

**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

**NON-PARTY THIRD ROCK VENTURE, LLC'S
MOTION FOR *IN CAMERA* TREATMENT**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), non-party Third Rock Ventures, LLC ("Third Rock") respectfully moves this Court for *in camera* treatment of the transcript of the June 24, 2021 deposition of Dr. Christoph Lengauer, a partner at Third Rock, in this matter ("Lengauer Deposition")¹. The Lengauer Deposition contains competitively-sensitive, confidential business information not known outside of Third Rock or its former portfolio company Thrive Earlier Detection Corp. ("Thrive")², the disclosure of which would significantly harm the commercial launch of CancerSEEK—the product that Third Rock, Thrive, and Dr. Lengauer have expended considerable time and resources developing. For the reasons herein, Third Rock requests that the Administrative Law Judge grant the Lengauer Deposition *in camera* treatment indefinitely. Third Rock further requests that

¹ The Lengauer Deposition is attached as Exhibit B.

² In October 2020, Exact Sciences Corp. acquired Thrive Earlier Detection Corp., and Thrive Earlier Detection Corp. is now known as Thrive an Exact Sciences Company. In this motion, the term "Thrive" refers to both Thrive Earlier Detection Corp. and Thrive an Exact Sciences Company.

the Lengauer Deposition only be viewed by parties who can view Confidential Material in accordance with the relevant protective orders. In support of this motion, Third Rock relies on the Declaration of Dr. Christoph Lengauer (“Lengauer Decl.”), attached as Exhibit A, which provides additional details about the Lengauer Deposition.

I. Background

Third Rock is a venture capital firm based in Boston, Massachusetts that incubates and invests in biotechnology startup companies. Relevant here, in 2019, Third Rock became a lead initial investor in, and Dr. Lengauer co-founded, Thrive, a company dedicated to incorporating earlier cancer detection into routine medical care. Lengauer Decl., ¶ 3. In addition to being a current partner of Third Rock, Dr. Lengauer is currently a consultant to Thrive, where he supports the research and development of Thrive’s lead product candidate, CancerSEEK. *Id.* ¶¶ 2, 6. As a private company, there is little information about Third Rock and its development of CancerSEEK in the public domain. *Id.* ¶ 13.

On April 12, 2021 and April 19, 2021, Third Rock received non-party subpoenas from the FTC and Defendants Illumina, Inc. and GRAIL, Inc. (collectively, the “Defendants”), respectively, in *FTC v. Illumina, Inc.*, No. 1:21-cv-00873-RDC (D.D.C.) (the “Litigation”). Among other things, the subpoenas sought documents concerning Third Rock’s efforts to research, develop, commercialize, market, and/or sell CancerSEEK or any other cancer detection test. On May 20, 2021, Third Rock produced a substantial number of documents in response to the non-party subpoenas. Third Rock designated all of its produced documents “Confidential” pursuant to the operative protective order in the Litigation. *See* Dkt. No. 15 at ¶ 7. Pursuant to the protective order, Confidential Material may only be disclosed to:

- (a) the Court presiding over this proceeding and personnel assisting the Court, including their support staff;
- (b) the Commission and its employees, and personnel retained by the

Commission as experts or consultants for this proceeding and any state or commonwealth that may hereafter join this Litigation as a plaintiff . . .; (c) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (d) outside counsel of record for any Defendant, their associated attorneys and other employees of their law firm(s), provided they are not employees of a Defendant; (e) anyone retained to assist outside counsel of record for any Defendant in the preparation or hearing of this proceeding including experts, consultants, contract attorneys, litigation support services, and their staff, provided they are not affiliated with a Defendant in any way . . .; (f) any witness or deponent who may have authored or received the information in question; and (g) any interpreter, court reporter, shorthand reporter, typist or videographer translating, recording, or transcribing Documents or testimony in connection with this Litigation.

See id. By its express terms, the protective order will “continue to be binding after the conclusion of th[e] [Litigation.]” *Id.* at ¶ 16.

On April 23, 2021, the Litigation was transferred to the United States District Court for the Southern District of California, Dkt. No. 59, and on June 1, 2021, the case was dismissed in its entirety. No. 3:21-cv-800 (D.S.C.), Dkt. 120. Following the dismissal, the parties continued with the instant administrative action, which was initiated on March 30, 2021. The protective order in the administrative action mirrors the protective order the court entered in the Litigation in that all of the Defendants’ employees are barred from accessing Confidential Material. In accordance with the protective orders, on June 24, 2021, counsel for Third Rock stated orally on the record that the Lengauer Deposition was being designated as Confidential. Ex. B at 10. On July 26, 2021, counsel for Defendants notified Third Rock that it intended to use the Lengauer Deposition as a trial exhibit. Ex. C.

The Lengauer Deposition reveals confidential information regarding Third Rock’s and Dr. Lengauer’s involvement in Thrive’s business strategies, research and development, and product development and commercialization efforts. The entire deposition transcript should

therefore receive *in camera* treatment and be kept out of the public domain.³ Moreover, the instant motion seeks to reaffirm what all parties to this action have understood—that the information provided by Third Rock, both in testimonial and documented form, cannot enter the public record.

II. Legal Standard

In camera treatment of materials is appropriate when its “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting” such treatment. 16 C.F.R. § 3.45(b); *see also In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984). A clear showing of serious competitive injury is established when “the information concerned is sufficiently secret and sufficiently material to [the movant’s] business.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980).

In considering secrecy and materiality, the Court may consider the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others within the business; (3) the extent of measures taken to protect the information’s secrecy; (4) the value of the information to the business and its competitors; (5) the effort or investment made in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re BristolMyers Co.*, 90 F.T.C. 455, 456-457 (1977).

Requests for *in camera* treatment by non-parties like Third Rock are given “special solicitude.” *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. at 500 (“As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”).

³ In the alternative, Third Rock seeks *in camera* treatment of certain highlighted portions of the Lengauer Deposition. Those highlighted portions are visible in Exhibit B.

III. The Lengauer Deposition Contains Secret and Material Information such that Disclosure Would Result In Serious Injury to Third Rock and Dr. Lengauer

Protection is warranted because the Lengauer Deposition contains secret and confidential material, disclosure of which would result in serious injury to Third Rock. Each of the factors set forth in *BristolMyers* weighs in favor of granting the Lengauer Deposition *in camera* treatment.

First, the Lengauer Deposition contains information that is material and highly valuable to Third Rock's business. As a venture capital firm, Third Rock is focused on building companies based on innovative and bold ideas that will positively impact the lives of patients and their families. Thus, Third Rock has invested significant resources into researching and developing innovative medical products, and analyzing how to commercialize these products. It is this focus that led Third Rock to become a lead initial investor in and Dr. Lengauer to co-found Thrive and develop CancerSEEK. During his deposition, Dr. Lengauer spoke at length regarding the research and development of CancerSEEK, including the sequencer technologies the test utilizes; future clinical studies for CancerSEEK, including details such as patient population, anticipated costs, and length of the studies; the regulatory approval status of CancerSEEK, including details of Thrive's and Dr. Lengauer's discussions with the FDA; marketing strategies for CancerSEEK; research concerning the commercialization of the test; and details of Thrive's supply contracts related to CancerSEEK. Lengauer Decl., ¶ 11; *see e.g.*, Ex. B at 19-21; 38-40; 77-79; 80-86. Should any company seeking to develop any type of cancer screening test acquire this information, competitive harm will ensue.

Second, because the information contained in the Lengauer Deposition is competitively sensitive, Third Rock has taken care to shield it from public disclosure. As a private company, there is little information about Third Rock and its portfolio companies in the public domain, and

Third Rock certainly does not disclose information related to research and development, product development, commercialization, or marketing strategies publicly or to potential consumers and competitors. Moreover, all Third Rock employees are subject to confidentiality agreements that prevent them from disclosing proprietary information concerning Third Rock. Lengauer Decl. ¶ 14. Third Rock also maintains organizational, physical, and technical precautions to restrict access to the confidential information contained in the Lengauer Deposition to only those employees who need such information to carry out their job responsibilities. *Id.*

Third, Third Rock will likely suffer competitive harm if the Lengauer Deposition is publicly disclosed. As stated previously, Third Rock has invested in researching, developing, and commercializing innovative medical products, including CancerSEEK. The Lengauer Deposition includes proprietary and confidential information about CancerSEEK and Third Rock's work in the cancer detection space. The disclosure of this information would enable other players in the cancer detection space to gain invaluable insight and visibility into Third Rock's and Thrive's business, including the companies' efforts to commercialize CancerSEEK. Third Rock would therefore be adversely affected if the Lengauer Deposition were made public, as competitors and other third parties would be unfairly equipped with Third Rock's competitively sensitive information. This "likely loss of business advantages is a good example of a 'clearly defined, serious injury.'" *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999). Moreover, the Defendants in this present action are seeking to consummate an acquisition that will allow them to launch Galleri MCED, a multi cancer detection test that will directly compete with Third Rock and Thrive's CancerSEEK test. Lengauer Decl., ¶ 4. Thus, even disclosing the contents of the Lengauer Deposition to parties to this action will cause Third Rock competitive harm. Therefore, Third Rock also requests that only the parties and

individuals that are entitled to access Confidential Material under the operative protective orders in the Litigation and this administrative action have access to the Lengauer Deposition.

IV. The Lengauer Deposition Contains Trade Secrets, which will Remain Sensitive Over Time and Thus, Permanent In Camera Treatment is Justified

Third Rock requests that the Lengauer Deposition be granted indefinite *in camera* treatment because it contains Third Rock's and Thrive's business strategies and scientific research used to develop CancerSEEK. Documents containing "trade secrets" or "secret formulas, processes, and other secret technical information" are eligible for indefinite protection. *In re 1-800 Contacts, Inc.*, 2017 F.T.C. LEXIS 55, at *5-6 (April 4, 2017). Further, indefinite *in camera* treatment is warranted where "the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time." 16 C.F.R. § 3.45(b)(3). The trade secret information contained in the Lengauer Deposition "is likely to remain sensitive or become more sensitive with the passage of time," thus indefinite *in camera* treatment is warranted. As indicated in *In re Dura Lube Corp.*, trade secrets such as secret formulas and secret technical information are granted more protection than ordinary business documents. 1999 FTC LEXIS 255 at *7. Information related to the research and development of CancerSEEK, which has not yet received final regulatory approval or been made available to consumers, does not become stale or diminish over time. Even once CancerSEEK enters the market, *how* Third Rock and Thrive developed the test will continue to be secret and material. *See Otto Bock HealthCare N. Am., Inc.*, 2018 FTC LEXIS 111, at *30-31 (July 6, 2018) (granting indefinite *in camera* treatment for non-party's documents that "reveal[ed] future research and development and new product development plans"). Thus, the Lengauer Deposition merits indefinite *in camera* treatment.

V. In the Alternative, the Administrative Law Judge Should Grant *In Camera* Treatment to the Highlighted Portions of the Lengauer Deposition

Third Rock respectfully submits that confidential information is so prevalent throughout the Lengauer Deposition that it may not be practical to grant partial *in camera* treatment. Indeed, of the more than 200 pages of testimony in the Lengauer Deposition, there are only 8 pages that do not contain any confidential information. Third Rock therefore reiterates its request that the Lengauer Deposition, be granted *in camera* treatment in full.

Should the Administrative Law Judge conclude that a narrower approach to *in camera* treatment is preferred, however, Third Rock requests in the alternative that the highlighted portions of the Lengauer Deposition receive *in camera* treatment.

VI. Conclusion

For the reasons set forth herein and in the accompanying declaration, Third Rock requests the Court grant the Lengauer Deposition indefinite *in camera* treatment.

Dated: August 5, 2021

Respectfully submitted,

/s/ Andrew M. Lacy

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Counsel for non-party Third Rock Ventures, LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I served the foregoing documents by email to the following:

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*Attorney for non-party Third Rock
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**UNITED STATES OF AMERICA
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Docket No. 9401

**[PROPOSED] ORDER ON NON-PARTY THIRD ROCK VENTURE, LLC'S
MOTION FOR *IN CAMERA* TREATMENT**

Upon consideration of Non-Party Third Rock Venture's LLC's Motion for *In Camera* Treatment (the "Motion"), it is hereby ordered that the Motion is GRANTED.

IT IS FURTHER ORDERED that the June 24, 2021 deposition of Dr. Christoph Lengauer in this matter will receive indefinite *in camera* treatment.

Dated: _____, 2021

D. Michael Chappell
Chief Administrative Law Judge

EXHIBIT A

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

In the Matter of

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and

GRAIL, Inc.,
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Respondents.

Docket No. 9401

**DECLARATION OF CHRISTOPH LENGAUER SUPPORT OF NON-PARTY
THIRD ROCK VENTURE, LLC'S MOTION FOR *IN CAMERA* TREATMENT**

I, Christoph Lengauer, declare as follows:

1. I make this declaration in support of Non-Party Third Rock Ventures, LLC's Motion for *In Camera* Treatment.
2. I am a partner at non-party Third Rock Ventures, LLC ("Third Rock"). I make this declaration based upon matters within my own personal knowledge and if called as a witness, I could and would competently testify to the matters set forth herein.
3. Third Rock is a venture capital firm based in Boston, Massachusetts that incubates and invests in innovative biotechnology startup companies. In 2019, Third Rock became a lead initial investor in Thrive Earlier Detection, n/k/a Thrive an Exact Sciences Company ("Thrive"), a company dedicated to incorporating earlier cancer detection into routine medical care. Thrive's lead product candidate is CancerSEEK, a blood test designed to detect multiple types of cancer at the earliest stages possible. CancerSEEK has not been approved by the FDA, and the product is not yet available for consumer use.

4. GRAIL is working to develop and commercialize the Galleri MCED test, which will directly compete with CancerSEEK.

5. I joined Third Rock in 2016 as a venture partner. I then became a partner in 2019. In my role, I work to launch and build biotechnology companies.

6. In 2019, I co-founded Thrive, and I served as the Chief Innovation Officer of that company until 2021. I am currently a consultant to Thrive, and I support the company's research and development efforts related to CancerSEEK.

7. On June 24, 2021, I was deposed in this matter (the "Lengauer Deposition"). During the deposition, I testified about Third Rock's and Thrive's efforts to research, develop, and commercialize CancerSEEK and other cancer detection tests.

8. I understand that on July 26, 2021, counsel for the Defendants notified Third Rock's outside counsel of their intent to use the Lengauer Deposition as an exhibit in the administrative trial for this matter.

9. Third Rock is seeking full *in camera* treatment of the Lengauer Deposition. In the alternative, Third Rock seeks *in camera* treatment of the highlighted portions of the Lengauer Deposition, which are visible in Exhibit B.

10. The Lengauer Deposition contains confidential information regarding Third Rock's initial funding of Thrive.

11. The Lengauer Deposition also contains confidential information concerning Third Rock's, Thrive's, and my research and development of CancerSEEK, including the sequencing technologies the test utilizes and biomarkers to be used for the test; future clinical studies related to regulatory approval of CancerSEEK, including key features of the studies, such as patient population, length of the studies, and anticipated costs; details of Thrive's and my discussions

with the FDA; research and analysis concerning the commercialization of CancerSEEK; and details concerning Thrive's supply contracts concerning CancerSEEK.

12. The information in paragraphs 10-11 is material to Third Rock's and Thrive's business. In support of its mission to fund biotechnology startup companies, Third Rock has invested significant resources into researching and developing innovative medical products, and analyzing how to commercialize these products. Third Rock has worked closely with Thrive to develop and commercialize CancerSEEK.

13. Third Rock has taken care to shield the information contained in the Lengauer Deposition from public disclosure. As a private company, there is little information about Third Rock and its portfolio companies in the public domain. Third Rock does not disclose information related to research and development, product development, commercialization, or marketing strategies publicly or to potential consumers and competitors.

14. All Third Rock employees, including myself, are subject to confidentiality agreements. We are not permitted to disclose any proprietary information concerning Third Rock or any of its portfolio companies at any time during or after our terms of employment.

15. Moreover, information specific to Thrive and CancerSEEK is only shared with Third Rock employees who need to know such information in order to perform their job duties.

16. Thrive similarly prohibits its employees and consultants from disclosing its proprietary information to the public, and I signed a non-disclosure agreement in connection with my consulting role.

17. The Lengauer Deposition includes proprietary and confidential information about CancerSEEK and Third Rock's and Thrive's work in the cancer detection space. The disclosure of this information would enable other players in the cancer detection space to gain invaluable

insight and visibility into Third Rock's and Thrive's business, including the companies' efforts to commercialize CancerSEEK. I believe that disclosing such sensitive information will undoubtedly harm any commercial launch of CancerSEEK.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 5th day of August, 2021.

Christoph Lengauer

Christoph Lengauer

EXHIBIT B

**Confidential –
Redacted in Entirety**

EXHIBIT C

From: [Michael Zaken](#)
To: [Drake, Ashley M.](#); [Lacy, Andrew M.](#); [Williams, Whitney](#)
Cc: [Xhesi Hysi](#); [Benjamin Spiegel](#)
Subject: In the Matter of Illumina Inc. and GRAIL Inc., Docket No. 9401
Date: Monday, July 26, 2021 5:56:09 PM

Counsel,

As part of the Administrative Trial for *In the Matter of Illumina, Inc. & Grail, Inc.* (Dkt. No. 09401) set to begin on August 24, we have submitted a proposed list of documents and testimony we intend to use as trial exhibits. This list includes third party documents and testimony that have been designated confidential under the protective order entered by the Administrative Law Judge.

Per our obligation under the Scheduling Order, we are providing you with notice that we intend to use the testimony of Christoph Lengauer listed below as a trial exhibit, pursuant to 16 C.F.R. § 3.45(b).

Testimony
Deposition Transcript of Christoph Lengauer

Under 16 C.F.R. § 3.45(b), if you wish, you may move the Administrative Law Judge to obtain in camera treatment for the testimony listed above. Please note that the deadline for filing such a motion is August 5, 2021, and note the following information set forth in the Scheduling Order about the content of any such motion:

[There are] strict standards for motions for in camera treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018); and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for in camera treatment shall provide one copy of the documents for which in camera treatment is sought to the Administrative Law Judge.

Scheduling Order ¶ 12.

Please confirm receipt of this notice.

Regards,

Michael

Michael Zaken
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