

[PUBLIC]

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

DOCKET NO. 9401

**NON-PARTY ULTIMA’S MOTION FOR *IN CAMERA* TREATMENT OF ITS  
CONFIDENTIAL MATERIAL FOR FIVE YEARS**

Pursuant to Rule 3.45 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.45(b), non-party Ultima Genomics, Inc. (“Ultima”) respectfully moves this Court for five years of *in camera* treatment for (a) the entirety of two competitively-sensitive, confidential business documents, (b) the entire transcript of Ultima’s deposition testimony provided pursuant to 16 C.F.R. § 3.33(c)(1), (c) the Declaration accompanying this motion, and (d) all of the information contained in those documents, transcript, and Declaration (the “Confidential Material”).<sup>1</sup> Ultima produced the documents and testimony solely in response to third-party subpoenas and civil

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<sup>1</sup> This Motion is timely. Under the Scheduling Order, the deadline for filing motions for *in camera* treatment of proposed trial exhibits is August 5, 2021. Moreover, Ultima files this motion within 10 days of receiving notice from Complaint Counsel and the Parties.

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investigative demands in this matter, and under the protections of the Protective Order for confidential information; and it now produces the Declaration solely in support of this Motion. If the Confidential Material were publicly disclosed, Ultima would suffer a clearly defined, serious injury.

Complaint Counsel and the Parties do not oppose.

Moreover, as discussed in the Declaration, further redactions of the Confidential Materials or line-by-line treatment of the deposition transcript would not protect Ultima's competitively sensitive, confidential information. Ultima therefore requests leave from the requirement in 16 C.F.R. § 3.45 that it file an "expurgated version of the document" and seeks *in camera* treatment for the Confidential Material in their entirety.

**Rule 3.45(b)(1): Description of the Confidential Material**

Ultima seeks *in camera* treatment for these documents and the material contained therein:

- The document beginning at bates number ULTIMA-FTC-000000001 (PX8570);
- The deposition transcript beginning at bates number PX7119-001 (PX7119);
- The document beginning at bates number ULTIMA-FTC-00000027; and
- The Declaration in Support of *In Camera* Treatment.

**Rule 3.45(b)(2): Statement of the Reasons for Granting *In Camera* Treatment**

"The Administrative Law Judge shall order that [confidential] material, whether admitted or rejected, be placed *in camera* 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. . . ."

16 C.F.R. § 3.45(b). Serious competitive injury is present where the documents are secret and material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999

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F.T.C. LEXIS 255, \*7 (1999) (“The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’”). The FTC also considers:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees 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); *see also* 16 C.F.R. § 3.45(b).

The Confidential Material identified above satisfies these standards, as shown in the Declaration.

Even if the need for *in camera* treatment were not as clear as it is here, every reasonable inference should be made in favor of Ultima because it is a third party who complied with the Part III process, it relied on the Protective Order, and making public the Confidential Material would discourage it and others from cooperating with future discovery requests. *See Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984) (“[A]s third parties, the requests of these companies deserve special solicitude” and “[a]s a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”). Moreover, making public Ultima’s Confidential Material would allow Parties to the Part III discovery and adjudication processes to force public disclosure of other firms’ competitively sensitive, confidential business information.

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**Rule 3.45(b)(3): Statement of the Reasons for the Date on Which  
In Camera Treatment Will Expire**

Ultima requests *in camera* treatment for five years. As explained in the Declaration, the default length of *in camera* treatment of three years is not sufficient to protect Ultima from the clearly defined, serious injury it would suffer if the Confidential Material were not provided five years of *in camera* treatment. Information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents often are provided *in camera* treatment for five years. See *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012). The Confidential Material is this type of information.

**Rule 3.45(b): Persons to Be Notified**

Ultima designates Ethan Glass and Kevin Johnson, Quinn, Emanuel, Urquhart & Sullivan, LLP, 1300 I Street NW, Suite 900, Washington DC 20004 as the persons who should be notified in the event that the Commission intends to disclose the Confidential Material in a final decision.

Date: August 5, 2021

/s/ Ethan Glass \_\_\_\_\_  
QUINN EMANUEL URQUHART & SULLIVAN, LLP  
Ethan Glass (Bar No. 216159)  
ethanglass@quinnemanuel.com  
1300 I Street NW, Suite 900  
Washington, DC 20005  
Telephone: (202) 538-8000  
Facsimile: (202) 538-8100

Attorneys for Non-Party Ultima Genomics, Inc.

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**CERTIFICATE OF SERVICE**

I certify that on August 5, 2021, I filed a copy of the foregoing and the Declaration in support thereof electronically using the FTC's e-filing system, which will send notification to:

Office of the Secretary  
Federal Trade Commission  
Constitution Center  
400 Seventh St. SW, Suite 5610  
Washington, DC 20024  
electronicfilings@ftc.gov

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave. NW, Room H-110  
Washington, DC 20580  
oalj@ftc.gov

I certify that on August 5, 2021, I served a copy of the foregoing and the Declaration in support thereof by e-mail upon:

Complaint Counsel at nstebinger@ftc.gov  
Counsel for Respondent Illumina, Inc. at xhysi@cravath.com  
Counsel for Respondent GRAIL, Inc. at Anna.Rathbun@lw.com

/s/ Ethan Glass

Ethan Glass