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

[redacted] RESPONDENTS' MOTION TO CERTIFY TO THE COMMISSION A REQUEST SEEKING COURT ENFORCEMENT OF DOCUMENT AND TESTIMONY SUBPOENAS ISSUED TO CARIS LIFE SCIENCES

Pursuant to the Federal Trade Commission's Rules of Practice 3.22 and 3.38, Respondents Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL"), by their counsel, respectfully move the Court to certify to the Commission a request for enforcement of limited aspects of document and testimony subpoenas issued to nonparty Caris Life Sciences ("Caris") with the recommendation that the Commission seek enforcement of those subpoenas in district court.

Caris is in sole possession of information at the core of Complaint Counsel's opposition to Illumina's proposed re-acquisition of GRAIL. Specifically, [redacted]

However, Caris has refused to provide Respondents with any documents or testimony central to assessing this basic claim {[redacted]} It cannot be disputed that this information is relevant. Instead, Caris has refused on the basis that it does not want to disclose confidential trade secret information. But the Protective Order was entered precisely to foreclose such arguments, and it will adequately safeguard Caris's interests here. Caris's refusal to comply with Respondents' subpoenas is unjustified, prejudices Respondents, and should be overruled.

I. FACTUAL AND PROCEDURAL BACKGROUND

Complaint Counsel contends that Illumina's proposed re-acquisition of GRAIL, which Illumina founded five years ago, would substantially lessen competition in the "market" for U.S. multi-cancer early detection ("MCED") tests. The basis for this contention is the speculation that, post-transaction, Illumina would disadvantage "rivals" developing MCED tests that would "likely compete" with GRAIL's Galleri test. (*See* Compl. ¶ 41, 48.) Specifically, Complaint Counsel claims that purported GRAIL "rivals" rely on Illumina's next-generation sequencing ("NGS") platform to develop so-called MCED tests, and that, post-acquisition, Illumina would have the incentive and ability to foreclose such test developers. (*Id.* at ¶¶ 4–6, 11.)

Complaint Counsel's pleadings allege {[redacted]}

Respondents vigorously dispute these allegations. There are no "rivals" to GRAIL. (Answer at 3.) Any other cancer screening tests in development are likely to be differentiated from GRAIL's Galleri test based on their features—namely, their scope, ability, and approved use. (*Id*. at 10.) Equally important, the purported "rivals" that Complaint Counsel have identified are many years behind GRAIL in their development of cancer screening tests. (*Id.* at 8–9.) And the stage of development is important because many providers of sequencing platforms have either recently improved their offerings or are expected to launch new products very soon. (*Id.* at 5–6, 8–10.) {[redacted]}

B. Caris Refuses to Cooperate with Respondents

After the FTC commenced its litigation, Respondents issued document and testimony subpoenas to Caris. (Exs. 4, 17, 18.)[1] Respondents negotiated with Caris for four months,

[1] Respondents reissued the subpoenas after the FTC voluntarily dismissed its district court action. (Ex. 16.)

through more than ten separate telephonic meet and confers and countless letters. (*See, e.g.*, Exs. 5, 30.) But Caris has steadfastly refused to produce {[redacted]}

During the course of the negotiations, Illumina substantially narrowed its document subpoena to Caris and offered two proposals with respect to the documents that it was still seeking after Caris's initial production: [redacted]

[redacted]

Caris then replaced its outside counsel. (Ex. 24.) [redacted]

On July 20, 2021, counsel for Caris proposed a 30(b)(6) deposition in lieu of any other discovery and asked for Respondents to propose topics (Ex. 27), but then on July 27 refused to proceed with a deposition [redacted] On August 2, 2021, the Respondents declared an impasse and that they intended to seek relief. (Ex. 30.)

II. ARGUMENT

Evidence from other market participants is necessary for Illumina to develop and prove its defenses. *See*, *e.g.*, *In re Lab'y Corp. of Am.*, No. 9345, 2011 WL 822920, at *2–3 (Feb. 28, 2011). [redacted]

[2] [redacted]

[redacted]

A. [redacted]

Relevance is broadly construed and extends to any information related to "the allegations of the complaint, to the proposed relief, or to the defenses of any respondent". 16 C.F.R. § 3.31(c)(1).

The discovery sought is plainly relevant because it relates directly to the FTC's allegations in this case. To meet its burden, the FTC must make a fact-specific showing that the effect of the proposed merger is likely to be anticompetitive in a relevant market. *United States v. AT&T*, 310 F. Supp. 3d 161, 192 (D.D.C. 2018). The FTC defines its "relevant market" as U.S. multi-cancer early detection tests, and claims that Illumina's re-acquisition of GRAIL will give Illumina the incentives and ability to harm GRAIL's potential "rivals" in that market[redacted] and thus the information is relevant and discoverable. *See In re Rambus, Inc.*, Dkt. No. 9302 (Nov. 18, 2002) (party need show "subpoena seeks information that is reasonably expected to be 'generally relevant to the issues raised by the pleadings'").

[3] Respondents intend to seek to exclude [redacted]

{[redacted]}

[4] [redacted]} Nor is a deposition upon written questions a reasonable alternative. Such depositions "present huge disadvantages, including the loss of spontaneity, the inability to ask follow-up questions, the inability to observe the witness, and the inability to ensure the integrity of the responses". *Fid. Int'l Currency Advisor a Fund, LLC v. United States*, 2007 WL 9412764, at *3 (D. Mass. May 23, 2007).

B. The Protective Order Protects Caris's Confidential Information.

Caris cannot resist compliance on the basis that the subpoenas seek confidential information. This Court has issued a protective order designed to protect "competitively sensitive information". (Protective Order, Attach. A ¶ 1.) It allows non-parties to designate any competitively sensitive information as "confidential material". (*Id*. ¶ 3.) Any information designated confidential by Caris cannot be viewed by Respondents, cannot be used outside of this proceeding, and can only be accessed by court personnel and outside counsel. (*Id.* ¶¶ 1, 7, 8.) Courts have consistently held that such protective orders adequately balance the parties' need for confidential business information and the sensitivity of non-parties to producing their non-public information. *See, e.g.*, *In re N. Texas Specialty Physicians*, Dkt. No. 9312, 2004 WL 527340, at *2 (Jan. 30, 2004) ("The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery.").

In fact, Caris has already produced materials pursuant to this Protective Order. {[redacted]} The Protective Order will protect Caris's information here too.

C. The Requested Information from Caris is Not Unduly Burdensome.

Nor can Caris resist producing these highly relevant documents by claiming burden. "[S]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest". *In re OSF Healthcare Sys.*, Dkt. No. 9349,

2012 WL 588758, at *2 (Feb. 14, 2012). Even a "substantial degree of burden" will "not excuse producing information that appears generally relevant to the issues in the proceeding". *Id.*

The burden on Caris is small, and much smaller than the burden on other third parties in this action. Respondents significantly narrowed the scope of the document request to forgo custodial document collections, search terms, or comprehensive searches of hard drives.

[redacted]

III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that their Motion be granted.

Dated: August 3, 2021

Respectfully submitted,

Sharonmoyee Goswami

Christine A. Varney
Richard J. Stark
David R. Marriott
J. Wesley Earnhardt
Sharonmoyee Goswami
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
cvarney@cravath.com
rstark@cravath.com
dmarriott@cravath.com
wearnhardt@cravath.com
sgoswami@cravath.com

Attorneys for Respondent Illumina, Inc.

Michael G. Egge
Marguerite M. Sullivan
Anna M. Rathbun
David L. Johnson
LATHAM & WATKINS LLP,
555 Eleventh Street NW
Suite 1000
Washington, D.C. 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
michael.egge.@lw.com

Alfred C. Pfeiffer
505 Montgomery Street
Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
Al.pfeiffer@lw.com

Attorneys for Respondent
GRAIL, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting 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:

Complaint Counsel
U.S. Federal Trade Commission
Susan Musser
Dylan P. Naegele
David Gonen
Jonathan Ripa
Matthew E. Joseph
Jordan S. Andrew
Betty Jean McNeil
Lauren Gaskin
Nicolas Stebinger
Samuel Fulliton
Stephen A. Mohr
Sarah Wohl
William Cooke
Catherine Sanchez
Joseph Neely
Nicholas A. Widnell
Daniel Zach
Eric D. Edmonson

Counsel for Respondent Illumina, Inc.
Cravath, Swaine & Moore LLP
Christine A. Varney
Richard J. Stark
David R. Marriott
J. Wesley Earnhardt
Sharonmoyee Goswami
Jesse M. Weiss
Michael J. Zaken

Counsel for Respondent GRAIL, Inc.
Latham & Watkins LLP
Michael G. Egge
Marguerite M. Sullivan
Alfred C. Pfeiffer, Jr.
Anna M. Rathbun
Carla Weaver
David L. Johnson
Charles A. Berdahl
Marcus Curtis

Counsel for Caris Life Sciences, Inc.
Skadden, Arps, Slate, Meagher & Flom LLP
Noelle M. Reed
Wallis M. Hampton

August 3, 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 3, 2021

By: *Sharonmoyee Goswami*
Sharonmoyee Goswami

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

SEPARATE MEET AND CONFER STATEMENT

The undersigned counsel certifies that Respondent Illumina, Inc. ("Illumina") conferred with counsel for Caris Life Sciences ("Caris") in a good faith effort to resolve by agreement the issues raised in this motion regarding the subpoenas for documents and testimony at issue.

Illumina and Caris first met and conferred via telephone on April 13, 2021 regarding the document subpoena, and Caris explained it would consider producing documents in response to tailored search terms proposed by Illumina, which Illumina provided on April 15, 2021. On April 26, 2021, counsel for Illumina, Caris and the FTC held another telephonic meet and confer, in which Caris raised concerns over the number of documents captured by the search terms. After further correspondence on April 27 and 28, 2021, and another meet and confer between Caris and Illumina on April 29, 2021, Illumina proposed changes to further narrow the search terms by email.

On May 3, 2021, Caris stated via letter that it would not apply the narrowed search terms. Through subsequent phone conversations and exchanges of correspondence on May 4, 5, 6, 7, 12 and 19 between Illumina and Caris, Illumina agreed to narrow its request to [redacted]

[redacted]. Caris produced a limited set of documents on May 24 and May 27, 2021, and Illumina communicated Illumina's position via email on June 1, 2021 that these documents did not address its narrow request. Caris confirmed that it would produce no further documents via a June 7 email, and in a June 17 email, invited Illumina to file a motion to compel.

With respect to Dr. Spetzler's deposition, the parties and Caris initially agreed via email on May 7, 2021 to schedule Dr. Spetzler's deposition for May 27, 2021. After the subpoena for Dr. Spetzler's testimony was re-served in the administrative matter, the parties and Caris agreed on June 7, 2021 to schedule the deposition for June 24, 2021. In a series of emails on June 22, 2021, Respondents and Caris reached an impasse regarding Dr. Spetzler's deposition, resulting in Caris canceling it.

Respondents and Caris continued to confer via email and telephone, including on a July 20, 2021 call between Respondents, Caris and the FTC, when Caris proposed that Respondents take a deposition of Caris pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. On July 21, 2021, Illumina proposed a set of topics for a Rule 30(b)(6) deposition. On July 27, 2021 Caris rejected Respondents' proposal and offered a proposed list of topics that not only omitted [redacted], but also omitted any reference to the very topic on which Respondents consistently sought discovery: [redacted].

Dated: August 3, 2021

Respectfully submitted,

Sharonmoyee Goswami

Christine A. Varney
Richard J. Stark
David R. Marriott
J. Wesley Earnhardt
Sharonmoyee Goswami
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
cvarney@cravath.com
rstark@cravath.com
dmarriott@cravath.com
wearnhardt@cravath.com
sgoswami@cravath.com

Attorneys for Respondent
Illumina, Inc.

EXHIBIT 1

PUBLIC

Filed In Camera

EXHIBIT 2

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 3

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 4

PUBLIC

Filed In Camera

EXHIBIT 5

PUBLIC

Filed In Camera

EXHIBIT 6

PUBLIC

Filed In Camera

EXHIBIT 7

PUBLIC

Filed In Camera

EXHIBIT 8

PUBLIC

Filed In Camera

EXHIBIT 9

PUBLIC

Filed In Camera

EXHIBIT 10

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 11

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 12

PUBLIC

Filed In Camera

EXHIBIT 13

PUBLIC

Filed In Camera

EXHIBIT 14

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 15

Filed In Camera

EXHIBIT 16

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 17

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 18

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 19

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 20

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 21

PUBLIC

Filed In Camera

EXHIBIT 22

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 23

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 24

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 25

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 26

PUBLIC

Filed In Camera

PUBLIC

EXHIBIT 27

PUBLIC

Filed In Camera

EXHIBIT 28

Filed In Camera

EXHIBIT 29

PUBLIC

Filed In Camera

EXHIBIT 30

Filed In Camera

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

[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION TO CERTIFY TO THE COMMISSION A REQUEST SEEKING COURT ENFORCEMENT OF DOCUMENT AND TESTIMONY SUBPOENAS ISSUED TO CARIS LIFE SCIENCES

Upon consideration of Respondents' Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences:

IT IS HEREBY ORDERED that Respondents' Motion is GRANTED.

IT IS FURTHER ORDERED that Respondents' request for court enforcement of the subpoenas issued to Caris Life Sciences (1) for the production of documentary material sufficient to [redacted], and (2) to make Dr. David Spetzler, President of Caris, available for deposition before August 24, 2021.

_____
D. Michael Chappell
Chief Administrative Law Judge

Dated: