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

NON-PARTY GUARDANT HEALTH, INC.'S
OPPOSITION TO ILLUMINA'S
EXPEDITED MOTION TO MODIFY THE PROTECTIVE ORDER

Non-party Guardant Health, Inc. ("Guardant"), through its undersigned counsel, respectfully submits this opposition in response to Respondent Illumina, Inc.'s ("Illumina") Expedited Motion to Modify the Protective Order (the "Motion"). In its Motion, Illumina seeks a "limited" modification of the March 30, 2021 Protective Order (the "Protective Order") entered in this case. Guardant opposes this Motion in full. Modifying the Protective Order is not permitted by Commission rules and would irreparably harm Guardant and its ability to safeguard its highly technical and sensitive confidential commercial information.

In support of this motion, Guardant provides the accompanying declaration of Juan Rodriguez, a European Union ("EU")-qualified Partner at the London and Paris offices of Sullivan & Cromwell LLP ("Rodriguez Decl."). This declaration provides additional details of European proceedings and EU confidentiality considerations.

I. BACKGROUND

Illumina requests a supposedly "limited" modification of the Protective Order that is allegedly necessary for its appeal (the "Appeal") to the General Court of the European Union (the "General Court") of the September 6, 2022 European Commission ("EC") decision to prohibit Illumina's acquisition of GRAIL, Inc. (the "EC Decision"). (Motion at 2.) Illumina's requested modification, however, is unnecessary, unsubstantiated and impermissible. It is also plainly an attempt to open the door to further modifications, which Illumina states it "may" seek in the future.

Illumina's requested modification will harm Guardant and other third parties irreparably and should be denied. *First*, Illumina's explanation of why it needs the modification in order to disclose confidential information to its EU lawyers does not withstand scrutiny, particularly when Guardant understands that no confidential business information is part of the factual record on appeal to the General Court. Illumina's modification request is plainly an attempt to skirt EU confidentiality rules. *Second*, if Illumina's Motion is granted, Guardant faces the very real risk that its confidential information will end up in the public domain. *Third*, the modification that Illumina seeks is in contravention of the Commission's rules governing protective orders. There is no basis upon which to subject Guardant—a non-party in this action and in the EU proceedings—to the risk of a damaging disclosure of its confidential business information.

II. ARGUMENT

Guardant produced its confidential material and provided testimony in this matter under the express understanding that those materials would be subject to the terms of the Protective Order as originally entered by this Court. Materials that Guardant has produced address highly sensitive commercial information, such as Guardant's marketing and distribution plans, information on its relationship with Illumina and Grail, financial data, business strategies, and competitive analyses. (*See* Non-Party Guardant Health, Inc.'s August 6, 2021 Motion for *In*

Camera Treatment at 6.) Perhaps most critically, Guardant has provided technical and other critical information relating to the development and launch of its competing Multi-Cancer Early Detection test. To allow Illumina to introduce exceptions to the Protective Order would unfairly prejudice Guardant and other third parties who produced materials and provided testimony in reliance on the understanding that the Protective Order would adequately protect their sensitive confidential materials.

For the reasons more fully set forth below, Illumina's motion should be denied.

First, Illumina has no need for confidential business information from this action in order to prepare its Appeal to the General Court. Similar to an appeal in the United States, the factual record for the Appeal to the General Court is limited to the evidence underlying the EC Decision—which the European Commission is legally required to provide to Illumina, with limited redactions to protect any third parties' business secrets. (Rodriguez Decl. at ¶ 3.) EU law requires that the EC give Illumina all of the information and evidence relevant to its Appeal, rendering the proceeding before this Court and the confidential materials that it seeks irrelevant to the EU proceedings. (*Id.* at ¶¶ 3-4.) The confidential material cannot lawfully have formed part of the EC Decision because the Protective Order did not allow Illumina to use the confidential material in proceedings other than this one. Unless Illumina is claiming that the protected material was somehow introduced into the EC procedure that led to the EC Decision, there can be no justification for Illumina's European external counsel and economists to have sight of the confidential material in connection with the Appeal. Indeed, Illumina's motion to modify the Protective Order is nothing more than an admitted end-run around EU disclosure rules: Illumina acknowledges that it would be unable to obtain Guardant's confidential material in the European proceedings under European rules. (Motion at 4.)

Second, Guardant would lose any further ability to protect its confidential material if the Protective Order is modified as Illumina seeks. The provision that Illumina seeks to modify, which limits the disclosure and use of information designated confidential under the Protective Order to *this proceeding and no other proceeding,* exists at least in part precisely because neither this Court nor the third parties who provided confidential materials in this proceeding are able to ensure adequate protection in other proceedings. And that is precisely what is likely to happen here: once Illumina is allowed to disclose Guardant's confidential materials for use in the EU proceedings, Guardant's ability to protect that information effectively vanishes.

Although Illumina stresses that the disclosure of confidential material that it requests will be limited to its "external counsel and economic consultants" in Europe, and thus will have "no impact" on the third parties whose information it seeks, Illumina's own motion signals otherwise. (Motion at 3.) Setting aside that Guardant believes that allowing *any* broader access to its materials *will* have an impact on its rights, Illumina reveals in a footnote that it "may request a further modification" to the Protective Order to allow it to submit Guardant's confidential materials to the General Court. (Motion at 2 n.2.) Given that Illumina's justification for seeking the modification is to use the confidential materials to rebut facts relied upon by the EC and win its appeal to the General Court, it is not difficult to imagine that Illumina will soon seek this additional modification. Illumina is claiming to seek an inch, but it will surely take the mile if given the chance.

As soon as the confidential information is disclosed to the General Court, any meaningful ability Guardant has to protect the confidentiality of its highly sensitive information would be permanently lost. (Rodriguez Decl. at ¶¶ 6-7.) Under General Court rules, Guardant is not permitted to intervene in the Appeal solely to protect its confidential materials, rendering

Guardant entirely dependent on Illumina[1] to request (and the General Court to grant) appropriate confidential treatment without any involvement of Guardant in those proceedings. (*Id*.) Even assuming, *arguendo*, that Illumina would seek to adequately protect Guardant's confidential material, the General Court has full discretion to deny such a request. In case of a denial, this information would be shared with all parties to the Appeal (including any intervenors) and could be used during the public hearing. (*Id.* at ¶ 5.) Given the high profile of the Appeal, there are likely to be intervenors, and Guardant expects the hearing to be attended by numerous third parties, including journalists from the general business press and specialist antitrust publications.

Illumina's "limited" modification thus is not "limited" at all. In reality, it undermines one of the core protections contained in the Protective Order and opens up the possibility that protection of whatever of Guardant's confidential materials Illumina decides to use will be irretrievably lost. This Court should not permit Illumina to manufacture a "need" for materials in the European proceedings and then use that need to render both this Court and Guardant powerless to protect the integrity of the confidentiality protections enshrined in this Court's Protective Order.

Third, the FTC rules expressly prohibit the modification Illumina seeks. Rule 3.31(d) of the FTC Rules of Practice for Adjudicative Proceedings, 16 CFR § 3.31(d) (2011) (the "Rule"), requires that "[i]n order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge *shall* issue a protective order *as set forth [in the appendix to this Rule]*." (emphasis added.) The Rule then adds that "[t]he

[1] Illumina is the only party to the European proceedings seeking permission to use Guardant's confidential materials in those proceedings, and it is therefore the party that would have the ability to seek protection for those materials in the European proceedings. (Rodriguez Decl. at ¶ 6.)

Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or dune burden or expense, or to prevent undue delay in the proceeding." (*Id.*) The text of the Rule makes clear that protecting confidential information is of the utmost importance and leaves no room for modifying the form protective order, much less limiting it. Indeed, during the rulemaking process, the American Bar Association suggested that parties should be able to negotiate changes to the standard protective order so as to fit the needs of a particular case. (FTC Rules of Practice, 74 Fed. Reg. 1804 at 1812-13 (Jan. 13, 2009) (to be codified at 16 CFR § 3.31(d)).) The FTC explicitly rejected this notion, concluding that such negotiations would "prevent the Commission from protecting confidential material in a uniform manner" and "reduce the confidence" of non-parties that their confidential information would be protected. (*Id.*) It is no accident, then, that the final Rule requires a protective order that strictly limits the disclosure of confidential information to "only…this proceeding, or any appeal therefrom, *and for no other purpose whatsoever*." (emphasis added.) The Commission's own rules recognize that no benefit to a party, like Illumina, can outweigh the harm that would come to a non-party, like Guardant, if the non-party's confidential information is not protected to the fullest extent.

III. CONCLUSION

For the reasons set forth above and in the accompanying declaration, Guardant respectfully requests that this Court protect Guardant's competitively sensitive business information by denying the Motion, including denying an expedited ruling on the Motion.

Respectfully submitted,

Dated: October 24, 2022

/s/ Renata B. Hesse

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DECLARATION OF JUAN RODRIGUEZ

I, Juan Rodriguez, declare and state:

1. I am a partner in the London and Paris offices of Sullivan & Cromwell LLP and am qualified to practice law in France (as a member of the Paris Bar – *Avocat au barreau de Paris*) and England and Wales (as a Solicitor of the Senior Courts of England and Wales). I make this declaration in support of Guardant's Motion in Opposition to Illumina's Expedited Motion to Modify the Protective Order.

2. In this declaration, I provide additional detail regarding confidentiality considerations during the relevant European Union ("EU") proceedings.

3. When a party appeals a European Commission decision made under the EU Merger Regulation ("EC Decision"), that appeal is heard by the General Court of the European Union (the "General Court"). The relevant factual record for an appeal comprises any materials from third parties that the European Commission relied on in its Decision. The EC is required by EU law to

provide the appellant with a copy of that factual record, subject to any redactions necessary to protect third parties' business secrets.

4. The appellant and the EC will then draft their briefs based on this factual record and submit the relevant documents cited in their briefs to the General Court. All briefing and submitted materials form part of the court's file on the case and, absent confidential treatment, are shared with the parties and any Intervenors in the case.

5. The general rule is that the briefs and their supporting documents are disclosed by the General Court to the other party to the case and the Intervenors without redaction for confidential information. Similarly, the general rule is that the hearing of the case, which follows the written part of the procedure, is public.

6. While, as an exception to the general rule, a party to the case may request confidential treatment of submitted materials during the written procedure and during the hearing by requesting the sensitive information be redacted from the briefs shared with the relevant parties or Intervenors, and the relevant part of the hearing be *in camera* if there are "serious reasons" justifying the exclusion of the public from the hearing, a non-party has no right to do so. A non-party may seek to intervene solely to support the position of one of the parties to the case, but there is no mechanism by which a non-party can intervene solely for the sake of requesting confidential treatment of part of the record. As a result, a non-party is entirely reliant on the submitting party to request, substantiate, and maintain the confidentiality of its information and materials, or on the General Court, of its own motion to grant confidential treatment.

7. Even if a party requests that a non-party's material be given confidential treatment, the General Court has full discretion over whether to grant confidential treatment to any of the submitted materials.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24th day of October, 2022 in London, England.

/s/ Juan Rodriguez
Juan Rodriguez

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[PROPOSED] ORDER DENYING RESPONDENT
ILLUMINA, INC.'S EXPEDITED MOTION TO MODIFY THE PROTECTIVE ORDER

Having considered Respondent Illumina, Inc.'s ("Illumina") October 7, 2022 Expedited Motion to Modify the Protective Order, and the related memoranda filed by Respondent, Complaint Counsel, and the intervening non-parties, Illumina's motion is **DENIED.** It is hereby **ORDERED** that the March 30, 2021 Protective Order in this matter ("Protective Order") shall not be modified.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date: _____

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, 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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I also certify that I caused the foregoing document to be served via email to:

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DATE: October 24, 2022

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