

**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'S MOTION
FOR *IN CAMERA* REVIEW OF CERTAIN TRIAL EXHIBITS**

Complaint Counsel supports an open and public trial subject to the narrow exception contemplated in Commission Rule 3.45(b). Respondents fail to satisfy Rule 3.45(b)'s strict standard and process for seeking *in camera* treatment here. Specifically, Respondent Illumina overreaches by seeking to withhold from the public record over two thousand documents in their entirety, including screenshots of websites and transcripts of public statements. In addition, Respondent seeks to impermissibly expand the *in camera* treatment provided for in Rule 3.45(b) from three years to either five years or indefinitely without the showing of exceptional circumstances necessary to warrant such extended protection.

By seeking extraordinary protection for such a vast number of documents, supported only by the conclusory testimony of one of its in-house counsel, Respondent fails to fulfill its obligations under Rule 3.45(b) to explain why, and what portions of, each document is sufficiently secret and material to Respondent's business that its disclosure would cause a clearly defined, serious competitive injury. Moreover, many of the documents do not appear to be competitively sensitive on their face. This is improper: the burden of showing good cause for *in*

camera treatment rests with the party seeking it. If Respondent's motions are granted, the public would be deprived of access to virtually the entire trial record in this matter. Therefore, Complaint Counsel respectfully requests that the Court deny Respondent's motion for *in camera* treatment without prejudice until it fully satisfies the requirements of Rule 3.45(b). *See* Commission Rule 3.42(c)(11), 16 C.F.R. § 3.42(c)(11) (enumerating the powers of Administrative Law Judges, including, *inter alia*, to "deny *in camera* status without prejudice until a party complies with all relevant rules").

I. STATEMENT OF FACTS

On August 5, 2021, Respondent Illumina filed a motion for *in camera* treatment of 2,485 trial exhibits that allegedly contain confidential information. Respondent grouped these documents into nine categories: (1) Trade Secrets and Product Development; (2) Financial Data; (3) Pricing and Pricing Strategy; (4) Sales and Marketing Strategy; (5) Regulatory Strategy; (6) Strategic Initiatives; (7) Third Party/Customer Information; (8) Grail Information; and (9) Sensitive Personal Information. (Illumina Mot. at 3). Respondent requests "complete" *in camera* treatment for 98% of these documents, rather than "partial" *in camera* treatment for those portions of the documents containing allegedly competitively sensitive information. Respondent further seeks indefinite *in camera* treatment for 132 documents.

II. ARGUMENT

Respondent's request for *in camera* treatment is overbroad in both scope and duration and lacks specific information about each document sufficient to determine whether it meets "the Commission's strict standards" for *in camera* treatment. *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *14 (Jul. 2, 2018).

A. Legal Standard

Under Commission Rule 3.45(b), the Court may grant a request for *in camera* treatment for material “only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b). An applicant for *in camera* treatment “must ‘make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.’” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *2 (Jul. 2, 2018) (quoting *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980)). If the applicant for *in camera* treatment is able to “make[] this showing, the importance of the information in explaining the rationale of FTC decisions is ‘the principal countervailing consideration weighing in favor of disclosure.’” *Id.*

Because “[t]he Federal Trade Commission recognizes the ‘substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons,’ the party requesting that documents be placed *in camera* bears ‘the burden of showing good cause for withholding documents from the public record.’” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3 (Jul. 2, 2018). As this Court recently explained, “[a] full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces.” *In re Altria Group, Inc.*, 2021 WL 2258803, at *1. Moreover, “there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old.” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3–4 (Jul. 2, 2018). To overcome this presumption, “an applicant seeking *in camera* treatment for such documents must also

demonstrate, by affidavit or declaration, that such material remains competitively sensitive.” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3–4 (Jul. 2, 2018).

The duration of *in camera* treatment depends on whether the material in question consists of ordinary business records or trade secrets. *In re Altria Group, Inc.*, 2021 WL 2258803, at *2 (May 19, 2021). Ordinary business records, such as “information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents,” typically receive *in camera* treatment for only two to five years. *In re Altria Group, Inc.*, 2021 WL 2258803, at *3. By contrast, trade secrets such as “secret formulas, processes, other secret technical information, or information that is privileged,” may merit indefinite *in camera* treatment, *id.* at *2, although indefinite treatment is warranted only “in unusual circumstances.” 16 C.F.R. § 3.45(b)(3). An applicant seeking indefinite *in camera* treatment of trade secrets “must further demonstrate ‘at the outset that the need for confidentiality of the material is not likely to decrease over time’ [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *Id.* at *2 (quoting *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (April 25, 1990)).

B. Respondent’s Requests for *In Camera* Treatment Do Not Meet the Relevant Standard Under Rule 3.45(b)

1. Respondent Fails to Satisfy Its Burden of Clearly Showing Disclosure Would Result in Serious Injury

Respondent’s motions and attached declaration do not explain specifically why *in camera* treatment is warranted for each exhibit. *See 1-800 Contacts*, 2017 FTC LEXIS 55, at *23 (explaining that a declaration supporting *in camera* review provided insufficient justification). Due to the substantial public interest in ensuring adjudicative proceedings are open to the public, Respondent bears the “heavy burden of showing good cause for withholding documents from the

public record.” *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3 (April 23, 2004).

Respondent seeks *in camera* treatment for 2,485 documents based on little more than conclusory justifications. In *Otto Bock*, this Court noted: “[T]he sheer number of documents for which these Motions seek *in camera* treatment (over 1,500 exhibits) far exceeds the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45 in a case of this type, which casts further doubt on the assertions that all the documents are entitled to such protection.” *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *14 (Jul. 2, 2018). Here, Respondent Illumina seeks *in camera* treatment for nearly a thousand more documents than the excessive number of documents for which the *Otto Bock* Respondents sought *in camera* treatment.

Moreover, a closer review of many of those documents indicates that disclosure would not likely result in serious competitive injury. For example, Respondent seeks *in camera* treatment for the following categories of documents:

- Publicly-available documents: PX2222 and PX2221 on the grounds that they contain “Financial Data; Sales and Marketing Strategy; [and] Strategic Initiatives.”¹ *Illumina Mot.*, “Exhibit A” at 42. However, PX2222 and PX2221 are emails with no content other than the publicly available transcripts for Illumina’s Q3 and Q4 earnings calls. Documents are only entitled to *in camera* treatment when “the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368

¹ Copies of PX2221 and PX2222 are attached to this motion as Exhibit A.

(Mar. 14, 1961). Consequently, documentary evidence that has already been publicly disclosed should not receive *in camera* treatment, particularly if such evidence was publicly disclosed by the party seeking *in camera* treatment.

- Information older than 3 years: Respondent's motion includes at least 850 documents that are more than three years old, over 500 documents that are over five years old, and some that date as far back as 2009.² Under the Commission's Rules and this Court's decisions, there is a presumption that *in camera* treatment should not be granted for information that is more than three years old. *I-800 Contacts*, 2017 FTC LEXIS 55, at *3. Respondent provides no justification for why the Court should depart from this presumption and precedent and grant *in camera* treatment to information that is more than three years old.
- Documents with no readily-ascertainable competitively-sensitive information: Complaint Counsel has likewise identified documents in each of Respondent's nine categories that similarly appear not to contain any competitively sensitive information, suggesting Respondent's process for determining which types of documents, and the specific parts of those documents, should properly receive *in camera* treatment has systematic flaws.³

² A list of these documents are attached as Exhibit B. Although Complaint Counsel has tried to identify all documents that are more than three years old, Exhibit B is not necessarily an exhaustive list of such documents.

³ *See, e.g.*, PX2223, PX2269, PX2821, RX0898, RX1101, RX1102, RX1103, RX1104, RX1105, RX1107, RX1108, RX1462, RX1897, RX1901 (Exh. A to Illumina Mot.). This list is not exhaustive.

2. Respondent Fails to Show Its Need for Blanket Five-Year *In Camera* Protections for Its Materials

Even for materials that may qualify for *in camera* treatment, Respondent's motion overreaches in terms of the time it seeks to have these materials withheld from the public record. Respondent makes no attempt to show why five years—rather than three years—is an appropriate period for protecting documents. As this Court has stated many times, there is a presumption against granting *in camera* treatment for information that is more than three years old. *See, e.g., 1-800 Contacts*, 2017 FTC LEXIS 55, at *3; *In re Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996). This presumption rests on the principle that documents are unlikely to cause competitive harm more than three years after they were created. Respondent has not explained why five-year *in camera* treatment is warranted for each exhibit. Among the documents for which Respondent seeks five-year *in camera* protections are documents relating to commercialized products that are over three years old. For example, [REDACTED] [REDACTED] [REDACTED]}. Likewise, [REDACTED] [REDACTED]}.⁴ Respondent has not met its burden of showing that such documents merit confidentiality protection—particularly since many of these products are available on the market today or, in some cases, have been declared obsolete and discontinued.

⁴ Copies of RX0418 and RX1023 are attached as Exhibit A.

3. Respondent Fails to Satisfy Its Burden to Show Circumstances Warranting Indefinite *In Camera* Treatment for Its Materials

Respondent seeks indefinite *in camera* treatment for 132 documents.⁵ Such treatment is justified only in “unusual circumstances.” 16 C.F.R. § 3.45(b)(3). Respondent bears the burden of showing, at the outset, that “the need for confidentiality of the material is not likely to decrease over time [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration.” *In re Altria Group, Inc.*, 2021 WL 2258803, at *2 (internal citations omitted). Respondent makes no effort to show that each document merits such extraordinary protection, relying only on generalized statements in Mr. Schwillinski’s declaration. For example, RX0422 is a screenshot of a page from Illumina’s website that is readily accessible to anyone with an internet connection.⁶ Likewise, { [REDACTED] [REDACTED] [REDACTED] }. It is unclear why either document merits three-year—let alone indefinite—*in camera* protection. Because Respondent did not provide an adequate basis to justify its request for indefinite *in camera* treatment of its ordinary business records, Respondent’s request should be denied.

⁵ A list of these documents is attached as Exhibit C. Although Complaint Counsel has tried to identify all documents for which Respondents are seeking indefinite *in camera* treatment, Exhibit C is not necessarily an exhaustive list of such documents.

⁶ RX0422 is attached as Exhibit A.

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's motions for *in camera* treatment without prejudice until it fully satisfies the requirements of Rule 3.45(b).

Date: August 18, 2021

Respectfully submitted,

s/ Dylan Naegele
Dylan Naegele
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2433
Email: dnaegele@ftc.gov

Counsel Supporting the Complaint

Exhibit A

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit B

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit C

(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>
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s/ Dylan Naegele
 Dylan Naegele

Counsel Supporting the Complaint