

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

In the Matter of

Illmina, Inc.,
a corporation,

DOCKET NO. 9401

and

GRAIL, Inc.,
a corporation.

Respondents.

**RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S
MOTION *IN LIMINE* TO EXCLUDE THE DECLARATION AND DEPOSITION
TRANSCRIPT OF GEORGE J. SERAFIN**

Complaint Counsel has failed to meet their burden, and their motion *in limine* should be denied. For this Court to grant a motion *in limine*, the movant must show that the evidence to be excluded is “clearly inadmissible on all potential grounds.” *In re Daniel Chapter One*, Dkt. No. 9329, 2009 F.T.C. LEXIS 85, at *19 (Apr. 20, 2009) (citations omitted). The Declaration of Respondents’ consulting expert George Serafin (the “Declaration”) and Mr. Serafin’s deposition testimony (the “Deposition”) are admissible under 16 CFR § 3.43(b) because they are relevant, material, and reliable. Accordingly, the Serafin Declaration and Deposition are not “clearly inadmissible on all potential grounds,” and Complaint Counsel’s motion *in limine* should be denied. *In re Rambus Inc*, Dkt. No. 9302, 2003 WL 21223850, at *2 (F.T.C. Apr. 21, 2003).

I. Background

Respondents retained Mr. George Serafin as a consulting expert to assess the impact that

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Illumina created GRAIL as a research and development company focused on developing

breakthrough technology that can detect more than fifty cancers in asymptomatic individuals.

REDACTED

See e.g., Deposition of George J. Serafin (“Serafin Deposition”) at 65:11-69:3, attached hereto as “Ex. 1”; Declaration of George J. Serafin (“Serafin Declaration”) at 18-21, attached hereto as “Ex. 2.” He has reviewed Respondents’ materials here and formed the expert opinion that REDACTED

Serafin Decl. ¶¶ 8-9. Mr. Serafin explains the bases for these opinions in his Declaration, and elaborated on them during his Deposition. Though Respondents have not designated Mr. Serafin to testify at trial—given the limited number of expert witnesses permitted to testify in Part 3 proceedings—his Declaration was cited in the expert report of Dr. Patricia Deverka, Respondents’ reimbursement expert, and his opinions are relevant and material to this case, and clearly reliable.

II. Argument

A. Complaint Counsel Have Not Shown That Mr. Serafin’s Declaration and Deposition Testimony Are Clearly Inadmissible On All Potential Grounds

In deciding Complaint Counsel’s motion *in limine*, the Court must consider whether the evidence is “clearly inadmissible on all potential grounds.” *Daniel Chapter One*, 2009 F.T.C. LEXIS, at *19. Complaint Counsel has failed to show that the Serafin Declaration and Deposition are “clearly inadmissible on all potential grounds.” *Daniel Chapter One*, 2009 F.T.C. LEXIS, at *19.

B. The Declaration and Deposition are Admissible Because they are Relevant, Material and Reliable

Complaint Counsel does not dispute that Mr. Serafin is Respondents’ consulting expert. See Complaint Counsel’s Motion *In Limine* (hereinafter, “Mot.”) at 2 REDACTED

They argue instead that “[t]here is no mechanism for the submission of an ‘expert declaration’ by a non-testifying ‘consulting’ expert under the Part 3 Rules.” *Id.* at 4. Not so. Section 343(b) of the Commission’s Rules of Practice (“Rules”), states that all “relevant, material, and reliable evidence shall be admitted.” 16 CFR § 3.43(b). This broad rule of admissibility even extends to hearsay evidence: “it is long settled that hearsay evidence is not to be out of hand rejected or excluded by administrative tribunals.” *In re Phila. Carpet Co.*, 64 F.T.C. 762, 773 (1964). Thus, “all relevant and material evidence—whether it is hearsay or not—is admissible, as long as it is reliable.” *In re Am. Home Prods. Corp.*, 98 F.T.C. 136, 368 n.9 (1981). The Serafin Declaration and Deposition are relevant, material and reliable.

First, Complaint Counsel does not dispute that the Serafin Declaration and Deposition are relevant. They both contain Mr. Serafin’s expert opinions that REDACTED

See e.g., Serafin Decl. ¶¶ 8-9 (Ex. 2). Considering that REDACTED

there is no question that Mr. Serafin’s opinions are relevant to this litigation. *See e.g.*, A Summary of Procompetitive, Lifesaving Benefits and Efficiencies To Be Created by the Illumina-GRAIL Transaction (hereinafter “White Paper”) at 8-12, attached hereto as Ex. 3.

They are also clearly material to this litigation. Evidence is material if it concerns issues that may make a difference to the outcome of the case. *Moss v. FTC.*, 148 F.2d 378, 380 (2d Cir. 1945). REDACTED

REDACTED *See e.g.*, White Paper at 8-12 (Ex. 3). Notwithstanding Mr. Serafin’s and GRAIL’s own views regarding these benefits, Respondents expect Complaint Counsel to attempt to prove at trial that
REDACTED

The Serafin Declaration and Deposition are therefore material to this litigation.

Finally, the Serafin Declaration and Deposition bear sufficient indicia of reliability. Mr. Serafin has been “shown to be widely experienced in the industry over an extended period of years.” *See, e.g., Callaway Mills Co. v. F.T.C.*, 362 F.2d 435, 444 (5th Cir. 1966). REDACTED

Serafin Dep. 65:11-69:3 (Ex. 1); Serafin Decl. ¶¶ 8-9, Exhibit I (Ex. 2). His testimony, along with his C.V., establishes that he is knowledgeable about the subjects addressed in his Declaration. Serafin Dep. 65:11-69:3; Serafin Decl. ¶¶ 8-9, Exhibit I (Ex. 2).

REDACTED

And Complaint Counsel had ample opportunity to test his knowledge and expertise, as well as his opinions, during his five hour deposition.

Thus, the Serafin Declaration and Deposition satisfy all of the requirements for admissibility admittance under 16 CFR § 3.43(b) and should be admitted into evidence. 16 CFR § 3.43(b).

C. The Declaration Contains Expert Witness Opinions and Was Considered By Respondents' Testifying Expert, And Was Therefore Timely

Complaint Counsel claim in their motion that the Declaration was not timely because Respondents served it on the deadline for expert disclosures, and Mr. Serafin is not a testifying expert. Mot. at 2. But the Part 3 Rules envision that parties may choose to retain consulting experts as well as testifying experts (*see, e.g.*, Rule 3.31A(e)),¹ and nothing in the Scheduling Order suggests that the July 16 deadline applied only to the latter. Scheduling Order at 2.

Moreover, Dr. Deverka, whom Respondents *have* designated as a testifying expert, cited to Mr. Serafin's Declaration in her expert report.² REDACTED

Consistent with Rule 3.31A(c), Respondents served the Declaration on the deadline for the disclosure of Dr. Deverka's report and the materials she considered. Thus, Mr. Serafin's Declaration was timely.

Complaint Counsel also would not be prejudiced by admitting the Serafin Declaration and Deposition into evidence. Two of the FTC's experts—Dr. Amol Navathe and Dr. Rothman—responded to the Serafin Declaration in their rebuttal reports, so clearly Complaint Counsel has had sufficient time to digest and respond to Mr. Serafin's opinions. *See* Expert Report of Dr. Amol Navathe, MD, PHD, ¶¶ 12-35, attached hereto as "Ex. 6"; Rothman Report ¶¶ 13-18, 50-59, 72 & nn.117-18 (Ex. 4). Complaint Counsel also spent five hours deposing Mr. Serafin, during which they questioned him on his background and experience, all of his opinions, and the materials he reviewed and relied upon to form his opinions. Thus, there would be no prejudice to Complaint

¹ Although Rule 3.31A(e) states that consulting expert opinions and materials are not discoverable, nothing in the rule prevents a party from voluntarily producing such opinions.

² Complaint Counsel argue that Mr. Serafin's Declaration does not contain all of the requirements for testifying expert reports under Rule 3.31A(c). But Mr. Serafin is not a testifying expert and Respondents are not offering his Declaration as an expert report. So whether or not it complies with Rule 3.31A(c) is beside the point.

Counsel from the admission of the Declaration and the Deposition, and their motion *in limine* should be denied for that reason as well.

III. Conclusion

For these reasons, Respondents respectfully request the Court deny Complaint Counsel's Motion *In Limine* to Exclude the Declaration and Deposition Transcript of George J. Serafin.

Dated: August 12, 2021

/s/ Anna M. Rathbun

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CERTIFICATE OF SERVICE

I hereby certify that on Aug. 12, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

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

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Docket No. 9401

DECLARATION OF ANNA M. RATHBUN

I, Anna M. Rathbun, declare and state:

1. I am a counsel at Latham & Watkins LLP and counsel for Respondent GRAIL, Inc. (“GRAIL”) in this matter.
2. I make this declaration pursuant to 28 U.S.C. § 1746 in support of Respondents’ Memorandum in Opposition to Complaint Counsel’s Motion *In Limine* to Exclude the Declaration and Deposition Transcript of George J. Serafin.
3. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the transcript of the Deposition of George J. Serafin, which occurred on August 2, 2021.
4. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of George J. Serafin in Support of the Merger Between Illumina and Grail.
5. Attached hereto as Exhibit 3 is a true and correct copy of A Summary of Procompetitive, Lifesaving Benefits and Efficiencies to be Created by Illumina-GRAIL Transaction.

6. Attached hereto as Exhibit 4 is a true and correct copy of the Rebuttal Expert Report of Dov Rothman, PH.D., which was served on July 26, 2021.

7. Attached hereto as Exhibit 5 is a true and correct copy of the Expert Report and Declaration on Payor Coverage Decisions by Patricia Deverka, M.D., M.S., which was served on July 16, 2021.

8. Attached hereto as Exhibit 6 is a true and correct copy of the Expert Report of Dr. Amol Navathe, M.D., PHD, which was served on July 26, 2021.

Dated: August 12, 2021

Respectfully submitted,

/s/ Anna M. Rathbun

Anna M. Rathbun of
Latham & Watkins LLP

EXHIBIT 1
Filed In Camera

EXHIBIT 2
Filed *In Camera*

EXHIBIT 3
Filed In Camera

EXHIBIT 4
Filed In Camera

EXHIBIT 5
Filed *In Camera*

EXHIBIT 6
Filed In Camera