

**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.**

DOCKET NO. 9401

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT ILLUMINA, INC.’S
MOTION TO MODIFY THE PROTECTIVE ORDER**

Less than a week before the start of the hearing, Respondent Illumina, Inc. (“Illumina”) seeks permission for two of its in-house counsel to watch and listen as competitors of Respondent GRAIL, Inc. (“GRAIL”) testify about competitively sensitive information that Illumina could use to do them harm. Illumina’s motion should be denied for three reasons. First, the Commission Rules do not allow in-house counsel to receive third-party confidential information—no exceptions. Second, Illumina fails to provide evidence or articulate reasons as to how an exception could be needed here. Third, the in-house counsel of Illumina’s choice appear to be involved in competitive decision-making for Illumina, contrary to Illumina’s representations to Complaint Counsel and to this Court.

BACKGROUND

On March 30, 2021, the Commission unanimously issued a Complaint alleging that Illumina’s proposed acquisition of Respondent GRAIL, Inc. (“Grail”) violates federal antitrust laws by giving Illumina the ability and incentive to disadvantage Grail’s rivals, thereby reducing

competition in the U.S. market for multi-cancer early detection (“MCED”) tests.¹ That same day, the Court entered the Protective Order in this case.² Complaint Counsel promptly shared the Protective Order with each of the third parties who had disclosed confidential information during the investigation and informed them that their information would be provided to Respondents’ counsel under the terms of the Protective Order. On April 7, 2021, attorneys with the law firm Cravath, Swaine & Moore LLP entered their appearance for Illumina. The parties proceeded to take extensive discovery, which included voluminous document productions, lengthy written discovery responses, and depositions of dozens of party and third-party witnesses.

Fact discovery closed on June 25, 2021. Nearly a month passed before, on July 21, Illumina’s counsel proposed an “amendment to the protective order in this case to allow Illumina in-house counsel, Roland Schwillinski and Steve Keane, to review Confidential Information in the parties’ intended trial exhibits and any testimony during the hearing.”³ Illumina’s counsel represented that Messrs. Schwillinski and Keane “are not involved in commercial negotiations relating to supply or in vitro diagnostic agreements.”⁴ Complaint Counsel declined Illumina’s proposal and cited evidence that Messrs. Schwillinski and Keane are, in fact, “involved in commercial negotiation ... and also appear to be involved in customer and competitor strategy discussion,” which puts them “in a position to use the information that they learn from the course of the trial to disadvantage Illumina customers and other industry participants.”⁵

¹ Complaint ¶¶ 48, 80 (Mar. 30, 2021).

² See Protective Order Governing Confidential Material (Mar. 30, 2021).

³ Ex. A (July 21, 2021 email from S. Goswami to S. Musser).

⁴ *Id.*

⁵ *Id.* (July 30, 2021 email from S Musser to S. Goswami) (cleaned up).

Two weeks later, and without addressing the evidence cited by Complaint Counsel, Illumina’s counsel proposed instead that Messrs. Schwillinski and Keane be allowed “to listen to confidential testimony during the hearing and to orally discuss that testimony with its outside counsel.”⁶ Complaint Counsel declined this proposal as well because “it still suffers from the same defects that made respondents’ original proposal unacceptable.”⁷ Illumina filed this motion the following day.

ARGUMENT

The Protective Order in this case was entered pursuant to Rule 3.31 of the Commission Rules of Practice, which provides that “the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section.”⁸ The standard protective order language provided by Rule 3.31 does not allow disclosure of confidential information to parties’ in-house counsel. This omission reflects a deliberate choice by the Commission, which “specifically rejected the suggestion that in-house counsel be allowed access to confidential materials because prohibiting such access might inhibit a respondent’s ability to defend itself[.]”⁹ The Commission stated that “it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.”¹⁰

The Commission Rules provide no mechanism for modifying the Protective Order—much less to create exceptions or reduce the scope of protection, as Illumina requests here. The absence of a modification mechanism ensures that third parties may justifiably rely on the

⁶ Ex. B (Aug. 16, 2021 5:22pm email from S. Goswami to W. Harrell).

⁷ *Id.* (Aug. 16, 2021 7:02pm email from W. Harrell to S. Goswami).

⁸ 16 C.F.R. § 3.31(d) App’x A.

⁹ Order Denying Respondents’ Motion to Amend the Protective Order at 3, *In re Tronox Ltd. & Cristal USA Inc.*, FTC Dkt. No. 9377 (Feb. 5, 2018), available at <https://www.ftc.gov/system/files/documents/cases/180205aljorderdenyingmotion589532.r.pdf>.

¹⁰ 74 Fed. Reg. 1804, 1813 (Jan. 13, 2009) (interim final rulemaking).

Protective Order when they disclose confidential information in a Commission investigation or enforcement action. As this Court observed in *McWane*, “[n]onparties responding to a subpoena have a right to expect that submissions designated by them as ‘confidential’ will be treated in accordance to the Protective Order provided to them, which followed the standard protective order required by Rule 3.31 *verbatim*.”¹¹ Respondent cites no Commission adjudication—nor is Complaint Counsel aware of any—in which a protective order was modified to allow in-house counsel to receive third-party confidential information.

Even if modifications were allowed, Illumina would still be required to demonstrate good cause for allowing their in-house counsel to receive third-party confidential information. Illumina needed to make two showings: that “that the requested modification is necessary,”¹² as this Court has recognized in other matters, and also that their chosen in-house counsel are not “involved in competitive decision making,”¹³ as federal courts have held and Illumina acknowledges.¹⁴ Illumina failed on both fronts.

On the issue of necessity, Illumina offers no more than conclusory assertions, unsubstantiated by evidence. Illumina argues that “[p]ermitting Messrs. Schwillinski and Keane access to confidential material that is discussed during the hearing is essential to mounting an effective and complete defense for Illumina[.]”¹⁵ The only evidence submitted by Illumina on

¹¹ Order Denying Respondent’s Motion to Amend the Protective Order Governing Discovery at 2, *In re McWane, Inc.*, FTC Dkt. No. 9351 (Aug. 8, 2012), available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120808aljorddenyrespmoamendprotectord.pdf> (“*McWane* Order”).

¹² See Order Denying Respondent’s Motion to Modify the Protective Order at 2, *In re Axon Enterprises, Inc. & Safariland, LLC*, FTC Dkt. No. 9389 (Jan. 31, 2020), available at https://www.ftc.gov/system/files/documents/cases/d09389_alj_order_denying_r_mtn_to_modify_public597456.pdf (“*Axon* Order”).

¹³ *FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 669 (N.D. Ill. 2016).

¹⁴ See Respondent Illumina, Inc.’s Expedited Motion to Modify the Protective Order at 5, *In re Illumina, Inc. & GRAIL, Inc.*, FTC Dkt. No. 9401 (Aug. 17, 2021) (“*Mot.*”).

¹⁵ *Id.* at 4.

this point are declarations from Messrs. Schwillinski and Keane, who state that they have “primary responsibility for the day-to-day support, management, and oversight regarding this action” but mention nothing about their access to third-party confidential information or their ability to discharge their responsibilities without it. Illumina offers no evidence, in these declarations or otherwise, establishing or even suggesting that Illumina would suffer prejudice if the Protective Order is maintained as written.¹⁶ Nor does Illumina bother to explain, with any specificity, how such access could possibly be essential for its defense. Threadbare say-so is not enough,¹⁷ as this Court has rightly concluded in rejecting similarly baseless requests.¹⁸

More than that, Illumina’s claims of necessity are belied by its own conduct. Illumina engaged sophisticated counsel at one of the largest law firms in the world to represent it in this matter.¹⁹ Through its outside counsel, Illumina participated fully in discovery.²⁰ Not once during fact discovery did Illumina ever signal that its ability to obtain relevant evidence or otherwise defend itself was impeded by its in-house counsel’s inability to access third-party confidential

¹⁶ The lack of any prejudice to Illumina dooms its constitutional arguments.

¹⁷ See *Advocate*, 162 F. Supp. 3d at 674, cited in Order Denying Respondent Henry Schein, Inc.’s Motion to Amend the Protective Order at 4, *In re Benco Dental Supply Co. et al.*, FTC Dkt. No. 9379 (June 15, 2018), available at https://www.ftc.gov/system/files/documents/cases/d09379_alj_ord_denying_r_henry_scheins_mtn_to_amend_po_591181.pdf (“*Benco* Order”).

¹⁸ *Axon* Order at 2–3 (“Respondent ... has failed to provide any specific reason why Ms. Petersen needs access to confidential non-party information.”); *Benco* Order at 4 (“Schein’s assertions that in-house counsel’s access to the IHTs is ‘vital’ and/or ‘essential’ to its defense are largely conclusory and lacking in explanation or factual support.”); *McWane* Order at 2 (“Respondent has failed ... to assert any special circumstances that might justify a deviation from the standard protective order language.”).

¹⁹ See *Axon* Order at 2 (denying motion to modify protective order after observing that “Respondent has hired well-qualified counsel”).

²⁰ See *Benco* Order at 3–4 (“[T]here is no valid basis for concluding that Schein’s outside counsel will be unable to sufficiently develop these arguments absent in-house counsel’s access to [investigational hearing transcripts]”).

information.²¹ Illumina’s silence confirms that such access was unnecessary for creating a complete evidentiary record; so too for presenting that record at the hearing.²²

As for the involvement of Illumina’s in-house counsel in competitive decision-making, Illumina’s proof falls short again. Illumina concedes that the relevant question is whether its in-house counsel have “a part in the type of competitive decision-making that would involve the potential use of the confidential information[.]”²³ In *Schering-Plough*, a respondent’s in-house counsel submitted sworn declarations with sweeping denials of “any responsibility for ... activities that could be fairly characterized as competitive decision making” and “any role in ... any [] area where a competitor’s confidential information would be potentially valuable.”²⁴ By contrast, the declarations of Illumina’s in-house counsel are far too narrow. Their disclaimers are limited to roles in “negotiations” on certain “terms relating to any commercial agreements,” raising the prospect that they are involved in competitive decision-making in other ways.²⁵ Mr. Schwillinski’s declaration is particularly worrisome because, unlike Mr. Keane, he says nothing about his past involvement and states only that he is “not responsible” for certain negotiations

²¹ Compare *McWane* Order at 2 (“Respondent has failed to articulate any reason for failing to request access to confidential information for in-house counsel earlier in the case, prior to the production of confidential information by these nonparties[.]”).

²² Illumina derisively refers to the upcoming hearing as a “‘secret’ proceeding.” Mot. at 2 (scare quotes in original). Illumina’s newfound calls for transparency conflict with its overdesignation of its internal documents for *in camera* treatment. See Order on Respondent Illumina, Inc.’s Motion for *In Camera* Treatment at 3–4, *In re Illumina, Inc. & GRAIL, Inc.*, FTC Dkt. No 9401 (Aug. 12, 2021), available at https://www.ftc.gov/system/files/documents/cases/d09401_-_602276_order_on_respondent_illumina_inc_s_motion_for_in_camera_treatment.pdf. Consistent with the routine practice of this Court and federal courts, the hearing in this matter will be public except to the extent necessary to protect competitively sensitive information (including Illumina’s own).

²³ Mot. at 5 (citation omitted).

²⁴ *In re Schering-Plough Corp.*, No. 9297, 2001 WL 1478371, at **2–3 (FTC June 20, 2001). The result in *Schering-Plough* is not instructive, as the decision predates the Commission rulemaking that mandatorily disallowed in-house counsel access to third-party confidential information.

²⁵ Compare Schwillinski Decl. ¶ 6 with Keane Decl. ¶ 6. They also deny involvement in “obtaining regulatory approval” or “seeking reimbursement,” *id.*, but these and other hyper-specific denials cover only some of the many ways in which in-house counsel could be involved in competitive decision-making.

now, which suggests that he *was* responsible for those negotiations before.²⁶ In sum, their declarations are so circumspect and carefully worded as to raise suspicions about the true nature and scope of their roles at Illumina.²⁷

These suspicions are confirmed by ample evidence that Illumina’s in-house counsel are, in fact, involved in competitive decision-making. Mr. Schwillinski was involved in recent discussions with Illumina’s CEO and CTO about [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].²⁸ He has also been involved in negotiations with [REDACTED], including with [REDACTED]

[REDACTED]²⁹ and with [REDACTED]

[REDACTED].³⁰ He has recently served as [REDACTED]

[REDACTED],³¹ as well as [REDACTED]

[REDACTED]

[REDACTED].³² Mr. Keane appears to have been involved

²⁶ *Id.*

²⁷ Both in-house counsel state that they have “never been accused of violating” any protective orders (Schwillinski Decl. ¶ 7; Keane Decl. ¶ 7), yet neither actually affirms that they have fully complied those orders, nor have they offered to incur the sort of penalties for non-compliance that have justified exceptions in the federal cases on which Illumina relies. *See, e.g., FTC v. Whole Foods Mkt., Inc.*, No. 07cv1021, 2007 WL 2059741, at *3 (D.D.C. July 6, 2007) (imposing “penalty provision” with “a fine of \$250,000” to be “paid individually by the person who violates this Order” and a referral to the violator’s “professional disciplinary authority ... to suspend or disbar the violator”), *cited in Mot.* at 5–6.

²⁸ Ex. C (ILMN-FTCVOL_26294546).

²⁹ Ex. D (ILMN-FTCVOL_03989677); *accord* Ex. E (ILMN-FTCVOL_05762586), Ex. F (ILMN-FTCVOL_03989935).

³⁰ Ex. G (ILMN-FTCVOL_08278978).

³¹ Ex. H (ILMN-FTCVOL_18188886) (“[REDACTED]”), Ex. I (ILMN-FTCVOL_15422037) (same); *see also* Ex. J (FTC_ILMN_00119269), Ex. K (ILMN-FTCVOL_06883911).

³² Ex. L (ILMN-FTCVOL_04678609).

in negotiating a { [REDACTED] }.³³ Other evidence of their involvement may have been withheld by Illumina on privilege grounds, as a search of Illumina’s privilege log for communications regarding a “business agreement” turns up { [REDACTED] } entries for Mr. Keane—and a staggering { [REDACTED] } entries for Mr. Schwillinski.³⁴ The weight of the evidence therefore indicates that allowing these in-house counsel to access third parties’ competitively sensitive information would give them the ability and incentive to use that information to the detriment of those third parties.³⁵

CONCLUSION

Respondents sow doubts about whether they can be trusted to meet their obligations and keep their promises. Illumina represented that its in-house counsel are not involved in competitive decision-making, despite Illumina’s own documents showing otherwise. Yet Respondents insist that Illumina will fully comply with the letter and spirit of its open offer to its customers and would never think of disadvantaging them. Those customers know better. This Court will hear testimony from customer after customer who will describe the many ways in which Illumina can harm them. Much of that testimony will be based on competitively sensitive information that Illumina could use to harm them further. The Court should not let that happen. Illumina’s motion should be denied.

³³ Ex. M (ILMN-FTCVOL_17390230).

³⁴ See Exs. N & O (excerpts from the Second Complete Privilege Log of Illumina, Inc.).

³⁵ See *Advocate*, 162 F. Supp. 3d at 670 (“The inescapable reality is that once ... a lawyer ... learns the confidential information that is being sought, that individual cannot rid himself of the knowledge he has gained; he cannot perform a prefrontal lobotomy on himself[.]”).

Date: August 20, 2021

Respectfully submitted,

/s/ J. Wells Harrell

J. Wells Harrell
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-3211
Email: jharrell@ftc.gov

Counsel Supporting the Complaint

**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.**

DOCKET NO. 9401

[PROPOSED] ORDER

Upon Respondent Illumina, Inc.'s Motion to Modify the Protective Order, it is hereby:

ORDERED that Respondent's motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August _____, 2021

Exhibit A

From: [Musser, Susan](#)
To: [Sharonmoyee Goswami](#)
Cc: [Mohr, Stephen A.](#); [Widnell, Nicholas](#); [Andrew, Jordan S.](#); [Simons, Bridget](#); [Fulliton, Samuel](#); [Cooke, William](#); [Woolery, Ricardo](#); [Harrell, Wells](#); [Jesse Weiss](#); [Michael Zaken](#); [Illumina Trial Team](#); ["Marguerite.Sullivan@lw.com"](#); ["Anna.Rathbun@lw.com"](#); ["LWVALORANTITRUST.LWTEAM@lw.com"](#); [Simons, Bridget](#)
Subject: RE: In re Illumina & Grail (No. 9401) - in-house counsel
Date: Friday, July 30, 2021 8:23:42 AM

Sharon:

Thank you for your proposal. As you know, the Protective Order entered in this case is statutorily required. (Appendix A to § 3.31). And the Protective Order explicitly limits the disclosure of confidential material to “outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s).” (Protective Order, ¶ 7). The Commission purposefully included the proposed language in the final rule because “it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.” 74 Fed. Reg. 1804, 1812-13 (Jan. 13, 2009). Complaint Counsel agrees with the Commission’s rationale in enacting this rule. Disclosing third-party’s confidential information to Illumina employees who have the ability and incentive to misuse that information is against sound policy and would have both a chilling effect in this case as in future cases. Moreover, contrary to your representations below, Roland Schwillinski and Steven Keane, are involved in “commercial negotiation relating to supply or in vitro diagnostic agreements” (see, PX2530, PX2243, ILMN-FTCVOL_17390230) and also appear to be involved in customer and competitor strategy discussion. (see, e.g., FTC_ILMN_00073422). As such, intentionally or not, they are in a position to use the information that they learn from the course of the trial to disadvantage Illumina customers and other industry participants. As such we do not agree to your proposal and were unable to come up with a counterproposal that would mitigate the concerns as recognized by the Commission and expressed above.

Best,
 Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Tuesday, July 27, 2021 11:35 AM
To: Musser, Susan <smusser@ftc.gov>
Cc: Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>; Simons, Bridget <bsimons@ftc.gov>; Fulliton, Samuel <sfulliton@ftc.gov>; Cooke, William <wcooke@ftc.gov>; Woolery, Ricardo <rwoolery@ftc.gov>; Harrell, Wells <jharrell@ftc.gov>; Jesse Weiss <jweiss@cravath.com>; Michael Zaken <mzaken@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'Marguerite.Sullivan@lw.com' <Marguerite.Sullivan@lw.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>
Subject: RE: In re Illumina & Grail (No. 9401) - in-house counsel

Susan:

Please let us know the FTC’s position on the below proposal and/or provide a compromise proposal under which in-house counsel could obtain access to the intended trial exhibits and to the testimony at the hearing.

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: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Wednesday, July 21, 2021 1:28 PM

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

Cc: Mohr, Stephen A. <smohr@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>; Simons, Bridget <bsimons@ftc.gov>; Fulliton, Samuel <sfulliton@ftc.gov>; Cooke, William <wcooke@ftc.gov>; Woolery, Ricardo <rwoolery@ftc.gov>; Harrell, Wells <jharrell@ftc.gov>; Jesse Weiss <jweiss@cravath.com>; Michael Zaken <mzaken@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'Marguerite.Sullivan@lw.com' <Marguerite.Sullivan@lw.com>; 'Anna.Rathbun@lw.com' <Anna.Rathbun@lw.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>

Subject: In re Illumina & Grail (No. 9401) - in-house counsel

Susan:

Following up on our call, given that the commencement of the administrative hearing is fast approaching, Illumina requests that in-house counsel who are in charge of managing the litigation be able to view Confidential Materials in connection with the planning for trial. Accordingly, Respondents propose a limited amendment to the protective order in this case to allow Illumina in-house counsel, Roland Schwillinski and Steve Keane, to review Confidential Information in the parties' intended trial exhibits and any testimony during the hearing. These in-house counsel have primary responsibility for day-to-day support, management, and oversight regarding this action, and are not involved in commercial negotiations relating to supply or in vitro diagnostic agreements. Please let us know Complaint Counsel's position and whether, if Complaint Counsel disagrees, there are any compromise proposals you could provide. As we noted yesterday, we are amenable to considering any compromise proposals you may have.

Best,

Sharon

Sharonmoyee Goswami

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sgoswami@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.

Exhibit B

From: [Harrell, Wells](#)
To: "[Sharonmoyee Goswami](#)"; [Illumina Trial Team](#); "[LWVALORANTITRUST.LWTEAM@lw.com](#)"
Cc: [Andrew, Jordan S.](#); [Mohr, Stephen A.](#); [Joseph, Matthew](#); [Gonen, David](#); [Naegele, Dylan](#); [McNeil, Betty](#); [Gaskin, Lauren](#); [Milici, Jennifer](#); [Musser, Susan](#)
Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite
Date: Monday, August 16, 2021 7:02:15 PM
Attachments: [image001.jpg](#)

Sharon,

Thank you for sending this proposal. Unfortunately it still suffers from the same defects that made respondents' original proposal unacceptable. As we explained weeks ago in our July 30 email, giving in-house Illumina attorneys access to the confidential information of Illumina's customers—who are also Grail's competitors—would violate the letter and spirit of the protective order, chill third-party cooperation, and position Illumina to disadvantage its customers.

We will therefore oppose respondents' motion. We will, however, consent to filing our opposition to the motion by Friday, August 20 as you request, provided that respondents file their motion before 10:00am Eastern on Tuesday, August 17.

Best,

Wells



J. Wells Harrell (he/him)
Federal Trade Commission
[\(202\) 326-3211](tel:(202)326-3211) | jharrell@ftc.gov

From: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Monday, August 16, 2021 5:22 PM

To: Harrell, Wells <jharrell@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmccneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; Musser, Susan <smusser@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite

Wells,

Our compromise proposal is an amendment to the protective order to allow Illumina in-house counsel, Roland Schwillinski and Stephen Keane, to listen to confidential testimony during the hearing and to orally discuss that testimony with its outside counsel. As part of this proposal, Messrs. Schwillinski and Keane would agree to not take notes regarding any confidential testimony or documents, or receive any written materials or transcripts referencing confidential testimony or documents.

If Complaint Counsel does not agree to this proposal, we intend to file the motion tomorrow (August 17), and request that Complaint Counsel's response be filed by Friday, August 20. Please let us know by 11 am tomorrow if Complaint Counsel agrees to our compromise, or, if the we are at an impasse, agrees to our proposed schedule and join a request for expedited consideration of the motions.

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: Harrell, Wells <jharrell@ftc.gov>

Sent: Monday, August 16, 2021 2:50 PM

To: Sharonmoyee Goswami <sgoswami@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; Musser, Susan <smusser@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite

Sharon,

Thank you for the update. You may recall that respondents raised the possibility of a “compromise proposal” over three weeks ago. In response, we explained that, having considered and rejected respondents’ original proposal to modify the protective order to allow Messrs. Schwillinski and Keane to receive third-party confidential information, we were unable to come up with an acceptable counterproposal.

While we will gladly consider a revised proposal from respondents, our primary focus this week is preparing for trial, which begins in less than eight days. As such, if you would like us to consider another proposal or consent to expedited briefing on a possible motion to modify the protective order, please send us your proposal by 5:30 p.m. today, so that we may reach either an agreement or an impasse as soon as possible.

Best,
Wells



J. Wells Harrell (he/him)
Federal Trade Commission
[\(202\) 326-3211](tel:(202)326-3211) | jharrell@ftc.gov

From: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Monday, August 16, 2021 1:58 PM

To: Harrell, Wells <jharrell@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; Musser, Susan <smusser@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite

Wells,

We have not yet filed the motion to modify the protective order because we have been working with our clients to prepare a compromise proposal, which we will send later today. In the event that proposal does not resolve the issue, we plan to file our motion tomorrow. Would Complaint Counsel agree to file their opposition on Friday?

Best,
Sharon

Sharonmoyee Goswami

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825 Eighth Avenue, New York, NY 10019
T [+1-212-474-1928](tel:+1-212-474-1928)
sgoswami@cravath.com

From: Harrell, Wells <jharrell@ftc.gov>

Sent: Monday, August 16, 2021 12:27 PM

To: Sharonmoyee Goswami <sgoswami@cravath.com>; Illumina Trial Team <illuminaTrialTeam@cravath.com>; 'LWVALORANTITRUST.LWTEAM@lw.com' <LWVALORANTITRUST.LWTEAM@lw.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; Musser, Susan <smusser@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite

Sharon,

We had expected that respondents would file their motion to modify the protective order this past Saturday, when respondents also filed their companion motion to modify the examination sequencing for party witnesses. But we have not received a courtesy copy of the motion to modify the protective order, nor have we seen a filing notification for it. If respondents still intend to file this motion, please let us know promptly, as we would need to revisit the briefing schedule at this point.

Best,

Wells



J. Wells Harrell (he/him)
Federal Trade Commission
(202) 326-3211 | jharrell@ftc.gov

From: Musser, Susan

Sent: Saturday, August 14, 2021 11:42 AM

To: Sharonmoyee Goswami <sgoswami@cravath.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Illumina Trial Team <illuminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite

Thanks, Sharon. We will oppose the underlying substantive motions. Regarding your request to expedite, if you file today, we would agree to an expedited response due Thursday, August 19.

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Saturday, August 14, 2021 10:00 AM

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

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Illumina Trial Team <illuminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici,

Jennifer <jmilici@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite

Susan:

Given the impending hearing, and that we are simply seeking your agreement on whether to expedite, we believe that our timeline was reasonable. Nonetheless, we will wait until noon to file our motions.

With respect to your question, we have routinely presented witnesses in this fashion in federal district court and in Chancery court. *See, e.g., Judy v. Preferred Commc'ns Sys., Inc.*, Consol. C.A. No. 4662-VCL, at 19-20 (Del. Ch. Dec. 15, 2011) (Transcript) (beginning with hostile cross "wastes a lot of the clock and it's not always as easy to understand").

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: Friday, August 13, 2021 10:22 PM

To: Sharonmoyee Goswami <sgoswami@cravath.com>

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>

Subject: RE: In re Illumina & Grail (No. 9401) - motion to expedite

Sharon:

It is unreasonable to expect us to respond with less than three hours notice on a Friday. We will do our best to provide you a response by noon tomorrow. Can you please provide us your authority regarding why Respondents should present direct testimony prior to Complaint Counsel's exam in its case in chief?

Thank you,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>

Sent: Friday, August 13, 2021 8:06 PM

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

Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>

Subject: In re Illumina & Grail (No. 9401) - motion to expedite

Susan:

Illumina is preparing to file (1) a motion to modify the protective order to allow Illumina's Illumina in-house counsel, Roland Schwillinski and Steve Keane, to review Confidential Information in the parties' intended trial exhibits and any testimony during the hearing and (2) a motion to permit

Respondents to present direct testimony of party witnesses before Complaint Counsel's examination of those witnesses in its case in chief. Because the hearing is imminent, we intend to request expedited consideration of these motions. We intend to file tonight (August 13) and request that Complaint Counsel's responses be filed by Wednesday, August 18. Please let us know by 11pm this evening if Complaint Counsel would agree to that schedule and join a request for expedited consideration of the motions; otherwise we will assume that Complaint Counsel will oppose the request.

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

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Exhibit C

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit D

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit E

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit F

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit G

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit H

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit I

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit J

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit K

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit L

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit M

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit N

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit O

(CONFIDENTIAL – REDACTED IN ENTIRETY)

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2021, 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:

<p>David Marriott Christine A. Varney Sharonmoyee Goswami Cravath, Swaine & Moore LLP 825 Eighth Avenue New York, NY 10019 (212) 474-1140 dmarriott@cravath.com cvarney@cravath.com sgoswami@cravath.com</p> <p><i>Counsel for Illumina, Inc.</i></p>	<p>Al Pfeiffer Michael G. Egge Marguerite M. Sullivan Latham & Watkins LLP 555 Eleventh Street, NW Washington, DC 20004 (202) 637-2285 al.pfeiffer@lw.com michael.egge@lw.com marguerite.sullivan@lw.com</p> <p><i>Counsel for GRAIL, Inc.</i></p>
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/s/ J. Wells Harrell

J. Wells Harrell

Counsel Supporting the Complaint