

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 RESPONDENTS’ MOTION *IN LIMINE*
TO EXCLUDE { [REDACTED] AND ANY EVIDENCE FROM CARIS

Complaint Counsel opposes the motion of Respondents Illumina, Inc. (“Illumina”) and GRAIL, Inc. (“GRAIL”) (collectively, “Respondents”) to exclude all evidence received from non-party Caris Life Sciences (“Caris”).

Respondents do not dispute that evidence from Caris, a { [REDACTED] }, is relevant to the claims and defenses in this case. To the contrary, Respondents have represented to the Court that “{ [REDACTED] }.”¹ Rather than allow the Court to give this relevant evidence its due weight, Respondents ask that the Court exclude it wholesale.² Respondents’ request is not

¹ Respondents’ Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences at 6, *In re Illumina, Inc. and GRAIL, Inc.*, FTC Dkt. No. 9401 (Aug. 3, 2021) (“Mot. to Certify”) (capitalized case converted to sentence case).

² See Respondents’ Motion *in Limine* to Exclude { [REDACTED] } and Any Evidence from Caris, *In re Illumina, Inc. and GRAIL, Inc.*, FTC Dkt. No. 9401 (Aug. 5, 2021) (“Mot. to Exclude”).

only premature, but also rests on several fundamental misunderstandings of the Part 3 rules and procedures. Their motion should be denied.

BACKGROUND

On April 8, 2021—nearly four months before filing this motion—Illumina sent a subpoena to Caris requesting production of ten categories of documents, including “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]”³ After serving responses and objections to the subpoena a week later,⁴ Caris sent Illumina a letter on May 3 expressing concern that “[REDACTED]

[REDACTED]

[REDACTED]”⁵ Weeks later, Caris criticized the subpoena as “[REDACTED]” and emphasized that

“[REDACTED]

[REDACTED]

[REDACTED]”⁶ Caris ultimately produced [REDACTED] to Respondents on a rolling basis between May 7 and June 3, 2021.⁷

Caris originally offered to make [REDACTED] available for deposition on May 27, 2021, but the day before the deposition, Illumina told Caris that Illumina “agrees to postpone

³ Ex. A (Notice of Third-Party Subpoena, dated April 9, 2021).

⁴ Ex. B (Non-Party Caris Life Sciences, Inc. Objections and Responses to Subpoena, dated April 15, 2021).

⁵ Ex. C (May 3, 2021 letter from S. Jones to S. Goswami).

⁶ Ex. D (May 26, 2021 email from S. Jones to S. Goswami).

⁷ See, e.g., Ex. E (May 27, 2021 email from S. Jones to T. York and others); Ex. F (June 3, 2021 email from S. Jones to S. Goswami and S. Fulliton). The documents produced by Caris in response to Illumina’s subpoena were in addition to those that Caris had previously provided to Complaint Counsel during the investigation, which Complaint Counsel subsequently produced to Respondents.

ARGUMENT

Respondents' motion to exclude any and all evidence received from Caris, which arises from Respondents' ongoing discovery dispute with Caris, is unripe and unfounded.

To begin with, the motion should not be decided unless and until the Court and the Commission first determine whether Respondents' subpoenas against Caris should be enforced. This motion *in limine* rests on the undetermined proposition that Caris has not complied with its discovery obligations.¹⁴ That same proposition lies at the heart of Respondents' separate, earlier-filed motion to certify their enforcement request to the Commission based on Caris's "refusal to comply with Respondents' subpoenas[.]"¹⁵ In both motions, Respondents argue that this refusal "prejudices" them unfairly.¹⁶ Respondents implicitly acknowledge that both motions are intertwined, as they note that the exclusionary remedies sought in this motion would become unnecessary if their motion to certify is granted and they successfully obtain the supplemental discovery they seek.¹⁷

Holding this motion in abeyance, pending resolution of Respondents' parallel motion to certify, makes good sense. It allows Caris a fair opportunity to address Respondents' arguments about Caris's compliance with its discovery obligations. It conserves this Court's resources by

Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences, *In re Illumina, Inc. and GRAIL, Inc.*, FTC Dkt. No. 9401 (Aug. 10, 2021).

¹⁴ See, e.g., Mot. to Exclude at 2–3 (seeking exclusion based on "Caris's noncompliance with its discovery obligations").

¹⁵ Mot. to Certify at 2.

¹⁶ Compare Mot. to Exclude at 2 ("Caris's noncompliance with its discovery obligations is improper and unjustified, and unfairly prejudices Respondents[.]") with Mot. to Certify at 2 ("Caris's refusal to comply with Respondents' subpoenas is unjustified, prejudices Respondents, and should be overruled.").

¹⁷ See, e.g., Mot. to Exclude at 2 n.2 ("To the extent Respondents have the opportunity to depose a witness regarding certain of these exhibits, Respondents will no longer require their exclusion."); Mot. to Certify at 6 n.3 ("Respondents intend to seek to exclude [REDACTED] } in the event that they are not able to receive the requested evidence prior to the hearing.") (cleaned up).

potentially obviating the need to decide a motion that could become moot. And it empowers the Commission, in the event that Respondents' motion to certify is granted, to freely decide questions about Caris's compliance and Respondents' discovery needs without any prejudgment. Respondents waited for almost four months after serving their subpoenas on Caris before filing their motion to certify, so they should not be heard to complain about delay or unfair prejudice.

Even if Respondents' motion were ripe for decision, Respondents fail to show good cause to exclude all evidence from Caris. Respondents make three arguments, none of which withstands scrutiny.

First, Respondents argue that Caris's non-compliance with its discovery obligations warrants exclusion of its evidence as a "sanction" against Complaint Counsel.¹⁸ The Part 3 rules do not allow for sanctions here. As this Court recognized in *Polypore International*, Docket No. 9327, sanctions under Rule 3.38(b) of the Commission Rules of Practice "are warranted only in limited circumstances" where:

(1) production of the requested material has been mandated by a subpoena or specific discovery order issued by an ALJ or the Commission and directed at *the party (or its officer or agent)* from whom the material is sought; (2) *the party's* failure to comply is unjustified; and (3) the sanction imposed is reasonable in light of the material withheld and the purposes of Rule 3.38(b) ... which is to promote discovery.¹⁹

Complaint Counsel does not possess any of the Caris-related discovery that Respondents seek, nor does Complaint Counsel bear responsibility for any refusal by Caris to provide that

¹⁸ Mot. to Exclude at 8.

¹⁹ Order on Respondent's Motion for Sanctions Regarding Expert Witness at 3, *In re Polypore International, Inc.*, FTC Dkt. No. 9327 (May 4, 2009) (cleaned up; emphasis in original), available at <https://www.ftc.gov/sites/default/files/documents/cases/2009/05/090504aljordonrespmosanctions.pdf>. Accord Order on Complaint Counsel's Renewed Motion to Compel and Motion for Sanctions at 3, *In re ECM BioFilms, Inc.*, FTC Dkt. No. 9358 (Mar. 11, 2014) (cleaned up), available at <https://www.ftc.gov/system/files/documents/cases/140311biotecorder.pdf> (recognizing that "purpose of a motion for sanctions is to induce parties to supply requested discovery" and that any sanction must be "reasonable in light of the material withheld and the purposes of Rule 3.38(b)").

[REDACTED]

[REDACTED]

[REDACTED] }

Third, Respondents argue that all documents produced by Caris should be excluded because “Caris has refused to produce a witness to testify on the topics discussed in these documents.”²⁵ Once again, this argument conflicts with the Part 3 rules, which do not require sworn testimony by sponsoring witnesses subject to cross-examination. *See, e.g.*, 16 C.F.R. § 3.43(c) (providing for authentication of third-party documents by written certification). The only Part 3 case cited by Respondents is inapposite because it concerned the adjudicatory decision of a foreign sovereign, rather than documents created by third-party market participants in the ordinary course of their business.²⁶

Respondents’ arguments about reliability and fairness rest on a supposition that evidence from Caris might be undermined by other, yet-to-be-discovered evidence. To whatever extent that this supposition could be true, it goes to weight, not admissibility. As this Court recognized in its Scheduling Order in this case, “the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assignment appropriate weight to evidence.”²⁷

²⁴ [REDACTED]

²⁵ Mot. at 8 n.3.

²⁶ Compare Order Denying Complaint Counsel’s Motion to Admit European Commission Decision, *In re Intel Corp.*, FTC Dkt. No. 9341 (May 6, 2010), available at <https://www.ftc.gov/sites/default/files/documents/cases/2010/05/100506aljorddenyccmoadmiteurocomdec.pdf>.

²⁷ Scheduling Order ¶ 13, *In re Illumina, Inc. and GRAIL, Inc.*, FTC Dkt. No. 9401 (Apr. 26, 2021), available at https://www.ftc.gov/system/files/documents/cases/d09401_alj_scheduling_order_public601271.pdf.

CONCLUSION

For these reasons, Complaint Counsel respectfully requests that the Court deny Respondents' motion to exclude all evidence obtained from non-party Caris.²⁸

Date: August 18, 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

²⁸ In a footnote, Respondents extend their overreach even further by seeking exclusion of dozens of paragraphs and an entire table from the opening and rebuttal expert reports of Dr. Fiona Scott Morton. *See* Mot. at 1 n.1. Respondents provide no justification or authority for this incredible request, and for good reason: it would be unwarranted and unfair to exclude expert testimony where, as here, the evidence at issue was not the sole basis for any particular expert opinion, many of which concern unrelated subjects. *See, e.g.*, Ex. J (Report of Dr. Fiona Scott Morton, dated July 2, 2021) at 19 & n.17; 21 & n.30; 23 & nn.39–40; 24 & n.45; 25 & nn.50–51; 29; 34; 37 & nn.84, 86, & 90; 50 & n.128; 54 & n.142; 55 & n.145; 61 & n.161; 64; 67 & n.213; 70; 85; 148 & n.495; 152 & n.506; 158; 180; 189 & n.606; 192 & n.613; 203; 222; 253 & n.778; and Table 1. *See also, e.g.*, Ex. K (Rebuttal Report of Dr. Fiona Scott Morton, dated July 26, 2021) at ¶¶ 34 & n.65; 68; 108 & n.225.

**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 Respondents' Motion *in Limine* to Exclude {

} and Any Evidence from Caris, it is hereby:

ORDERED that Respondents' motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August _____, 2021

Exhibit A

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit B

(CONFIDENTIAL – REDACTED IN ENTIRETY)

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)

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 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>
--	---

/s/ J. Wells Harrell
 J. Wells Harrell

Counsel Supporting the Complaint