PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Illumina, Inc.,** **a corporation,** **and** **GRAIL, Inc.,** **a corporation.**	**DOCKET NO. 9401**

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO SUBSTITUTE A REPLACEMENT EXPERT WITNESS FOR DR. ROBERT WILLIG

Respondents seek leave to hire an additional expert to "step into Dr. Willig's shoes" and present at trial deposition "the opinions that would have been submitted by Dr. Willig."[1] {[redacted]} Dr. Willig's opinions have already been admitted into evidence in the form of his expert report. If Dr. Willig had testified via trial deposition, his trial testimony would have been limited to the contents of his report and the basis for those opinions contained therein.[2]

Complaint Counsel has made efforts to accommodate Dr. Willig's unavailability to provide live testimony. Specifically, while the Part 3 Rules limit expert witnesses to those experts called to testify at the evidentiary hearing,[3] Complaint Counsel informed Respondents that it would forgo its right to conduct live cross examination of Dr. Willig and would raise no

[1] Respondents' Motion at 1-2.

[2] § 3.31A(c); Scheduling Order Par. 21.

[3] The first sentence of Rule 3.31A(a) makes clear that "expert witnesses" for purposes of Part 3 are "experts [the parties] intend to call as witnesses at the hearing." § 3.31A(a) (emphasis added).

objection to the admission of Dr. Willig's expert report and deposition transcript.[4] Respondents attempt to minimize this offer by characterizing Complaint Counsel's sacrifice of its cross-examination right as "sleeves off the vest."[5] The Supreme Court has taken a different view of the importance of cross-examination, however, referring to it as "one of the safeguards essential to a fair trial." *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (*quoting Alford v. United States*, 282 U.S. 687, 692 (1931)).

Respondents ask this Court for relief that is both novel and extraordinary. Respondents seek to add a new expert witness – well after the close of fact and expert discovery – while continuing to rely upon their existing witness (unlike movants in the cases they cite); they seek to have the new expert witness testify on the basis of someone else's report (unlike movants in the cases they cite); they seek to add the new expert witness after both parties have completed their presentation of live testimony (unlike movants in the cases they cite); and they make their request for the stated purpose of soliciting impermissible surrebuttal testimony.

Put simply, Respondents do not actually seek to "replace" Dr. Willig as an expert by forgoing his testimony in favor of that of a substitute expert.[6] Rather, Respondents propose to continue to rely on Dr. Willig as an expert (and to rely on his report as evidence), while also hiring a new expert to offer additional testimony based on the analysis conducted by Dr. Willig.

The problem with Respondents' proposal is obvious: a substitute expert is not Dr. Willig. He or she thus cannot provide truthful and accurate testimony about how Dr. Willig reached his conclusions. For example, a substitute expert could not speak about what data and evidence Dr.

[4] *See* Ex. A (Email from S. Musser to D. Marriott, Sept. 23, 2021).

[5] Respondents' Motion at 6.

[6] *See id.* at 5 ("[T]o be clear, Respondents are not seeking to replace Dr. Willig's report and discovery deposition.").

Willig considered useful or not useful and how he made those determinations, why Dr. Willig made certain assumptions, whether Dr. Willig was aware of evidence that contradicts his analysis, and what methods and approaches Dr. Willig considered but decided not to use as part of his analysis. Complaint Counsel would not have the opportunity to test the veracity of any claims made by an expert wearing "Dr. Willig's shoes" because the underlying source of that information would not be on the stand.

Any statements by a new expert that are not explicitly contained within Dr. Willig's existing report and deposition would, by their very nature, represent an attempt to explain, characterize, or expound upon an analysis that the person giving the testimony did not themselves conduct in a way that is not permitted by the rules. Any such statements would not aid this Court. They also would be fundamentally unfair and prejudicial to Complaint Counsel given the inability to engage in meaningful cross examination.

ARGUMENT

Respondents seek to solicit improper surrebuttal testimony from a new expert witness. The cases cited by Respondents do not support the extraordinary relief they seek. Respondents cite no authority for adding an expert witness a month after the start of trial to provide live testimony on the basis of someone else's expert report. Respondents should not be permitted to augment the record with additional testimony from a new witness who would not actually replace Dr. Willig – particularly not when the stated purpose of that additional testimony is improper and would violate the Court's Scheduling Order.

1. Respondents Seek A Substitute Expert to Provide Improper Surrebuttal Testimony

Respondents offer contradictory positions for seeking to add a new expert witness. In their attempt to argue why Complaint Counsel would not be prejudiced by the addition of a new

expert witness, Respondents assert that the new expert "would not in any way exceed the opinions set out in the expert report or deposition of Dr. Willig."[7] Yet elsewhere in the motion, Respondents concede that they seek an additional expert for an improper purpose – namely to "respond to assertions made by Dr. Scott Morton in her rebuttal report and her trial deposition testimony, both of which were completed after Dr. Willig submitted his expert report."[8] These statements by Respondents cannot both be true. A new expert cannot provide novel surrebuttal testimony to "respond to assertions made by Dr. Scott Morton" while at the same time "not in any way exceed[ing] the opinions set out in the expert report or deposition of Dr. Willig."

If Respondents indeed seek only to offer live testimony that "would not in any way exceed the opinions set out in the expert report or deposition of Dr. Willig," Complaint Counsel's offer to allow Dr. Willig's expert report and deposition transcript to be considered as his trial testimony would accomplish that goal.[9] To the extent that Respondents' actual purpose in seeking a substitute expert, however, is to provide novel surrebuttal testimony – as Respondents themselves admit it is – that purpose is improper. Paragraph 21 of the Court's Scheduling Order states: "An expert witness' testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party."[10] There is no carve-out exception for responding to testimony contained in a rebuttal report.[11]

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[7] *Id*.

[8] *Id*. at 4.

[9] If Respondents consider it important to have Dr. Willig's existing report and deposition testimony made part of the live trial record, Complaint Counsel would not object to Respondents designating an agent for the limited purpose of reading statements of Dr. Willig from his report and deposition into the trial record.

[10] Scheduling Order Par. 21.

[11] Respondents have nonetheless attempted to elicit surrebuttal testimony from other witnesses in trial depositions. *See, e.g.,* Deverka Trial Tr. at 87:1 – 120:25.

Respondents made no motion asking leave to submit a surrebuttal to Dr. Scott Morton's rebuttal report.[12] As this Court has instructed, {[redacted]} If Dr. Willig were available to testify, he would not be permitted to provide novel surrebuttal to Dr. Scott Morton's rebuttal report and trial deposition testimony under the Scheduling Order. It is unclear how Respondents' inability to elicit improper and inadmissible live testimony is prejudicial to them.

2. The Cases Cited by Respondents Do Not Support the Relief Requested

Respondents' claim that they "propose addressing the situation in the way it has been dealt with in a number of other cases."[14] Respondents, however, fail to identify a single case in which a court permitted a party to add a new expert witness after the start of trial to "adopt" and testify on the basis of someone else's expert report.

Respondents cite several cases in which courts granted parties permission to hire a replacement expert to conduct independent analysis as a substitute for the former expert. *See U.S. ex rel. Agate Steel, Inc. v. Jaynes Corp.*, 2015 U.S. Dist. LEXIS 45379 at *6 n.5 (D. Nev. Apr. 6, 2015) (substitute expert to conduct independent analysis without access to prior expert's report, though ultimately restricted from "provid[ing] an opinion that is contrary to or inconsistent with" prior expert's opinion); *Palatkevich v. Choupak*, 2014 U.S. Dist. LEXIS

[12] Dr. Scott Morton submitted a rebuttal report to Dr. Willig's report and so it was properly within the scope of her rebuttal report to address issues and topics raised by Dr. Willig. Respondents note that Dr. Willig's report and deposition were referenced in the trial deposition of Dr. Fiona Scott Morton. Respondents' Motion at 1 (citing Dr. Scott Morton Trial Dep. Tr. 85:3-86:3). But as the trial deposition transcript makes clear, Respondents did not object to Dr. Scott Morton's testimony as beyond the scope of her rebuttal report. Respondents thus do not allege any unfair surprise from that trial testimony.

[13] [redacted]

[14] Respondents' Motion at 2.

153867 at *4, 6 (S.D.N.Y. Oct. 22, 2014) (granting movant's motion "to provide a fresh report" and noting that "an appointed expert is to be independent and offer his opinions based on his experience and expertise in the subject matter"); *Whiteside v. State Farm Fire & Cas. Co.*, 2011 U.S. Dist. LEXIS 123978 at *4-5 (E.D. Mich. Oct. 26, 2011) (granting movant's unopposed motion to permit a replacement expert to conduct a separate investigation and produce a new expert report); *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co*., 2010 U.S. Dist. LEXIS 103744 at *11 (N.D. Ind. Sept. 30, 2010) (referencing replacement expert's ability "to review all of the evidence, conduct his own independent analysis, and express his opinion in his own words").[15] Unlike movants in the above cases, Respondent do not actually seek to replace Dr. Willig as an expert by forgoing reliance on his personal testimony.[16] Rather, Respondents propose to have their cake and eat it too. They wish to continue to rely on Dr. Willig as their expert, while paying a new expert to expound upon Dr. Willig's analysis and improperly "respond to" statements made by others at trial.

Additionally, the cases cited by Respondents universally involve expert substitutions requested prior to the start of trial and before the substituting party had access to a complete trial record and full insight into the trial strategy of the opposing party. *See U.S. ex rel. Agate Steel, Inc. v. Jaynes Corp* at *5 (motion to replace experts filed prior to discovery cutoff); Letter for

[15] Respondents cite three other cases. *Torres v. Mactac*, 1998 U.S. Dist. LEXIS 14305 at *6 (N.D. Ill. Sept. 4, 1998) involves a three-sentence ruling granting leave to substitute experts with no meaningful discussion of the underlying facts. In *JSX v. Foxhoven*, 2019 U.S. Dist. LEXIS 43063 (S.D. Iowa 2019), the replacement expert adopted the previous expert's opinions as her own expert opinions after conducting her own independent review. That case involved opinion testimony about accepted professional standards, not economic analysis. *See* Iowa Public Radio, Psychologist Testifies School Restraint Device Is "Akin To A Torture Device," June 11, 2019, https://www.iowapublicradio.org/ipr-news/2019-06-11/psychologist-testifies-school-restraint-device-is-akin-to-a-torture-device. As the Advisory Committee Notes to Fed. R. Evid. 702 explain, there is distinction between expert witnesses that rely "solely or primarily on experience" versus those that rely primarily on scientific or technical analytical techniques. *Inge v. Rock Fin. Corp*., 281 F.3d 613 (6th Cir. 2002) did not involve a motion to replace experts.

[16] *See* Respondents' Motion at 5.

Plaintiff at 2, *Palatkevich v. Choupak* (Oct. 8, 2014) (motion to replace experts filed prior to close of discovery and "*before* the [expert] disclosure end date") (Ex. B, emphasis in original); *Whiteside v. State Farm Fire & Cas. Co.* at *5 (plaintiffs notified three months prior to trial); *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co*. at *3-4 (motion to replace experts made over five months prior to start of trial); *Torres v. Mactac,* 1998 U.S. Dist. LEXIS 14305 (N.D. Ill. Sept. 4, 1998) (motion to replace experts made prior to trial; trial date not disclosed in ruling); *JSX v. Foxhoven*, 2019 U.S. Dist. LEXIS 43063 at *11 (S.D. Iowa 2019) (motion to replace experts filed three months prior to trial).

Finally, expert reports in federal jury trials are generally discovery materials, not evidence. *See, e.g., Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic,* 152 F.3d 588, 595 (7th Cir. 1998) ("[B]ear in mind that while we have been treating the defendants' experts' reports as if they were evidence, they are not. They are merely discovery materials.") (*citing Kirk v. Raymark Industries, Inc*., 61 F.3d 147, 164 (3d Cir. 1995); *Bryan v. John Bean Division of FMC Corp*., 566 F.2d 541, 544-47 (5th Cir. 1978)). Thus, when an expert witness becomes unavailable in a federal jury trial, the party that retained the witness faces a complete evidentiary loss unless that party is permitted to retain a replacement witness. This is the underlying good cause against which courts balance the prejudice to the party opposing the modification.[17] In the instant proceeding, Respondents do not face the loss of Dr. Willig's opinions and analysis as contained in his expert report and deposition transcript because his report has already been admitted into evidence. Moreover, Dr. Willig's testimony trial testimony

[17] Rule 16(b)(4) is recognized as a stricter standard than Rule 15(a)(2) on the amendment of pleadings, which states that a court "should freely give leave when justice so requires." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp*., 614 F.3d 57, 84 (3d. Cir. 2010) (comparing Rule 16(b)(4)'s "good cause" requirement with the "more liberal approach" of Rule 15(a)(2)).

would have been limited to the contents of his report and the basis for those opinions contained therein.

CONCLUSION

Respondents have filed a motion to retain a new expert witness for the stated purpose of soliciting impermissible surrebuttal testimony after both parties have completed their presentation of live testimony. Respondents' motion would prejudice Complaint Counsel. Moreover, Respondents' proposal would serve no valid purpose in light of the accommodations Complaint Counsel has offered Respondents, particularly given that this is not a federal jury trial and experts are limited to the opinions in their report only. For the reasons stated above, Respondents' motion should be denied. Complaint Counsel, however, does not object to Respondents designating an agent to read the contents of Dr. Willig's report or deposition testimony into the live trial record.

Date: October 5, 2021

Respectfully submitted,

s/ Brian A. O'Dea
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Counsel Supporting the Complaint

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In the Matter of **Illumina, Inc.,** **a corporation,** **and** **GRAIL, Inc.,** **a corporation.**	**DOCKET NO. 9401**

[PROPOSED] ORDER

Upon Respondents' Motion for Leave to Substitute a Replacement Expert Witness for Dr. Robert Willig, it is hereby:

ORDERED that Respondents' motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: October _____, 2021

Exhibit A

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit B

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Kayla Demarest
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October 8, 2014

Hon. Michael H. Dolinger
United States Magistrate Judge, SDNY
500 Pearl Street
New York, New York 10007

Re: Palatkevich and Zaytsev v. Choupak, et. al
1:12-cv-1681 (CM)(MD)

Dear Judge Dolinger:

I respectfully submit this correspondence in further support of plaintiffs' pending letter motion for an extension of the expert discovery end date, so that plaintiffs may retain a new expert in light of the inability of Dr. Warren Keegan to testify in this matter due to grave illness. This letter is further submitted in response to the letter motion filed this evening by defendants.

At the outset, let me state that I have no objection to a conference with the court, should Your Honor deem one appropriate. However, I object to Mr. Krol's characterization of my letter motion as procedurally defective. I was presented with an emergency that was not of my making, which emergency prejudiced plaintiffs greatly. I had to notify the Court and opposing counsel of the situation in an expeditious manner, and I did so. Motions for leave to substitute an expert are generally treated as a motion to enlarge the scheduling order and enlarge the discovery period to Rule 16(b), which Rule is wholly *outside of* the text of Local Rule 37.2. *Jung v. Neschis*, 2007 U.S. Dist. Lexis 97173 (S.D.N.Y. 01 Civ. 6993, October 23, 2007).

Procedural issues regarding a conference aside, it appears that defendants raise three objections to plaintiffs' application. The first is less an argument that an insinuation – namely, that the motion was made in order to obtain a tactical advantage. That's untrue, as established by the Affirmation of Mark Keegan. The motion was made solely because plaintiffs are left without an expert witness and we are less than two weeks from the expert disclosure end date. Plaintiffs cannot be penalized because their expert's cancer battle took a tragic turn for the worse, particularly when they knew nothing of the

diagnosis when the expert was retained and the incapacity was recent. *Jung*, supra. Dr. Warren Keegan is a highly regarded expert and esteemed academic, whose inability to testify due to his medical condition will be a great loss to plaintiffs. Mr. Keegan is in the process of obtaining a letter from Dr. Keegan's physician.

Defendants also argue that they would be prejudiced by the substitution. At page 2 of his letter, opposing counsel complains that he is "to be faced with yet another expert disclosure and another expert report to contradict and rebut once Dr. Keegan is *sacrificed, much as a pawn in a chess game, to obtain tactical advantage"* [emphasis mine]. Respectfully, that is one of the most callous comments I have read in 28 years of practice, and one that is lacking in any substance or truth.

Should the motion be granted, defendants will have the benefit of their expert's valuation of Stanacard, LLC itself. That work will not have to be duplicated.

We have not passed the discovery end date. No expert depositions have been conducted, and at defendants' request plaintiffs have stipulated that they will not seek to depose Mr. Griswold twice, and will withdraw their subpoena pending the resolution of these motions. No trial date has been set. While defendants now express their desire to file a motion at some point *in limine* against Dr. Keegan, that motion has not been made. There is no substantive prejudice to defendants, who will have a full and fair opportunity to review, inquire, examine, investigate and properly rebut the findings, conclusions and proposed testimony of whatever expert is retained in Dr. Keegan's stead. Moreover, plaintiffs are not seeking to *add* another expert upon another subject matter. They would simply be replacing a valuation expert with a valuation expert, who will be reviewing the same material and issues. The scope of the inquiry will remain the same.

The fact remains that the motion was prepared within 24 hours of learning of Dr. Keegan's unavailability, *before* the disclosure end date, and before defendants engaged in any further discovery efforts. To the extent that defendants have expended any efforts towards "researching" Dr. Keegan[1], those efforts pale in comparison to the inconvenience and expense suffered by plaintiffs – again, due to circumstances utterly beyond the control of the parties or their counsel.

Defendants' third argument is that Warren Keegan's son, Mark Keegan, can testify in his father's stead. That position is similarly unavailing. While it is true that "Mark Keegan is not disabled," he is *not* the individual retained and identified by plaintiffs in their Rule 26 disclosure, *not* the expert who prepared the expert report, and *not* the expert subpoenaed by defendants. His background, qualifications and experience are not comparable to Warren Keegan's. I was expressly advised that Mark Keegan signed the report simply because his father was unavailable due to the holiday schedule (and perhaps, as I now understand, his deteriorating condition). Plaintiffs retained Dr. Keegan as their only and sole expert, as indicated in their disclosure statement, a copy of

[1] Having read the pleadings and motion papers in *Jermyn v. Best Buy, L.P.*, cited by defendants, it appears that Judge McMahon's decision on the *motion in limine* there bears no relation to this matter.

which is attached. Plaintiffs are entitled to present testimony from the expert of their choice.

There is another issue. As noted in my original letter motion and in Mr. Keegan's Affirmation, Warren Keegan was diagnosed with cancer in January 2014, a fact that was not disclosed until October 6. Given that circumstance, plaintiffs have no way of knowing whether the illness (ongoing chemotherapy, for instance) affected the preparation of the report in any manner. As a matter of fairness, and for good cause shown, plaintiffs must be permitted to retain a new expert, without restrictions.

Finally, I must address the post-script to Mr. Krol's letter. As far as this motion is concerned, I made only one request for an extension of expert discovery, which request was coordinated with opposing counsel. Though your July 29, 2014 order said that, "No further extensions will be granted," the present application is based upon extraordinary circumstances beyond plaintiffs' control that could not have been anticipated.

On the basis of the foregoing, I respectfully request that plaintiffs' motion be granted.

Thank you for your courtesy and consideration in this matter.

Very truly yours,

Eileen T. Rohan

cc: Igor Krol, Esq.
Krol & O'Connor
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New York, New York 10024

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

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s/ Brian A. O'Dea
Brian A. O'Dea

Counsel Supporting the Complaint