

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

In the Matter of

Illumina, Inc.,
a corporation,

and

GRAIL, Inc.,
a corporation.

DOCKET NO. 9401

**COMPLAINT COUNSEL’S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN
TRIAL EXHIBITS**

Pursuant to Rule 3.4(b), Complaint Counsel (or “FTC”) respectfully seeks *in camera* treatment for two FTC-produced documents that appear on the Respondents’ Final Proposed Exhibit List. As explained more fully below, these two documents—RX0490 and RX3152—contain information related to cooperation efforts with foreign competition agencies, and the public release of this information at the administrative trial could result in a “clearly defined, serious injury” to the FTC. 16 C.F.R. § 3.45(b).

Specifically, RX0490 contains { [REDACTED]

[REDACTED] } while RX3152 is a

{ [REDACTED]

[REDACTED]

[REDACTED] } produced by Complaint Counsel in response to Respondents’ First Set of Interrogatories.¹

¹ RX3152 also { [REDACTED] }

Publicly disclosing the { [REDACTED] } contained in RX0490 and the full contents of RX3152 would run counter to FTC obligations to protect our exchanges with certain foreign agencies from disclosure. When foreign agencies communicate with the FTC, they do so with the expectation, based on the obligations contained in the arrangements identified below, that these exchanges will be precluded from public disclosure. Disclosure of the two documents in question would run contrary to the FTC's obligations to protect non-public information involving the { [REDACTED] } and could affect cooperation with those agencies, to the detriment of the FTC's mission.

ARGUMENT

Under Rule 3.45(b) of the Commission's Rules of Practice, the Court may grant *in camera* treatment to material after finding that "its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment." 16 C.F.R. § 3.45(b). In his declaration, Randolph W. Tritell, Director of the FTC's Office of International Affairs, explains that the FTC's frequent cooperation with foreign authorities plays an important role in the FTC's ability to fulfill its mission most effectively, and that this cooperation is facilitated by various obligations protecting those exchanges from public disclosure.²

Here, those obligations include the Protective Order Governing Confidential Material issued in this matter,³ § 21(f) of the FTC Act,⁴ the { [REDACTED] }

² Declaration of Randolph W. Tritell attached as Ex. 1.

³ See Protective Order Governing Confidential Material, *In re Illumina, Inc. & GRAIL, Inc.*, Dkt. No. 9401 (Mar. 30, 2021) ("Protective Order").

⁴ 15 U.S.C. §§ 57b-2(b), 57b-2(f). Section 21(f) of the FTC Act explicitly protects from disclosure any materials received from a non-U.S. competition authority when "the foreign law enforcement agency or other foreign government agency has requested confidential treatment, or has precluded such disclosure under other use limitations, as a condition of providing the material."

[REDACTED]

[REDACTED],⁵ the [REDACTED]

[REDACTED]

[REDACTED],⁶ and the OECD Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings, to which the [REDACTED] [REDACTED] are adherents (OECD Recommendation).⁷

For example, Section 21(f) of the FTC Act explicitly exempts from public disclosure under the Freedom of Information Act any materials received from a non-U.S. competition authority when “the foreign law enforcement agency or other foreign government agency has requested confidential treatment, or has precluded such disclosure under other use limitations, as a condition of providing the material.”⁸ More specifically, for FTC cooperation with the [REDACTED] [REDACTED] precludes the disclosure of certain confidential information, stating in relevant part that:

[REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

⁷ Organization for Economic Cooperation and Development, Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings § 7, available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408>.

⁸ 15 U.S.C. §§ 57b-2(b), 57b-2(f).

Likewise, the { [REDACTED] }, which applies to FTC cooperation with the { [REDACTED] }, and the OECD Recommendations, which apply to our cooperation with the { [REDACTED] }, includes similar provisions that protect from disclosure materials related to agency cooperation, notably non-public information provided in the context of foreign cooperation enforcement.⁹ Given these obligations, Complaint Counsel contends that the public disclosure of the materials at issue here runs contrary to the FTC's commitments that facilitate its international cooperation efforts.

RX0490 discloses the { [REDACTED] } to a third-party market participant. Redacting this information will not undermine the full and fair resolution of this case because the { [REDACTED] } is not relevant or material to any of the issues presented by this matter. In fact, confidential treatment of the { [REDACTED] } is consistent with Commission Rule of Practice 3.45(b),¹⁰ which provides that the Court can order permanent *in camera* treatment for "sensitive personal information."¹¹ This Court has found individuals' names and phone numbers, among other information, to constitute sensitive personal information. *See, e.g., In re Jerk, LLC*, 2015 FTC LEXIS 64 (FTC Feb. 23, 2015) (ordering permanent in camera treatment for sensitive personal information, including names, emails, and telephone numbers, considering the "substantial privacy interest of protecting consumers from abuse, harassment, and embarrassment"). Here, RX0490 clearly identifies the { [REDACTED] }

⁹ *See* { [REDACTED] }; OECD Recommendations § VII(4).

¹⁰ 16 C.F.R. § 3.45(b).

¹¹ "Sensitive personal information' shall include, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records." 16 C.F.R. § 3.45(b) (emphasis added).

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[REDACTED] } (Tritell Decl. ¶ 6) and includes their [REDACTED]. Like other forms of personal sensitive information, disclosure of this information may expose the individuals to increased, unnecessary risk of harassment, identity theft, fraud, and other harm. As such, under both this Court's precedent and our agreements with foreign enforcers, we respectfully request that this limited information be given *in camera* treatment.

RX3152 is a [REDACTED]
[REDACTED]
[REDACTED] } pursuant to Respondents' First Set of Interrogatories. The components included within the [REDACTED] } reveal sensitive information—the timing of and participants in various cooperation efforts—provided to Complaint Counsel in confidence by three separate jurisdictions while arranging the [REDACTED]. In doing so, those authorities relied on the various disclosure protections outlined above and the failure to protect this information from public disclosure could hamper future FTC enforcement cooperation, to the detriment of the FTC's mission.¹² Moreover, precluding disclosure of this document would not undermine the full and fair resolution of this case because the information is neither relevant nor material to any of the issues presented by this matter.

CONCLUSION

For these reasons, Complaint Counsel respectfully requests that the Court grant *in camera* treatment for the documents identified.

¹² Tritell Decl. ¶ 6.

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Date: August 6, 2021

Respectfully submitted,

s/ Betty Jean McNeil
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Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
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[PROPOSED] ORDER GRANTING *IN CAMERA* TREATMENT

Upon consideration of Complaint Counsel's Motion for In Camera Treatment of Certain Trial Exhibits it is hereby:

ORDERED, that Complaint Counsel's motion is GRANTED,

ORDERED, that pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), the portions of the documents identified in Exhibit 2 to the Motion shall be subject to *in camera* treatment and will be kept confidential and not placed on the public record of this proceeding.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August ___, 2021

EXHIBIT 1

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT 2

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Exhibit No.	Description	Date	BegBates	EndBates
RX0490	Email from S. Razi to S. Wohl et al re Illumina/GRAIL	11/11/2020	FTC-PROD-00000744	FTC-PROD-00000745
RX3152	Complaint Counsel's Responses and Objections to Respondents' First Set of Interrogatories			

RX0490

CONFIDENTIAL – REDACTED IN ENTIRETY

RX3152

CONFIDENTIAL – REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I filed the foregoing document electronically using the FTC’s E-Filing System, which will send notification of such filing to:

April Tabor
 Secretary
 Federal Trade Commission
 600 Pennsylvania Ave., NW, Rm. H-113
 Washington, DC 20580
 ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
 Administrative Law Judge
 Federal Trade Commission
 600 Pennsylvania Ave., NW, Rm. H-110
 Washington, DC 20580

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

<p>David Marriott Christine A. Varney Sharonmoyee Goswami Cravath, Swaine & Moore LLP 825 Eighth Avenue New York, NY 10019 (212) 474-1140 dmarriott@cravath.com cvarney@cravath.com sgoswami@cravath.com</p> <p><i>Counsel for Illumina, Inc.</i></p>	<p>Al Pfeiffer Michael G. Egge Marguerite M. Sullivan Latham & Watkins LLP 555 Eleventh Street, NW Washington, DC 20004 (202) 637-2285 al.pfeiffer@lw.com michael.egge@lw.com marguerite.sullivan@lw.com</p> <p><i>Counsel for GRAIL, Inc.</i></p>
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s/ Betty Jean McNeil

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