

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

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In the Matter of)	
)	
Illumina, Inc.,)	
a corporation,)	Docket No. 9401
)	
and)	
)	
GRAIL, Inc.,)	
a corporation,)	
)	
Respondents.)	
_____)	

**ORDER ON RESPONDENT ILLUMINA, INC.’S
THIRD MOTION FOR *IN CAMERA* TREATMENT**

I.

By Orders issued August 12, and August 24, 2021, the original motion and the second motion for *in camera* treatment filed by Respondent Illumina, Inc. (“Respondent” or “Illumina”) were denied without prejudice in part, with leave to refile (“August 12 and August 24 Orders”). The August 12 and August 24 Orders directed Illumina to thoroughly review all documents for which it seeks *in camera* treatment, and to strictly narrow its requests in any subsequent motion to only those documents that comply with the Commission’s strict standards for *in camera* treatment.

On August 28, 2021, Illumina filed a third Motion for *in Camera* Treatment of Certain Trial Exhibits (“Motion”). Federal Trade Commission Complaint Counsel filed an opposition to the Motion on September 1, 2021.

II.

After setting forth the standards by which motions for *in camera* treatment are evaluated, both the August 12 and August 24 Orders determined that the sheer number of documents for which Illumina sought *in camera* treatment far exceeded the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45. In the instant Motion, Illumina has pared down its requests for *in camera* treatment to 975 exhibits. Illumina

supports the Motion with a declaration from its vice president of Global IP and Litigation that provides additional details about the documents for which Illumina seeks *in camera* treatment.

Illumina asserts that it is a technology company engaged in highly sensitive work with a core focus on research and technical development and that the evidence in this case uses highly confidential documents concerning proprietary information on new and current products. Illumina further asserts that the merger at issue concerns a company in a nascent market, which heightens the potential for highly confidential information and heightens the risk that revealing those documents could result in serious competitive injury to Illumina. Illumina argues that because of the highly sensitive nature of its operations and the subject matter of this litigation, Illumina necessarily has a substantial number of highly sensitive documents to be used as exhibits in this litigation.

Complaint Counsel asserts that some of the designations of testimony from depositions and investigational hearing transcripts reflect information that has been described in public statements by non-parties. Complaint Counsel further asserts that a number of Illumina's testimony designations consist of vague statements that, if disclosed, could not result in serious competitive injury.

With respect to documents in the categories identified by Illumina as financial data, pricing and pricing strategy, sales and marketing strategy, regulatory strategy, strategic initiatives, third party/customer information, and GRAIL information, Illumina has met its burden of demonstrating that the documents in these categories are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents Illumina identifies as falling under these categories.

With respect to transcripts from investigational hearings and depositions, Illumina continues to seek *in camera* treatment for vast portions of its transcripts. Illumina's proposed designations are overbroad and include testimony that does not meet the criteria for *in camera* treatment. For example, as pointed out by Complaint Counsel, Illumina seeks *in camera* treatment for a portion of an investigational hearing transcript that describes public statements that a nonparty made about its research program and sales organization. Illumina also seeks *in camera* treatment for a portion of an investigational hearing transcript that discusses common industry abbreviations and general facts about Illumina's products. In addition, Illumina seeks *in camera* treatment for testimony of an employee describing his professional background and responsibilities. Such testimony does not appear to be confidential. To the extent that the transcript portions at issue do convey non-public information, such information does not appear to be sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury. Granting *in camera* treatment for general statements in depositions or investigational hearing transcripts would prevent inquiry on these topics at trial on the public record, which would detract from the public understanding of decisions at the Commission. *See In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). Accordingly, with respect to Illumina's request for *in camera* treatment for the designations from the investigational hearing transcripts and depositions, Respondent's motion is DENIED WITHOUT PREJUDICE.

III.

Illumina will be given a final opportunity to file a revised motion for *in camera* treatment, significantly narrowing the designations in its depositions and investigational hearing transcripts for which it seeks *in camera* treatment. If Illumina cannot comply with the directives in this and the August 12 and August 24 Orders, its next motion will be denied, without the right to refile. Illumina's deadline for filing a revised motion for *in camera* treatment for the designations in investigational hearing and deposition transcripts is September 7, 2021. Complaint Counsel may file an opposition by September 9, 2021.

Illumina shall prepare a proposed order listing, by exhibit number, the documents that have been granted *in camera* treatment by this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: September 3, 2021