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**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 OPPOSITION TO RESPONDENT GRAIL, INC.’S SECOND
MOTION FOR *IN CAMERA* REVIEW OF CERTAIN TRIAL EXHIBITS**

On August 5, 2021, Respondent Grail filed its first motion for *in camera* review of certain trial exhibits and sought *in camera* treatment for approximately 850 documents. On August 12, 2021, Complaint Counsel filed its opposition to Respondent’s motion. In the same day, the Court denied the Respondent’s motion without prejudiced (hereinafter “August 12 Order”). In its Order, the Court observed that “[t]he sheer number of documents for Respondent [Grail] seeks *in camera* treatment far exceeds the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45.” August 12 Order at 4. The Court further noted that “[a] cursory review of the documents indicates that many do not meet the standards for *in camera* treatment.” *Id.*

On August 17, 2021, Respondent filed a second motion for *in camera* review and designated, yet again, approximately 850 documents for confidential treatment. Although it now identifies the basis for claiming *in camera* treatment for specific documents, Respondent’s second motion flouts this Court’s August 12 Order by essentially recycling its previously failed motion with some modest changes. { [REDACTED]

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[REDACTED]
[REDACTED]}

Respondent once more fails to satisfy Rule 3.45(b)'s strict standard for seeking *in camera* treatment here. If Respondent's motion is granted, the public would be deprived of access to virtually the entire trial record in this matter. Complaint Counsel therefore respectfully requests that the Court deny Respondent's second motion for *in camera* treatment without prejudice until Respondent fully satisfies the requirements of Rule 3.45(b). *See* Commission Rule 3.42(c)(11), 16 C.F.R. § 3.42(c)(11) (enumerating the powers of Administrative Law Judges, including, *inter alia*, to "deny *in camera* status without prejudice until a party complies with all relevant rules").

I. STATEMENT OF FACTS

On August 5, 2021, Respondent Grail filed a motion for *in camera* treatment of approximately 850 trial exhibits that allegedly contain confidential information. Respondent grouped these documents into seven categories: (1) Trade Secrets and Product Development; (2) Financial Data; (3) Pricing and Pricing Strategy; (4) Sales and Marketing Strategy; (5) Regulatory Strategy; (6) Strategic Initiatives; and (7) Sensitive Personal Information. (Grail Mot. at 3).

On August 12, 2021, the Court denied Respondent's motion without prejudice with respect to most confidentiality designations. The Court, however, granted Respondent's motion with respect to sensitive personal information—provided Respondent redacted that information where practical.

On August 17, 2021, Respondent submitted a second motion seeking *in camera* treatment for certain trial exhibits and grouped documents by the same seven categories as the first motion. This motion lists, to Complaint Counsel's best accounting, 67 trial exhibits that have been redacted, and for the remainder of those documents, Respondent requests complete *in camera*

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treatment. The motion also provides a basic description of what information Respondent deems confidential in each document.

II. ARGUMENT

Respondent's request for *in camera* treatment is overbroad in both scope and duration to meet "the Commission's strict standards" for *in camera* treatment. *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *14 (Jul. 2, 2018).

A. Legal Standard

Under Commission Rule 3.45(b), the Court may grant a request for *in camera* treatment for material "only 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 or after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b). An applicant for *in camera* treatment "must 'make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.'" *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *2 (Jul. 2, 2018) (quoting *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980)). If the applicant for *in camera* treatment is able to "make[] this showing, the importance of the information in explaining the rationale of FTC decisions is 'the principal countervailing consideration weighing in favor of disclosure.'" *Id.*

Because "[t]he Federal Trade Commission recognizes the 'substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons,' the party requesting that documents be placed *in camera* bears 'the burden of showing good cause for withholding documents from the public record.'" *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3 (Jul. 2, 2018). As this Court recently explained, "[a] full and open record also provides guidance to persons affected by its

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actions and helps to deter potential violators of the laws the Commission enforces.” *In re Altria Group, Inc.*, 2021 WL 2258803, at *1. Moreover, “there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old.” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3–4 (Jul. 2, 2018). To overcome this presumption, “an applicant seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive.” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3–4 (Jul. 2, 2018).

The duration of *in camera* treatment depends on whether the material in question consists of ordinary business records or trade secrets. *In re Altria Group, Inc.*, 2021 WL 2258803, at *2 (May 19, 2021). Ordinary business records, such as “information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents,” typically receive *in camera* treatment for only two to five years. *In re Altria Group, Inc.*, 2021 WL 2258803, at *3. By contrast, trade secrets such as “secret formulas, processes, other secret technical information, or information that is privileged,” may merit indefinite *in camera* treatment, *id.* at *2, although indefinite treatment is warranted only “in unusual circumstances.” 16 C.F.R. § 3.45(b)(3). An applicant seeking indefinite *in camera* treatment of trade secrets “must further demonstrate ‘at the outset that the need for confidentiality of the material is not likely to decrease over time’ [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *Id.* at *2 (quoting *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990)).

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B. Respondent Fails to Satisfy Its Burden of Clearly Showing Disclosure Would Result in Serious Injury under Rule 3.45

Like its previous motion, Respondent seeks *in camera* treatment for approximately 850 documents. A closer review of these documents indicates that disclosure would not likely result in serious competitive injury. In particular, many of those documents contain little-to-no competitively sensitive information—certainly not the sort of information that would lead to the kind of serious competitive injury that would require disturbing the Commission’s presumption to make such information public. For instance:¹

¹ Documents attached as Exhibit A.

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² U.S. Securities & Exchange Comm'n, S-4, Illumina, Inc. at 179 (Nov. 24, 2020),
<https://www.sec.gov/Archives/edgar/data/1110803/000119312520302773/d801214ds4.htm> (§ 204(a)(4)).

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- { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]}
[REDACTED]

Even after a second review, Respondent continues to designate documents confidential that are not. Although some material may be awkward, unhelpful to Respondent, or contain vague references to information that might be confidential, Respondent “must ‘make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.’” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *2 (Jul. 2, 2018). Awkward, unhelpful, or vague material is not necessarily equivalent to material that would lead to serious competitive injury.

Moreover, Complaint Counsel notes that Respondent has designated vast portions of its executives IH and deposition transcripts for in camera treatment. Respondent’s proposed designations are overbroad and include testimony that does not satisfy this court’s criteria for in camera treatment. For example, { [REDACTED]
[REDACTED]
[REDACTED]}

[REDACTED]}. If Respondent’s proposed designations are granted, this would result in significant portions of the examinations of Respondent’s executives to be conducted in camera.

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Finally, in its second motion, Respondent perplexingly observes that, while opposing Respondents' whole motion, Complaint Counsel only identified nine documents that are not confidential. Resp. Second Mot. at 2. That is beside the point. It is Respondent's—not Complaint Counsel's—burden to show why *in camera* treatment is merited. *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3 (Jul. 2, 2018). In our prior opposition motion and in this one, we highlight a sampling of documents that expose deep flaws in Respondent's process of reviewing and designating documents for *in camera* treatment. This flaw in Respondent's process becomes even clearer when considered against the fact that, notwithstanding the Court's admonition that, “[t]he sheer number of documents for Respondent [Grail] seeks *in camera* treatment far exceeds the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45,” August 12 Order at 4, Respondent only de-designated a handful of those documents that they designated confidential before.

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's motions for *in camera* treatment without prejudice until it fully satisfies the requirements of Rule 3.45(b).

Date: August 20, 2021

Respectfully submitted,

/s/ Nandu Machiraju

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Exhibit A

(CONFIDENTIAL – REDACTED IN ENTIRETY)

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 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:

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/s/ Nandu Machiraju
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Counsel Supporting the Complaint