

**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.**

EXPEDITED TREATMENT REQUESTED

DOCKET NO. 9401

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION FOR LEAVE
TO ALLOW TWO ADDITIONAL TESTIFYING EXPERTS**

Complaint Counsel opposes the motion of Respondents Illumina, Inc. (“Illumina”) and GRAIL, Inc. (“GRAIL”) (collectively, “Respondents”) to exceed the five-expert limit under Rule 3.31A(b) of the Commission Rules of Practice, 16 C.F.R. § 3.31A(b). Complaint Counsel also respectfully requests an expedited decision on Respondents’ motion.

The central issue in this case is straightforward: would Illumina’s proposed acquisition of GRAIL increase Illumina’s ability and incentive to reduce competition in the U.S. market for multi-cancer early detection (“MCED”) tests? Unlike the two prior matters where the Court granted leave to call more than five experts,¹ the Complaint here alleges harm in a single market, under a single legal theory, resulting from a single proposed transaction. Given the relatively

¹ Order Granting Respondent’s Motion, *In re 1-800 Contacts, Inc.*, FTC Dkt. No. 9372 (Feb. 22, 2017), available at https://www.ftc.gov/system/files/documents/cases/d09372_order_6expert_witnesses.pdf (“1-800 Contacts Order”); Order on Cross-Motions Regarding Limitation on Number of Expert Witnesses Designated by Respondents, *In re POM Wonderful LLC*, FTC Dkt. No. 9344 (Feb. 23, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110223aljordoncrossmo.pdf> (“POM Wonderful Order”).

straightforward nature of the case, Complaint Counsel will rely on, at most, three expert witnesses at the hearing.

Respondents insist that their defenses are so complex, and that each of their eight² experts is so important, that there are “extraordinary circumstances” under Rule 3.31A(b).³ Respondents have failed to make this showing, and this Court should deny their motion for three reasons. First, the factual and legal issues here are not numerous or complex enough to make this case “extraordinary” under the rule. Second, the substantial overlap among Respondents’ three proposed economists indicates that Respondents’ failed to even attempt to comply with the rule. Third, three other experts proposed by Respondents suffer from procedural and substantive deficiencies that prevent their opinions from supporting a finding of “extraordinary circumstances” here.⁴

Complaint Counsel respectfully seeks expedited consideration of Respondents’ motion. Despite Complaint Counsel raising the five-expert limit with Respondents over five weeks ago, Respondents waited until this past Saturday, July 24 to seek leave to exceed the limit. An expedited decision could allow Complaint Counsel to avoid the prejudice and cost of taking potentially unnecessary depositions of some of Respondents’ experts at issue in this motion, which are scheduled to begin this Friday, July 30. It would also provide necessary guidance as to

² Although Respondents style this a motion as a request for leave to call a total of seven experts at the hearing, their exhibit list includes a report from an eighth expert. As explained below, Respondents should not be permitted to offer testimony from more than five experts at the hearing, whether live or by declaration.

³ See generally Motion for Leave to Allow Two Additional Testifying Experts, *In re Illumina, Inc. & GRAIL, Inc.*, FTC Dkt. No. 9401 (July 24, 2021) (“Mot.”).

⁴ These deficiencies also render the three experts’ opinions unreliable and inadmissible. Complaint Counsel anticipates filing motions *in limine* to exclude these experts’ testimony wholly or in part.

whether the deposition of Respondents' expert George Serafin, which is currently scheduled for August 2,⁵ is allowed under the Commission Rules of Practice. *See* 16 C.F.R. § 3.31A(e).

BACKGROUND

On March 30, 2021, a unanimous Commission issued a Complaint charging that Illumina's proposed acquisition of GRAIL would violate federal antitrust law by substantially lessening competition in the U.S. market for MCED tests.⁶ Specifically, the Complaint alleges—and discovery has substantiated—that the proposed acquisition will harm American patients by reducing innovation, potentially raising the price of MCED tests, reducing patient choice, and degrading test quality.⁷ The Complaint further alleges that “Respondents cannot show that any cognizable efficiencies are of a character and magnitude such that the Acquisition is not likely to be anticompetitive.”⁸

On May 21, 2021, Respondents' counsel served an initial expert witness list identifying *fifteen* experts: five economists, four industry consultants, two intellectual property consultants, two physicians, a national security consultant, and an accountant.⁹ Complaint Counsel voluntarily narrowed its own list to three experts several weeks later.¹⁰ At the same time, Complaint Counsel noted that Respondents had disclosed “three times as many [experts] as can testify” under Rule 3.31A(b) and reminded Respondents that their expert witness list should include only those witnesses whom Respondents had a good-faith basis to call at the hearing.¹¹

⁵ *See* Ex. A (July 22, 2021 email from S. Musser to M. Zaken).

⁶ *See* Complaint at p. 1 & ¶¶ 80–81, *In re Illumina, Inc. & GRAIL, Inc.*, FTC Dkt. No. 9401 (Mar. 30, 2021) (“Compl.”).

⁷ *Id.* ¶ 48.

⁸ *Id.*

⁹ *See* Ex. B (Respondents' Expert Witness List).

¹⁰ Ex. C (June 25, 2021 email from W. Harrell to counsel).

¹¹ *Id.*

Consistent with the rule, Complaint Counsel also asked Respondents to either limit their witness list to five experts or seek leave to call more than five experts.¹²

Three weeks passed.¹³ On the morning of Saturday, July 17, Respondents' counsel served reports from eight experts: three industrial organization economists, two industry consultants, two physicians, and one accountant.¹⁴ Among them was the expert report of Richard Abrams, M.D., in which he stated that he “{ [REDACTED]

[REDACTED] }.”¹⁵ Respondents' counsel later confirmed that Dr. Abrams { [REDACTED]

[REDACTED] }—the same day he signed his report.¹⁶ Dr. Abrams' report also indicated that he { [REDACTED] [REDACTED] }, even though the Protective Order does not allow sharing such information with consultants who are “affiliated *in any way* with a respondent[.]”¹⁷

Respondents confirmed that they gave Dr. Abrams documents containing third-party confidential information, including { [REDACTED] [REDACTED] }.¹⁸

¹² *Id.*

¹³ During a conference on a different matter on about July 9, Respondents' counsel told Complaint Counsel that respondents would remove one expert from their list of fifteen experts, but otherwise did not commit to reducing Respondents' expert witness list any further.

¹⁴ See Ex. D (July 17, 2021 email from M. Zaken to counsel).

¹⁵ See Ex. E ¶ 1 (Expert Report and Declaration of Richard Abrams, M.D., redacted with highlights reflecting Complaint Counsel's proposed redactions) (“Abrams Rep.”).

¹⁶ Ex. F (July 21, 2021 email from A. Rathbun to W. Harrell).

¹⁷ See Protective Order Governing Confidential Material, *In re Illumina, Inc. & GRAIL, Inc.*, Dkt. No. 9401 (Mar. 30, 2021) (“Protective Order”) (emphasis added).

¹⁸ Complaint Counsel will submit copies of Dr. Abrams' previously unredacted report, along with the materials on which he had previously relied containing third-party confidential information, for *in camera* inspection at the Court's request.

Although Complaint Counsel and Respondents disagreed about whether Respondents' disclosure of third-party confidential information to Dr. Abrams violated the Protective Order,¹⁹ Respondents' counsel represented that they have instructed Dr. Abrams to destroy all third-party confidential information in his possession and provided Complaint Counsel with a proposed redacted version of his report purporting to strike all such information.²⁰ Complaint Counsel responded the next business day to identify additional third-party confidential information that required redaction.²¹ The parties are still negotiating which redactions would be necessary to alleviate Complaint Counsel's concerns about the potential Protective Order violation.²²

In parallel, Complaint Counsel continued to press Respondents for information about whether, when, and how they plan to ask permission to exceed the five-expert limit.²³ Respondents finally met and conferred with Complaint Counsel on July 20.²⁴ Respondents proposed that they be allowed to submit reports for three experts who would not testify at the hearing. Complaint Counsel declined this proposal because it "would effectively be an end-run around Rule 3.31A(b)'s five-expert limit."²⁵ Several days later on July 23, Respondents served a final witness list identifying seven experts.²⁶ Respondents' final witness list omitted George Serafin, despite Respondents' inclusion of his expert report and declaration on their final exhibit list.²⁷ About twelve hours after serving their final witness list, Respondents filed this motion.

¹⁹ See Ex. G (July 20, 2021 email from A. Rathbun to W. Harrell).

²⁰ Ex. F (July 23, 2021 11:31 a.m. email from A. Rathbun to W. Harrell).

²¹ *Id.* (July 26, 2021 email from W. Harrell to A. Rathbun).

²² *Id.*

²³ See Ex. C (July 19, 2021 email from W. Harrell to S. Goswami).

²⁴ *Id.* (July 21, 2021 email from W. Harrell to S. Goswami).

²⁵ *Id.*

²⁶ Ex. H (Respondents' Final Proposed Witness List).

²⁷ Ex. I at 71 (Respondents' Final Proposed Exhibit List).

ARGUMENT

Respondents cannot call more than five experts at the hearing unless the Court allows otherwise. Rule 3.31A(b) of the Commission Rules of Practice provides, in relevant part, that “[e]ach side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses.” 16 C.F.R. § 3.31A(b). Promulgated in 2009, this rule reflects the Commission’s judgment that “five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases[.]” 74 Fed. Reg. 1803, 1813 (Jan. 13, 2009) (interim final rulemaking). As such, the rule provides that an exception may be granted only “due to exceptional circumstances[.]” 16 C.F.R. § 3.31A(b).

Only twice has the Court found “exceptional circumstances” under Rule 3.31A(b). In *POM Wonderful*, Docket No. 9344, the Court granted an exception on the ground that complaint counsel “brought broad and comprehensive charges” and asserted “at least two theories of liability” based on “up to 20 different advertisements” that spanned “multiple areas of science.”²⁸ Then in *1-800 Contacts*, Docket No. 9372, the respondent sought to call only one expert beyond the five-expert limit, which the Court permitted after observing that the complaint “involves 14 Challenged Agreements that are broadly challenged as both unjustified under trademark law and anticompetitive.”²⁹ This case is different. The Complaint here does not target multiple advertisements that each raise distinct scientific questions,³⁰ nor does it challenge multiple agreements that raise legal questions about the intersection of trademark and antitrust law.³¹

²⁸ *POM Wonderful* Order at 5–6.

²⁹ *1-800 Contacts* Order at 4.

³⁰ *Contra POM Wonderful* Order at 5–6.

³¹ *Contra* Order *1-800 Contacts* Order at 4.

Instead it alleges competitive harm in one market, based on one acquisition, resulting from incentives to reduce competition in that one market.³²

Further distinguishing this case from *POM Wonderful* and *1-800 Contacts* is Respondents' failure to demonstrate that they could not elicit the proffered testimony through only five experts, despite reasonable efforts to do so. Respondents have not even attempted to make this showing, and the record raises doubts that they could. Three of the experts Respondents propose to call—Dr. Dennis Carlton, Ms. Margaret Guerin-Calvert, and Dr. Robert Willig—are industrial organization economists who lack medical or scientific expertise. Unlike in *1-800 Contacts*, where the two proffered economists rendered distinctly different opinions,³³ Respondents' three economists opine on overlapping subjects. For example:

- [REDACTED]
[REDACTED]
[REDACTED]};³⁴ and
- [REDACTED]
[REDACTED]}.³⁵

While there may be differences among the experts' opinions, Respondents have given no indication of any attempt to consolidate them in order to abide by Rule 3.31A(b).


³² Complaint Counsel never “demanded” (Mot. at 5) that Respondents produce documents from a certain number of custodians, much less hundreds. *See* Ex. J (Dec. 31, 2020 email from D. Naegle to S. Goswami).

³³ *1-800 Contacts* Order at 3 (noting that one “professor of law and economics” was offered to testify about “trademark protections” while a separate “economics professor” was offered to “present an economic analysis of the competitive effects”).

³⁴ *Compare* Ex. K (excerpts from the Expert Rebuttal Report of Dennis W. Carlton) *with* Ex. L (excerpts from the Expert Report and Declaration of Robert D. Willig).

³⁵ *Compare id.* *with* Ex. M (excerpts from the Expert Report and Declaration of Margaret Guerin-Calvert).

Finally, the opinions of three other experts proposed by Respondents are too flawed to support a finding of “extraordinary circumstances” here. For one of those experts, George Serafin, the flaw is procedural. Respondents omitted Mr. Serafin from their final expert witness list, yet they included his expert report and declaration on their final exhibit list. Presumably, Respondents intend to offer Mr. Serafin’s opinions in evidence without presenting him as a live witness. But the Commission Rules of Practice do not provide a mechanism for presenting opinions from a non-testifying expert. Rule 3.31A(e) instructs that a “party may not discover facts known or opinions held by an expert . . . who is not listed as a witness for the evidentiary hearing.” 16 C.F.R. § 3.31A(e). In effect, the rule prevents parties from circumventing the five-expert limit under Rule 3.31A(b) by submitting written opinions in lieu of live testimony; otherwise, parties could submit an unlimited number of written expert opinions about which opposing parties could take no discovery whatsoever. Because Respondents do not even mention Mr. Serafin in their motion, much less explain the significance of his opinions, Respondents cannot offer Mr. Serafin’s testimony at the hearing (whether live or by declaration).

The opinions of two other proposed experts, Dr. Abrams and Mr. Rock, suffer from substantive flaws that deprive them of any substantial value to the Court. Dr. Abrams is not only biased by virtue of his affiliation with GRAIL, but he also now “disowns reliance on the third-party confidential materials listed in Appendix B in support of the opinions provided in his report[.]”³⁶ While Respondents maintain that Dr. Abrams “will testify about current and potential cancer screening options,”³⁷ including “purported MCED tests,”³⁸ his opinions will necessarily be limited in scope given his inability to consider third-party confidential information about 

³⁶ Ex. F (July 23, 2021 11:31 a.m. email from A. Rathbun to W. Harrell)

³⁷ Mot. at 6.

³⁸ Ex. H at 8.

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[REDACTED]. As for Mr. Rock, Respondents assert that he will testify about “the efficacy of the auditing processes contemplated by the Open Offer,”³⁹ but they fail to mention that Mr. Rock [REDACTED] [REDACTED] because no audit plan or proposal has been developed by Respondents.⁴⁰ In sum, these experts cannot support a finding of “extraordinary circumstances” as necessary for Respondents to rely on more than five experts at the hearing.

CONCLUSION

For these reasons, Complaint Counsel respectfully requests that the Court decline to turn the hearing into a trial-by-expert and deny Respondents’ motion. Complaint Counsel also respectfully requests a decision before July 30, 2021, when the first deposition of an expert at issue will begin.

Date: July 30, 2021

Respectfully submitted,

/s/ J. Wells Harrell

J. Wells Harrell
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3211
Email: jharrell@ftc.gov

Counsel Supporting the Complaint

³⁹ Mot. at 8.

⁴⁰ Ex. N ¶¶ 17 & 26–27 (Expert Report and Declaration of Robert J. Rock).

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a corporation.**

DOCKET NO. 9401

[PROPOSED] ORDER

Upon Respondents' Motion for Leave to Allow Two Additional Testifying Experts, it is hereby:

ORDERED that Respondents' motion is DENIED; and it is further

ORDERED that Respondents may introduce testimony from no more than five expert witnesses at the hearing, whether live or by declaration; and it is further

ORDERED that within one (1) business day of this Order, Respondents shall identify to Complaint Counsel which five expert witnesses Respondents may call at the hearing.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July _____, 2021

EXHIBIT A

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From: [Musser, Susan](#)
To: [Michael Zaken](#); "[LWVALORANTITRUST.LWTEAM@lw.com](#)"; [Illumina Trial Team](#); [Sharonmoyee Goswami](#); "[Anna.Rathbun@lw.com](#)"
Cc: [Andrew, Jordan S.](#); [Mohr, Stephen A.](#); [Widnell, Nicholas](#); [Milici, Jennifer](#)
Subject: RE: Illumina/GRAIL | Deposition Dates
Date: Sunday, July 25, 2021 4:21:02 PM

Michael –

Your proposed start time works for Complaint Counsel.

Best,

Susan

From: Michael Zaken <mzaken@cravath.com>
Sent: Sunday, July 25, 2021 3:24 PM
To: Musser, Susan <smusser@ftc.gov>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>
Subject: RE: Illumina/GRAIL | Deposition Dates

Susan,

Thank you for accepting the original date of July 30. As noted in my email below, Dr. Abrams would like to start the deposition at 8:00am MT. Please confirm that that time will work for the FTC.

Michael Zaken
Cravath, Swaine & Moore LLP
825 8th Avenue
New York, NY 10019
212-474-1888

From: Musser, Susan <smusser@ftc.gov>
Sent: Saturday, July 24, 2021 3:33 PM
To: Michael Zaken <mzaken@cravath.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>
Subject: RE: Illumina/GRAIL | Deposition Dates

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Michael –

As you are aware, Complaint Counsel is entitled to a full seven hours of on-the-record time for the deposition of each expert under the scheduling order. The date you propose will not allow us to take a full and complete deposition and as such we cannot accept your proposal. However, in the spirit of compromise, we are willing to rearrange our schedule to make Respondents' original date of July 30 work.

Best regards,

Susan

From: Michael Zaken <mzaken@cravath.com>
Sent: Saturday, July 24, 2021 11:41 AM
To: Musser, Susan <smusser@ftc.gov>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>
Subject: RE: Illumina/GRAIL | Deposition Dates

Susan:

Dr. Abrams is not available to testify on August 3 as he will be treating patients all day. Please let us know if the FTC will accept the proposed August 2 date.

Best,

Michael

Michael Zaken
Cravath, Swaine & Moore LLP
825 8th Avenue
New York, NY 10019
212-474-1888

From: Musser, Susan <smusser@ftc.gov>
Sent: Friday, July 23, 2021 9:54 PM
To: Michael Zaken <mzaken@cravath.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com'

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<Anna.Rathbun@lw.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>

Subject: RE: Illumina/GRAIL | Deposition Dates

Michael:

Complaint Counsel is able to accommodate Respondents' request to depose Dr. Deverka on July 29. Regarding Dr. Abrams, we also proposed August 3. Is Dr. Abrams available to testify on that date?

Thanks,

Susan

From: Michael Zaken <mzaken@cravath.com>

Sent: Friday, July 23, 2021 8:59 AM

To: Musser, Susan <smusser@ftc.gov>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>

Subject: RE: Illumina/GRAIL | Deposition Dates

Counsel:

Respondents do not understand why Complaint Counsel is not prepared to accept our proposed dates for Dr. Abrams and Dr. Deverka. Complaint counsel had originally proposed those same dates and Respondents merely proposed swapping those dates between Dr. Abrams and Dr. Deverka. We do not understand why Complaint Counsel is no longer available on those dates.

Nevertheless, to accommodate Complaint Counsel's requests to the extent possible, Dr. Abrams is available on August 2 from 7:30 MT to 2 MT. Unfortunately, Dr. Deverka is only available on July 29 and Professor Willig is only available on July 26. Please confirm that Complaint Counsel will accept these dates.

Best regards,

Michael

Michael Zaken
Cravath, Swaine & Moore LLP
825 8th Avenue
New York, NY 10019

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212-474-1888

From: Musser, Susan <smusser@ftc.gov>**Sent:** Thursday, July 22, 2021 12:40 PM**To:** Michael Zaken <mzaken@cravath.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>**Cc:** Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>**Subject:** RE: Illumina/GRAIL | Deposition Dates

Counsel:

Thank you for confirming the below deposition dates.

| EXPERT | DEPOSITION DATE |
|----------------|-----------------------------------|
| Carlton | August 3 |
| Guerin-Calvert | August 3 |
| Cote | July 30 |
| Rock | August 3 |
| Serafin | August 2 |
| Scott Morton | August 3 (start time 8:00 AM EST) |

Regarding Respondent Counsel's counter proposal for Willig, Deverka, and Abrams, unfortunately, Complaint Counsel is unable to accommodate those dates due to scheduling conflicts and the need for sufficient time to adequately prepare for each deposition.

Complaint Counsel proposes the follow alternative dates for each witness:

| EXPERT | DEPOSITION DATE |
|---------|-----------------|
| Willig | August 2 |
| Deverka | August 2 |
| Abrams | August 2 or 3 |

Finally, we are unable to "identify which of Respondents' witness, opinion, and report sections [Drs. Rothman and Navathe] are responding to, and the anticipated length of each of their reports." As you can imagine, our reports are still in the process of being drafted. That being said, we can assure you that Drs. Rothman and Navathe's reports will be limited to rebutting topics raised in Respondents' expert reports. To the extent that you seek additional time to depose our rebuttal experts, we will oppose any such request. Complaint Counsel is confident that if it can respond to your 8 expert reports within the allotted time that Respondents' Counsel can prepare for depositions on issues raised in their own expert reports given the resources they have at hand.

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Best regards,

Susan

From: Michael Zaken <mzaken@cravath.com>

Sent: Wednesday, July 21, 2021 5:45 PM

To: Musser, Susan <smusser@ftc.gov>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>

Subject: RE: Illumina/GRAIL | Deposition Dates

Susan,

Please see a response to Complaint Counsel's proposed deposition dates below.

Respondents' Experts

Respondents are able to accommodate Complaint Counsel's dates for Carlton, Guerin-Calvert, Cote, Rock and Serafin. Due to scheduling conflicts, we have proposed alternative dates for Willig, Abrams and Deverka in the chart below. Unless otherwise noted, we propose that the depositions begin at 9:30am ET. Please let us know if Complaint Counsel will accept these dates.

| EXPERT | DEPOSITION DATE |
|----------------|---------------------------|
| Willig | July 26 |
| Carlton | August 3 |
| Guerin-Calvert | August 3 |
| Cote | July 30 |
| Rock | August 3 |
| Abrams | July 30 (8:00am MT start) |
| Serafin | August 2 |
| Deverka | July 29 |

Complaint Counsel's Experts

-
Respondents accept Complaint Counsel's proposed date for Scott Morton. Respondents also conditionally accept the proposed dates for Rothman and Navathe. As we noted on Tuesday's call, to date, Complaint Counsel has provided only a generalized description of what these reports might contain. And we have no idea how long they might be. Complaint Counsel's July 16 Final Witness List merely states for both witnesses that "Complaint Counsel reserves the right to present

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testimony from [the two rebuttal experts] rebutting certain analyses, assumptions, and conclusions presented by Respondents' expert witnesses." We understand that Complaint Counsel may have left these descriptions so vague because Respondents had not yet served their expert reports when Complaint Counsel made this disclosure. Since that time, however, Respondents have served their expert reports. Accordingly, so that we may weigh whether it is necessary to seek court intervention relating to the scheduling of these depositions and the expert discovery deadline, for each of the FTC's rebuttal expert witnesses, please identify which of Respondents' witnesses, opinions, and report sections they will be responding to, and the anticipated length of each of their reports.

| EXPERT | DEPOSITION DATE |
|--------------|-----------------------------------|
| Scott Morton | August 3 (start time 8:00 AM EST) |
| Rothman | August 3 |
| Navathe | August 3 |

Michael Zaken
 Cravath, Swaine & Moore LLP
 825 8th Avenue
 New York, NY 10019
 212-474-1888

From: Musser, Susan <smusser@ftc.gov>
Sent: Monday, July 19, 2021 8:58 PM
To: 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Sharonmoyee Goswami <sgoswami@cravath.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>
Subject: Illumina/GRAIL | Deposition Dates

Counsel:

Please see below proposed dates for the depositions of Respondents' experts. Please let us know by the end of day Wednesday if Respondents' experts are available to be deposed on those dates.

| EXPERT | DEPOSITION DATE |
|----------------|-----------------|
| Willig | August 2 |
| Carlton | August 3 |
| Guerin-Calvert | August 3 |
| Cote | July 30 |
| Rock | August 3 |
| Abrams | July 29 |
| Serafin | August 2 |

| | |
|---------|---------|
| Deverka | July 30 |
|---------|---------|

We also propose the following dates for the depositions of Complaint Counsel's experts:

| EXPERT | DEPOSITION DATE |
|--------------|-----------------------------------|
| Scott Morton | August 3 (start time 8:00 AM EST) |
| Rothman | August 3 |
| Navathe | August 3 |

Best,

Susan

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

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EXHIBIT B

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

In the Matter of

 Illumina, Inc.,
 a corporation, and

 and

 GRAIL, Inc.,
 a corporation,

 Respondents

Docket No. 9401

RESPONDENTS' EXPERT WITNESS LIST

Pursuant to the Scheduling Order entered in the above-captioned proceeding on April 26, 2021, this list designates the witnesses whom Illumina, Inc. (“Illumina”) and GRAIL, Inc. (“GRAIL”) (collectively, the “Respondents”) may call as expert witnesses to testify in this proceeding.

Respondents reserve the following rights:

- A. To provide supplemental expert reports and opinions, if necessary, to address any rebuttal or criticisms of the opinions offered by an expert or to supplement an expert’s conclusions and the basis therefore.
- B. To provide, through the below-identified experts or through subsequently identified experts, expert testimony rebutting any expert report or testimony offered by Complaint Counsel’s expert witnesses.
- C. Not to call at the hearing any of the persons listed, as circumstances may warrant.
- D. To call any of these individuals or any person at the hearing in order to provide rebuttal testimony.

Subject to these reservations of rights, Respondents provide the following list:

1. **Dennis Carlton:** Dr. Carlton's *curriculum vitae* is enclosed, which identifies all publications authored by Dr. Carlton within the last ten years. Also enclosed is a list of all matters in which Dr. Carlton has testified or has been deposed within the last four years. Enclosed are all transcripts of Dr. Carlton's testimony from these matters that are not under seal and that are within the possession, custody, or control of Respondents or Dr. Carlton.
2. **Richard Cote:** Dr. Cote's *curriculum vitae* is enclosed, which identifies most publications authored by Dr. Cote within the last ten years. Also enclosed is a list of Dr. Cote's additional publications within the last ten years and all matters in which Dr. Cote has testified or has been deposed within the last four years. Enclosed are all transcripts of Dr. Cote's testimony that are not under seal and that are in the possession, custody, or control of Respondents or Dr. Cote.
3. **George Serafin:** Mr. Serafin's *curriculum vitae* is enclosed, which identifies all publications authored by Mr. Serafin within the last ten years. Also enclosed is the name of the one matter in which Mr. Serafin has testified or has been deposed within the last four years. The transcript of this testimony is under seal and cannot be disclosed.
4. **Patricia Deverka:** Dr. Deverka's *curriculum vitae* is enclosed, which identifies all publications authored by Dr. Deverka within the last ten years. Dr. Deverka has not testified or been deposed within the last four years.
5. **Joseph Ferrara:** Mr. Ferrara's *curriculum vitae* is enclosed, which identifies all publications authored by Mr. Ferrara within the last ten years. Mr. Ferrara has not testified or been deposed within the last four years.
6. **Margaret Guerin-Calvert:** Ms. Guerin-Calvert's *curriculum vitae* is enclosed, which identifies all publications authored by Ms. Guerin-Calvert within the last ten years. Also enclosed is a list of all matters in which Ms. Guerin-Calvert has testified or has been deposed within the last four years. The transcripts of this testimony are under seal and cannot be disclosed.
7. **Tasneem Chipty:** Dr. Chipty's *curriculum vitae* is enclosed, which identifies all publications authored by Dr. Chipty within the last ten years. Also enclosed is a list of all matters in which Dr. Chipty has testified or has been deposed in the last four years. Enclosed are all transcripts of Dr. Chipty's testimony that are not under seal and that are within the possession, custody, or control of Respondents or Dr. Chipty.
8. **Robert Willig:** Dr. Willig's *curriculum vitae* is enclosed, which identifies all publications authored by Mr. Willig within the last ten years. Also enclosed is a list of all matters in which Dr. Willig has testified or has been deposed within the last four years. Enclosed are

all transcripts of Dr. Willig's testimony from these matters that are not under seal and that are within the possession, custody, or control of Respondents or Dr. Willig.

9. **Daniel O'Brien:** Dr. O'Brien's *curriculum vitae* is enclosed, which identifies all publications authored by Dr. O'Brien within the last ten years. Also enclosed is the name of the one matter in which Dr. O'Brien has testified or has been deposed within the last four years. The transcript of this testimony is under seal and cannot be disclosed.
10. **Judge Paul Michel:** Judge Michel's *curriculum vitae* is enclosed. Enclosed is a list of all publications authored by Judge Michel within the last ten years, and the name of the one matter in which Judge Michel has testified or has been deposed within the last four years. Also enclosed are all the excerpts of the transcript of this testimony that are within the possession, custody, or control of Respondents or Judge Michel.
11. **Judge Abraham Sofaer:** Judge Sofaer's *curriculum vitae* is enclosed, which identifies some publications authored by Judge Sofaer within the last ten years. Also enclosed is a list of additional publications authored by Judge Sofaer within the last ten years. Judge Sofaer has not testified or been deposed within the last four years.
12. **Robert Rock:** Mr. Rock's *curriculum vitae* is enclosed. He has not authored any publications in the last ten years. Also enclosed is a list of all matters in which Mr. Rock has testified or has been deposed within the last four years. Also enclosed are all transcripts of Mr. Rock's testimony from these matters that are not under seal and that are within the possession, custody, or control of Respondents or Mr. Rock.
13. **Sean Iyer:** Mr. Iyer's *curriculum vitae* is enclosed, which identifies all publications authored by Mr. Iyer within the last ten years. Also enclosed is a list of all matters in which Mr. Iyer has testified or has been deposed within the last four years. Also enclosed are transcripts of Mr. Iyer's testimony from those matters that are not under seal and that are within the possession, custody, or control of Respondents or Mr. Iyer.
14. **Charles Mathews:** Mr. Mathews' *curriculum vitae* is enclosed, which identifies all publications authored by Mr. Mathews within the last ten years. Also enclosed is the name of the one matter in which Mr. Mathews has testified or has been deposed within the last four years. The transcript from this testimony is under seal and cannot be disclosed.
15. **Richard Abrams:** Dr. Abrams' *curriculum vitae* is enclosed. Dr. Abrams has not authored any publications in the last ten years. Dr. Abrams has not testified or been deposed within the last four years.

Dated: May 21, 2021

Respectfully submitted,

/s/ Richard J. Stark

Christine A. Varney
Richard J. Stark
David R. Marriott
J. Wesley Earnhardt
Sharonmoyee Goswami
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CERTIFICATE OF SERVICE

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

Complaint Counsel

U.S. Federal Trade Commission

Susan Musser
Dylan P. Naegele
David Gonen
Jonathan Ripa
Matthew E. Joseph
Jordan S. Andrew
Betty Jean McNeil
Lauren Gaskin
Nicolas Stebinger
Samuel Fulliton
Stephen A. Mohr
Sarah Wohl
William Cooke
Catherine Sanchez
Joseph Neely
Nicholas A. Widnell
Daniel Zach
Eric D. Edmonson

May 21, 2021

/s/ Richard J. Stark

Richard J. Stark

EXHIBIT C

PUBLIC

From: [Sharonmoyee Goswami](#)
To: [Harrell, Wells](#); [Jesse Weiss](#); [Michael Zaken](#); [Illumina Trial Team](#); "[Marguerite.Sullivan@lw.com](#)"; "[Anna.Rathbun@lw.com](#)"; "[LWVALORANTITRUST.LWTEAM@lw.com](#)"
Cc: [Musser, Susan](#); [Mohr, Stephen A.](#); [Widnell, Nicholas](#); [Andrew, Jordan S.](#); [Simons, Bridget](#); [Fulliton, Samuel](#); [Cooke, William](#)
Subject: RE: In re Illumina & Grail (No. 9401) - revised expert list
Date: Saturday, July 24, 2021 12:06:58 AM
Attachments: [image001.jpg](#)
[image002.png](#)

Thank you, Wells. Respondents intend to file their motion for leave tomorrow morning.

Sharonmoyee Goswami

Cravath, Swaine & Moore LLP
 825 Eighth Avenue, New York, NY 10019
 T [+1-212-474-1928](tel:+1-212-474-1928)
sgoswami@cravath.com

From: Harrell, Wells <jharrell@ftc.gov>
Sent: Wednesday, July 21, 2021 4:56 PM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Michael Zaken <mzaken@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'Marguerite.Sullivan@lw.com' <Marguerite.Sullivan@lw.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>
Cc: Musser, Susan <smusser@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>; Simons, Bridget <bsimons@ftc.gov>; Fulliton, Samuel <sfulliton@ftc.gov>; Cooke, William <wcooke@ftc.gov>
Subject: RE: In re Illumina & Grail (No. 9401) - revised expert list

Sharon,

Thank you for meeting and conferring with us yesterday afternoon regarding respondents' intent to exceed the five-expert limit under Rule 3.31A(b). We appreciate your proposal to present five or six experts at the hearing and offer the remaining two or three through their depositions or declarations.

Having considered your proposal, we cannot agree to it. As we previewed during the call, the proposal would effectively be an end-run around Rule 3.31A(b)'s five-expert limit. It would also deny the Court an opportunity to observe those experts under cross-examination. The respondents bear the burden of showing that "extraordinary circumstances" justify calling more than five experts, and while we understand respondents' position, we are unconvinced that respondents can meet that burden based on your representations to date.

If respondents serve a final witness list with more than five experts without having filed a motion for leave to exceed the five-expert limit for good cause, then we expect to move promptly to enforce the limit.

Best,
 Wells



J. Wells Harrell (he/him)
 Federal Trade Commission
[\(202\) 326-3211](tel:(202)326-3211) | jharrell@ftc.gov

From: Sharonmoyee Goswami <sgoswami@cravath.com>

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Sent: Monday, July 19, 2021 3:09 PM

To: Harrell, Wells <jharrell@ftc.gov>; Jesse Weiss <jweiss@cravath.com>; Michael Zaken <mzaken@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'Marguerite.Sullivan@lw.com' <Marguerite.Sullivan@lw.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>

Cc: Musser, Susan <smusser@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>; Simons, Bridget <bsimons@ftc.gov>; Fulliton, Samuel <fulliton@ftc.gov>; Cooke, William <wcooke@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - revised expert list

Counsel:

We are available to meet and confer on this and other issues tomorrow at 3pm ET. Please see below for our proposed set of topics for tomorrow:

1. Expert witnesses
2. Fact witnesses
3. Scheduling
4. Protective Order
5. Illumina's Privilege log

Best,

Sharon

Sharonmoyee Goswami

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sgoswami@cravath.com

From: Harrell, Wells <jharrell@ftc.gov>

Sent: Monday, July 19, 2021 9:50 AM

To: Sharonmoyee Goswami <sgoswami@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Michael Zaken <mzaken@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'Marguerite.Sullivan@lw.com' <Marguerite.Sullivan@lw.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>

Cc: Musser, Susan <smusser@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>; Simons, Bridget <bsimons@ftc.gov>; Fulliton, Samuel <fulliton@ftc.gov>; Cooke, William <wcooke@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - revised expert list

Counsel,

It's been over three weeks since we raised Rule 3.31A(b)'s five-expert limit with respondents and invited them to meet and confer. In my June 25 email, we noted that respondents had disclosed triple the number of experts allowed under the rule. We also asked whether respondents had a good-faith basis to believe that they would call every one of those fifteen experts, whether respondents would serve a narrowed expert list, and whether respondents intend to seek leave to exceed the five-expert limit. Although respondents orally suggested during an unrelated meet and confer that they might omit one expert from their fifteen-expert list, respondents never replied to my June 25 email. Instead, respondents proceeded to serve eight expert reports over three weeks

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later on July 17.

We are disappointed that respondents have refused to engage with us on this. As a result of respondents' refusal, we wasted time and effort preparing to examine six experts who appeared in respondents' expert disclosures but did not submit reports, and we must now proceed to take depositions of experts who may later be precluded from testifying. If respondents had met and conferred weeks ago, as we had requested, the question of whether respondents would be limited to five experts could have already been resolved.

Nonetheless, we will make ourselves available to meet and confer tomorrow and Wednesday between noon and 5:00pm Eastern. Please be prepared to discuss, among other things, which experts respondents intend to call at the hearing and what if any basis respondents would have for exceeding the five-expert limit.



J. Wells Harrell (he/him)
Federal Trade Commission
(202) 326-3211 | jharrell@ftc.gov

From: Harrell, Wells

Sent: Friday, June 25, 2021 5:24 PM

To: sgoswami@cravath.com; jweiss@cravath.com; mzaken@cravath.com; illuminaTrialTeam@cravath.com; Marguerite.Sullivan@lw.com; Anna.Rathbun@lw.com; LWVALORANTITRUST.LWTEAM@lw.com

Cc: Musser, Susan <smusser@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>; Simons, Bridget <bsimons@ftc.gov>; Verwilt, Hana <hverwilt@ftc.gov>; Fulliton, Samuel <fulliton@ftc.gov>; Cooke, William <wcooke@ftc.gov>

Subject: In re Illumina & Grail (No. 9401) - revised expert list
Counsel,

Please find attached complaint counsel's revised expert witness list. In accordance with Rule 3.31A(b)'s limit on the number of experts who may be called at the hearing, and in a good-faith effort to promote transparency and cooperation, we have voluntarily reduced our list to three experts: Dr. Fiona Scott Morton, Dr. Amol Navathe, and Dr. Dov Rothman. The accompanying materials were shared with you previously on May 14 and are also attached here for convenience. We note that respondents have designated an unprecedented fifteen experts: three times as many as can testify under the Part 3 rules. As you know, Rule 3.31A(b) provides that respondents "will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses." The rule further provides that respondents "may file a motion seeking leave to call additional expert witnesses," but only "due to extraordinary circumstances." *Id.* Moreover, Rule 3.43(b) allows exclusion of testimony based on "needless presentation of cumulative evidence." It seems highly implausible that respondents will attempt to call—much less be permitted to call—all fifteen of their disclosed experts at the hearing, particularly those in the same field (*e.g.*, five economists).

To facilitate our preparation for expert discovery and avoid unfair prejudice, we kindly ask that respondents share the following:

- Whether respondents currently have a good-faith basis to believe that they will seek to call every one of the fifteen experts whom they have disclosed and, if not, which experts they have ruled out calling at the hearing;
- Whether respondents will follow our example and serve a revised expert witness list, which

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omits experts for whom respondents will not be serving reports, at least one week before the July 16 deadline for respondents' expert reports; and

- Whether respondents intend to seek leave to call more than five experts at the hearing and, if so, the basis for the request.

We are available to meet and confer on this issue. Thank you, and have a nice weekend.



J. Wells Harrell (he/him)
Counsel to the Director
Bureau of Competition
Federal Trade Commission
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EXHIBIT D

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT E

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT F

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT G

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT H

**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' FINAL PROPOSED WITNESS LIST

Pursuant to the April 26, 2021 Scheduling Order, this list designates the witnesses whom Illumina, Inc. (“Illumina”) and GRAIL, Inc. (“GRAIL”) (collectively, the “Respondents”) currently contemplate calling as witnesses to testify in the above-captioned matter, along with the topics of each witness’s proposed testimony, based on the information available on the undersigned date. Subject to the limitations in the Scheduling Order entered in this matter, Respondents reserve the right:

- A. To amend this list, including to add or remove witnesses as necessary, including, but not limited to, in connection with any motions (including motions in limine) and the submission of witness testimony, exhibits or other evidence that Complaint Counsel may proffer;
- B. To call any witnesses necessary to present summaries of voluminous evidence, or to demonstrate the authenticity or admissibility of any such summaries;
- C. To supplement this list in light of any discovery that has not yet been completed;
- D. To supplement this list in light of the Complaint Counsel’s expert reports and/or expert depositions;

- E. To present testimony by investigational hearing or deposition transcript of any person identified by a Party or non-Party as an FTC Rule 3.33(c) or Federal Rule of Civil Procedure 30(b)(6) representative of that Party or non-Party pursuant to a 3.33(c) or 30(b)(6) notice served by Complaint Counsel or Respondents;
- F. To present testimony by declaration;
- G. To call the custodian of records of any Party or non-Party from whom documents or records have been obtained—including but not limited to those Parties and non-Parties listed below—to the extent necessary for the admission of documents or deposition testimony into evidence in the event a stipulation cannot be reached concerning the authenticity or admissibility of such documents or testimony;
- H. To call witnesses who may be necessary to lay the foundation for the admissibility of evidence should the parties prove unable to stipulate to admissibility;
- E. To call any witnesses for the purposes of rebuttal or impeachment;
- F. To question the persons listed below about any topics that are the subjects of testimony by witnesses called by Complaint Counsel;
- G. To call any of these individuals or other witnesses who are not named, including any individual identified in Complaint Counsel's or Respondents' Preliminary Witness Lists, Supplemental Witness Lists, Final Witness Lists, any witness lists disclosed as part of the district court litigation, or who was otherwise deposed in this proceeding or in the district court litigation for rebuttal testimony, including any person who has or may be identified by Complaint Counsel as a potential witness in this matter.

Subject to these reservations of rights, Respondents provide the following final proposed witness list. Respondents currently intend to present the testimony of the below witnesses through live testimony (by virtual web platform) at the hearing. Respondents reserve the right to offer the prior testimony of additional witnesses who have been deposed, provided declarations or otherwise given testimony in connection with the district court litigation, this proceeding or the FTC's investigation of the Proposed Transaction. By including any of the witnesses on this list, Respondents assume no obligation to call or make available any witness during the proceeding, or to call them live rather than by deposition, investigational hearing transcript or declaration.

PARTY WITNESS LIST

1. **Francis deSouza** – President and Chief Executive Officer, Illumina, Inc. We expect Mr. deSouza will testify about Illumina’s business strategy; Illumina’s Next-Generation Sequencing Technology (“NGS”) products; Illumina’s customer relationships, including Illumina’s open offer and the standard contract for oncology customers; Illumina’s proposed re-acquisition of GRAIL (the “Proposed Transaction”); and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts,¹ and any topics identified by Complaint Counsel as potential topics for his testimony.
2. **Alex Aravanis** – Senior VP and Chief Technology Officer, Illumina, Inc. We expect Dr. Aravanis will testify about Illumina’s NGS products; switching between diagnostic platforms for clinical applications, including oncology; alternative diagnostic platforms; the history of GRAIL; the Proposed Transaction, including Illumina’s deal model; efficiencies and procompetitive effects of the Proposed Transaction; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts, and any topics identified by Complaint Counsel as potential topics for his testimony.
3. **Phil Febbo** – Chief Medical Officer, Illumina, Inc. We expect Dr. Febbo will testify about Illumina’s NGS products; efficiencies and procompetitive effects of the Proposed Transaction, including efficiencies and procompetitive effects relating to regulatory approval of GRAIL’s tests, including the Galleri test; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his deposition transcript and any topics identified by Complaint Counsel as potential topics for his testimony.
4. **Joydeep Goswami** – Senior VP, Corporate Development and Strategic Planning, Illumina Inc. We expect Dr. Goswami will testify about the Proposed Transaction, Illumina’s strategic planning, Illumina’s deal model, Illumina’s agreements with customers including the open offer and agreements relating to regulated, kitted tests on Illumina’s instruments; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts, and any topics identified by Complaint Counsel as potential topics for his testimony.
5. **Nicole Berry** – Senior VP and General Manager, Americas Region, Illumina, Inc. We expect Ms. Berry will testify about Illumina’s NGS products, Illumina’s negotiations with customers, Illumina’s customer relationships,

¹ Respondents reserve all rights to object to the admissibility of all transcripts of investigational hearings conducted by the FTC during its investigation of the Proposed Transaction, and reference herein to the facts and opinions expressed in the investigational hearing transcripts does not alter those objections.

including Illumina's open offer and the standard contract for oncology customers; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in her investigational hearing and deposition transcript and any topics identified by Complaint Counsel as potential topics for her testimony.

6. **Ammar Qadan** – VP and Global Head of Market Access, Illumina, Inc. We expect Mr. Qadan will testify about efficiencies and procompetitive effects of the Proposed Transaction, including efficiencies and procompetitive effects relating to regulatory approval of, third party payor reimbursement for, GRAIL's tests, including the Galleri test; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his deposition transcript and any topics identified by Complaint Counsel as potential topics for his testimony.
7. **Stacie Young** – Senior Director of Business Development, Illumina, Inc. We expect Ms. Young will testify about Illumina's agreements with customers including the open offer and agreements relating to regulated, kitted tests on Illumina's instruments ("Illumina's IVD Agreements"); and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in her deposition transcript and any topics identified by Complaint Counsel as potential topics for her testimony.
8. **Jay Flatley** – former Chief Executive Officer; Outgoing Chairman of Illumina's Board of Directors, Illumina, Inc. We expect Mr. Flatley will testify about Illumina's NGS products; the history of GRAIL; Illumina's Non-Invasive Prenatal Testing ("NIPT") business; the Proposed Transaction; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts, and any topics identified by Complaint Counsel as potential topics for his testimony.
9. **Nicholas Naclerio** – former Senior VP, Corporate & Venture Development, Illumina Inc.; Founding Partner, Illumina Ventures. We expect Dr. Naclerio will testify about Illumina's NIPT business; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts, and any topics identified by Complaint Counsel as potential topics for his testimony.
10. **John Leite** – former VP Clinical Business Development, Illumina, Inc.; Chief Business Officer, InterVenn Biosciences. We expect Dr. Leite will testify about Illumina's agreements with customers including agreements relating to regulated, kitted tests on Illumina's instruments, InterVenn's proteomics platform, InterVenn's cancer screening tests in development and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts

and any topics identified by Complaint Counsel as potential topics for his testimony.

11. **Hans Bishop** – Chief Executive Officer, GRAIL, Inc. We expect Mr. Bishop will testify about the history of GRAIL; GRAIL’s business; GRAIL’s tests; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts, and any topics identified by Complaint Counsel as potential topics for his testimony.
12. **Josh Ofman** – Chief Medical Officer, GRAIL, Inc. We expect Mr. Ofman will testify about efficiencies and procompetitive effects of the Proposed Transaction relating to regulatory approval and reimbursement of GRAIL’s tests, including the Galleri test; oncology tests, including GRAIL’s tests; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his deposition transcript and any topics identified by Complaint Counsel as potential topics for his testimony.
13. **Aaron Freidin** – Senior VP, Finance, GRAIL, Inc. We expect Mr. Freidin will testify about efficiencies and procompetitive effects of the Proposed Transaction; GRAIL’s deal model; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his investigational hearing and deposition transcripts and any topics identified by Complaint Counsel as potential topics for his testimony.
14. **Arash Jamshidi** – VP of Bioinformatics and Data Science, GRAIL, Inc. We expect Mr. Jamshidi will testify about oncology tests, including GRAIL’s tests; switching between diagnostic platforms for clinical applications, including oncology; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his deposition transcript, and any topics identified by Complaint Counsel as potential topics for his testimony.
15. **Chris Della Porta** – Director of Growth Marketing, GRAIL, Inc. We expect Mr. Della Porta will testify about GRAIL’s business; oncology tests including GRAIL’s tests; efficiencies and procompetitive effects of the Proposed Transaction; and other topics relevant to the Complaint, Answer or any affirmative defenses, including facts and opinions expressed in his deposition transcript and any topics identified by Complaint Counsel as potential topics for his testimony.

THIRD PARTY WITNESS LIST

16. **Konstantin Fiedler** – Chief Operating Officer, Foundation Medicine, Inc. (“FMI”). We expect Dr. Fiedler will testify about the Proposed Transaction; Illumina’s relationship with FMI and Roche, including agreements between FMI and Roche; Dr. Fiedler’s declaration; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions

expressed in his deposition transcript, and any topics identified by Complaint Counsel as potential topics for his testimony.

17. **Lauren Silvis** – Senior VP, External Affairs, Tempus Labs, Inc. (“Tempus Labs”). We expect Ms. Silvis will testify about Tempus Labs’ business; its oncology products; the Proposed Transaction; supply agreement negotiations with Illumina, including the open offer and the standard contract for oncology customers; and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in her investigational hearing and deposition transcripts, and any topics identified by Complaint Counsel as potential topics for her testimony.
18. **Jorge Velarde** – Senior Vice President, Corporate Development and Strategy, Singular Genomics. We expect Mr. Velarde will testify about the Proposed Transaction; Singular’s S-1 filing and subsequent Initial Public Offering (“IPO”); Singular’s NGS platform and products in development; the ability to use Singular’s platforms and products in development for cancer screening applications; switching between Illumina’s platforms and Singular’s platforms for clinical applications and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his deposition transcript, and any topics identified by Complaint Counsel as potential topics for his testimony.
19. **Matthew Strom** – Managing Director, Morgan Stanley. We expect Mr. Strom will testify about any contemplated fundraising, IPO, or merger by GRAIL; Illumina and GRAIL’s royalty and supply agreement; efficiencies and procompetitive effects of the proposed transaction; and other topics relevant to the Complaint, Answer or any affirmative defenses, including facts and opinions expressed in his deposition transcript and any topics identified by Complaint Counsel as potential topics for his testimony.
20. **William Cance** – Chief Medical and Scientific Officer at the American Cancer Society. We expect Dr. Cance will testify about the American Cancer Society’s operations, current cancer screening methods, the importance of early cancer detection, innovation in cancer detection and treatments, the importance of customer choice, market definition, regulatory processes and approvals, and other topics relevant to the Complaint, Answer, or any affirmative defenses, including facts and opinions expressed in his declaration and deposition transcript and any topics identified by Complaint Counsel as potential topics for his testimony.

EXPERT WITNESS LIST

1. **Dennis Carlton** – Dennis Carlton is an industrial organization and antitrust economics expert. He will testify about economic issues, including the proposed transaction, finances, projections, strategic plans, pricing strategy and structure, cost structure, customer relationships and contract negotiations, the competitive effects of the proposed transaction, efficiencies arising from the

transaction and the procompetitive nature of the transaction, other topics relevant to the Complaint and Answer, any topics contained in his expert report(s) or deposition and any topics raised by Complaint Counsel's experts in their expert reports or depositions and will respond to any economic analysis or other arguments put forward by Complaint Counsel.

2. **Richard Cote** – Richard Cote is an expert on the field of cancer care, the area of test development for cancer screening and in the area of next-generation sequencing (“NGS”), and is a medical doctor. He will testify about cancer and cancer treatment, methods for cancer screening, the differences between different types of oncology tests in the cancer continuum, oncology tests on the market and in development, comparisons between such tests on the market and in development, the development timelines for such oncology tests, various platforms—both NGS and non-NGS—that can be used for such oncology tests, switching between different platforms for such oncology tests and the potential use of *in vitro* diagnostic (“IVD”) kitted tests for oncology testing. He will also testify regarding technical issues relating to the relevant market(s) alleged by Complaint Counsel, other topics relevant to the Complaint and Answer, any topics contained in his expert report(s) or deposition and any topics raised by Complaint Counsel's experts in their expert reports or depositions and will respond to any technical issues or other arguments put forward by Complaint Counsel, primarily focusing on issues relating to cancer screening and NGS technologies.
3. **Patricia Deverka** – Patricia Deverka is an expert on the field of health economics and outcomes research, focusing on the clinical adoption of genomics. She will testify about the process for obtaining private payor and Medicare/Medicaid coverage, including potential pathways for multi-cancer screening tests and Illumina's ability to accelerate that process for GRAIL's Galleri test, payor relationships, other topics relevant to the Complaint and Answer, any topics contained in her expert report(s) or deposition and any topics raised by Complaint Counsel's experts in their expert reports or depositions and will respond to any other arguments put forward by Complaint Counsel, primarily focusing on third party payor reimbursement and Medicare/Medicaid coverage for cancer screening tests.
4. **Margaret Guerin-Calvert** – Margaret Guerin-Calvert is an industrial organization, antitrust and healthcare economics expert. She will testify about issues relating to Illumina's open offer and standard contract for oncology, including Illumina's standard IVD terms, as a means to reduce or eliminate certain alleged potential anticompetitive effects raised by Complaint Counsel and Dr. Fiona Scott Morton, relating to Illumina's proposed acquisition of GRAIL; other topics relevant to the Complaint and Answer; any topics contained in her expert report(s) or deposition; and any topics raised by Complaint Counsel's experts in their expert reports or depositions and will respond to any economic analysis or other arguments put forward by

Complaint Counsel, primarily focusing on the open offer and other contractual terms from Illumina.

5. **Robert Willig** – Robert Willig is an industrial organization and antitrust economics expert. He will testify about the soundness and reliability of the relevant product market defined by Dr. Fiona Scott Morton, and her analysis in support of that definition, market participants’ conduct and whether their conduct is consistent with Complaint Counsel’s claim that there will be no viable substitutes for Illumina’s NGS platforms (from the standpoint of purported multi-cancer early detection (“MCED”) test developers), during the relevant time period, the bargaining model presented by Dr. Scott Morton, its applicability to the proposed merger, and its robustness, other topics relevant to the Complaint and Answer, any topics contained in his expert report(s) or deposition and any topics raised by Complaint Counsel’s experts in their expert reports or depositions and will respond to any economic analysis or other arguments put forward by Complaint Counsel, primarily focusing on the relevant product market from an economics standpoint, bargaining and theories of anticompetitive effects.
6. **Robert Rock**² – Robert Rock is an expert in financial accounting, contract compliance, and audit engagements. He will testify about the proposed transaction, customer relationships and contract negotiations; Illumina’s open offer, standard contract for oncology customers, and any other agreements, including the ability of an independent auditor or consultant to be effective in examining an entity’s compliance with various terms of contracts, performing agreed-upon procedures related to an entity’s compliance with specified terms and performing agreed-upon procedures related to an entity’s internal controls over compliance with specified terms; other topics relevant to the Complaint and Answer; any topics contained in his expert report(s) or deposition; and any topics raised by Complaint Counsel’s experts in their expert reports or depositions, and will respond to any accounting, compliance or audit analysis or other arguments put forward by the Complaint Counsel, primarily focusing on the open offer and other contractual terms from Illumina.
7. **Richard Abrams**³ – Richard Abrams is an expert in the field of primary and preventative care, and is a medical doctor. He will testify about current and anticipated cancer screening options, including purported MCED tests, the factors primary care physicians would consider prior to using a MCED test and whether the blood-based tests with other characteristics could substitute for GRAIL’s Galleri test and vice versa, other topics relevant to the Complaint and Answer; any topics contained in his expert report(s) or deposition; and any

² Pursuant to 16 CFR § 3.31A, Respondents intend to move for leave to call Robert Rock as an additional expert beyond the five expert witnesses permitted under the default rules.

³ Pursuant to 16 CFR § 3.31A, Respondents intend to move for leave to call Richard Abrams as an additional expert beyond the five expert witnesses permitted under the default rules.

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topics raised by Complaint Counsel's experts in their expert reports or depositions, and will respond to any analysis or arguments put forward by Complaint Counsel, primarily focusing on the factors primary care physicians would consider prior to using a MCED test.

Dated: July 23, 2021

Respectfully submitted,

/s/ Richard J. Stark
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CERTIFICATE OF SERVICE

I hereby certify that, on July 23, 2021, I caused to be delivered via email a copy of Complaint Counsel's Final Proposed Witness List to:

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

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

Complaint Counsel
U.S. Federal Trade Commission

Susan Musser
Dylan P. Naegele
David Gonen
Jonathan Ripa
Matthew E. Joseph
Jordan S. Andrew
Betty Jean McNeil
Lauren Gaskin
Nicolas Stebinger
Samuel Fulliton
Stephen A. Mohr
Sarah Wohl
William Cooke
Catherine Sanchez
Joseph Neely
Nicholas A. Widnell
Daniel Zach
Eric D. Edmonson

July 23, 2021

/s/ Richard J. Stark
Richard J. Stark

EXHIBIT I

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT J

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT K

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT L

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT M

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT N

CONFIDENTIAL - REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 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 & 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 & 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> |
|--|---|

/s/ J. Wells Harrell
 J. Wells Harrell

Counsel Supporting the Complaint