

**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 FOR LEAVE TO SUBSTITUTE A REPLACEMENT EXPERT
WITNESS FOR DR. ROBERT WILLIG**

Pursuant to 16 CFR § 3.22(d), Respondents respectfully move for leave to file a reply in response to Complaint Counsel's Opposition to For Leave to Substitute a Replacement Expert Witness for Dr. Robert Willig. 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 seek leave to file a reply in order to clarify and respond to certain misstatements of law and fact in Complaint Counsel's opposition brief and to provide the Court with an update on Respondents' efforts to identify a substitute expert. As explained in Respondents' reply brief, Respondents have identified Dr. Michael Katz as the substitute expert for Dr. Willig. Contrary to Complaint Counsel's contentions, by seeking to substitute Dr. Katz

for Dr. Willig, Respondents are not seeking improper surrebuttal testimony. Dr. Katz will not deviate from the opinions expressed by Dr. Willig. Far from providing any advantage to Respondents, Dr. Katz's trial testimony is necessary to ensure that Respondents are on a level playing field with Complaint Counsel.

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

Dated: October 7, 2021

Respectfully submitted,

/s/ David R. Marriott

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CERTIFICATE OF SERVICE

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October 7, 2021

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REPLY IN SUPPORT OF RESPONDENTS' MOTION TO SUBSTITUTE

In its opposition brief, Complaint Counsel contends that Respondents should not be permitted to replace Dr. Willig's trial deposition testimony, despite the fact that [REDACTED] [REDACTED]

[REDACTED] and is unable to testify for no fault of his own or of Respondents. In so doing, Complaint Counsel misrepresents Respondents' position, ignores Respondents' actual contentions and makes baseless arguments not raised during the parties' meet and confer. Respondents file this reply to correct those misrepresentations and to update the Court on Respondents' progress in identifying a replacement expert for Dr. Willig.

As stated in Respondents' September 24 email to the Court, [REDACTED] [REDACTED], Respondents promptly engaged two replacement experts to independently determine whether or not they share Dr. Willig's opinion and could offer that same opinion by way of a trial deposition—which both experts have now confirmed. With the Court's permission, Respondents will serve Complaint Counsel with the expert report of Dr. Michael Katz, a professor at the University of California Berkeley and former chief economist of the United States

Department of Justice. Dr. Katz can be available for a discovery deposition next week and his trial deposition the following week—before anyone proposes that the record close.

Complaint Counsel seizes upon language in Respondents' motion to argue that "Respondents seek to solicit improper surrebuttal testimony from a new expert witness" and to "have their cake and eat it too". (Opp. 3, 6.) Contrary to Complaint Counsel's contention, Respondents seek only to present testimony that would have been permitted if Dr. Willig were able to testify. To be clear, Respondents do not intend for Dr. Katz to go beyond the scope of Dr. Willig's opinions. But Complaint Counsel goes too far in saying that trial testimony of Dr. Willig would be "limited to the contents of his report". (Opp. 1.) While the expert report must contain "all opinions to be expressed and the basis and reasons therefor", 16 CFR § 3.22(c), the rules do not limit an expert to the same words found in their report or prohibit the expert from explaining opinions/bases/reasons previously expressed in their report. If that were the case, there would be no purpose to having expert trial testimony in these administrative proceedings. Indeed, Complaint Counsel's own experts have used trial testimony to further explain their opinions.¹

Complaint Counsel also suggests that a replacement expert cannot truthfully state Dr. Willig's opinions or how he arrived at those opinions. That argument is misguided. The substitute expert will adopt Willig's opinions, reasoning and bases and will be able to say, truthfully, that he agrees with those opinions and explain why *he* believes they are correct. In other words, the witness need not and will not testify as to what Dr. Willig believed, but only that the opinions in Willig's report are correct and well supported.

Nor is Respondents' request novel or extraordinary. As set forth in Respondents' opening brief, courts have granted such substitutions in numerous cases. (Opening Br. 3-5.)

¹ See Scott Morton Trial Dep. 74:16-75:10 (explaining how Dr. Scott Morton's opinion applies to Respondents' September 8 Open Offer Amendment).

While Complaint Counsel suggests Respondents' request is too late in the process, Complaint Counsel does not point to any case denying substitution on that basis. And the fact that expert reports are admitted into evidence in these proceedings does not change the utility of presenting expert testimony to this Court.

Despite professing to have made efforts to accommodate Respondents, Complaint Counsel resorts to distorting Respondents' position in order to secure a strategic advantage, as illustrated in the below table:

Complaint Counsel's Contention	The Truth
"Respondents seek to solicit improper surrebuttal testimony from a new expert witness." (Opp. 3)	Dr. Katz's testimony will not exceed the scope of Dr. Willig's opinion; Respondents do not seek to offer surrebuttal testimony.
Respondents seek to have a replacement expert "adopt" and testify on the basis of someone else's expert report". (Opp. 5.)	Dr. Katz will submit his own report that adopts Dr. Willig's opinions and will testify on the basis of that report and his own independent assessment.
"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." (Opp. 3)	Complaint Counsel have already had the opportunity to depose Dr. Willig and Dr. Katz's opinion will be subject to vigorous cross examination.
Complaint Counsel is willing to "forgo its right to conduct live cross examination". (Opp. 1.)	Nothing has been foregone. Complaint Counsel has already had an opportunity to cross examine Dr. Willig at a discovery deposition and will have an opportunity to depose Dr. Katz.
"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 trial record." (Opp. 8.)	This would not allow this Court to assess the credibility of the opinions expressed by Dr. Willig and Dr. Katz or to view meaningful cross examination.

In addition, Complaint Counsel largely ignores the reasons it provided for opposing Respondents' motion during the parties' meet and confer. At that time, Complaint Counsel stated that it opposed Respondents' request because allowing a replacement would unnecessarily delay the case and could require Complaint Counsel to amend its expert reports and call a rebuttal witness. Complaint Counsel's opposition brief is notably silent on either point. This is for good reason. Allowing a replacement for Dr. Willig's trial deposition testimony will not in any way delay the close of this proceeding (the Caris issue remains outstanding) or give rise to the need for a rebuttal expert (Dr. Katz's opinions will extend no further than Dr. Willig's).²

Complaint Counsel contends that granting Respondents' motion would prejudice the government because it would amount to an improper surrebuttal. Complaint Counsel's argument finds no support in the record, fair process or common sense. Respondents seek simply to preserve the status quo but for [REDACTED]. Refusing Respondents the opportunity to replace Dr. Willig's trial deposition testimony would put them at a disadvantage vis-à-vis the government. For all of its experts, Complaint Counsel will submit the expert reports, depositions, and trial deposition testimony. By contrast, unless this motion is granted, Respondents will only be able to submit a report and discovery deposition for Dr. Willig. Respondents will be unable to provide the Court with direct trial testimony (via a trial deposition transcript and video) that will allow this Court, the Commission, and the Court of Appeals to evaluate credibility.³

² While Complaint Counsel moved Dr. Willig's report into evidence, that does not make a replacement witness unnecessary, because trial deposition testimony serves a very different purpose, as illustrated by Complaint Counsel's insistence on submitting trial deposition testimony from each of its experts (though their reports are already in evidence).

³ Complaint Counsel's belated suggestion of prejudice is belied by their insistence on using information from Caris even though all trial testimony has been completed.

In sum, Complaint Counsel should not be allowed to gain an advantage from misfortune. Respondents seek only to level the playing field between Complaint Counsel and Respondents. At a minimum Respondents should be able to submit Dr. Katz's report and take his trial deposition. If Complaint Counsel believes that Dr. Katz's testimony exceeds the scope of Dr. Willig's report they can object to it in post-trial briefing or seek to exclude it.

Dated: October 7, 2021

Respectfully submitted,

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**[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION FOR LEAVE TO FILE
A REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO SUBSTITUTE A
REPLACEMENT EXPERT WITNESS FOR DR. ROBERT WILLIG**

Upon consideration of Respondents' Motion for Leave to File a Reply in Support of
Their Motion to Substitute a Replacement Expert Witness for Dr. Robert Willig:

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: