PUBLIC

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

In the Matter of **Illumina, Inc.,** **a corporation** **and** **GRAIL, Inc.,** **a corporation,** **Respondents**	**DOCKET NO. 9401**

RESPONDENTS' MOTION IN LIMINE TO EXCLUDE IMPROPER LAY WITNESS OPINION TESTIMONY

Respondents Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") (collectively, the "Respondents") respectfully submit this motion *in limine* for an Order excluding improper lay witness opinion testimony contained in both the investigational hearing transcripts listed on Complaint Counsel's Final Proposed Exhibit List as PX7040 through PX7073 and the deposition transcripts listed on Complaint Counsel's Final Proposed Exhibit List as PX7074 through PX7124 (collectively, the "Transcripts").[1]

Consider the following, which appears in PX7040—the transcript of [redacted] investigational hearing—from the first Transcript on Complaint Counsel's proposed exhibit list:

[redacted]

[1] Attached as Appendix A is a table providing the specific ranges of the transcripts Complaint Counsel designated that Respondents seek to exclude as objectionable.

[redacted]

That is classic expert opinion testimony: hypothetical questions followed by [redacted] But this testimony ***did not come from an expert***—it came from [redacted] and it came from an *ex parte* investigational hearing at which Respondents were not permitted even to attend, much less object. Complaint Counsel did not designate [redacted] as an expert nor did they produce any expert report by [redacted]. Nonetheless, Complaint Counsel now seek to offer this exchange, along with extensive additional opinion testimony from lay witnesses, into evidence.

Such evidence runs afoul of this Court's Scheduling Order ("Order"), prohibiting "[w]itnesses not properly designated as expert witnesses" from "provid[ing] opinions beyond what

[2] [redacted]

is allowed in" Rule 701 of the Federal Rules of Evidence. (Order ¶ 17.) The Administrative Law Judge should limit opinion testimony at trial only to experts whom the FTC has properly disclosed.

ARGUMENT

I. The Lay Opinion Testimony in the IH and Deposition Transcripts Should Be Excluded.

The Order provides that Rules 602 and 701 of the Federal Rules of Evidence apply to this proceeding. (Scheduling Order, ¶¶ 16, 17.) Rule 602 provides that a lay witness "may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter". In addition, a lay witness may offer opinion testimony ***only if*** it is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702", which pertains to expert witnesses. Fed. R. Evid. 701; *see also* Fed. R. Evid. 702. The proponent of lay opinion testimony has the burden of establishing the testimony meets all three foundational requirements. *See, e.g.*, *United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. 2005). This Court should exclude the portions of the Transcripts identified in Appendix A, which contain lay opinion testimony that is not based on the witnesses' own perception, but rather on speculation and hearsay, and because it is impermissibly based on technical and specialized knowledge.

A. Lay Opinion Testimony That Is Impermissibly Speculative Should Be Excluded.

A witness presenting lay opinion testimony must have the requisite personal knowledge about the facts to which the witness is testifying. Fed. R. Evid. 701. "A lay witness's opinion testimony necessarily draws on the witness's own understanding, including a wealth of personal information, experience, and education". *United States v. Lloyd*, 807 F.3d 1128, 1154 (9th Cir. 2015) (cleaned up). But a lay witness may not speculate. *Id.* Nor may a lay witness

answer hypothetical questions. *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993); *cf.* Fed. R. Evid. 703 & advisory committee's note (providing that an expert may rely on facts or data that may otherwise be inadmissible and may be derived from a "hypothetical question").

The Transcripts are replete with testimony elicited by Complaint Counsel that relies on ***nothing more*** than speculation,[3] illustrated in the following examples from four of the next Transcripts offered by the FTC:[4]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

Much of Complaint Counsel's examination strategy appears to have been driven by a desire to get third parties to speculate about negative future actions that Respondents might hypothetically take. For example, Complaint Counsel asked [redacted]

[3] The exchange cited in the introduction is only one example of many speculative lines of questioning at [redacted] investigational hearing. *See* App'x A at PX7040.
[4] All emphasis added.

[redacted][5] to opine on [redacted]

[redacted]—an opinion that can in no way be based on [redacted] personal experience and must be purely based on speculation and conjecture.

Other speculative testimony pertained to [redacted]

Even a cursory review of the Transcripts reveals that they are full of improper hypothetical questions. For example:[12]

- [redacted]
- [redacted]
- [redacted]

[5] [redacted]
[6] [redacted]
[7] [redacted]
[8] [redacted]
[9] [redacted]
[10] *Id.* at 127:5.
[11] *Id.* at 126:17–18.
[12] All emphasis added.

- [redacted]
- [redacted]
- [redacted]

"[T]he ability to answer hypothetical questions is the essential difference between expert and lay witnesses", *Henderson*, 409 F.3d at 1300 (cleaned up), and Complaint Counsel failed to comply with the expert disclosure requirements for any of the witnesses examined in the Transcripts. Accordingly, the Court should exclude from the record the portions of the Transcripts identified in Appendix A.

B. Lay Opinion Testimony That Relies on Hearsay Should Be Excluded.

Although an expert witness may rely on hearsay and the experiences of others in the expert's field[13], a lay witness may not. *See, e.g.*, Fed. R. Evid. 701; Fed. R. Evid. 703, advisory committee note[14]; *Daubert*, 509 U.S. at 592 (explaining that expert witnesses may rely on "the

[13] Edward J. Imwinkelried, *Distinguishing Lay from Expert Opinion: The Need to Focus on the Epistemological Differences Between the Reasoning Processes Used by Lay and Expert Witnesses*, 68 SMU L. Rev. 73, 88–89 (2015).

[14] The advisory committee note explains,

> Thus, a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives,

knowledge and experience of his [or her] discipline"); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) (characterizing *Daubert* as recognizing that expert witnesses have "testimonial latitude unavailable to other witnesses"). Despite this prohibition, witnesses not designated as experts by Complaint Counsel repeatedly and impermissibly relied on such hearsay—*e.g.*, "market research"[15]; "behavioral research"[16]; and "analyst reports"[17]. Accordingly, this Court should find their testimony inadmissible as hearsay.

C. Lay Opinion Testimony That Is Impermissibly Technical and Specialized Should Be Excluded.

Expert testimony may be based on the expert's "scientific, technical, or other specialized knowledge", while lay testimony may not. *Compare* Fed. R. Evid. 702, *with* Fed. R. Evid. 701.

Testimony pertaining to the scope of competition and the market for purposes of antitrust law is technical, specialized and consequently expert in nature, and therefore inadmissible when offered by a lay witness. *See, e.g.*, *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991) (rejecting testimony regarding market definition because there was no evidence that they "were experts qualified to opine on a highly technical economic question"); *see also Kentucky Speedway, LLC v. Nat'l Assoc. of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 919 (6th Cir. 2009) (rejecting use of lay testimony relating to relevant market because it "does not provide a sound economic basis for assessing the market"); *Colsa Corp. v. Martin Marietta Servs.*, 133 F.3d 853, 855 n.4 (11th Cir. 1998) (rejecting testimony regarding

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> reports and opinions from nurses, technicians and other doctors, hospital records, and X rays.

Fed. R. Evid. 703, advisory committee note.

[15] [redacted]

[16] *Id.* at 168:2.

[17] *Id.* at 173:10.

market definition as "lay opinion testimony" and noting that "[c]onstruction of a relevant economic market or a showing of monopoly power in that market cannot . . . be based upon lay opinion testimony" (alteration in original)); *Water Craft Mgmt., L.L.C. v. Mercury Marine*, 361 F. Supp. 2d 518, 543 (M.D. La. 2004) ("[D]efining a relevant market requires expert identification of both the product at issue and the geographic market for that product."); *Cogan v. Harford Mem'l Hosp.*, 843 F. Supp. 1013, 1020 (D. Md. 1994) ("To allow a jury to make a finding as to the geographic market, [plaintiff] must provide the Court with expert testimony on this highly technical economic question."). Although such evidence is inadmissible, Complaint Counsel consistently attempted to elicit testimony, throughout the Transcripts, pertaining to market dynamics and competitive effects—*e.g.*, price, quality and innovation—from witnesses not designated as experts.[18]

D. This Court Should Reject the Challenged Testimony as Precluded by the Scheduling Order.

Testimony that relies on hearsay or that is technical and specialized is not *per se* inadmissible. It may be admissible when properly offered by an expert. However, this Court's Order made clear that "[w]itnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701." (Order ¶ 17.) Complaint Counsel did not designate as experts any of the nonparty witnesses examined in the Transcripts. This Court should accordingly reject Complaint Counsel's offer of the Transcripts into evidence. *See In re LabMD, Inc.*, F.T.C. Docket No. 9357 at 4 (May 8, 2014 Order, Ex. A hereto) (Chappell, J.) (excluding opinion testimony where "Complaint Counsel did not list Mr. Johnson as an expert witness,

[18] *See, e.g.*, [redacted]

provide an expert report for Mr. Johnson, or comply with the other expert disclosure requirements of FTC Rule 3.31A").

CONCLUSION

For the foregoing reasons, the Court should preclude Complaint Counsel's introduction of lay witness opinion testimony at trial.

Dated: August 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 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:

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August 5, 2021

/s/ Karl C. Huth
Karl C. Huth

Appendix A

Exhibit (Witness)	Objectionable Testimony
PX 7040 [redacted]	127:11–128:17; 130:12–131:2; 144:5–147:10; 161:2–169:8; 170:24–175:6
PX 7041 [redacted]	99:4–109:4; 143:20–148:4
PX 7042 [redacted]	102:5–20; 127:22–135:20; 136:24–138:14
PX 7044 [redacted]	130:14–132:20
PX 7045 [redacted]	73:17–75:23; 88:1–21; 102:10–25; 105:5–110:25; 118:12–119:21
PX 7046 [redacted]	96:8–106:19
PX 7047 [redacted]	133:13–138:12; 146:2–12; 153:16–154:15
PX 7050 [redacted]	123:12–127:24; 189:3–193:5; 259:1–261:23
PX 7053 [redacted]	86:16–88:1; 88:20–91:25
PX 7055 [redacted]	139:4–140:2; 144:22–145:12
PX 7058 [redacted]	120:24–121:5; 151:7–154:10; 161:14–162:23; 164:25–166:15; 168:15–169:15; 170:5–170:18; 171:5–171:20; 174:24–188:3; 240:2–18; 246:5–249:15
PX 7074 [redacted]	126:11–128:6; 154:3–156:13; 153:9–159:3; 177:10–178:5
PX 7080 [redacted]	51:16–52:22
PX 7085 [redacted]	198:13–199:11
PX 7100 [redacted]	60:21–61:6; 78:20–83:1
PX 7105 [redacted]	38:13–41:8; 238:15–239:14; 240:18–241:18
PX 7109 [redacted]	222:1–224:6
PX 7094 [redacted]	221:25–223:9
PX 7110 [redacted]	70:16–71:1
PX 7111 [redacted]	51:21–52:10; 55:18–56:6
PX 7077 [redacted]	25:15–28:22
PX 7116 [redacted]	78:23–81:4
PX 7121 [redacted]	66:17–71:8

PUBLIC

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

DECLARATION OF KARL HUTH

I, Karl Huth, declare and state:

1. I am a partner at Huth Reynolds LLP and counsel for Respondent Illumina, Inc. ("Illumina") in this matter.

2. I make this declaration pursuant to 28 U.S.C. § 1746 in support of Respondents' Motion *In Limine* to Exclude Improper Lay Witness Opinion Testimony.

3. Attached hereto as Exhibit A is a true and correct copy of *In re LabMD*, F.T.C. Docket No. 9357 (May 8, 2014 Order).

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 5, 2021.

Respectfully submitted,

/s/ Karl Huth
Karl Huth

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
LabMD, Inc.,	)	DOCKET NO. 9357
a corporation,	)	
Respondent.	)	

ORDER GRANTING MOTION *IN LIMINE* TO LIMIT THE TESTIMONY OF ERIC JOHNSON

On April 22, 2014, Respondent Lab MD, Inc. filed a Motion *in Limine* to Limit the Testimony of Eric Johnson ("Motion"). Specifically, Respondent seeks an order prohibiting Mr. Johnson's testimony on the subject of "the consequences of inadvertent disclosures of consumers' personal information." Federal Trade Commission ("FTC") Complaint Counsel filed its Opposition on April 29, 2014 ("Opposition"). Having fully reviewed and considered the Motion and Opposition, and all assertions and arguments therein, the Motion is GRANTED, as explained below.

I.

The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, engaged in an unfair trade practice in violation of Section 5(a) of the FTC Act by engaging in a number of data security practices that, "taken together, failed to provide reasonable and appropriate security for personal information on [Respondent's] computer networks," which conduct caused, or is likely to cause, substantial injury to consumers. Complaint ¶¶ 10, 22-23. Respondent's Answer denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23.

In Complaint Counsel's Final Proposed Witness List, served on March 26, 2014, Complaint Counsel lists as a fact witness Mr. Eric Johnson, Dean of Owen Graduate School of Management, Vanderbilt University, and states that he is expected to testify about:

> facts related to his study entitled "Data Hemorrhages in the Health-Care Sector," including his research methodology and findings; the "P2P insurance aging file" referenced in Paragraph 17 of the Complaint; facts relating to the security incident alleged in Paragraphs 17-20 of the Complaint; peer-to-peer file sharing applications and networks and ***the consequences of inadvertent disclosures of***

> ***consumers' personal information***; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel as to which he has knowledge; or any other matters as to which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

Opposition, Ex. C, Complaint Counsel's Final Proposed Witness List, at 16 (emphasis added).[1]

Respondent asserts that Complaint Counsel improperly intends to elicit expert testimony from Mr. Johnson, a lay witness whom Complaint Counsel has not designated as an expert witness. Motion at 1. Respondent contends that testimony about the "consequences of inadvertent disclosures of consumers' personal information" constitutes impermissible expert opinion because the opinion would necessarily be based upon the results of Mr. Johnson's academic research into data breaches, rather than his own personal knowledge. Thus, Respondent argues, the proffered testimony regarding the potential "consequences" that could befall generalized "consumers" through "inadvertent disclosures," constitutes the type of opinion that can only be given by an expert witness. *Id.* at 2-3. Because Complaint Counsel did not designate Mr. Johnson as an expert witness in this matter, the argument continues, such expert opinion testimony should be precluded. Moreover, Respondent argues that LabMD would be substantially prejudiced if Complaint Counsel were permitted to bypass the rules designed to ensure not only that expert testimony is reliable, but also that the opposing party has fair notice and opportunity to probe a witness offering expert testimony in order to be able to rebut his conclusions. *Id.* at 3.

Complaint Counsel contends that the facts related to Mr. Johnson's Health-Care Sector Data Hemorrhages Study, including his research methodology and findings and the consequences of inadvertent disclosures of personal information, constitute relevant and admissible lay testimony, because the testimony is based on Mr. Johnson's own personal knowledge in conducting the study. Opposition at 5. Complaint Counsel argues also that Respondent's motion should be denied because Respondent fails to identify any specific testimony that it seeks to exclude or demonstrate that such unspecified testimony is clearly inadmissible on all potential grounds; that Respondent waived any argument that Mr. Johnson's testimony lacks foundation by not objecting to it during his deposition; and that Respondent failed to meet and confer about its objection to Complaint Counsel's introduction of Mr. Johnson's testimony. *Id.*

II.

As set forth in the Order Denying Respondent's recent Motion *in Limine* to Strike Trial Witness, issued May 1, 2014, a "motion *in limine*" refers "to any motion, whether made before

[1] Respondent has also listed Mr. Johnson on its Final Proposed Witness List and indicates that it intends to call Mr. Johnson to testify to: "the facts underlying his study entitled 'Data Hemorrhages in the Health-Care Sector'; communications with the FTC, Tiversa, and/or Health and Human Services regarding LabMD, the 1718 file and his research methodology in general and specifically in relation to locating and downloading the 1718 [file]; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer." Opposition, Ex. D at 3.

or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp.*, 1999 FTC LEXIS 207, at *1 (Aug. 5, 1999).

> Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, No. 96 C 1982, 1998 U.S. Dist. LEXIS 15431, at *6 (N.D. Ill. February 28, 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, I*nc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL)(AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).

In re POM Wonderful LLC, 2011 FTC LEXIS 79, at *6-8 (May 6, 2011).

"Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009); *accord In re Gemtronics, Inc.*, 2009 FTC LEXIS 121, at *6-7 (May 26, 2009).

III.

The Scheduling Order entered in this case on September 25, 2013, adopts Federal Rule of Evidence 701, which provides that "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701; Scheduling Order, Additional Provision 18. The Scheduling Order also adopts Federal Rule of Evidence 602, which states that witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Fed. R. of Evid. 602; Scheduling Order, Additional Provision 17. The Advisory Committee Note explains that this requires a witness to "be a percipient witness whose testimony is grounded in first-hand information obtained through one of his or her five senses." *405 Condo Assocs LLC. v. Greenwich Ins. Co.*, 2012 U.S. Dist. LEXIS 181922, *13 (S.D.N.Y. Dec. 26, 2012); Fed. R. Evid. 602, Advisory Committee Note.

Rule 701 generally does "not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (citation omitted). When Rule 701 was amended to emphasize that lay

opinion testimony is limited to observations that are "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702" the Advisory Committee Notes explained:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.

Fed. R. Evid. 701, 2000 Advisory Committee Note; *U.S. v. Conn*, 297 F.3d 548, 553 (7th Cir. 2002).

When testimony is based on scientific, technical, or other specialized knowledge, it falls under Rule 702, which states that a witness who is "qualified as an expert by knowledge, skill, experience, training, or education" may testify to "scientific, technical or other specialized knowledge" in the form of opinion or otherwise where such knowledge "would assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Rule 702 thus requires that expert testimony be the product of reliable principles and methods. Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593-94 (1993) (listing factors to guide courts in assessing reliability); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (*Daubert's* "gatekeeping" obligation applies not only to "scientific" expert testimony, but to all kinds of expert testimony). "Unlike a lay witness under Rule 701, an expert can answer hypothetical questions and offer opinions not based on first-hand knowledge because his opinions presumably 'will have a reliable basis in the knowledge and experience of his discipline.'" *Sinkovich*, 232 F.3d at 204 (*quoting Daubert*, 509 U.S. at 592). In addition, a witness who presents testimony that falls under Rule 702 must be designated as an expert, as a matter of fundamental fairness, to prevent lay witness opinions being offered without compliance with all the expert witness disclosure requirements set forth in FTC Rule 3.31A, which enable a determination of the reliability of the expert's opinions. Fed. R. Evid. 701, 2000 Advisory Committee Note (*citing* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process")).

IV.

It is undisputed that Complaint Counsel did not list Mr. Johnson as an expert witness, provide an expert report for Mr. Johnson, or comply with the other expert disclosure requirements of FTC Rule 3.31A. Complaint Counsel argues that Mr. Johnson is a fact witness and the testimony it seeks to elicit from Mr. Johnson is based on his "personal knowledge from conducting the study." Opposition at 5. However, even if Mr. Johnson has "personal knowledge" regarding the study, the findings and conclusions Mr. Johnson has reached regarding the "consequences of" data disclosure constitute his opinions, are based on his analysis of data generated by the study, and to this extent, Complaint Counsel's argument runs counter to *Certain Underwriters at Lloyd's v. Sinkovich*, 232 F.3d 200 (4th Cir. 2000). There, the district court admitted several statements from a witness regarding a vessel involved in an accident and conditions surrounding the accident. On appeal, the Court of Appeals for the Fourth Circuit

found that the witness "did not have any first-hand knowledge of the accident nor were his conclusions ones that a normal person would form based upon his perceptions." *Id.* at 204. Instead, the witness's "sole basis of knowledge concerning the accident derived from his investigation and his analysis of the data he collected." *Id.* The court found, "as a lay, not expert, witness, he lacked the personal knowledge necessary to express the opinions that he did . . . and his answers [to certain questions] exceed[ed] the scope of common experience." *Id.* Accordingly, the Court of Appeals held that the district court erred in admitting the witness's lay opinion. *Id. See also Medtronic, Inc. v. Boston Scientific Corp.*, 2002 U.S. Dist. LEXIS 28355, *74-75 (D. Minn. Aug. 8, 2002) (distinguishing opinion based on facts that can be perceived through one of the five senses, from opinion based on facts that must be inferred). Similarly, in the instant case, Mr. Johnson's knowledge concerning "the consequences of inadvertent disclosures of consumers' personal information" is derived from an analysis of data he collected, which data, in turn, reflects events and circumstances of which he has no personal knowledge. Under these circumstances, Mr. Johnson's conclusions regarding the harm resulting from data disclosure is not based upon facts he perceived with his own senses and is not fairly characterized as "rationally based on [Mr. Johnson's] perception." In addition, this analysis is necessarily based on information that Mr. Johnson obtained from statements of persons who will not be present to testify in this case, and thus are not subject to cross examination. The truth of those underlying statements cannot and will not be presumed.

Furthermore, it appears that if Mr. Johnson has formed an opinion on "the consequences of inadvertent disclosures of consumers' personal information," he has done so based on his scientific, technical, or other specialized knowledge, in formulating a study, collecting data, analyzing the data, and drawing conclusions based on that data. In *General Steel Domestic Sales v. Chumley*, 2012 U.S. Dist. LEXIS 55678 (April 20, 2012), where a party sought to introduce opinion from a witness who specialized in internet search engine marketing and forensic information technology analysis on degree of brand recognition, the court found the subject matter to be clearly "scientific, technical, or other specialized knowledge" "that would not be understood by an ordinary person" and thus found the witness's testimony was inadmissible lay opinion testimony pursuant to Fed. R. Evid. 701. *Id.* at*7. *Accord Water Pik, Inc*., 2012 U.S. Dist. LEXIS 1373, at *6-7 (D. Colo. 2012) (finding the same with respect to a witness who provided testimony based on "his extensive financial analysis expertise" and who "describe[d] the methods of analysis and calculations utilized and the results he obtained"); *Gunkel v. Robbinsville Custom Molding, Inc.*, 2013 U.S. Dist. LEXIS 4020, *29 (W.D.N.C. Jan. 10, 2013) (citation omitted) (Where plaintiff sought to introduce evidence through a witness "based on his credentials and training as an engineer, not his observations as a lay person," the court excluded his testimony, noting "'[h]is post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701.'"). Because Mr. Johnson's findings and conclusions regarding "the consequences of inadvertent disclosures of consumers' personal information," are clearly based on Mr. Johnson's "scientific, technical, or other specialized knowledge," such testimony is inadmissible lay opinion under Fed. R. Evid. 701(c) and the Scheduling Order in this case.

V.

Complaint Counsel's other objections to Respondent's Motion are addressed as follows.

First, Complaint Counsel contends that Respondent has failed to identify any specific testimony that it seeks to exclude. This objection is rejected. Respondent has clearly identified the specific testimony that it seeks to exclude: Mr. Johnson's "expert opinions on the subject of 'the consequences of inadvertent disclosures of consumers' personal information.'" Motion at 4.

Second, Complaint Counsel objects that Respondent has failed to demonstrate that such testimony is clearly inadmissible on all potential grounds. As stated above, "[e]vidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds" and courts "may reserve judgment until trial, so that the motion is placed in the appropriate factual context." *In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at *6-8 (citations omitted). As explained above, if a witness's testimony is based on scientific, technical, or other specialized knowledge within the scope of Rule 702 and has not been "scrutinized under the rules regulating expert opinion," Fed. R. Evid. 701, 2000 Advisory Committee Note, it is not reliable. Under FTC Rule 3.43(b), "[i]rrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. § 3.43(b). To be clear, because unreliable evidence shall be excluded, Mr. Johnson's opinions on "the consequences of inadvertent disclosures of consumers' personal information" is clearly inadmissible on all potential grounds and no trial context is necessary to resolve this issue.

Third, Complaint Counsel argues that Respondent waived any argument that Mr. Johnson's testimony lacks foundation by not objecting to it during his deposition. Mr. Johnson's opinion on the subject of the consequences of inadvertent disclosures of consumers' personal information is inadmissible because it is impermissible lay opinion, not because of lack of foundation. Accordingly, Complaint Counsel's argument that Respondent waived any argument based on lack of foundation by failing to make such objection at the deposition is without merit.

Fourth, Complaint Counsel's charge that Respondent failed to meet and confer about its objection to Complaint Counsel's introduction of Mr. Johnson's testimony is also without merit. A review of both the Motion and the Opposition reveals numerous communications between the parties on this subject.

VI.

For the reasons set forth above, Respondent's Motion is GRANTED. Complaint Counsel is hereby precluded from eliciting testimony from Mr. Johnson on the subject of "the consequences of inadvertent disclosures of consumers' personal information."

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: May 8, 2014

PUBLIC

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

STATEMENT IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE IMPROPER LAY WITNESS OPINION TESTIMONY

Pursuant to Paragraph 4 of the Scheduling Order entered on April 26, 2021, Respondents hereby represent that counsel for the moving parties has conferred with Complaint Counsel by email in an effort in good faith to resolve by agreement issues raised by the motion. The parties corresponded by email on August 4 and August 5, 2021 to discuss a potential agreement with respect to the evidence that Respondents seek to exclude in this motion, but were unable to reach an agreement.

Dated: August 5, 2021

Respectfully submitted,

/s/ Karl Huth
Karl Huth
Huth Reynolds LLP

PUBLIC

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

[PROPOSED] ORDER ON RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE IMPROPER LAY WITNESS OPINION TESTIMONY

On August 5, 2021, Respondents filed a Motion *In Limine* to Exclude Improper Lay Witness Opinion Testimony pursuant to Commission Rule 3.43(b) and this Court's Scheduling Order. Having considered Respondents' Motion and attached Exhibit, it is hereby ORDERED that Respondents' motion is GRANTED. Complaint Counsel is precluded from introducing the testimony identified in Appendix A of Respondents' motion, and contained in the investigational hearing transcripts listed on Complaint Counsel's Final Proposed Exhibit List as PX7040 through PX7073 and the deposition transcripts listed on Complaint Counsel's Final Proposed Exhibit List as PX7075 through PX7124.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: