

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

In the Matter of

**Illumina, Incorporated,
a corporation,**

And

**GRAIL, Incorporated,
a corporation.**

Docket No. 9401

**NON-PARTY PACIFIC BIOSCIENCES OF CALIFORNIA, INCORPORATED'S
MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), non-party Pacific Biosciences of California, Inc. ("PacBio") respectfully moves this court for *in camera* treatment of portions of the declaration of Christian Henry dated March 26, 2021 (the "Confidential Declaration") in response to a request from the Federal Trade Commission ("FTC") during its investigation into the above-captioned matter.

The FTC has informed PacBio that it intends to offer the Confidential Declaration into evidence in the administrative trial in the above-captioned matter. *See* Letter from the Federal Trade Commission dated July 26, 2021 (attached as Exhibit A). For the reasons discussed in this motion, PacBio requests that this Court afford *in camera* treatment to the portions of the Confidential Declaration indicated in Exhibit B for a period of five years.¹

¹ In Exhibit B, PacBio provides two copies of the Confidential Declaration – a copy with proposed redactions indicated with yellow highlighting, and a copy with the proposed redactions applied.

Portions of the Confidential Declaration contain highly confidential and competitively sensitive information that, if disclosed to the public or to PacBio’s competitors, could cause serious and significant competitive injury to PacBio. In support of this motion, PacBio relies upon the Declaration of Christian Henry, President and Chief Executive Officer of PacBio (attached at Exhibit C) (the “Henry Declaration”).

I. CONFIDENTIAL MATERIALS FOR WHICH *IN CAMERA* PROTECTION IS REQUESTED

In camera protection is requested for portions of the Confidential Declaration described below. As noted previously, the Confidential Declaration (along with highlighting indicating the portions for which *in camera* treatment is requested) is attached at Exhibit B.

Exhibit No.	Document Title/Description	Date	Bates/PX Range	Requested Duration of <i>In Camera</i> Treatment
PX8399	Declaration of Christian Henry	March 26, 2021	PX8399-001 to PX8399-004	Five years

II. DISCLOSURE OF THE CONFIDENTIAL DECLARATION WOULD CAUSE SIGNIFICANT INJURY TO PACBIO

In camera treatment of material is appropriate when its “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting” such treatment. 16 C.F.R. § 3.45(b). The proponent demonstrates serious competitive injury by showing that the documents are secret and that they are material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, *5 (1999). In this context, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In considering both secrecy and materiality, 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 involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol Myers Co.*, 90 F.T.C. 455, 456-457 (1977).

The portions of the Confidential Declaration for which PacBio requests *in camera* treatment contain information that is secret and material to PacBio's business. In sum, these portions of the Confidential Declaration describe PacBio's product roadmap, research and development plans, and strategic priorities. Henry Declaration at ¶ 4. PacBio's ability to compete and win business depends on its investments in research and development, and its ability to offer customers enhancements in existing offerings and new product offerings. Henry Declaration at ¶ 3. Disclosure of this information would critically harm PacBio's competitive position by granting competitors an unfair advantage—competitors could adapt their own strategies to copy PacBio's product roadmap or engage in similar research and development activities. Henry Declaration at ¶ 4. Such information is closely held within PacBio, and not publicly known outside of PacBio. Declaration at ¶ 5. Indeed, when PacBio produced the Confidential Declaration to the FTC, PacBio clearly designated it as Confidential and requested its contents be kept confidential. PX8399 at ¶ 12.

Additionally, PacBio's status as a third party is relevant to the treatment of its documents. The FTC has held that "[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible." *H.P. Hood &*

Sons, 58 F.T.C. at 1186. This is especially so in the case of a third party, which deserves “special solicitude” in its request for in camera treatment for its confidential business information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (1984) (“As a policy matter, extensions of confidential or in camera treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”). PacBio’s third party status therefore weighs in favor of granting in camera status to the Confidential Declaration.

III. CONCLUSION

For the reasons set forth above and in the accompanying Henry Declaration, PacBio respectfully requests that this Court grant *in camera* treatment to portions of the Confidential Declaration for a period of five years.

Dated: August 5, 2021

Respectfully submitted,

/s/ Matthew McDonald

Matthew McDonald

WILSON SONSINI GOODRICH & ROSATI, P.C.

1700 K Street, N.W.

Washington, DC 20006

Telephone: (202) 791-8035

Email: mmcdonald@wsgr.com

Counsel for Non-Party Pacific Biosciences of California, Inc.

EXHIBIT A

PUBLIC



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Mergers I Division

July 26, 2021

VIA EMAIL TRANSMISSION

Pacific Biosciences of California, Inc.
c/o Michelle Yost Hale and Matthew McDonald
Wilson Sonsini Goodrich & Rosati
1700 K St. NW
Washington, DC 20006
mhale@wsgr.com; mmcdonald@wsgr.com

RE: *In the Matter of Illumina, Inc., and GRAIL, Inc., Docket No. 9401*

Dear Ms. Hale and Mr. McDonald:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intends to offer the documents and testimony referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. For your convenience, a copy of the documents and testimony will be sent to you in a separate email with an FTP link.

The administrative trial is scheduled to begin on August 24, 2021. All exhibits admitted into evidence become part of the public record unless Chief Administrative Law Judge D. Michael Chappell grants *in camera* status (i.e., non-public/confidential).

For documents or testimony that include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R §§ 3.45 and 4.10(g). If you do not file an *in camera* motion, your documents will not receive *in camera* treatment and may be publicly disclosed. Judge Chappell may order that materials be placed *in camera* only after finding that their public disclosure will likely result in a clearly-defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018); and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). For your convenience, we included, as links in the cover email, an example of a third-party motion (and the accompanying declaration or affidavit) for *in camera* treatment that was filed

PUBLIC

and granted in an FTC administrative proceeding. If you choose to move for *in camera* treatment, you must provide a copy of the document(s) for which you seek such treatment to the Administrative Law Judge.

Also, please be advised, if you intend to file an *in camera* motion, you will need credentials for the Commission's electronic filing system and a Notice of Appearance. The Notice of Appearance must be approved by the Office of the Secretary and can take up to twenty-four ("24") hours to issue. As such, you will need to file your Notice of Appearance at least one day prior to the day on which you intend to file your *in camera* motion. I have attached an e-filing checklist to assist with this process.

Please be aware that under the current Scheduling Order **the deadline for filing motions seeking *in camera* treatment is August 5, 2021**. A copy of the April 26, 2021 Scheduling Order can be found at <https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter>. If you have any questions, please feel free to contact me at (202) 326-3287.

Sincerely,

/s/ Wade Lippard

Wade Lippard

Counsel Supporting the Complaint

Attachment

Attachment A

Confidential Notice
PUBLIC
Attachment A

Exhibit No.	Bates - Begin	Bates - End	Date	Full Name
PX8399	PX8399-001	PX8399-004	3/26/2021	Document: Declaration of Christian Henry

EXHIBIT B

Confidential

DECLARATION OF CHRISTIAN HENRY

CITY OF MENLO PARK)
)
 STATE OF CALIFORNIA)

Christian Henry declares as follows:

1. I am the President and Chief Executive Officer of Pacific Biosciences of California, Inc. (“PacBio”). PacBio is a Menlo Park, California-based company that supplies long-read sequencing platforms: instruments and consumables that analyze genetic material such as DNA and RNA. I have held this position since September 2020. My former roles include Chief Financial Officer and Chief Commercial Officer at Illumina, Inc. (“Illumina”), where I oversaw the life sciences and genomics solutions business units. In my current position at PacBio, I am responsible for company strategy and business plan execution. I have a B.A. in Biochemistry and Cell Biology from the University of California, San Diego and an M.B.A. from University of California, Irvine. In 2020, PacBio’s total revenue was approximately \$79 million.

2. DNA is made up of nucleotides, or bases, that bind together to form the rungs of the ladder-like structure of DNA’s double helix. Sequencing platforms call these bases in a given sample to generate reads that are processed through bioinformatics software to provide genetic information about the sample to the user. Depending on the desired information, scientists can analyze an organism’s DNA in its entirety—known as “whole-genome sequencing”—or a targeted portion of the genome. To accomplish whole-genome sequencing, sequencing platforms must sequence longer genomes—such as the human genome—by piecing together many individual sequencing reads using bioinformatics software. This process is akin to putting together puzzle pieces to form a complete picture of a genome.

Confidential

DECLARATION OF CHRISTIAN HENRY

3. Sequencing platforms may be short-read or long-read. Short-read sequencing technology, such as Illumina's NGS platforms, can generate reads of up to 350 contiguous base pairs, with some lower-throughput Illumina platforms generating reads of up to 700 base pairs for some applications. PacBio's platforms, in contrast, use long-read sequencing technology. PacBio's platforms can generate contiguous reads of up to 25,000 base pairs. Longer reads are particularly beneficial for applications such as human whole-genome sequencing because it is easier to determine the entire genomic sequence by assembling fewer long sequence fragments than by assembling many short ones. Using the puzzle analogy, it is easier to piece together a puzzle with fewer larger pieces than many smaller ones. PacBio's platforms are well-suited for applications where it is necessary to sequence long repetitive regions of the genome or identify large structural genetic variants.
4. Today, because Illumina's short-read NGS platforms are higher throughput—they are faster and can sequence a higher volume of samples—Illumina's NGS platforms are significantly cheaper and faster than long-read platforms for certain applications, including RNA quantification and targeted amplicon sequencing. In contrast, PacBio's sequencing platforms offer technical benefits over short-read platforms for some sequencing applications such as whole-genome sequencing or large-variant identification.
5. A clinical liquid biopsy is a test done on a sample of blood to look for cancer cells from a tumor that are circulating in the blood or for pieces of DNA from tumor cells that are in the blood. Liquid biopsy involves sequencing circulating tumor DNA ("ctDNA")—tumor DNA fragments in the bloodstream—to test for the presence of cancer within a patient. Because they are typically fewer than 350 base pairs long, Illumina's short-read

Confidential

DECLARATION OF CHRISTIAN HENRY

NGS platforms are capable of analyzing many ctDNA fragments in their entirety. Given the relatively short length of many ctDNA fragments, long-read sequencing does not often present the same technical benefits over short-read sequencing as it does for other sequencing applications. [REDACTED]

[REDACTED]

[REDACTED] Like RNA quantification, ctDNA analysis also requires counting the relative levels of cancerous DNA compared to healthy DNA in the bloodstream, which, as mentioned above is better suited for Illumina’s high-throughput short read instruments.

6. PacBio’s long-read sequencing platforms include the Sequel I, which is no longer available for sale, and the currently available Sequel II and Sequel Iie. None of PacBio’s long-read sequencing platforms are FDA-approved for clinical use.

7. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

8. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Confidential

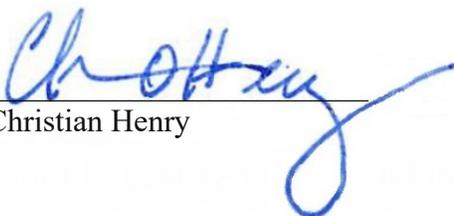
DECLARATION OF CHRISTIAN HENRY

9. [REDACTED]

10. [REDACTED]

11. Softbank Group Corporation recently invested \$900 million in PacBio to support its growth initiatives. [REDACTED]

12. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I have personal knowledge of the facts provided in this declaration. I am submitting this declaration voluntarily, in lieu of compulsory process, to the Federal Trade Commission. I understand that by voluntarily submitting this declaration to the Commission I have not waived my rights to confidentiality as protected by the FTC Act. I hereby request that my identity and the content of this declaration be kept confidential and be exempt from public disclosure as provided by applicable law.


Christian Henry

Signed this 26th day of March, 2021

EXHIBIT C

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

In the Matter of

**Illumina, Incorporated,
a corporation,**

And

**GRAIL, Incorporated,
a corporation.**

Docket No. 9401

**DECLARATION OF CHRISTIAN HENRY IN SUPPORT OF NON-PARTY
PACIFIC BIOSCIENCES OF CALIFORNIA, INCORPORATED'S MOTION
FOR *IN CAMERA* TREATMENT**

I, Christian Henry, declare as follows:

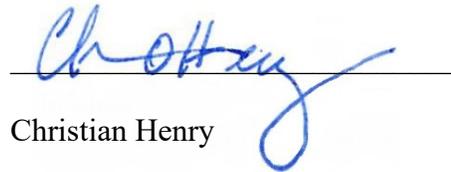
1. I am the President and Chief Executive Officer of Pacific Biosciences of California, Inc. ("PacBio"). I make this declaration in support of non-party PacBio's Motion for *In Camera* Treatment (the "Motion"). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.
2. I authored and signed the declaration dated March 26, 2021 (the "Confidential Declaration") that is the subject of the Motion. I have reviewed and am familiar with the contents of the Confidential Declaration. Based on my review of the Confidential Declaration, my knowledge of PacBio's business, and my familiarity with the confidentiality protection afforded this type of information by PacBio, I submit that the disclosure of the Confidential Declaration to competitors of PacBio would cause serious competitive injury to PacBio.

3. PacBio is a Menlo Park, California-based company that supplies long-read sequencing platforms, meaning instruments and consumables that analyze genetic material such as DNA and RNA. To succeed in its business and win business from competitors, PacBio must continually invest in its research and development efforts. Customers expect PacBio to improve the performance and expand the applications of its existing sequencing platforms, and to introduce new sequencing platforms. Consequently, PacBio's product roadmap and research and development plans are extremely competitively sensitive.
4. The Declaration contains my testimony regarding PacBio's product roadmap, its research and development plans, and its strategic priorities. Disclosure of this information would critically harm PacBio's competitive position by granting competitors an unfair advantage. Competitors could adapt their own strategies to copy PacBio's product roadmap or engage in similar research and development activities. Such an outcome would cause PacBio both immediate and lasting economic harm.
5. PacBio has taken significant measures to protect the confidentiality of the information included in the Declaration. The information contained in the Declaration is not publicly known outside the company. Indeed, much of the information is closely held even *within* PacBio. PacBio has taken many steps to protect the confidentiality of the information included in the Declaration, including employee and third-party non-disclosure requirements, and limiting distribution within the company on a need-to-know basis among other internal policies and practices. PacBio produced the Declaration to the FTC in order to avoid a compulsory subpoena and in reliance on

PUBLIC

assurances that its competitively sensitive information would receive protection in these proceedings.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.


Christian Henry

Dated: August 5, 2021

CERTIFICATE OF SERVICE

I certify that on August 5, 2021, I filed a copy of the foregoing electronically using the FTC's e-filing system, which will send notification of such filing to:

Office of the Secretary
Federal Trade Commission
Constitution Center
400 Seventh St. SW, Suite 5610
Washington, DC 20024
electronicfilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW, Room H-110
Washington, DC 20580
oyalj@ftc.gov

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Complaint Counsel:

Wade Lippard (wlippard@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-3623

Counsel for Respondent Illumina, Inc.

David Marriott (dmarriott@cravath.com)
Christine Varney (cvarney@cravath.com)
Sharonmoyee Goswami (sgoswami@cravath.com)
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1140

Counsel for Respondent GRAIL, Inc.

Al Pfeiffer (al.pfeiffer@lw.com)
Michael G. Egge (michael.egge@lw.com)
Marguerite M. Sullivan (marguerite.sullivan@lw.com)
Latham & Watkins LLP

PUBLIC

555 Eleventh Street, NW
Washington, DC 20004
(202) 637-2285

Dated: August 5, 2021

Respectfully submitted,

/s/ Matthew McDonald

Matthew McDonald

WILSON SONSINI GOODRICH & ROSATI, P.C.

1700 K Street, N.W.

Washington, DC 20006

Telephone: (202) 791-8035

Email: mmcdonald@wsgr.com

*Counsel for Non-Party Pacific Biosciences of
California, Inc.*