

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

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| In the Matter of |) | |
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| Illumina, Inc., |) | |
| a corporation, |) | Docket No. 9401 |
| |) | |
| and |) | |
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| GRAIL, Inc., |) | |
| a corporation, |) | |
| |) | |
| Respondents. |) | |
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**ORDER ON RESPONDENT GRAIL, INC.’S
THIRD MOTION FOR *IN CAMERA* TREATMENT**

I.

By Orders issued August 12 and August 24, 2021, the original motion and the second motion for *in camera* treatment filed by Respondent GRAIL, Inc. (“Respondent” or “GRAIL”) were denied without prejudice, with leave to refile (“August 12 and August 24 Orders”). The August 12 and August 24 Orders directed GRAIL to thoroughly review all documents for which it seeks *in camera* treatment, and to strictly narrow its requests in any subsequent motion to only those documents that comply with the Commission’s strict standards for *in camera* treatment.

On August 28, 2021, GRAIL filed a third Motion for *in Camera* Treatment of Certain Trial Exhibits (“Motion”). Federal Trade Commission Complaint Counsel filed an opposition to the Motion on September 1, 2021. On September 2, 2021, GRAIL filed a motion for leave to file a reply in support of its Motion, together with a proposed reply (“Reply”). The motion for leave to file a reply is GRANTED. The Motion for *In Camera* Treatment is DENIED WITHOUT PREJUDICE.

II.

After setting forth the standards by which motions for *in camera* treatment are evaluated, both the August 12 and August 24 Orders determined that the sheer number of

documents for which GRAIL sought *in camera* treatment far exceeded the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45. In the instant Motion, GRAIL has pared down its requests for *in camera* treatment to 674 exhibits and has shortened the requested amount of time for *in camera* treatment for the majority of the identified documents. GRAIL supports the Motion with a declaration from its general counsel that provides additional details about the documents for which GRAIL seeks *in camera* treatment.

GRAIL asserts that multi-cancer screening is a nascent technology and that, while there are other companies developing other types of early cancer detection tests, those tests are behind GRAIL in development. GRAIL further asserts that information about GRAIL's current and future products is competitively sensitive and that the disclosure of this otherwise confidential material would allow potential competitors to copy GRAIL's technology, and develop commercial strategies designed to undermine GRAIL's current products. GRAIL explains that the documents contain sensitive information that GRAIL asserts is indispensable to GRAIL's operations. GRAIL argues that because GRAIL's research and development efforts, and their results, are central to the subject matter of this litigation, GRAIL necessarily has a substantial number of highly sensitive documents contained in the exhibit lists in this litigation.

Complaint Counsel asserts that some of the designations of testimony from depositions and investigational hearing transcripts reflect information that has been revealed in public filings. Complaint Counsel further asserts that a number of GRAIL's testimony designations consist of vague statements that, if disclosed, could not result in serious competitive injury.

III.

With respect to documents that GRAIL places in the category of trade secrets and product development, GRAIL has reduced the number of documents for which it seeks *in camera* treatment. GRAIL states that these documents contain the technical specifications for GRAIL's multi-cancer early detection test, Galleri, and information regarding GRAIL's development of future tests and versions of those tests. GRAIL has met its burden of demonstrating that the documents in this category are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Further, GRAIL has demonstrated that the need for confidentiality for the detailed information in these documents is not likely to decrease over time. Accordingly, extended *in camera* treatment, for a period of ten years, to expire September 1, 2031, is GRANTED for the 18 documents identified in the trade secrets and product development category.

With respect to documents in GRAIL's categories of financial data, pricing and pricing strategy, sales and marketing strategy, regulatory strategy, and strategic initiatives, GRAIL has met its burden of demonstrating that the documents in these categories are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to

expire on September 1, 2026,¹ is GRANTED for the documents GRAIL identifies as falling under the categories of financial data, pricing and pricing strategy, sales and marketing strategy, regulatory strategy, and strategic initiatives.

With respect to documents that contain details regarding individuals' compensation, job performance, personal phone numbers, personal email addresses, and home addresses, the request to protect this sensitive personal information is GRANTED. GRAIL shall redact such sensitive personal information from the documents listed in the category of sensitive personal information

With respect to transcripts from investigational hearings and depositions, GRAIL continues to seek *in camera* treatment for vast portions of its transcripts. GRAIL's proposed designations are overbroad and include testimony that does not meet the criteria for *in camera* treatment. For example, Complaint Counsel cites to a press release in which GRAIL's Chief Executive Officer Hans Bishop publicly stated that a benefit of the transaction is to accelerate access to the Galleri test. Yet, GRAIL seeks *in camera* treatment for testimony from Hans Bishop that, because GRAIL has a small team and Illumina has a large team that has experience getting a PMA approval for the certain technologies, Illumina can assist GRAIL in the PMA approval process, which will accelerate patient access to the Galleri test. Such testimony provides little further detail to statements that have been publicly made. An observation that Illumina has more employees than GRAIL cannot be a well-kept secret. An observation by someone in GRAIL about Illumina's perceived capabilities are vague and general.

In its Reply, GRAIL states that, in response to Complaint Counsel's objections to portions of two transcripts, it now agrees to de-designate certain portions of the investigatory hearing transcript and deposition transcript of Hans Bishop. However, GRAIL's de-designations from these two transcripts do not remedy GRAIL's overbroad designations from the remaining transcripts. Indeed, GRAIL seeks *in camera* treatment for portions of 17 transcripts. Each example noted by Complaint Counsel was intended only as "one of several instances" where GRAIL over designated *in camera* material. These examples are not the only instances. Other instances where GRAIL seeks *in camera* treatment for material that is not sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury include: PX7108 21:1-24:6 (testimony that many IPOs were occurring in 2020; comparable companies had positive market performance; GRAIL wants to be opportunistic in taking advantage of favorable financings; in 2020, market conditions were favorable for raising capital publicly); PX7103 57:23-58:8 (testimony describing in general how the Galleri test works); PX7098 60:15-61:2 (testimony describing in general GRAIL's strategy for reimbursement from payers for use of the Galleri test); PX7078 at 22:1-13 (testimony that Morgan Stanley

¹ For documents in these categories, GRAIL differentiated between exhibits, seeking *in camera* treatment for periods of two, three, or five years, depending on the sensitivity of each document. In order to make the expiration date of *in camera* treatment consistent across exhibits, which furthers the public interest in administrative efficiency, *in camera* treatment for a period of five years is granted to the documents for which GRAIL sought protection for five years or less. *See In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, at *20 n.1 (May 25, 2011).

offered advice on how the agreement with Illumina would be perceived by the public market and assisted on various modeling activities, without revealing the specific advice or the details of the various modeling activities). The foregoing are examples and are not the only instances of testimony that does not meet the *in camera* treatment standard.

Granting *in camera* treatment for general statements in depositions or investigational hearing transcripts would prevent inquiry on these topics at trial on the public record, which would detract from the public understanding of decisions at the Commission. See *In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). Accordingly, with respect to GRAIL's request for *in camera* treatment for the designations from the investigational hearing transcripts and depositions, Respondent's motion is DENIED WITHOUT PREJUDICE.

IV.

GRAIL will be given a final opportunity to file a revised motion for *in camera* treatment, significantly narrowing the designations in its depositions and investigational hearing transcripts for which it seeks *in camera* treatment. If GRAIL cannot comply with the directives in this and the August 12 and August 24 Orders, its next motion will be denied, without the right to refile. GRAIL's deadline for filing a revised motion for *in camera* treatment for the designations in investigational hearing and deposition transcripts is September 8, 2021. Complaint Counsel may file an opposition by September 10, 2021.

GRAIL shall prepare a proposed order listing, by exhibit number, the documents that have been granted *in camera* treatment by this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: September 3, 2021