

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

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

ORDER DENYING MOTION TO CLOSE THE RECORD

I.

On October 25, 2021, Federal Trade Commission (“FTC”) Complaint Counsel filed a motion to close the record in this matter on November 3, 2021 and to set a schedule for post-trial briefing (“Motion”). Respondents Illumina, Inc. (“Illumina”) and GRAIL, Inc. (“GRAIL”) filed an opposition on November 1, 2021. For the reasons set forth below, the Motion is DENIED.

II.

The final witness to testify live at the evidentiary hearing completed testimony on September 24, 2021. The record was left open to allow the parties to complete trial depositions of several expert witnesses and to enable Respondents to obtain discovery from nonparty Caris Life Sciences (“Caris”), who has resisted compliance with subpoenas for documents and testimony. That dispute is currently the subject of an enforcement action in the U.S. District Court for the District of Columbia.¹ Respondents’ motion *in limine* to exclude Complaint

¹ At the Commission’s direction, the Commission’s General Counsel filed a petition to enforce subpoenas against Caris in the U.S. District Court for the District of Columbia on September 9; on October 5, the federal district court presiding over the subpoena enforcement action entered a show cause order, directing that any written response by Caris must be filed by November 5 and allowing a reply to be filed by November 12; the district court has not provided an estimated date by which a ruling should be expected. Complaint Counsel states that, at this time, it is unlikely that Caris-related discovery will be complete until December at the earliest.

Counsel's documents and testimony from Caris, has been held in abeyance in light of the pending district court matter.²

Complaint Counsel states that, since court recessed in September, all trial depositions have been completed, except for the trial deposition of Respondents' newly-substituted expert, Dr. Michael Katz, which was scheduled for November 1. Complaint Counsel further states that by November 3, the only remaining deposition or trial deposition would involve Caris. Complaint Counsel argues that Caris' unwillingness to provide the discovery sought by Respondents should not provide a basis to delay closing the record. Therefore, Complaint Counsel requests that the record be closed, subject to future motions by Complaint Counsel or Respondents to reopen the record for the limited purpose of introducing any Caris-related evidence after resolution of the pending discovery dispute and the related motion *in limine*. Complaint Counsel also seeks an expedited briefing schedule, with a November 17, 2021 deadline for briefs and proposed findings of fact, and a December 17, 2021 deadline for replies thereto.

Respondents assert that Caris is central to Complaint Counsel's case and Complaint Counsel has introduced evidence from Caris, but Respondents have not had the opportunity to rebut that evidence. Respondents argue that closing the record and beginning briefing only to reopen the record after receiving discovery from Caris would prejudice Respondents, be impractical for the parties and this Court, and unnecessarily delay resolution of the case. Respondents submit that this Court should either (1) wait until discovery from Caris is completed to close the record or (2) grant Respondents' pending motion *in limine* to exclude evidence from Caris. Respondents further oppose Complaint Counsel's request for expedited briefing, noting that Complaint Counsel proposes a schedule shorter than the default schedule under 16 C.F.R. § 3.46, despite the complex nature of this case.

III.

On September 24, 2021, the parties completed their presentation of live testimony, but several issues remained outstanding, including: (1) trial depositions of expert witnesses, (2) objections regarding some proposed exhibits, (3) redaction of the expert reports of Dr. Amol Navathe and Dr. Dov Rothman in light of the exclusion of testimony from Mr. George Serafin, and (4) discovery from Caris. (*See* Trial Tr. 4574-75).

Based on Complaint Counsel's representations, it appears that the trial depositions of all expert witnesses have now been completed. The parties were directed to label each trial deposition they seek to admit and list them on a joint exhibit to be labelled JX4 and to offer the depositions into evidence when the trial reconvenes. The record cannot be closed until the exhibits to be listed on JX4 are offered and admitted into evidence.

² Respondents filed a motion *in limine* to exclude evidence from Caris on August 5, 2021. On August 12, 2021, Complaint Counsel opposed the motion, arguing Respondents' then pending motion to compel discovery from Caris should first be resolved. In a ruling from the bench, the ruling on the motion *in limine* was deferred in light of the subpoena enforcement request then before the Commission. August 25, 2021 Order Memorializing Bench Rulings.

The objections regarding some proposed exhibits have not been resolved. The parties were directed to prepare a joint exhibit (JX3) listing the remaining trial exhibits to be offered into evidence when the evidentiary hearing reconvenes. The parties had advised that there were three categories of documents for which admissibility was in dispute. The parties were directed to provide a status report stating their theory of admissibility or objections to admissibility. No status report has been provided.³ The record cannot be closed until any objections to the remaining exhibits are resolved and the exhibits listed on JX3 are offered and admitted into evidence.

The redaction of the expert reports of Dr. Navathe and Dr. Rothman in light of the exclusion of testimony from Mr. Serafin is subject to a pending motion, filed by Respondents on October 25, 2021. This motion will be ruled upon before the completion of the evidentiary hearing so that the properly redacted expert reports may be offered into evidence before the close of the record.

The outstanding discovery from Caris is not, as Complaint Counsel represents, merely a dispute over a “handful of documents and a single deposition.” Motion at 4. The Complaint alleges specifically that [REDACTED]

[REDACTED] would be disadvantaged if Illumina were to engage in anticompetitive strategies post-transaction. *Id.* ¶¶ 46, 72. The Complaint further alleges that [REDACTED]

[REDACTED] *Id.* at ¶ 46. Respondents raise a number of defenses to the Complaint, including asserting “[t]here are no ‘rivals’ to GRAIL” because “[n]o NGS-based cancer screening tests have been launched on the market anywhere in the world.” Answer at 3. Respondents specifically deny the Complaint’s allegation that [REDACTED] *Id.* ¶ 72.

During the pre-filing investigation, Complaint Counsel served a Civil Investigative Demand (“CID”) on Caris. In response to the CID, Caris asserted that [REDACTED]

[REDACTED] Complaint Counsel also conducted an investigational hearing of Dr. David Spetzler, Caris’ President and Chief Scientific Officer, at which Dr. Spetzler testified under oath that [REDACTED]

[REDACTED] Pursuant to Commission Rule 2.7(f)(3), Respondents’ counsel did not attend the investigational hearing and were not able to cross-examine Dr. Spetzler. 16 C.F.R. § 2.7(f)(3).

The Complaint references [REDACTED]

[REDACTED] In reviewing the request for enforcement of Respondents’ subpoenas to Caris, the Commission acknowledged the relevance of the documents and testimony from Caris to the allegations and defenses in the case. August 24, 2021 Order Directing General Counsel to Enforce Nonparty Subpoenas. Because Respondents have not had the opportunity to cross-examine Dr. Spetzler or received documents necessary to verify or refute Complaint Counsel’s

³ The parties are directed to provide a status report on any outstanding disputes regarding JX3 to OALJ@FTC.GOV by November 23, 2021.

claims, closing the record and ordering post-trial briefing before resolving this dispute will prejudice Respondents.

Under Commission Rule 3.51(e)(1), at any time from the close of the hearing record until the filing of the initial decision, the Administrative Law Judge may reopen the proceeding for the reception of further evidence. 16 C.F.R. § 3.51(e)(1); *see also In the Matter of Polypore*, 2009 WL 3775105, at *2 (Oct. 22, 2009). However, given Complaint Counsel's heavy reliance on Caris, to close the record without evidence from Caris would pose practical and logistical challenges. The record need to be supplemented with the discovery obtained from Caris. In addition, briefing would be required to explain the significance of any new evidence. Doing this after the record is closed and briefing is submitted is not only inconvenient, but would also require the submission of additional piecemeal briefing that would delay the process. Accordingly, and as the parties were instructed on September 24, 2021, the hearing record is not complete until the discovery dispute with Caris is resolved.

IV.

For the above stated reasons, Complaint Counsel's Motion is DENIED. The parties shall provide a status report when the outstanding matters are resolved and court will then reconvene to admit evidence. After the record is complete and the outstanding matters addressed in this Order are resolved, an order closing the record will be issued in accordance with Rule 3.44(c). An order establishing the post-trial brief requirements and deadlines will also be issued after the completion of the evidentiary hearing.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: November 5, 2021