UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., **Plaintiffs,** **v.** **AETNA INC., et al.,** **Defendants.**	**Civil Action No. 16-1494 (JDB)**

ORDER

Under the Scheduling and Case Management Order, the parties were required to exchange final fact witness lists by not later than October 7, 2016. See Scheduling & Case Management Order [ECF No. 55] at 1. Plaintiffs now move for leave to amend their final fact witness list to include two Aetna executives: Karen Lynch, Aetna's President, and Steve Kelmar, Aetna's Executive Vice President and Chief of Staff to its Chairman and CEO. Plaintiffs say they have only recently discovered that Lynch and Kelmar were significantly involved in Aetna's decision to withdraw from the public exchanges in the 17 complaint counties, and thus seek amendment so that Lynch and Kelmar can be heard on that topic at trial. As plaintiffs already have 19 fact witnesses (out of a maximum of 20) on their final witness list, the proposed amendment would substitute Kelmar for a Humana executive, Tod Zacharias, and add Lynch into the remaining open spot. Defendants oppose this change, arguing that plaintiffs either knew or should have known about the roles played by Lynch and Kelmar much earlier in the discovery process. In the Court's view, plaintiffs have established good cause for amending their final fact witness list. Their motion will therefore be granted.

The Scheduling Order in this case may be modified for "good cause." Scheduling & Case

Management Order at 18; see also Fed. R. Civ. P. 16(b)(4). The good cause standard "focuses on the timeliness of the amendment and the reasons for its tardy submission." Headfirst Baseball LLC v. Elwood, 2016 WL 4574622, at *4 (D.D.C. Sept. 1, 2016) (internal quotation marks omitted). Other relevant factors include the imminence of trial; whether the request is opposed; whether the non-moving party would be prejudiced; whether the moving party has been diligent; the foreseeability of the need to amend the schedule; and the likelihood that the amendment will lead to relevant evidence. Watt v. All Clear Business Solutions, LLC, 840 F. Supp. 2d 324, 326 (D.D.C. 2012) (citing Childers v. Slater, 1978 F.R.D. 185, 188 (D.D.C. 2000)).

Plaintiffs have made an adequate showing of good cause. First, they appear to have acted with reasonable diligence in investigating the roles played by Lynch and Kelmar in Aetna's withdrawal decision. Once plaintiffs obtained a clear insight into the subject during the deposition of Aetna's CEO Mark Bertolini, they moved promptly to request additional documents, review those documents, depose Lynch and Kelmar, and file the pending motion. Although defendants had not identified them as participants in or custodians of documents relevant to the withdrawal decision, plaintiffs have now concluded based on this discovery (most of which occurred after witness lists were exchanged) that Lynch and Kelmar are very important witnesses. Defendants, moreover, do not explain how they would be prejudiced if Lynch and Kelmar are added to plaintiffs' witness list—indeed, both have been deposed and their documents have been produced and reviewed. In the absence of any such prejudice, the Court hesitates to exclude testimony bearing on a potentially important issue in this case.

For all these reasons, it is hereby **ORDERED** that [179] plaintiffs' motion for leave to amend their fact witness list will be **GRANTED**. The Court is aware, of course, that trial is fast approaching. To ensure defendants have adequate time to prepare Lynch and Kelmar for trial, it

is further **ORDERED** that plaintiffs may not call them to testify earlier than Monday, December 12, 2016, without defendants' consent.

SO ORDERED.

/s/
JOHN D. BATES
United States District Judge

Dated: November 29, 2016