

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Illumina, Inc.,
a corporation,

and

GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

**RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT
OF THEIR MOTION TO CERTIFY TO THE COMMISSION A
REQUEST SEEKING COURT ENFORCEMENT OF DOCUMENT AND
TESTIMONY SUBPOENAS ISSUED TO CARIS LIFE SCIENCES**

Pursuant to 16 CFR § 3.22(d), Respondents respectfully move for leave to file a two-page reply in response to Caris Life Sciences' ("Caris") Opposition to Respondents' Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences. The proposed Reply is attached to this motion. Respondents' proposed reply brief complies with the timing and word count requirements set forth in Rule 3.22 (c)-(d).

The Court is authorized under Rule 3.22(d) to permit a reply brief "where the parties wish to draw . . . attention to recent important developments . . . that could not have been raised earlier in the party's principal brief." 16 CFR § 3.22(d).

Respondents wish to draw the Court's attention to the misrepresentation at the core of Caris's Opposition: namely, that Respondents chose to "wait[] until the eleventh hour" to file their Motion. Opp. at 2. As detailed in the proposed Reply, that is false. It is Caris that has caused delay at every turn. Respondents did not anticipate that Caris would misrepresent these

facts, and so Respondents could not have raised this issue in their initial Motion. Leave to file a Reply is appropriate to correct this misrepresentation at the heart of Caris's Opposition.

Accordingly, Respondents respectfully request that this Motion for Leave to File a Reply be granted.

Dated: August 13, 2021

Respectfully submitted,

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Pursuant to 16 CFR § 3.22(d), Respondents seek leave to file this Reply. Caris Life Sciences (“Caris”) opposes enforcement of Respondents’ document and testimony subpoenas based on a misrepresentation: that Respondents are at fault, having waited too long to seek Court enforcement. Opp. at 1, 2, 6. That is false.

It is Caris who prevented Respondents from filing their motion earlier. For four months, Caris led Respondents to believe a compromise was available as to the core issues on which Respondents sought discovery: [REDACTED]

[REDACTED]. Instead of clearly refusing to provide the discovery, Caris asked Respondents to wait, and wait, and wait:

- **April 8:** Respondents first served a document subpoena on Caris on April 8, 2021. Mot. Ex. 4. Over the next eight weeks, Respondents frequently met and conferred with Caris over the phone, proposed search terms for Caris, and sent numerous emails and letters requesting that Caris produce [REDACTED]. See, e.g., Mot.

Exs. 5, 7, 10, 12, 19, 20, 21, 22. But Caris waited until June 17, 2021 to reveal for the first time that it had [REDACTED] but that it would not produce those documents. Mot. Ex. 22.

- **May 21:** Respondents served a testimony subpoena on Caris's Chief Scientific Officer Dr. David Spetzler. Mot. Ex. 18. Caris waited *more than four weeks*, until June 22, 2021, before revealing it would not let Dr. Spetzler testify until after the scope of Caris's document production was resolved, withdrawing his deposition less than 48 hours before it was scheduled to begin. Mot. Ex. 23.
- **June 23:** Respondents promptly asked for a final meet and confer in order to file a motion seeking court enforcement of the document and testimony subpoenas. Mot. Ex. 24. But Caris suddenly announced on June 24 that it had changed counsel from Locke Lord to Skadden, suggesting that Caris had reconsidered its position. *Id.* That turned out not to be the case. [REDACTED]
[REDACTED] See Mot. Decl. ¶ 25. In the meantime, Caris repeatedly pushed off requests to discuss its response to Respondents' subpoenas, and it was not until July 20, 2021 that Caris agreed to a substantive meet and confer on whether Caris would now be willing to provide the testimony or additional documents that Respondents sought. See, e.g., Mot. Ex. 24 (repeated requests to Caris from both Respondents and Complaint Counsel for information on Caris's position); Mot. Ex. 25 (Caris finally agreeing to set meet and confer for July 20).
- **July 20:** Further still, instead of clearly refusing the core discovery, Caris yet again delayed by proposing a 30(b)(6) deposition. Mot. Ex. 27. While Respondents promptly proposed topics for the deposition the next day, on July 21, 2021, Caris waited another whole week, until July 27, 2021 before revealing it would not allow any 30(b)(6) witness to testify about [REDACTED] at all. Mot. Ex. 29-30.

Respondents filed their motion promptly thereafter on August 3.

This Court should not punish Respondents for their belief that Caris might be willing to resolve the dispute without Court intervention, and their good faith efforts to work toward such an outcome. See, e.g., *Patrick v. Teays Valley Trustees, LLC*, 297 F.R.D. 248, 255 (N.D.W. Va. 2013), *aff'd sub nom. Patrick v. PHH Mortg. Corp.*, 298 F.R.D. 333 (N.D.W. Va. 2014) (granting motion to compel over opposing party's delay objections, when delay was the result of the

opposing party's "repeated assurances that further responses would be forthcoming" and movant "went out of [its] way to avoid bringing this matter to the Court.").

Nor should the Court reward Caris for its delay tactics. *See e.g. Smith v. Kansa Tech., LLC*, No. CV 16-16597, 2017 WL 6407984, at *2 (E.D. La. Aug. 3, 2017) (granting motion to compel deposition when opposing party delayed deposition without proper justification, and denial of motion would "reward such delay"); *Cunningham v. Smithkline Beecham*, 255 F.R.D. 474, 477-78 (N.D. Ind. 2009) (granting motion to compel filed after the close of discovery in order to not "unfairly prejudice" moving party because of opposing party's "delay tactics").

For these reasons, and the reasons stated in its Motion, Respondents respectfully request that their Motion be granted.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I also certify that I caused the foregoing document to be served via email to:

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August 13, 2021

By: Sharonmoyee Goswami
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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

August 13, 2021

By: Sharonmoyee Goswami
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**[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION FOR LEAVE TO FILE
A REPLY IN SUPPORT OF THEIR MOTION TO CERTIFY TO THE COMMISSION A
REQUEST SEEKING COURT ENFORCEMENT OF DOCUMENT AND
TESTIMONY SUBPOENAS ISSUED TO CARIS LIFE SCIENCES**

Upon consideration of Respondents' Motion for Leave to File a Reply in Support of
Their Motion to Certify to the Commission a Request Seeking Court Enforcement of Document
and Testimony Subpoenas Issued to Caris Life Sciences:

IT IS HEREBY ORDERED that Respondents' Motion is GRANTED.

IT IS FURTHER ORDERED THAT Respondents have leave to file their Reply.

D. Michael Chappell
Chief Administrative Law Judge

Dated: