

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

_____)	
In the Matter of)	
)	
Illumina, Inc.,)	
a corporation,)	
)	
and)	Docket No. 9401
)	
GRAIL, Inc.)	
a corporation,)	
)	
Respondents.)	
_____)	

**NON-PARTY GUARDANT HEALTH, INC.’S
MOTION TO INTERVENE IN OPPOSITION TO ILLUMINA’S
EXPEDITED MOTION TO MODIFY THE PROTECTIVE ORDER**

Non-party Guardant Health, Inc. (“Guardant”), through its undersigned counsel and pursuant to Rule 3.14 of the Federal Trade Commission’s (“FTC”) Rules of Practice, 16 C.F.R., § 3.14(a), respectfully requests that the Court allow Guardant to intervene in order to submit a brief in opposition to Respondent Illumina, Inc.’s (“Illumina”) Expedited Motion to Modify the Protective Order (the “Motion”). Illumina’s US counsel provided Guardant with a “courtesy copy” of the Motion on October 13, 2022. (*See* Hesse Decl. Exhibit A.)

Guardant seeks to intervene in order to preserve its ability to safeguard its confidential information, and to ensure that all interested non-parties to the litigation have sufficient time to seek the continued protection of their own confidential information.

Respectfully submitted,

Dated: October 17, 2022

/s/ Renata Hesse

Renata B. Hesse

SULLIVAN & CROMWELL LLP

1700 New York Avenue, N.W. Suite 700

Washington, District of Columbia 20006

Telephone: (202) 956-7000

Facsimile: (202) 293-6330

hesser@sullcrom.com

Counsel for Non-Party Guardant Health, Inc.

**UNITED STATES OF AMERICA
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Illumina, Inc.,)	
a corporation,)	
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and)	Docket No. 9401
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GRAIL, Inc.)	
a corporation,)	
)	
Respondents.)	
_____)	

DECLARATION OF RENATA HESSE

I, Renata Hesse, declare and state:

1. I am a partner at Sullivan & Cromwell LLP and counsel for non-party Guardant Health, Inc. (“Guardant”) in this matter. I make this declaration in support of Guardant’s Motion to Intervene in Opposition to Illumina’s Expedited Motion to Modify the Protective Order.
2. Attached as Exhibit A is a true and correct copy of an October 13, 2022 email from Benjamin Atlas of Cravath, Swaine & Moore, Illumina’s US counsel, to Renata Hesse conveying a “courtesy copy” of Illumina’s Expedited Motion to Modify the Protective Order.

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

Executed on this 17th day of October, 2022 in Washington, D.C..

/s/ Renata Hesse
Renata Hesse

HESSE DECL. EXHIBIT A

Black, Caroline M.L.

From: Hesse, Renata
Sent: Monday, October 17, 2022 8:49 AM
To: Black, Caroline M.L.; Bock, Karl L.
Subject: FW: [EXTERNAL] Docket No. 9401 -- Illumina, Inc.'s Expedited Motion to Modify the Protective Order (Public)
Attachments: 2022.10.13 -- Illumina's Expedited Motion to Modify the Protective Order (Public) (Service Copy).pdf

From: Benjamin Atlas <batlas@cravath.com>
Date: Thursday, Oct 13, 2022, 7:54 PM
To: Kully, David (WAS - X75415) <David.Kully@hklaw.com>, McDonald, Matthew <mmcdonald@wsgr.com>, mina.rhee@emory.edu <mina.rhee@emory.edu>, allen.bachman@klgates.com <allen.bachman@klgates.com>, Kelley, Derek W. <Derek.Kelley@klgates.com>, hsu@bradley.com <hsu@bradley.com>, Hesse, Renata <hesser@sullcrom.com>, Van Voorhis, Lee K. <LVanVoorhis@jenner.com>, Dunn, Alvin <alvin.dunn@pillsburylaw.com>, Leigh.Oliver@CliffordChance.com <Leigh.Oliver@CliffordChance.com>, Jeffrey.Perry@weil.com <Jeffrey.Perry@weil.com>, Stephen Weissman <SWeissman@gibsondunn.com>, dlitvack@jenner.com <dlitvack@jenner.com>, zzExt-Leon.Greenfield <Leon.Greenfield@wilmerhale.com>, zzExt-Nana.Wilberforce <Nana.Wilberforce@wilmerhale.com>, Richard Parker <RParker@gibsondunn.com>, Christopher Kopp <CKopp@gibsondunn.com>, mantalics@omm.com <mantalics@omm.com>, Jason Ewart <Jason.Ewart@arnoldporter.com>, James P. Ellison <JEllison@hpm.com>, Karin Moore <KMoore@hpm.com>, Agin, Neely <NAgin@winston.com>, jharkrider@axinn.com <jharkrider@axinn.com>, malexander@axinn.com <malexander@axinn.com>, Lacy, Andrew M <ALacy@goodwinlaw.com>, Mike Bonanno <mikebonanno@quinnemanuel.com>
Cc: OALJ@ftc.gov <oalj@ftc.gov>, Gross, Dana <DGROSS@ftc.gov>, 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>, Illumina Trial Team <IlluminaTrialTeam@cravath.com>, LW Valor Antitrust <LWVALORANTITRUST.LWTEAM@lw.com>
Subject: [EXTERNAL] Docket No. 9401 -- Illumina, Inc.'s Expedited Motion to Modify the Protective Order (Public)

Counsel,

Attached please find a courtesy copy of Respondent Illumina, Inc.'s Expedited Motion to Modify the Protective Order, filed electronically on Oct. 7 in the above-referenced docket number.

Thank you,
Ben

Benjamin A. Atlas
Cravath, Swaine & Moore LLP
825 Eighth Avenue | New York, NY 10019
(212) 474-1105
batlas@cravath.com

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

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

In the Matter of

Illumina, Inc.,
a corporation, and

and

GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

**RESPONDENT ILLUMINA, INC.’S EXPEDITED MOTION TO
MODIFY THE PROTECTIVE ORDER**

Respondent Illumina, Inc. (“Illumina”), through undersigned counsel, respectfully requests that the Court order a limited modification to the Protective Order to allow undersigned counsel to share certain confidential material produced by third parties in this proceeding with Illumina’s external European (“EU”) counsel and external economic consultants, on an external advisor only basis, in connection with Illumina’s appeal to the General Court of the European Union (the “EU General Court”) of the European Commission’s decision prohibiting Illumina’s acquisition of GRAIL. Complaint Counsel does not oppose Illumina’s request for the modification sought herein (Decl. of Sharonmoyee Goswami, Ex. 1), on the condition that Illumina’s external EU counsel and economic consultants who will receive such material agree in writing to abide by the terms of the Protective Order, which they have done (Decl. of Sharonmoyee Goswami, Exs. 2-4).

Illumina respectfully requests that the Court consider this motion on an expedited basis¹, because Illumina’s appeal in the European proceeding is due in approximately seven weeks, and, as discussed below, Illumina’s external EU counsel and economic consultants require the materials to fully prepare the EU appeal.²

I. BACKGROUND

On September 6, 2022, the European Commission (“EC”) issued a decision prohibiting Illumina’s acquisition of GRAIL (the “EC Decision”).³ Illumina intends to appeal the EC Decision to the General Court of the European Union, and has retained external EU Counsel at Cleary Gottlieb Steen & Hamilton LLP and Monckton Chambers to litigate its appeal. Illumina’s deadline to appeal the EC Decision is November 17, 2022. To fully prepare Illumina’s appeal, it is essential that Illumina’s external EU counsel and economic consultants have access to certain confidential materials produced by third parties in this proceeding. Specifically, Illumina seeks to provide external EU counsel and economic consultants with the complete trial record: the Initial Decision, the parties’ respective post-trial submissions, trial testimony, trial depositions and any document admitted into evidence. Because the Protective Order provides that disclosure of confidential material “shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever”, the limited modification requested herein is necessary to enable Illumina’s external

¹ Complaint Counsel opposes expedited consideration.

² Illumina anticipates that, following review of the confidential material by its external EU counsel and consultants, Illumina may request a further modification of the Protective Order to enable its counsel to submit certain identified confidential materials to the EU General Court on a confidential basis in connection with the appeal. At this time, however, Illumina seek only a modification to enable external its EU counsel and economic consultants to review such materials.

³ See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

EU counsel and economic consultants to receive such material for the purpose of preparing the EU appeal.

II. ARGUMENT

“[A] protective order is always subject to modification” for good cause shown. *In re Se. Milk Antitrust Litig.*, No. MDL. 1899, 2009 WL 3713119, at *1 (E.D. Tenn. Nov. 3, 2009); *see, e.g., In the Matter of Schering-Plough Corp.*, No. 9297, 2001 WL 1478371, at * 1, 3 (F.T.C. June 20, 2001) (reaching merits of Complaint Counsel’s motion to amend); *In re McWane, Inc.*, No. 9351, 2012 WL 3518638, at *2 (F.T.C. Aug. 8, 2012) (considering whether circumstances justified “a deviation from the standard protective order language”). The limited modification to the Protective Order sought here is warranted for the following reasons.

First, the proposed modification is reasonable, narrowly tailored, and fully consistent with the intent underlying the standard protective order language established by Rule 3.31 of the Commission Rules of Practice, and Complaint Counsel does not oppose it. (Decl. of Sharonmoyee Goswami, Ex. 1.) The proposed modification has no impact whatsoever on third parties who produced confidential material in this proceeding or on the treatment of their confidential material. Under the protective order today, Illumina’s external counsel and economic consultants *in the United States* can already see confidential material. Under the proposed modification, confidential material will remain limited to external counsel and economic consultants—now including Illumina’s European representatives—who have already agreed to abide by the terms of the Protective Order. (Decl. of Sharonmoyee Goswami, Exs. 2-4.)

Second, the proposed modification is necessary to ensure Illumina, through its EU counsel, has a fair opportunity to fully prepare the EU appeal. Certain third parties who produced confidential information and testified *in camera* in *this* proceeding made

representations to the European Commission regarding the status of the development of their cancer screening tests and the adequacy of the Open Offer that were material to the EC’s decision to prohibit the Transaction.⁴ Those representations, we submit, are contradicted by the confidential materials in the trial record. It is essential that Illumina’s external EU counsel and economic consultants be able to evaluate the complete record in preparing the appeal, to determine whether to seek this Court’s permission to submit any such confidential material to the EU General Court on a confidential basis.⁵ Further, there is no process for Illumina’s external EU counsel to obtain confidential material from third parties through the European proceedings.

III. CONCLUSION

For the reasons stated above, Illumina respectfully requests that the Court grant its motion for a limited modification to the Protective Order to allow undersigned counsel to share confidential material produced by third parties in this proceeding with Illumina’s external EU counsel and economic consultants on an external advisor only basis, in connection with Illumina’s appeal of the decision from the European Commission prohibiting the Transaction.

⁴ Upon announcing the prohibition decision, the EC’s Executive Vice-President claimed that the decision preserved “competition between early cancer detection test developers at this critical stage of development” and that Illumina’s proposed remedy (which included the Open Offer) was inadequate. *See* European Commission Press Release, Commission prohibits acquisition of GRAIL by Illumina, Sept. 6, 2022, *available at*: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364

⁵ For example, the modified Protective Order would enable Illumina’s external EU counsel to review Dr. Cote’s unredacted expert opinions, which this Court found “are well supported by the record evidence and are persuasive” (Initial Decision at 145), for the purpose of preparing the appeal and determining whether to seek this Court’s permission to submit Dr. Cote’s report to the EU General Court on a confidential basis.

Dated: October 7, 2022

Respectfully submitted,

/s/ Sharonmoyee Goswami

Christine A. Varney
David R. Marriott
Sharonmoyee Goswami
Jesse M. Weiss
Michael J. Zaken
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
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cvarney@cravath.com
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sgoswami@cravath.com
jweiss@cravath.com
mzaken@cravath.com

Counsel for Respondent Illumina, Inc.

**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

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 Illumina, Inc.’s (“Illumina”) Unopposed Expedited Motion to Modify the Protective Order.

2. Attached as **Exhibit 1** is a true and correct copy of an email conversation between Sharonmoyee Goswami and Susan Musser.

3. Attached as **Exhibit 2** is a true and correct copy of Cleary Gottlieb Steen & Hamilton LLP’s executed Agreement to Abide by the Protective Order in this matter.

4. Attached as **Exhibit 3** are true and correct copies of Monckton Chambers’ executed Agreements to Abide by the Protective Order in this matter.

5. Attached as **Exhibit 4** is a true and correct copy of RBB Economics’ executed Agreement to Abide by the Protective Order in this matter.

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

Executed on this 7th day of October, 2022 in New York, New York.

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

EXHIBIT 1

From: Sharonmoyee Goswami
Sent: Thursday, October 6, 2022 10:39 PM
To: Musser, Susan
Cc: 1037-Illumina-Grail-DL; Michael Zaken; Jesse Weiss; Anna M. Rathbun -contact; Benjamin Atlas; Mohr, Stephen A.
Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Susan:

I can confirm that Illumina's European economists are not affiliated with either Illumina or GRAIL.

We have also notified third parties of our intent to seek modification of the protective order.

Best,

Sharon

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Thursday, October 6, 2022 4:31 PM
To: Sharonmoyee Goswami <sgoswami@cravath.com>
Cc: 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>; Michael Zaken <mzaken@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin Atlas <batlas@cravath.com>; Mohr, Stephen A. <smohr@ftc.gov>
Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

External (smusser@ftc.gov)

[Report This Email](#) [FAQ](#)

Sharon:

Can you represent that your European economists are not affiliated with either Illumina or GRAIL (i.e., Dr. Abrams)? Subject to that confirmation we will not oppose your motion based on your representations below and subject to the additional understanding that any further disclosure must be done through modification of the PO and that Illumina/GRAIL's outside counsel and economists representing in them in front of the European Commission will abide by the terms of the protective order.

We would, however, oppose any request for expedited briefing. It is our position that third-parties must be provided adequate opportunity to intervene should they so choose. Finally, it is our understanding that Illumina has notified (or intends to notify) third parties of its intent to seek modification of the protective order. Please let us know if our understanding is in error.

Best,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Wednesday, October 5, 2022 7:46 PM

To: Musser, Susan <smusser@ftc.gov>

Cc: 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>; MichaelJ.Zaken-contact <mzaken@cravath.com>; JesseM.Weiss-contact <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin A. Atlas <batlas@cravath.com>

Subject: Re: Docket 9401 - Illumina/GRAIL Protective Order

Ok, thank you.

Sharonmoyee Goswami

Cravath, Swaine & Moore LLP

825 Eighth Avenue, New York, NY 10019

T [+1-212-474-1928](tel:+1-212-474-1928)

sgoswami@cravath.com

On Oct 5, 2022, at 7:14 PM, Musser, Susan <smusser@ftc.gov> wrote:

Sharon –

We are still running things down on our end but need to revert back to you tomorrow given limited availability over the holiday.

Thanks,

Susan

From: Musser, Susan

Sent: Wednesday, October 5, 2022 12:19 PM

To: Sharonmoyee Goswami <sgoswami@cravath.com>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>

Cc: MichaelJ.Zaken-contact <mzaken@cravath.com>; JesseM.Weiss-contact <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin A. Atlas <batlas@cravath.com>

Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Sharon –

We are considering your request and will do our best to get back to you today.

Best,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Wednesday, October 5, 2022 9:49 AM

To: Musser, Susan <smusser@ftc.gov>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>

Cc: MichaelJ.Zaken-contact <mzaken@cravath.com>; JesseM.Weiss-contact <jweiss@cravath.com>; Anna M. Rathbun -

Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Susan:

Can you please let me know as soon as possible if the FTC would oppose the slightly revised scope of Illumina's motion to modify the protective order as detailed below? I am happy to discuss on a call if necessary.

Best,

Sharon

Sharonmoyee Goswami

Cravath, Swaine & Moore LLP

825 Eighth Avenue, New York, NY 10019

T +1-212-474-1928

sgoswami@cravath.com

From: Sharonmoyee Goswami

Sent: Monday, October 3, 2022 2:59 PM

To: 'Musser, Susan' <smusser@ftc.gov>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>

Cc: Michael Zaken <mzaken@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin Atlas <batlas@cravath.com>

Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Thank you, Susan.

One follow-up:

- Would the FTC oppose a motion where GRAIL's outside counsel representing them in front of the European Commission and Illumina's economic experts could also access the materials designated *in camera*, provided that GRAIL's outside counsel and Illumina's economic experts in Europe (1) agreed to abide by the terms of the protective order and (2) Illumina/GRAIL moved for modification prior to any disclosure.

Sharonmoyee Goswami

Cravath, Swaine & Moore LLP

825 Eighth Avenue, New York, NY 10019

T +1-212-474-1928

sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>

Sent: Thursday, September 29, 2022 12:22 PM

To: Sharonmoyee Goswami <sgoswami@cravath.com>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>

Cc: Michael Zaken <mzaken@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin Atlas <batlas@cravath.com>

Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Sharon:

To follow up on our conversation, the FTC would not oppose a motion to allow Illumina's outside counsel representing them in front of the European Commission access to the materials designated *in camera* by the court, provided that (1) Illumina's outside counsel agree in writing to abide by the terms of the protective order as entered by Judge Chappell in this proceeding and that (2) Illumina move for modification of the protective order prior to any disclosure.

Please let us know if you have any questions or wish to discuss.

Best,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Thursday, September 29, 2022 11:00 AM
To: Musser, Susan <smusser@ftc.gov>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>
Cc: MichaelJ.Zaken-contact <mzaken@cravath.com>; JesseM.Weiss-contact <jweiss@cravath.com>; Anna M. Rathbun - contact <anna.rathbun@lw.com>; Benjamin A. Atlas <batlas@cravath.com>
Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Susan:

Can you please let us know when you will have a response regarding the questions we posed on the meet and confer on Monday? We will need to file our motion promptly.

Best,

Sharon

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T [+1-212-474-1928](tel:+1-212-474-1928)
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Monday, September 26, 2022 9:42 AM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>
Cc: Michael Zaken <mzaken@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin Atlas <batlas@cravath.com>
Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Great. Can you please send a dial-in?

Many thanks,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Sunday, September 25, 2022 4:47 PM

To: Musser, Susan <smusser@ftc.gov>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>

Cc: MichaelJ.Zaken-contact <mzaken@cravath.com>; JesseM.Weiss-contact <jweiss@cravath.com>; Anna M. Rathbun - contact <anna.rathbun@lw.com>; Benjamin A. Atlas <batlas@cravath.com>

Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Thanks, Susan. We are available to meet and confer at 4pm ET tomorrow.

Sharonmoyee Goswami

Cravath, Swaine & Moore LLP

825 Eighth Avenue, New York, NY 10019

T +1-212-474-1928

sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>

Sent: Friday, September 23, 2022 12:12 PM

To: Sharonmoyee Goswami <sgoswami@cravath.com>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>

Cc: Michael Zaken <mzaken@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin Atlas <batlas@cravath.com>

Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Sharon:

As you know, the Protective Order in Part 3 is mandated by Part 3 regulations. See, Appendix A to § 3.31: Standard Protective Order. As such, Complaint Counsel is unable to consent to modification of the Protective Order. Moreover, despite your below email we still have a multitude of unanswered questions regarding both the scope of your anticipated disclosures as well as how such information shall be used. As such, Respondents need to file a motion explaining both what information specifically it seeks to disclose (i.e., it is unclear what is meant by "intended" trial exhibits) as well as the process in the EC regarding how it will treat confidential information and the opportunities third parties will have to protect their confidential information from further disclosure. Once you have filed the motion, we can review and let you know whether we oppose.

Regarding your request for an expedited briefing schedule, I am afraid we cannot agree. Third parties produced information to Complaint Counsel and Respondents under the assurances that they would have the protection afforded by the specified procedures that allow them to protect their confidential information throughout the FTC administrative proceedings. Many third parties availed themselves of that opportunity during the course of this proceeding by obtaining in camera treatment of their confidential information. As such, Complaint Counsel's understanding is that Illumina needs to provide notice to third parties that it now seeks to amend the Protective Order to allow for potential disclosure of their information and provide third parties an opportunity to intervene. Please confirm that you will be providing notice to third parties regarding your intent to modify the protective order in this case and that you will cc the FTC on any such communication.

That all said, we are happy to meet and confer and can be available on Monday from 3-5.

Best regards,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Thursday, September 22, 2022 3:57 PM
To: Musser, Susan <smusser@ftc.gov>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>
Cc: MichaelJ.Zaken-contact <mzaken@cravath.com>; JesseM.Weiss-contact <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin A. Atlas <batlas@cravath.com>
Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Susan:

To clarify, we are not asking for Illumina's in house counsel to have access to any confidential information. Our request would be limited to modifying the protective order to allow Illumina's European outside counsel and the European General Court to review documents marked confidential in accordance with the protective order. In particular we intend to ask that Illumina's European outside counsel and the European General Court be able to review all of the parties' intended trial exhibits, all of the hearing testimony (including trial depositions), all of the parties' post-trial and appellate filings and the ALJ's initial decision. Access to this information is necessary for Illumina's European outside counsel's appeal of the European Commission's decision.

Please let us know when you are available to meet and confer.

Sharonmoyee Goswami

Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Thursday, September 22, 2022 3:24 PM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>
Cc: Michael Zaken <mzaken@cravath.com>; Jesse Weiss <jweiss@cravath.com>; Anna M. Rathbun -contact <anna.rathbun@lw.com>; Benjamin Atlas <batlas@cravath.com>
Subject: RE: Docket 9401 - Illumina/GRAIL Protective Order

Sharon:

Can you please provide additional information regarding what, exactly, you are asking Illumina's counsel to access? Specifically, whether you are asking that Illumina's counsel obtain access to the complete trial record and exhibits or some subset. Moreover, can you provide an explanation regarding your justification as to why Illumina's in-house counsel needs access to confidential information? Once you provide that information we would be happy to meet and confer.

Best,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Monday, September 19, 2022 3:47 PM
To: 1037-Illumina-Grail-DL <1037-Illumina-Grail-DL@ftc.gov>

FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 10/17/2022 | Document No. 605868 | PAGE Page 21 of 43 * PUBLIC *;
Cc: MichaelJ.Zaken-contact <mzaken@cravath.com>; JesseM.Weiss-contact <jweiss@cravath.com>; Anna M. Rathbun - contact <anna.rathbun@lw.com>; Benjamin A. Atlas <batlas@cravath.com>
Subject: Docket 9401 - Illumina/GRAIL Protective Order

Susan:

Illumina is preparing to file a motion to modify the protective order to allow Illumina’s European Counsel to review (in connection with the European proceedings) Confidential Information in the following materials from the Administrative Record: the parties’ intended trial exhibits, the hearing testimony (including trial depositions), the parties’ post-trial and appellate filings, and the Court’s decision.

Given the timeline in Europe, we intend to request expedited consideration of this motion. We are available to meet and confer this week to discuss (1) whether Complaint Counsel will oppose this motion and (2) if Complaint Counsel will oppose the motion, whether Complaint Counsel will agree to an expedited briefing schedule. Please let us know when you are available to meet and confer.

Best,

Sharon

Sharonmoyee Goswami
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EXHIBIT 2

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

In the Matter of

Illumina, Inc.,
a corporation, and

and

GRAIL, Inc.,
a corporation,

Respondents.

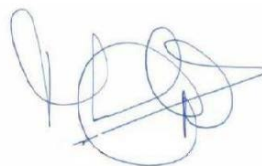
Docket No. 9401

AGREEMENT TO ABIDE BY PROTECTIVE ORDER

On behalf of Cleary Gottlieb Steen & Hamilton LLP (“Cleary”), I hereby confirm that Cleary will abide by the terms of the Protective Order entered in the above-captioned proceeding.

CLEARY GOTTLIEB STEEN &
HAMILTON LLP,

by



Name: F. E. González Díaz
Title: Partner

EXHIBIT 3

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

In the Matter of

Illumina, Inc.,
a corporation, and

and

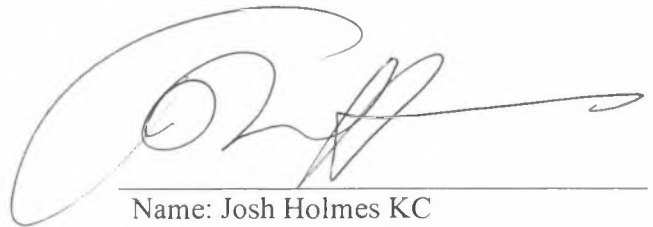
GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

AGREEMENT TO ABIDE BY PROTECTIVE ORDER

I, Josh Holmes KC, a barrister practicing from Monckton Chambers, Gray's Inn, London, hereby confirm that I will abide by the terms of the Protective Order entered in the above-captioned proceeding.



Name: Josh Holmes KC
Title: Mr

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

In the Matter
of

Illumina, Inc.,
a corporation, and

and

GRAIL, Inc.,
a corporation,

Respondents

Docket No.
9401

AGREEMENT TO ABIDE BY PROTECTIVE ORDER

I, Daniel Beard KC, a barrister practicing from Monckton Chambers, Gray’s Inn, London, hereby confirm that I will abide by the terms of the Protective Order entered in the above-captioned proceeding.



5 - Oct - 22

Name: Daniel Beard KC

Title: Mr

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

In the Matter of

Illumina, Inc.,
a corporation, and

and


GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

AGREEMENT TO ABIDE BY PROTECTIVE ORDER

I, Alistair Lindsay, a barrister practicing from Monckton Chambers, Gray's Inn, London, hereby confirm that I will abide by the terms of the Protective Order entered in the above-captioned proceeding.



4 October 2022

Name: Alistair Lindsay
Title: Mr

EXHIBIT 4

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

In the Matter of

Illumina, Inc.,
a corporation, and

and

GRAIL, Inc.,
a corporation,

Respondents.

Docket No. 9401

AGREEMENT TO ABIDE BY PROTECTIVE ORDER

On behalf of RBB Economics (“RBB”), I hereby confirm that RBB will abide by the terms of the Protective Order entered in the above-captioned proceeding.

RBB Economics,

by



Name:

A Tyler

Title:

COO

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

In the Matter of

Illumina, Inc.
a corporation,

and

GRAIL, Inc.
a corporation,

Respondents.

Docket No. 9401

[PROPOSED] ORDER

Upon consideration of Respondent Illumina, Inc.’s (“Illumina”) Expedited Motion to
Modify the Protective Order, it is hereby

ORDERED, that Illumina’s motion is GRANTED and the modified Protective Order
attached as Appendix A take effect.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge

APPENDIX A

**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,

Respondents.

Docket No. 9401

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: “In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section.” Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:

/s/ DM Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date:

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be 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. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.
6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof),

or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation “CONFIDENTIAL – FTC Docket No. 9401” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9401” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) external European (“EU”) counsel for any respondent in connection with proceedings before the General Court of the European Union (the “EU General Court”) of the European Commission, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent ~~(e)~~ anyone retained to assist outside counsel or external EU counsel in the preparation or hearing of this proceeding or EU General Court proceedings, including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (ef) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a

duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, 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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U.S. Federal Trade Commission

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Stephen A. Mohr
Jordan S. Andrew
Sarah Wohl
Stephanie Bovee
Peter Colwell
Eric Edmondson
Paul Frangie
Samuel Fulliton
Lauren Gaskin
David Gonen
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Matthew Joseph
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Sharonmoyee Goswami
Jesse M. Weiss
Michael J. Zaken

Counsel for Respondent GRAIL, LLC
Latham & Watkins LLP

Michael G. Egge
Marguerite M. Sullivan
Alfred C. Pfeiffer, Jr.
Anna M. Rathbun
David L. Johnson

October 7, 2022

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

Counsel for Respondent Illumina, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, I caused the foregoing document to be served via email to:

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Quinn Emanuel Urquhart & Sullivan, LLP

Mike Bonanno

mikebonanno@quinnemanuel.com

October 13, 2022

/s/ Sharonmoyee Goswami

Sharonmoyee Goswami

Counsel for Respondent Illumina, Inc.

[END OF EXHIBITS]

**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 NON-PARTY
GUARDANT HEALTH, INC.’S MOTION TO INTERVENE IN OPPOSITION TO
ILLUMINA’S EXPEDITED MOTION TO MODIFY THE PROTECTIVE ORDER**

Having considered non-party Guardant Health, Inc.’s (“Guardant”) Motion to Intervene in Opposition to Illumina’s Expedited Motion to Modify the Protective Order, Guardant’s motion is **GRANTED**. It is hereby **ORDERED** that Guardant shall be permitted to intervene in this action in order to file a memorandum in opposition to Respondent Illumina, Inc.’s October 7, 2022 Expedited Motion to Modify the Protective Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2022, 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-110
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
oalj@ftc.gov

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

Sarah Wohl
Susan A. Musser
Federal Trade Commission
600 Pennsylvania Ave., NW,
Washington, D.C. 20580
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Complaint Counsel

Christine A. Varney
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Illumina, Inc.*

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*Counsel for Respondent
GRAIL, Inc.*

DATE: October 17, 2022

/s/ Renata Hesse
Renata B. Hesse

Counsel for Non-Party Guardant Health, Inc.