700 Louisiana, Suite 1700  
Houston, TX 77002-2755  
*Attorneys for Plaintiff Guardant Health, Inc.*

*VIA ELECTRONIC MAIL*

*/s/ Karen Jacobs*  
Karen Jacobs (#2881)