

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

In the Matter of

Illumina, Inc.,
a corporation,

and

GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE

AND ANY EVIDENCE FROM CARIS

Pursuant to the Federal Trade Commission's Rules of Practice 3.22 and 3.43, Respondents Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL"), by their counsel, respectfully move to exclude (1) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; and

(4) the exhibits on Complaint Counsel's exhibit list that were obtained from Caris.¹

The Court should exclude [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Exhibit Nos. PX8319 – PX8323, PX9130 – PX9159. Any expert testimony relying on [REDACTED] evidence should also be excluded. *See, e.g.*, Scott Morton 7/2/21 Rpt. ¶¶ 19, 21, 23-25, 29, 34, 37, 50, 54, 55, 61, 64, 67, 70, 85, 111-114, 148, 152, 158, 180, 189, 192, 203, 222, 252, and Table 1; Scott Morton 7/26/21 Rpt. ¶¶ 34, 68, 108.

_____—and Respondents will face substantial prejudice if this evidence is introduced.

The Court should also exclude any evidence regarding _____

Finally, the Court should exclude the Caris documents on Complaint Counsel’s exhibit list because they relate to topics that _____

_____ While Caris offered that a witness may speak to a small subset of those topics in a deposition, Respondents could not agree to that deposition because it omitted all of the most crucial topics necessary for Respondents to address Complaint Counsel’s allegations.²

Although Respondents moved on August 3, 2021 to compel Caris to produce these documents and to make _____ available for a deposition, this motion *in limine* seeks to preclude Complaint Counsel from introducing _____ or the other evidence described above in the event Respondents’ motion to compel is denied or is not resolved in time for Respondents to make use of Caris’s documents _____ in this hearing. Caris’s non-compliance with its discovery obligations is improper and unjustified, and unfairly prejudices Respondents by limiting their ability to challenge Complaint Counsel’s claims. The introduction

² See Respondents’ August 3, 2021 Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences. To the extent Respondents have the opportunity to depose a witness regarding certain of these exhibits, Respondents will no longer require their exclusion.

of such evidence from Caris would unfairly reward Complaint Counsel for a non-party's discovery violations and should be excluded.

I. BACKGROUND

A. [REDACTED]

As part of Complaint Counsel's review of Illumina's proposed re-acquisition of GRAIL, Complaint Counsel sought information from Caris. (Ex. 1.) [REDACTED]

B. Caris Refuses To Cooperate With Respondents

Respondents subsequently served Caris with document and testimony subpoenas to test [REDACTED] (Exs. 4, 6.) Respondents negotiated with Caris for four months to narrow the scope of the subpoenas, to no avail. Caris has steadfastly refused to produce the core documents and testimony relevant to testing Complaint Counsel's allegations [REDACTED]

With regard to the testimony subpoena, Caris initially represented that [REDACTED] would testify about [REDACTED], and attempted to use that representation as a basis for withholding document productions [REDACTED]. (Ex. 9.) But two days before [REDACTED] deposition, Caris reversed course and informed Respondents that [REDACTED] would not answer questions about [REDACTED]. (Ex. 10.) Caris then refused to make [REDACTED] or any Caris witness available for testimony to testify about any of the topics necessary for Respondents to address Complaint Counsel’s allegations. (Ex. 11.)

II. ARGUMENT

Caris is the only source of information about [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and the exhibits Caris

provided to Complaint Counsel should be excluded because they are unreliable and confusing, and their admission would unfairly prejudice Respondents.

A. [REDACTED] Other Exhibits Caris provided to Complaint Counsel Should Be Excluded Because They Are Unreliable

The admissibility of evidence in Part III administrative trials is governed by Rule 3.43 of the Commission’s Rules of Practice. 16 C.F.R. § 3.43. Rule 3.43(b) provides that “unreliable evidence shall be excluded”, including hearsay that does not “bear satisfactory indicia of reliability so that its use is fair”. *Id.* at § 3.43(b); *see also id.* at § 3.43(d) (directing the Administrative Law Judge to control the presentation of evidence so as to make the presentation “effective for the ascertainment of the truth”).

[REDACTED]

B. The Court Should Exclude [REDACTED] and Other Exhibits Caris provided to Complaint Counsel Because They Are Confusing And Unfairly Prejudicial to Respondents

This evidence should be excluded for the independent reason that the prejudice to Respondents from its introduction far outweighs its probative value. Proffered evidence must meet “the standards for admissibility described” in Rule 3.43(b). This standard of admissibility in turn requires a determination of whether the probative value of the proffered evidence “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading”. *In re Intel Corp.*, 2010 FTC LEXIS 45, at *5-6 (Chappell, J.) (quoting 16 C.F.R. § 3.43(b)); *see also* Fed. R. Evid. 403 (same). [REDACTED]

[REDACTED] should be excluded because it fails to meet this test: its probative value is substantially outweighed by the unfair prejudice to Respondents from the misleading and confusing picture painted by these materials.

As set forth above, [REDACTED] has limited probative value and muddies the record. [REDACTED]

[REDACTED] *See United*

States v. Casey, 825 F.3d 1, 24 (1st Cir. 2016) (“preliminary investigatory results” should have been excluded because they were contradicted by other evidence and thus had “limited probative value”); *United States v. Gutman*, 725 F.2d 417, 435-46 (7th Cir. 1984) (“probative value” of evidence was “minimal” because evidence was “inconsistent and contradictory”). Respondents’ requests to Caris were intended to try to resolve the apparent contradiction—and yet Caris will not provide any information that would help clarify this issue.

By contrast, the prejudice to Respondents is high. Caris is the sole source of information about [REDACTED]—and Caris has foreclosed any examination of this topic by refusing to produce documents or witnesses about [REDACTED]. It has foreclosed any discovery at all into [REDACTED]

[REDACTED]

[REDACTED] Courts routinely exclude evidence as unfairly prejudicial in similar circumstances. [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

would prejudice Respondents by significantly hobbling their ability to litigate its case.

Exclusion of this evidence is also consistent with Commission Rule 3.38(b)(4), providing that a party who fails to comply with discovery obligations may not later rely upon “improperly

withheld or undisclosed materials” that the adversary did not get an opportunity to test. *See* 16 C.F.R. § 3.38(b)(4); Fed. R. Civ. P. 37(c) (same). While it is non-party Caris that refused to comply with its discovery obligations, the evidence should still be excluded under this rule given that the interests of Caris and Complaint Counsel appear to be aligned based on [REDACTED]

[REDACTED] and its lack of cooperation with Respondents. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Caris is the reason why Respondents have been unable to question witnesses or review documents about [REDACTED]. It would be manifestly unfair to now allow Caris and Complaint Counsel to reap the rewards of Caris’s non-compliance with its discovery obligations. Courts routinely exclude evidence in similar circumstances as a sanction for such non-compliance.³ *See, e.g., In re ECM BioFilms*, 2014 FTC LEXIS 63, *11–13 (March 21, 2014) (Chappell, J.) (imposing Rule 3.38(b) sanction prohibiting party from using or relying upon testimony where party failed to show that its non-compliance with discovery obligations was justified and sanction would “affirm the integrity of the administrative process”); *Glob. Force Ent., Inc. v. Anthem Wrestling Exhibitions, LLC*, 468 F. Supp. 3d 969, 973-74 (M.D. Tenn. 2020) (excluding non-party witness from testifying at trial under Rule 37 because defendant did not have opportunity to depose her); *Stella v. Dep’t of Educ.*, 367 F. Supp. 3d 235, 264 (D. Del. 2019) (excluding affidavit under Rule 37 where non-compliance with discovery rules “improperly

³ Similarly, the exhibits Caris provided to Complaint Counsel should be excluded because Caris has refused to produce a witness to testify on the topics discussed in these documents. (Ex. 11.)

deprive[d] [party] of any opportunity to challenge [the] affidavit”); *Jama v. City & Cty. of Denver*, 304 F.R.D. 289, 300-01 (D. Colo. 2014) (excluding testimony under Rule 37 where party was prejudiced by the delay in disclosures and alternative remedies would unfairly reward the offending party).

CONCLUSION

Admitting [REDACTED]
[REDACTED] and other documents relating to [REDACTED], would permit only one, wholly untested and incomplete, side of the story to be presented. Not only is this confusing and misleading, admitting this evidence would unfairly prejudice Respondents—who have never had the chance to question any Caris witness or review documents regarding [REDACTED]—and unfairly reward Caris and Complaint Counsel for Caris’s flouting of discovery rules. Respondents thus respectfully request that their motion be granted and that these materials be excluded.

Dated: August 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

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

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August 5, 2021

By: *Sharonmoyee Goswami*
Sharonmoyee Goswami

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

August 5, 2021

By: Sharonmoyee Goswami
Sharonmoyee Goswami

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**STATEMENT IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO
EXCLUDE [REDACTED]
AND ANY EVIDENCE FROM CARIS**

Pursuant to Paragraph 4 of the Scheduling Order entered on April 26, 2021, Respondents hereby represent that counsel for the moving parties has conferred with Complaint Counsel by email in an effort in good faith to resolve by agreement issues raised by the motion. The parties corresponded by email on August 4 and August 5, 2021 to discuss a potential agreement with respect to the evidence that Respondents seek to exclude in this motion, but were unable to reach an agreement.

Dated: August 5, 2021

Respectfully submitted,

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

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DECLARATION OF SHARONMOYEE GOSWAMI

I, Sharonmoyee Goswami, declare and state:

1. I am a partner at Cravath, Swaine & Moore LLP and counsel for Respondent Illumina, Inc. (“Illumina”) in this matter. I make this declaration in support of Respondents’ Motion *In Limine* To Exclude [REDACTED] And Any Evidence From Caris.

2. Attached as **Exhibit 1** is a copy of the [REDACTED].

3. Attached as **Exhibit 2** is a true and correct copy of an excerpt from [REDACTED].

4. Attached as **Exhibit 3** is a true and correct copy of [REDACTED].

5. Attached as **Exhibit 4** is a true and correct copy of Respondents’ April 8, 2021 subpoena to Caris issued in the district court action.

6. Attached as **Exhibit 5** is a true and correct copy of the May 25-26, 2021 email exchange between S. Jones (Caris) and S. Goswami.

7. Attached as **Exhibit 6** is a true and correct copy of the subpoena for the deposition of Dr. David Spetzler issued by counsel for Illumina on May 21, 2021.

8. Attached as **Exhibit 7** is a true and correct copy of the June 1, 2021 email from S. Goswami (Illumina) to S. Jones (Caris).

9. Attached as **Exhibit 8** is a true and correct copy of the June 7, 2021 email from S. Goswami (Illumina) to S. Jones (Caris).

10. Attached as **Exhibit 9** is a true and correct copy of the June 17, 2021 email from S. Jones (Caris) to S. Goswami (Illumina).

11. Attached as **Exhibit 10** is a true and correct copy of the June 22, 2021 email from S. Jones (Caris) to S. Goswami (Illumina) about the June 24, 2021 deposition of Dr. Spetzler (which was since canceled).

12. Attached as **Exhibit 11** is a true and correct copy of the August 2, 2021 email from S. Goswami (Illumina) to N. Reed and W. Hampton (Caris).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of August, 2021 in New York, New York.

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

EXHIBIT 1

Filed In Camera

EXHIBIT 2

Filed In Camera

EXHIBIT 3

Filed In Camera

EXHIBIT 4

Filed In Camera

EXHIBIT 5

Filed In Camera

EXHIBIT 6

Filed In Camera

EXHIBIT 7

Filed In Camera

EXHIBIT 8

Filed In Camera

EXHIBIT 9

Filed In Camera

EXHIBIT 10

Filed In Camera

EXHIBIT 11

Filed In Camera

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**[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION *IN LIMINE* TO
EXCLUDE [REDACTED]
[REDACTED] AND ANY EVIDENCE FROM CARIS**

On August 5, 2021, Respondents filed a Motion *In Limine* to Exclude [REDACTED]

[REDACTED] And Any Evidence from Caris pursuant to Commission Rules 3.22 and 3.43, and this Court's Scheduling Order. Having considered Respondents' Motion and attached Exhibits, it is hereby ORDERED that Respondents' Motion is GRANTED. Complaint Counsel is precluded from introducing [REDACTED]

[REDACTED] and the exhibits on Complaint Counsel's exhibits list that were obtained from Caris, including Exhibit Nos. PX8319 – PX8323 and PX9130 – PX9159. Any expert testimony, including that of Dr. Fiona Scott Morton, is also excluded to the extent it relies on those materials.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: