

**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'S MOTION FOR
IN CAMERA REVIEW OF CERTAIN TRIAL EXHIBITS**

Complaint Counsel supports an open and public trial subject to the narrow exception contemplated in Commission Rule 3.45(b). But Respondent Grail fails to satisfy Rule 3.45(b)'s strict standard and process for seeking *in camera* treatment here. Specifically, Respondent seeks to impermissibly expand the duration of *in camera* treatment provided for by Rule 3.45(b) for ordinary course business documents from three years to ten years without showing the exceptional circumstances necessary to warrant such extended protection. By seeking extraordinary protection for certain documents, supported only by the conclusory testimony of its in-house counsel, Respondent fails to fulfill its obligations under Rule 3.45(b) to explain what portions of each document is sufficiently secret and material to Respondent's business that the document's disclosure would cause a clearly defined, serious competitive injury.

The burden of showing good cause for *in camera* treatment rests with the party seeking it, and Respondent fails to meet that burden. 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 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 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). Respondent requests complete *in camera* treatment for its documents, rather than partial *in camera* treatment for those portions of the documents containing allegedly competitively sensitive information. Respondent also seeks indefinite *in camera* treatment for documents containing sensitive personal information.

II. ARGUMENT

Respondent’s request for *in camera* treatment is overbroad in both scope and duration and lacks specific information about each document sufficient to determine whether it meets “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 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)).

Finally, sensitive personal information shall be placed *in camera*. 16 C.F.R. § 3.45(b). Sensitive personal information includes, but is not 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.” *Id.* And, under certain circumstances, individuals’ names and addresses and witness telephone numbers might be considered sensitive personal information. *In re Altria Group, Inc.*, 2021 WL 2258803, at *3. But, where documents include sensitive personal information, such “information can be redacted without requiring *in camera* treatment and shall not serve as the basis for withholding public documents.” *Id.* at *6.

B. Respondent's Requests for *In Camera* Treatment Do Not Meet the Relevant Standard Under Rule 3.45(b)

1. Respondent Fails to Satisfy Its Burden of Clearly Showing Disclosure Would Result in Serious Injury

Respondent's motion and attached declaration do not explain specifically why *in camera* treatment is warranted for each exhibit. *See 1-800 Contacts*, 2017 FTC LEXIS 55, at *23 (explaining that a declaration supporting *in camera* review provided insufficient justification).

Due to the substantial public interest in maintaining open adjudicative proceedings, Respondent bears the "heavy burden of showing good cause for withholding documents from the public record." *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3 (April 23, 2004).

Respondent seeks *in camera* treatment for approximately 850 documents based on little more than conclusory justifications. A close review of these documents indicates that disclosure would not likely result in serious competitive injury. For example, Respondent seeks *in camera* treatment for the following categories of documents:

- Publicly available documents: Respondent's motion includes documents that predominantly contain publicly available information. For example, Respondent seeks 10 years of *in camera* treatment for a news clip { [REDACTED] } about the Illumina/Grail transaction.¹ Respondent designates PX4099 confidential notwithstanding the fact that it is mainly a document that Grail filed publicly with the U.S. Securities and Exchange Commission.² Documents are only entitled to *in camera* treatment when "the public disclosure of the documentary evidence will result in a clearly defined,

¹ PX4083 and PX4178 are attached as Exhibit A.

² Excerpt of PX4099 is attached as Exhibit A. *Compare* Excerpt of PX4099 with Grail, Inc., General Form for Registration of Securities under the Securities Act of 1933 (Form S-1) (Sept. 9, 2020), <https://sec.report/Document/0001628279-20-000227/#grails-1.htm>.

serious injury to the person or corporation whose records are involved.” *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961).

By their very nature, publicly available documents do not merit *in camera* treatment.

- Information older than 3 years: Respondent’s motion includes documents that are more than three years old.³ Under the Commission’s Rules and this Court’s decisions, there is a presumption that *in camera* treatment should not be granted for information that is more than three years old. *1-800 Contacts*, 2017 FTC LEXIS 55, at *3. Respondent provides no justification for why the Court should depart from this presumption and grant *in camera* treatment to information that is more than three years old.
- Documents with no readily ascertainable competitively sensitive information: Complaint Counsel has likewise identified documents in which Respondent does not appear to contain any competitively sensitive information, for example,

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Respondent’s

³ See, e.g., PX4077 and PX4094 are attached as Exhibit B. This is not an exhaustive list of Grail documents that are more than three years old.

⁴ PX4103, PX4105, and PX4180 are attached as Exhibit C.

process for determining the types of documents that should receive *in camera* treatment appears to possess systematic flaws.

2. Respondent Fails to Show Its Need for Blanket Ten-Year *In Camera* Protections for Its Materials

Even for materials that may qualify for *in camera* treatment, Respondent's motion overreaches in terms of the time it seeks to have these materials withheld from the public record. Respondent makes no attempt to show why their documents require ten years rather than five or, more appropriately, three years of *in camera* treatment. As this Court has stated many times, there is a presumption against granting *in camera* treatment for information that is more than three years old. *See, e.g., 1-800 Contacts*, 2017 FTC LEXIS 55, at *3; *In re Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996). This presumption rests on the principle that documents are unlikely to cause competitive harm more than three years after they were created. { [REDACTED]

[REDACTED] } Respondent has not explained why ten-year *in camera* treatment is warranted for each exhibit, and, accordingly, has not met its burden of showing that such documents merit confidentiality protection.

3. Respondent Fails to Satisfy Its Burden to Show Circumstances Warranting Withholding Documents From the Public Record Based on Sensitive Personal Information

Respondent seeks to withhold indefinitely 15 documents that allegedly include sensitive personal information.⁶ For instance, { [REDACTED]

⁵ PX4192 is attached as Exhibit D.

⁶ A list of these documents is attached as Exhibit E. Exhibit E reflects Complaint Counsel's best efforts to identify all documents for which Respondent's Counsel requests *in camera* treatment based on "Sensitive Personal Information." But, to the extent there are other documents identified as having "Sensitive Personal Information" that are not listed in Exhibit E, Complaint Counsel's objection would apply to those as well.

[REDACTED]

[REDACTED] } Respondent makes no effort to show why withholding from the public record indefinitely—rather than redaction—is the appropriate remedy.

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 18, 2021

Respectfully submitted,

/s/ Nandu Machiraju
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Counsel Supporting the Complaint

⁷ See PX4500, PX4501, and PX4502 are attached as Exhibit F.

Exhibit A

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit B

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit C

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit D

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit E

Exhibit E

Exhibit Number
PX4253
PX4271
PX4290
PX4291
PX4312
PX4313
PX4500
PX4501
PX4502
PX4514
PX6049
RX0581
RX0615
RX0835
RX0836

*This is a non-exhaustive list of documents that Respondent Grail has identified as containing "Sensitive Personal Information."

Exhibit F

CONFIDENTIAL - REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 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/ Nandu Machiraju
 Nandu Machiraju

Counsel Supporting the Complaint