

PUBLIC

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

In the Matter of

**Illumina, Inc.,
a Corporation;**

AND

**GRAIL, Inc.,
a Corporation.**

Docket No. 9401

**THIRD-PARTY SINGULAR GENOMICS SYSTEMS'
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), third-party Singular Genomics Systems, Inc. ("Singular") moves this Court for *in camera* treatment of three competitively-sensitive and Confidential business documents, including the deposition transcript of Jorge Velarde. Singular produced these documents and testimony in response to a third-party subpoena. The Federal Trade Commission ("FTC") and Defendants have now notified Singular that they intend to introduce Singular's confidential documents and deposition transcript into evidence at the administrative trial in this matter. *See* Letter from the Federal Trade Commission dated July 26, 2021 (attached as Exhibit A) and email from Cravath, Swaine & Moore LLP dated July 26, 2021 (attached as Exhibit B).

All of the materials for which Singular is seeking *in camera* treatment are confidential business documents, such that if they were to become part of the public record, Singular would be significantly harmed in its ability to compete in the life science technology industry. For the reasons discussed in this motion, and in the accompanying Durie Declaration, Singular requests

PUBLIC

that this Court afford its confidential business documents *in camera* treatment for a minimum period of three to five years. In support of this motion, Singular relies on the Declaration of Daralyn Durie (“Durie Declaration”) attached as Exhibit C, which provides additional details on the documents for which Singular is seeking *in camera* treatment.

I. Documents for Which Protection is Sought

Singular seeks *in camera* treatment for the following Confidential Documents, copies of which are attached as Exhibit D.

Exhibit No.	Beginning Bates No.	Ending Bates No.	Document Title/Description
PX7117	PX7117-001	PX7117-069	[REDACTED]
PX8562	SGS_000216	SGS_000230	[REDACTED]
PX8563	SGS_000231	SGS_000249	[REDACTED]

II. Singular’s Documents are Secret and Material such that Disclosure Would Result in Serious Injury to Singular

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

PUBLIC

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 Confidential documents are both secret and material to Singular's business as discussed in detail in the Durie Declaration. In sum, the materials at issue contain information of competitive significance to Singular, such as sensitive business plans or strategies, projections, and/or customer outreach, including the performance of Singular's product capabilities, the disclosure of which would cause Singular serious competitive harm from other integrated solutions product developers. Durie Decl. at ¶ 6. As a life sciences technology company, Singular depends on its ability to negotiate with potential customers for the use of its G4 and PX Integrated Solutions. Durie Decl. at ¶ 4. Thus, Singular has spent significant resources on developing a business plan to reach new customers in the integrated solutions market. Durie Decl. at ¶ 6. Such information is proprietary to Singular and not publicly known outside of Singular. Durie Decl. at ¶ 6. Indeed, when Singular produced the confidential documents, it took steps to maintain confidentiality by designating the documents "Confidential" pursuant to the Protective Order in this case. Because of the confidential and proprietary nature of the information and its materiality to Singular's business, *in camera* treatment is appropriate.

Further, disclosure of the Confidential documents will result in the loss of a business advantage to Singular. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999) ("The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'"). The Confidential documents are material to Singular's promotion of its products that it has placed

PUBLIC

in the market in order to compete with other life sciences technology companies. Durie Decl. ¶ 6. Making such documents public would result in a loss of business advantage that Singular has built as the result of its own substantial investments in the development of its sales strategy.

The litigants in this matter have also given notice that they intend to introduce the deposition transcript from Mr. Jorge Velarde (PX7109-001/PX7109-114) in which Mr. Velarde candidly discussed the same documents and subjects as referred to above. Given the competitively sensitive nature of these discussions and their prevalence throughout the entirety of the transcript, Singular requests that the deposition transcript also receives *in camera* treatment for a minimum period of three to five years. A copy of the transcript is attached as Exhibit E.

Finally, Singular'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."). Singular's third-party status therefore weighs in favor of granting *in camera* status to the Confidential documents.

PUBLIC

III. Conclusion

For the reasons set forth above, and in the accompanying Durie Declaration, Singular respectfully requests that this Court grant *in camera* treatment for the Confidential Documents in their entirety.

Dated: August 5, 2021

Respectfully submitted,

/s/ Leigh L. Oliver

Leigh L. Oliver

HOGAN LOVELLS US LLP

555 Thirteenth Street, NW

Washington, D.C. 20004

Telephone: 202-637-3648

Facsimile: 202-637-5910

leigh.oliver@hoganlovells.com

*Counsel for Laboratory Corporation of
America Holdings*

PUBLIC

EXHIBIT A



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

Bureau of Competition
Mergers I Division

July 26, 2021

VIA EMAIL TRANSMISSION

Singular Genomics Systems, Inc.
c/o Leigh L. Oliver
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, D.C. 20004
leigh.oliver@hoganlovells.com

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

Dear Ms. Oliver:

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

PUBLIC

motion (and the accompanying declaration or affidavit) for *in camera* treatment that was filed 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) 326-3129.

Sincerely,

/s/ David J. Gonen

David J. Gonen

Counsel Supporting the Complaint

Attachment

PUBLIC

Attachment A

PUBLIC

Confidentiality Notice
Attachment A

Exhibit No.	Bates - Begin	Bates - End	Date	Full Name
PX7109 (Excerpts)	PX7109-001	PX7109-114	6/4/2021	[REDACTED]
PX7117	PX7117-001	PX7117-069	6/16/2021	[REDACTED]
PX8561	SGS_000001	SGS_000215	5/7/2021	[REDACTED]
PX8562	SGS_000216	SGS_000230	6/3/2021	[REDACTED]
PX8563	SGS_000231	SGS_000249	6/10/2021	[REDACTED]

PUBLIC

EXHIBIT B

PUBLIC

Noble, Meschelle L.

From: Xhesi Hysi <xhysi@cravath.com>
Sent: Monday, July 26, 2021 6:19 PM
To: Oliver, Leigh L.
Cc: Michael Zaken; Anna.Rathbun@lw.com
Subject: In the Matter of Illumina Inc. and GRAIL Inc., Docket No. 9401

[EXTERNAL]
 Counsel,

As part of the Administrative Trial for *In the Matter of Illumina, Inc. & Grail, Inc.* (Dkt. No. 09401) set to begin on August 24, we have submitted a proposed list of documents and testimony we intend to use as trial exhibits. This list includes third party documents and testimony that have been designated confidential under the protective order entered by the Administrative Law Judge.

Per our obligation under the Scheduling Order, we are providing you with notice that we intend to use the documents and any associated family members produced by Singular Genomics Inc. and testimony provided by Singular Genomics Inc. witnesses listed below as trial exhibits, pursuant to 16 C.F.R. § 3.45(b).

Documents
SGS_000001
SGS_000216
SGS_000231
Testimony
Deposition Transcript of Jorge Velarde

Under 16 C.F.R. § 3.45(b), if you wish, you may move the Administrative Law Judge to obtain in camera treatment for the documents and testimony listed above. Please note that the deadline for filing such a motion is August 5, 2021, and note the following information set forth in the Scheduling Order about the content of any such motion:

[There are] strict standards for motions for in camera treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained *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 (Apr. 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for in camera treatment shall provide one copy of the documents for which in camera treatment is sought to the Administrative Law Judge.

Scheduling Order ¶ 12.

Please confirm receipt of this notice.

Thanks,
 Xhesi

PUBLIC

Xhesi Hysi
Cravath, Swaine & Moore LLP
825 Eighth Avenue | New York, NY 10019
T: (212) 474-1198
xhysi@cravath.com

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

PUBLIC

EXHIBIT C

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

)	
In the Matter of)	
)	
Illumina, Inc.,)	
a corporation,)	
)	
and)	
)	
GRAIL, Inc.,)	DOCKET NO. 9401
a corporation,)	
)	
Respondents.)	
)	

DECLARATION OF DARALYN DURIE IN SUPPORT OF THIRD-PARTY SINGULAR GENOMICS SYSTEMS’ MOTION FOR *IN CAMERA* TREATMENT

I, Daralyn Durie, pursuant to 28 U.S.C. §1746, make the following statement:

1. I am General Counsel of Singular Genomics Systems, Inc. (“Singular”). I make this declaration in support of third-party Singular’s Motion for *In Camera* Treatment. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.

2. I have reviewed and am familiar with the documents referenced in Table A of this Declaration, which have been identified by the Federal Trade Commission (“FTC”) and Defendants for use as exhibits in the above-captioned matter. Given my position at Singular, I am familiar with the type of information contained in the documents at issue and their competitive significance to Singular. Based on my review of the documents, my knowledge of Singular’s business, and my familiarity with the confidentiality protection afforded this type of information by Singular, I submit that the disclosure of these documents to the public and to competitors of Singular would cause serious competitive injury to Singular.

PUBLIC

3. Singular is a life science technology company, leveraging novel next generation sequencing (“NGS”) and multiomics technology to build products that empower researchers and clinicians. Singular has developed a NGS technology which is a foundational platform technology that forms the basis of Singular’s products: G4 Integrated Solution and PX Integrated Solution. The G4 Integrated Solution is targeted at the NGS market and is comprised of an instrument and an associated menu of consumable kits which address specific applications in markets such as oncology and immune profiling. The PX Integrated Solution combines single cell analysis, spatial analysis, genomics and proteomics in one integrated instrument. Singular’s G4 and PX Integrated Solutions are seen as competitive alternatives to existing tools and technologies currently on the market. Singular’s NGS technology, along with its G4 and PX Integrated Solutions, distinguish Singular from its competitors and are critical components to Singular’s business development and competitive strategy.

4. PX7117 is the deposition transcript of Jorge Velarde, the Senior Vice President of Corporate Development and Strategy at Singular. Throughout this deposition, Mr. Velarde spoke candidly about competitively sensitive information relating to Singular’s NGS technology, as well as Singular’s development of the G4 and PX Integrated Solutions. The information Mr. Velarde shared relating to Singular’s competitive products is not publicly disclosed information and would be harmful to Singular’s development in the market if this information became publicly accessible.

5. PX8562 is a confidential presentation which is intended to introduce Singular to potential customers. PX8562 discusses the performance of Singular’s technologies, as compared to their competitors, including the accuracy and speed of their NGS capabilities. PX8563 is also a confidential presentation on Singular’s evaluation of oncology. PX8563

PUBLIC

discusses the potential overall market of customers seeking NGS technologies. PX8563 also discusses Singular’s potential target customers for its G4 Integrated Solutions. Both documents would give a competitor insight into how Singular views its competitors and how it approaches competition in the life sciences technology market all together. These documents are not otherwise disclosed publicly by the company and are intended strictly for internal strategy and/or customer expansion. Thus, to reiterate, the disclosure of the documents referenced in Table A to the public, and to competitors of Singular, would cause serious competitive injury to Singular and therefore deserve *in camera* treatment.

TABLE A

Exhibit No.	Beg. Bates Label	End Bates Label
PX7117	PX7117-001	PX7117-069
PX8562	SGS_000216	SGS_000230
PX8563	SGS_000231	SGS_000249

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

Executed on: August 5, 2021



 Name: Daralyn Durie
 Title: General Counsel

PUBLIC

EXHIBIT D – NON-PUBLIC
IN CAMERA

PUBLIC

EXHIBIT E – NON-PUBLIC
IN CAMERA