

**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

RESPONDENT GRAIL, LLC'S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN PORTIONS OF CHRISTOPHER DELLA PORTA'S TRIAL TESTIMONY

Respondent GRAIL, LLC (“GRAIL”) respectfully submits this motion under 16 C.F.R. § 3.45 for *in camera* treatment of confidential and competitively sensitive information in the August 25, 2021 trial transcript, in particular with respect to the testimony of Christopher Della Porta, GRAIL’s Director of Growth Strategy.

On August 25, 2021, Christopher Della Porta was called to testify on behalf of both Complaint Counsel and GRAIL. This Court granted provisional *in camera* treatment for a portion of this testimony. In this Motion, GRAIL provides details regarding the portions of Christopher Della Porta’s testimony requiring *in camera* treatment. As explained here and in the accompanying declaration of Marissa Lee Song, General Counsel of GRAIL (the “Song Declaration”), the portions of testimony identified in this motion represent the core of information that “will likely result in a clearly defined, serious injury” to GRAIL if publicized. 16 C.F.R. § 3.45(b).

I. LEGAL STANDARD

Parties to a Part 3 proceeding may move the Court to “obtain *in camera* treatment for material, or portions thereof, offered into evidence.” *Id.* *In camera* treatment is appropriate if public disclosure of the information is likely to “result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.” *Id.* “[M]aterial made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted.” 16 C.F.R. § 3.45(a). “Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.” *Id.*

In camera treatment may be granted if “public disclosure will likely result in a clearly defined, serious injury.” § 3.45(b). In considering whether to grant *in camera* treatment, the Court may consider (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others within the business; (3) the extent of measures taken to protect the information’s secrecy; (4) the value of the information to the business and its competitors; (5) the effort or investment made in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol Meyers Co.*, 90 F.T.C. 455, 456-57 (1977). *In camera* review may be appropriate not just for trade secrets and highly detailed cost data, but also for information in many ordinary-course business records “such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents.” *In re 1-800 Contacts, Inc.*, No. 9372, 2017 FTC LEXIS 55, at *5-6 (Apr. 4, 2017).

II. ARGUMENT

The testimony identified in this Motion contains sensitive information central and indispensable to GRAIL’s operations. GRAIL has a vested interest in preventing disclosure of this highly confidential testimony. Its publication would be catastrophic for GRAIL, allowing other entities to free-ride on GRAIL’s years of hard work, which would undermine GRAIL’s mission.

The below chart lists each category of testimony for which GRAIL seeks *in camera* treatment, the paragraph discussing each category in the Song Declaration, and the time period for which GRAIL requests *in camera* treatment. Exhibit 2 contains excerpts of the transcript, with yellow highlighting to indicate which portions should remain *in camera*. A majority of the portions of Christopher Della Porta’s testimony listed in Exhibit 1 are related to documents for which this Court has already granted *in camera* treatment in its Order dated September 3, 2021. *See* Order On GRAIL’s Third Mot. For *In Camera* Treatment, at 2-3.

Category	Song Declaration	Time period for <i>In Camera</i> Treatment
Sales and Marketing Strategy	¶7	See Exhibit 1
Strategic Initiatives	¶8	

A. Sales and Marketing Strategy

Recent detailed information regarding GRAIL’s strategy and considerations related to sales and marketing warrant *in camera* treatment. *See 1-800 Contacts*, 2017 FTC LEXIS 55, at *11 (protecting documents containing “marketing and bidding strategies”).

By way of example, this category includes testimony that provides insight on GRAIL’s commercial planning related to which distribution channels GRAIL plans to target and why, identifies specific potential customers that GRAIL has approached or intends to approach in the future, and discloses GRAIL’s sales strategy for approaching these customers. Disclosure of this

confidential testimony would provide GRAIL's potential future competitors with previously unavailable details about GRAIL's sales and marketing strategies, which they could use in their own negotiations with retailers or as they consider marketing plans to compete with GRAIL. Moreover, disclosure could undermine GRAIL's relationships and negotiating positions with its customers, resulting in competitive and commercial harm to GRAIL. Because GRAIL would experience a clearly defined, serious injury if the information on sales and marketing strategies in Christopher Della Porta's testimony were publicly disclosed, GRAIL respectfully requests five years of protection for such testimony. Five years of protection, as noted in Exhibit 1, is warranted for information in this category due to the nascent nature of GRAIL's products and is consistent with the level of protection granted to the documents underlying much of this testimony. *See Order On GRAIL's Third Mot. For In Camera Treatment*, at 2-3. *See also In re E.I. DuPont de Nemours & Co.*, 151 F.T.C. 679, 680 (2011) (granting ten year *in camera* protection for unique information whose competitive utility was not likely to diminish due to the characteristics of the industry at issue).

B. Strategic Initiatives

Strategic initiatives contain confidential information about the company's strategic direction and also require *in camera* treatment. *See In re McWane Inc.*, No. 9351, 2012 FTC LEXIS 143, at *7-8 (Aug. 17, 2012) (protecting documents "which contain . . . business strategies, and negotiating strategies"). Disclosure of this information could result in serious injury to GRAIL because it would reveal GRAIL's internal analyses of its business and provide direct insight into the company's deliberative process with respect to strategic initiatives.

Because GRAIL would experience a clearly defined, serious injury if the information on strategic initiatives were publicly disclosed, GRAIL respectfully requests five years of protection for such testimony, as listed in Exhibit 1, due to the nascent nature of the multi-cancer early

detection test industry and the potentially long time horizon before other potential test developers bring any cancer screening tests to market. *See, e.g., E.I. DuPont de Nemours*, 151 F.T.C. at 680 (granting ten year *in camera* protection for unique information whose competitive utility was not likely to diminish due to the characteristics of the industry at issue). Five years of *in camera* treatment is consistent with the length of *in camera* treatment this Court granted for the exhibits underlying much of this testimony. *See Order On GRAIL's Third Mot. For In Camera Treatment*, at 2-3.

III. CONCLUSION

Given the serious risk that public disclosure of certain portions of Christopher Della Porta's trial testimony would cause to GRAIL's business, GRAIL respectfully requests an *in camera* order to protect the trial testimony listed in Exhibit 1 to the Song Declaration from public disclosure.

Dated: September 14, 2021

Respectfully submitted,

/s/ Anna M. Rathbun
Michael G. Egge
Marguerite M. Sullivan
Anna M. Rathbun
David L. Johnson
LATHAM & WATKINS LLP,
555 Eleventh Street NW
Suite 1000
Washington, D.C. 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
Michael.Egge@lw.com
Marguerite.Sullivan@lw.com
Anna.Rathbun@lw.com
David.Johnson@lw.com

Alfred C. Pfeiffer
505 Montgomery Street
Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
Al.Pfeiffer@lw.com

Marcus Curtis
12670 High Bluff Drive
San Diego, CA 92130
Telephone: (858) 509-8465
Marcus.Curtis@lw.com
Attorneys for Respondent
GRAIL, LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting 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:

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

Counsel for Respondent Illumina, Inc.

Cravath, Swaine & Moore LLP

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

Jesse M. Weiss
Michael J. Zaken

Counsel for Respondent GRAIL, LLC

Latham & Watkins LLP

Michael G. Egge
Marguerite M. Sullivan
Alfred C. Pfeiffer, Jr.
Anna M. Rathbun
David L. Johnson
Marcus Curtis

September 14, 2021

/s/ Anna M. Rathbun

Anna M. Rathbun

**UNITED STATES OF AMERICA
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[PROPOSED] ORDER

Upon consideration of Respondent GRAIL, LLC's ("GRAIL") motion for *in camera* treatment of certain portions of Christopher Della Porta's trial testimony, it is hereby

ORDERED, that GRAIL's motion is GRANTED, and it is further

ORDERED, that pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), the testimony identified in Exhibit 1 to the Motion, shall be subject to *in camera* treatment and will be kept confidential and not placed on the public record of this proceeding.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge

**UNITED STATES OF AMERICA
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**DECLARATION OF MARISSA LEE SONG IN SUPPORT OF RESPONDENT
GRAIL, LLC'S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN PORTIONS
OF CHRISTOPHER DELLA PORTA'S TRIAL TESTIMONY**

I, Marissa Lee Song, declare as follows:

1. I am the General Counsel and Corporate Secretary at GRAIL, LLC ("GRAIL"), a defendant in the above-listed action. I have been employed by GRAIL since September 29, 2019.

2. I make this declaration in support of GRAIL's motion for *in camera* review of certain portions of Christopher Della Porta's trial testimony. GRAIL seeks *in camera* treatment for the trial testimony identified in Exhibit 1, which is also attached in Exhibit 2. The portions of the testimony for which GRAIL seeks *in camera* treatment are highlighted in yellow. I have personal knowledge of the competitive significance and confidential nature of this testimony. Based on my review of Exhibit 1, my knowledge of GRAIL's business, and my knowledge of the confidential nature of these documents, I respectfully submit that disclosure of the testimony listed in Exhibit 1 to the public would result in a clearly defined, serious injury to GRAIL.

3. In the ordinary course of business, GRAIL treats this information as strictly confidential and limits its disclosure to employees that need to know it to perform their business functions. GRAIL also takes reasonable steps to protect its network and electronically stored information to prevent access by outside parties.

4. The Motion is narrowly tailored to protect GRAIL's confidential information. GRAIL's counsel carefully reviewed the testimony and provided me with the portions identified in Exhibit 1. I reviewed Exhibit 1, and GRAIL's outside counsel described to me the approach used to identify the testimony listed on Exhibit 1 and the relevant categories.

5. GRAIL has grouped the testimony listed in Exhibit 1 into the following categories:

- a. Sales and Marketing Strategy
- b. Strategic Initiatives

6. Each category describes testimony that discloses confidential and competitively sensitive information. Third parties with access to this information would gain a significant business advantage at the expense of GRAIL. Exhibit 1 identifies the specific page and line number of the relevant testimony, a description of the relevant category of information, any document that pertains to the relevant portion of testimony and for which this Court has already granted *in camera* treatment in its Order dated September 3, 2021, and denotes the duration of *in camera* treatment sought.

7. **Sales and Marketing Strategy:** The testimony in this category contains detailed information regarding GRAIL's strategy and considerations related to sales and marketing to patients, physicians, and payors. This testimony provides insight as to how GRAIL intends to sell the first-of-its-kind multi-cancer screening test, Galleri, and other products in development in various channels and its plans to scale its tests to achieve wide range adoption. These materials serve as the basis for GRAIL's business plans, and disclosure of this confidential testimony would

provide third parties with previously unavailable details about GRAIL's current and future sales and marketing strategies, which they could use in their own negotiations with the various stakeholders described above. Because GRAIL would experience a clearly defined, serious injury if the information on sales and marketing strategy in this testimony were publicly disclosed, this information should remain confidential for five years.

8. **Strategic Initiatives:** The testimony in this category contains information on strategic initiatives that are currently or were recently considered by GRAIL. This testimony reflects confidential information regarding GRAIL's strategic direction. Disclosure of this information could result in serious injury to GRAIL because it would reveal GRAIL's internal analyses of its business and provide direct insight into the company's deliberative process with respect to strategic initiatives. Although GRAIL has been acquired by Illumina, Inc. the Federal Trade Commission is seeking to unwind the deal. In the event that the transaction is unwound, the information contained in this testimony would retain their significance to GRAIL. Moreover, disclosure of this information could negatively impact GRAIL's position in future corporate transactions or financing efforts in the event of a divestiture. Because GRAIL would experience a clearly defined, serious injury if the information on strategic initiatives contained in the testimony were publicly disclosed, the information should remain confidential for five years.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I executed this declaration on September 13, 2021, in Los Altos, California.



Marissa Lee Song

Exhibit 1

PUBLIC RECORD

FILED *IN CAMERA*

Exhibit 2

PUBLIC RECORD

FILED *IN CAMERA*