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14 **UNITED STATES DISTRICT COURT**  
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 FEDERAL TRADE COMMISSION,  
17 Plaintiff,  
18 v.  
19 ILLUMINA Inc. and GRAIL, Inc.,  
20 Defendants.

Case No.: 3:21-cv-00800-CAB-BGS

**DECLARATION OF SUSAN A.  
MUSSEY IN SUPPORT OF  
PLAINTIFF'S EX PARTE  
APPLICATION TO DISMISS THE  
COMPLAINT WITHOUT  
PREJUDICE**

Judge: Hon. Cathy Ann Bencivengo  
Magistrate: Hon. Bernard G. Skomal  
Courtroom: 15A  
Hearing Date:

1 I, Susan A. Musser, declare as follows:

- 2 1. I am an attorney for Plaintiff Federal Trade Commission (“FTC”) in the above-  
3 captioned matter. Pursuant to this Court’s Rule IV in its Civil Case Procedures, I  
4 submit this declaration in support of the FTC’s *Ex Parte* Application to Voluntarily  
5 Dismiss the Complaint Without Prejudice.
- 6 2. The FTC sent Defendants an interrogatory asking Defendants to identify all  
7 “events, conditions, investigations, proceedings or barriers” to closing the  
8 transaction.
- 9 3. The Defendants responded to the interrogatory on May 3, 2021 providing an  
10 incomplete response. In the meet and confer conducted days later, Defendants  
11 again refused to answer directly what impact, if any, the EC’s investigation had on  
12 their ability to close the transaction.
- 13 4. FTC contacted Defendants on May 18, 2021 providing notice of its intent to  
14 potentially seek to dismiss the complaint and asking Defendants to meet and  
15 confer. Defendants responded that they were able to meet and confer a day later.
- 16 5. On May 19, 2021, I conferred with counsel for Defendants by telephone in a good-  
17 faith effort to resolve the FTC’s *Ex Parte* Application to Dismiss the Complaint  
18 Without Prejudice. During that call, I detailed the FTC’s position and answered  
19 Defendants’ questions. Defendants did not provide their position on the phone  
20 call, explaining that they needed to confer with their clients. I followed up by  
21 emailing to ask whether Defendants agree to an expedited briefing schedule. In  
22 that same email, I offered consider any joint motion to extend the deadlines for fact  
23 discovery in the administrative hearing and told the defendants that the FTC would  
24 not object to service of discovery in the following week.
- 25 6. On May 20, 2021 at 9:01 PM EST, Defendants sent an email saying they “oppose”  
26 this motion without providing any additional information. I responded by asking  
27 Defendants to provide additional detail regarding their clients’ position so we  
28 could attempt to narrow the issues before the Court.

1 7. On May 21, 2021 at 12:17 AM, I emailed the Defendants to explain that the FTC  
2 did not intend to file a motion for expedited briefing schedule. Nevertheless, I  
3 offered to meet and confer with them in case they were interested in proposing a  
4 jointly-agreed upon briefing schedule for the FTC’s *Ex Parte Application*. The  
5 FTC and Defendants met and conferred later that day. Defendants proposed that  
6 they have two weeks to respond to the FTC’s motion followed by one week for the  
7 FTC to reply to the Defendants’ opposition brief. The FTC rejected that proposal  
8 given its need for expedited relief.

9 8. The Defendants’ position is as follows: “FTC has provided no factual or legal basis  
10 to Defendants for their motion to dismiss the case without prejudice. Defendants  
11 would not oppose a motion by the FTC to dismiss the case with prejudice.  
12 Defendants oppose the FTC’s application to dismiss this case without prejudice,  
13 including the FTC’s application to do so by *Ex Parte Application*. The FTC’s *Ex*  
14 *Parte Application* is prejudicial to Defendants, given that the parties are in the  
15 midst of fact discovery under the stipulated CMSO, as ordered by the  
16 Court. Given that the FTC is seeking to make a case dispositive motion,  
17 Defendants believe that the FTC should proceed under the ordinary briefing  
18 schedule for a noticed motion under the Court’s rules, under which noticed  
19 motions are heard on a 35-day schedule. Such a schedule would provide  
20 Defendants 21 days to respond to FTC’s motion. As a compromise, Defendants  
21 have proposed an accelerated schedule under which Defendants would have less  
22 time to respond, but the FTC rejected that proposal.”

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24  
25 DATED: May 21, 2021

/s/ Susan A. Musser

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Susan A. Musser

*Counsel for Federal Trade Commission*