

**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 ON RESPONDENT GRAIL, INC.’S
RENEWED MOTION FOR *IN CAMERA* TREATMENT**

I.

By Order issued August 12, 2021, the original motion for *in camera* treatment filed by Respondent GRAIL, Inc. (“Respondent” or “GRAIL”) was denied without prejudice (“August 12 Order”). The August 12 Order directed GRAIL to thoroughly review all documents for which it seeks *in camera* treatment, and to strictly narrow its requests to only those documents that comply with the Commission’s strict standards for *in camera* treatment.

On August 17, 2021, GRAIL filed its Second Motion for *in Camera* Treatment of Certain Trial Exhibits. Complaint Counsel filed an opposition on August 20, 2021.¹

¹ GRAIL complains that Complaint Counsel has opposed its motion for *in camera* treatment, while not opposing motions filed by non-parties. Respondent’s motion is held to a higher standard than those of non-parties. Requests for *in camera* treatment by non-parties warrant “special solicitude.”; *In re Crown Cork & Seal Co.*, 1967 FTC LEXIS 128, at *2 (June 26, 1967); *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, at *3-4 (May 25, 2011). *See also In re Kaiser Aluminum & Chem. Corp.*, 1984 FTC LEXIS 60, at *2-3 (May 25, 1984) (“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.”).

II.

After setting forth the standards by which motions for *in camera* treatment are evaluated, the August 12 Order determined that the sheer number of documents for which GRAIL sought *in camera* treatment far exceeded the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45. GRAIL's original motion sought *in camera* treatment for approximately 850 exhibits. GRAIL's second motion seeks *in camera* treatment for approximately 850 exhibits. Based solely on the fact that GRAIL did not reduce the number of documents presented for *in camera* treatment, it is obvious that GRAIL has not complied with the August 12 Order to pare down its requests.

The August 12 Order noted that a cursory review of the documents indicated that many did not meet the standards for *in camera* treatment, and pointed to PX4083 as one such example. In GRAIL's renewed motion, GRAIL lists PX4083 as a document with "proposed redactions" for which it seeks *in camera* treatment for a period of 10 years on the grounds that it is a "strategic initiative" or "sales and marketing strategy." PX4083 is an email forwarding a news clip. Apparently, GRAIL no longer seeks to protect the news clip, but wants to protect the email message forwarding the news clip, which conveys a statement about media coverage and a general statement that some Illumina employees who are now at GRAIL might not be excited to return to Illumina. This is clearly not confidential information that likely will result in serious competitive injury.

Other examples of documents for which GRAIL continues to seek *in camera* treatment that do not contain competitively sensitive information have been noted by Complaint Counsel in its opposition pleading. GRAIL has failed to make the required showing that the documents it seeks to shield are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury.

GRAIL's motion is also overbroad in the duration of time for which it seeks *in camera* treatment. As set forth in the August 12 Order, while trade secrets, specifications and product development plans might merit *in camera* treatment for an extended time period, when *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. Nevertheless, GRAIL continues to seek *in camera* treatment for a period of ten years for many documents falling into categories such as sales and marketing strategy or pricing and pricing strategy.

With respect to transcripts from investigational hearings and depositions, GRAIL seeks *in camera* treatment for vast portions of its transcripts. GRAILS' proposed designations are overbroad and include testimony that does not meet the criteria for *in camera* treatment. For example, Respondent seeks *in camera* treatment for general statements such as a statement that in 2020, there was a strong IPO market or a good market for raising capital publicly. PX7108 (Freidin Dep. at 21:19-22:14). Granting *in camera* treatment to general statements in depositions or investigational hearing transcripts would prevent inquiry on these topics at trial on the public record, which would thwart

public understanding of decisions at the Commission. *See In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977).

III.

The burden rests on the movant to demonstrate that the evidence sought to be withheld from the public record is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. GRAIL has failed to sustain its burden. Pursuant to FTC Rule 3.42(c)(11), Respondent's motion is DENIED WITHOUT PREJUDICE.

GRAIL will be given another opportunity to file a revised motion for *in camera* treatment, supported by a sworn statement containing sufficient detail to demonstrate that such documents are entitled to *in camera* treatment. Prior to filing such motion, GRAIL must narrow its requests to only those documents that comply with the Commission's strict standards for *in camera* treatment, the August 12 Order, and this Order. If GRAIL cannot comply with these directives, its next motion may be denied, without the right to refile.

GRAIL's deadline for filing a revised motion for *in camera* treatment is August 27, 2021. Complaint Counsel may file an opposition by September 1, 2021.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 24, 2021