

**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 MOTION TO CLOSE THE RECORD AND FOR  
EXPEDITED CONSIDERATION**

To ensure prompt and efficient resolution of this case, Complaint Counsel moves to close the record in this matter on November 3, 2021 and set a schedule for the submission of post-trial briefing and proposed findings of fact and conclusions of law. Complaint Counsel also respectfully requests expedited briefing on this motion.

After the last witness testified live at the evidentiary hearing over one month ago, the record was left open to accommodate the trial depositions of several expert witnesses and the resolution of a discovery dispute between Respondent Illumina and nonparty Caris Life Sciences (“Caris”). All trial depositions have been completed since October 1, except for the trial deposition of Respondents’ newly-substituted expert, Dr. Michael Katz, which is scheduled for November 1. By November 3, the only remaining deposition or trial deposition would involve Caris, which remains the subject of a subpoena enforcement action in federal court. Since the end of live testimony, the timeline for resolution of that action has been extended and, at this time, could very well take months.

Commission Rule 3.44(a) provides an expedient procedure for post-trial briefing, but that procedure cannot begin until the record closes. At this time, it is Complaint Counsel’s understanding that Caris stands by their opposition to Respondents’ Motion to Compel and will not be participating in further discovery unless ordered to do so by a federal court. Caris’s unwillingness to provide the discovery sought by Respondents should not hold the resolution of this case hostage. Therefore, Complaint Counsel respectfully requests that the Court close the record on November 3—two days after the completion of the final trial deposition—subject to future motions by Complaint Counsel or Respondents to reopen the record for the limited purpose of introducing any Caris-related evidence after resolution of the pending discovery dispute and the pending Motion *in Limine*. Complaint Counsel also respectfully requests that the Court set a schedule that provides for the filing of initial post-trial submissions before November 17 and the filing of reply submissions on December 17.

An expedited briefing schedule is necessary to enable the Court to rule on this motion before the requested date of November 3. Respondents have agreed to a briefing scheduling such that their response be due on Monday, November 1, 2021. We respectfully request an expedited ruling on this motion.

**I. STATEMENT OF FACTS**

On April 8, 2021, Respondent Illumina sent a subpoena to Caris seeking various categories of documents. While Caris began a rolling document production on May 7 and ultimately produced { [REDACTED] }, Illumina was unsatisfied and pressed Caris to produce even more documents. Caris told Illumina on May 26 that “{ [REDACTED] }  
[REDACTED]

\_\_\_\_\_}.”<sup>1</sup> The dispute over the scope of Caris’ document production prevented Caris and Illumina from reaching an agreement regarding Illumina’s separately-issued subpoena for the deposition of a Caris representative.<sup>2</sup>

After waiting over two months, Illumina filed a motion *in limine* to exclude all evidence received from Caris, including \_\_\_\_\_  
\_\_\_\_\_.<sup>3</sup> In parallel, Respondents moved to certify to the Commission a request for enforcement of Illumina’s document and deposition subpoenas to Caris, which the Court granted on August 16. At the Commission’s direction, the Commission’s General Counsel filed a petition to enforce subpoenas against Caris in the U.S. District Court for the District of Columbia on September 9.<sup>4</sup> On October 5, the federal district court presiding over the subpoena enforcement action entered a show cause order, directing that any written response by Caris must be filed by November 5 and allowing a reply to be filed by November 12.<sup>5</sup> The district court has not provided an estimated date by which a ruling should be expected. To Complaint Counsel’s knowledge, Caris remains unwilling to comply with the subpoenas, even after the Commission filed its subpoena enforcement action and the district court entered a show cause order. At this time, it is unlikely that Caris-related discovery will be complete until December at the absolute earliest.

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<sup>1</sup> \_\_\_\_\_}.

<sup>2</sup> *See, e.g.*, \_\_\_\_\_  
\_\_\_\_\_.

<sup>3</sup> *See* Respondents’ Motion *in Limine* to Exclude \_\_\_\_\_  
and Any Evidence from Caris, *In re Illumina, Inc. and GRAIL, Inc.*, FTC Dkt. No. 9401 (Aug. 5, 2021).

<sup>4</sup> *See* Petition of the Federal Trade Commission for an Order Enforcing Subpoenas *Duces Tecum* and *Ad Testificandum* in an Administrative Proceeding, *FTC v. Caris Life Sciences, Inc.*, No. 1:21-mc-00115-RJL (D.D.C. Sept. 9, 2021).

<sup>5</sup> Exhibit D, Docket, *FTC v. Caris Life Sciences, Inc.*, No. 1:21-mc-00115-RJL (D.D.C. Oct. 5, 2021).

## **II. ARGUMENT**

After a hearing consisting of eighteen days of live testimony and eight trial depositions, as well as 4,221 documents and sixty-three deposition transcripts already admitted into evidence, the dispute between Caris and Respondent Illumina over a handful of documents and a single deposition should not be allowed to delay the closing of the record.

An efficient resolution of this case is in the public interest. To that end, Complaint Counsel respectfully asks this Court to close the record on November 3, 2021. Under Commission Rule 3.44(c), the Court “shall issue an order closing the hearing record after giving the parties 3 business days to determine if the record is complete or needs to be supplemented.” 16 C.F.R. § 3.44(c). Once the hearing record has closed, each party may file proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof, within 21 days of the closing of the hearing record. 16 C.F.R. § 3.46(a). Under Rule 4.3(b), the Court may change the deadlines for post-trial filings when good cause has been shown. 16 C.F.R. § 4.3; *see also In the Matter of Impax Laboratories*, 2017 WL 5623686 (Nov. 17, 2017) (extending the deadlines for post-trial filings).

Holding the record open pending a final resolution of the Caris subpoena enforcement action is impracticable. The district court presiding over the action has set a briefing schedule that does not end until November 15, 2021. Allowing a lone third party’s discovery dispute to indefinitely delay the closing of the record would not only frustrate the public’s interest in an expeditious decision from this Court and the Commission in this case, but it would also invite obstinacy and gamesmanship from any party or third party who seeks to delay a Part 3 adjudication in the future.

Closing the record on November 3 will not prejudice Respondents. None of the evidence that Respondent Illumina sought to exclude in its motion *in limine* has been admitted into

evidence, except for certain Caris-produced documents introduced by Respondents themselves. Moreover, Respondents brought this delay on themselves by waiting for months to file an enforcement action. Respondents will also have an opportunity to move for the introduction of any additional discovery that Caris may provide. Under Commission Rule 3.51(e)(1), at any time from the close of the hearing record until the filing of the initial decision, the Court may reopen the proceeding for the reception of further evidence. 16 C.F.R. § 3.51(e)(1); *see also In the Matter of Polypore*, 2009 WL 3775105, at \*2 (Oct. 22, 2009) (holding that the Court may reopen the record for the limited purpose of considering additional evidence that arose after the close of the record). Under Rule 3.51(e)(1), the Court may reopen the record for the limited purpose of admitting any discovery or deposition testimony obtained from Caris. Complaint Counsel will not object to the reopening of the record for this limited purpose and has conveyed this assurance to Respondents.

Complaint Counsel requests that the Court, upon closing the record, also set a deadline of November 17 for the concurrent filing of post-trial briefs, proposed findings of fact, and conclusions of law, as well as a deadline of December 17 for the concurrent filing of reply briefs and replies to any proposed findings of fact. The proposed deadline for initial filings is one week shorter than the default period of twenty-one days, which reflects the fact that live testimony concluded on September 24, over five weeks before the proposed date for closing the record, as well as the strong public interest in resolving this case promptly.<sup>6</sup>

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<sup>6</sup> Respondents disagree with Complaint Counsel's proposed timeline, and instead propose a longer schedule than contemplated by the FTC Rules. Under Respondent's proposed timeline, the initial filings would be due thirty days after the record closes and reply filings would be due forty days after the exchange of the initial filings.

### **III. CONCLUSION**

For the foregoing reasons, Complaint Counsel respectfully requests that the Court close the record pursuant to Rule 3.44(c) on November 3, 2021 and set the deadline of November 17 for the concurrent post-trial briefs, proposed findings of fact, and conclusions of law, and the deadline of December 17 for concurrent reply briefs and replies to the proposed findings of fact.

Date: October 27, 2021

Respectfully submitted,

*s/ Dylan Naegele*

Dylan Naegele  
Federal Trade Commission  
Bureau of Competition  
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*Counsel Supporting the Complaint*

**STATEMENT OF CONFERENCE PURSUANT TO  
PARAGRAPH 4 OF THE SCHEDULING ORDER**

At 3:00 p.m. Eastern Daylight Time on Wednesday, October 13, 2021, Complaint Counsel Susan Musser, Stephen Mohr, and Sarah Wohl conferred by telephone with Respondents' counsel Sharonmoyee Goswami, Michael Zaken, and Marguerite Sullivan and corresponded by email thereafter in an effort in good faith to resolve by agreement the issues raised by the motion and have been unable to reach such an agreement.

Date: October 25, 2021

*s/ Dylan Naegele*  
Dylan Naegele

**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**

**[PROPOSED] ORDER CLOSING HEARING RECORD**

Upon consideration of Complaint Counsel's Motion to Close the Record, it is hereby:

**ORDERED**, that pursuant to Rule 3.44(c) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.44(c), the hearing record will close on November 3, 2021. Corrections to the record may still be made, if necessary, pursuant to Rule 3.44(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.44(b).

**ORDERED**, that pursuant to Rule 4.3(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 4.3(b), the deadlines for post-trial filings are as follows:

November 17, 2021	Deadline for filing concurrent post-trial briefs, proposed findings of fact, and conclusions of law; and
December 17, 2021	Deadline for filing concurrent reply briefs and replies to proposed findings of fact.

**ORDERED:**

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D. Michael Chappell  
Chief Administrative Law Judge

Date:



# Exhibit A

**\*\*CONFIDENTIAL - REDACTED IN ENTIRETY\*\***

# Exhibit B

**\*\*CONFIDENTIAL - REDACTED IN ENTIRETY\*\***

# Exhibit C

**\*\*CONFIDENTIAL - REDACTED IN ENTIRETY\*\***

# Exhibit D

**U.S. District Court**  
**District of Columbia (Washington, DC)**  
**CIVIL DOCKET FOR CASE #: 1:21-mc-00115-RJL**

FEDERAL TRADE COMMISSION v. CARIS LIFE SCIENCES, INC.

Assigned to: Judge Richard J. Leon  
Cause: Motion to Enforce Subpoena

Date Filed: 09/09/2021

Jury Demand: None

Nature of Suit: 890 Other Statutory Actions

Jurisdiction: U.S. Government Plaintiff

**Petitioner**

**FEDERAL TRADE COMMISSION**

represented by **Michael D. Bergman**  
Federal Trade Commission  
Office of the General Counsel  
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Washington, DC 20580  
202-326-3184  
Fax: 202-326-2477  
Email: [mbergman@ftc.gov](mailto:mbergman@ftc.gov)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

V.

**Respondent**

**CARIS LIFE SCIENCES, INC.**

Date Filed	#	Docket Text
09/14/2021	<u>2</u>	ORDER granting 1 MOTION for Leave to File Petition For An Order Enforcing Subpoena Under Seal. Signed by Chief Judge Beryl A. Howell on 09/14/2021. (See Order for full detail)(zjf) (Entered: 09/21/2021)
09/30/2021	<u>4</u>	MOTION to Enforce <i>Subpoenas in an Administrative Proceeding</i> by FEDERAL TRADE COMMISSION. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Memorandum in Support, # <u>3</u> Text of Proposed Order, # <u>4</u> Certificate of Service)(Bergman, Michael) (Entered: 09/30/2021)
09/30/2021	<u>5</u>	SEALED MOTION filed by FEDERAL TRADE COMMISSION (Attachments: # <u>1</u> Exhibit 1-7, 9, # <u>2</u> Exhibit 8, # <u>3</u> Memorandum in Support, # <u>4</u> Text of Proposed Order, # <u>5</u> Certificate of Service)(Bergman, Michael) (Entered: 09/30/2021)
10/05/2021		MINUTE ORDER. Upon consideration of petitioner's <u>4</u> Petition for an Order Enforcing Subpoenas Duces Tecum and Ad Testificandum in an Administrative Proceeding, it is hereby ORDERED that respondent Caris Life Sciences, Inc. shall show cause, if any there be, why this Court should not enter an order, subject to the penalty of contempt, directing respondent to comply in full with the May 21, 2021 subpoenas that are the subject of the Petition. It is further ORDERED that if respondent intends to file pleadings, affidavits, exhibits, motions, or other papers in opposition to said Petition or to the entry of the Order requested therein, such papers must be filed with the Court and received by petitioner's counsel on or before November 5, 2021; any reply by the petitioner to an opposition filed by the respondent shall be filed with the Court and received by Respondent's counsel on or before November 12, 2021. It is further ORDERED that a copy of this Order and copies of said Petition and exhibits filed therewith shall be served by petitioner upon respondent and/or its counsel, using as expeditious means as practicable. SO ORDERED. Signed by Judge Richard J. Leon on 10/5/2021. (lcrjl1) (Entered: 10/05/2021)
10/08/2021	<u>6</u>	NOTICE of Service by FEDERAL TRADE COMMISSION re Order,,, <u>2</u> Order on Motion for Leave to File (Attachments: # <u>1</u> Exhibit Email, Sept. 29, 2021, # <u>2</u> Exhibit Email, Sept. 30, 2021, # <u>3</u> Exhibit Email, Oct.4, 2021, # <u>4</u> Exhibit Email, Oct. 5, 2021)(Bergman, Michael) (Entered: 10/08/2021)

**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580  
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

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

<p>David Marriott Christine A. Varney Sharonmoyee Goswami Cravath, Swaine &amp; Moore LLP 825 Eighth Avenue New York, NY 10019 (212) 474-1140 dmarriott@cravath.com cvarney@cravath.com sgoswami@cravath.com</p> <p><i>Counsel for Illumina, Inc.</i></p>	<p>Al Pfeiffer Michael G. Egge Marguerite M. Sullivan Latham &amp; Watkins LLP 555 Eleventh Street, NW Washington, DC 20004 (202) 637-2285 al.pfeiffer@lw.com michael.egge@lw.com marguerite.sullivan@lw.com</p> <p><i>Counsel for GRAIL, Inc.</i></p>
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s/ Dylan Naegele  
Dylan Naegele

*Counsel Supporting the Complaint*