

**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

**RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF A FACT
WITNESS'S DIVORCE PROCEEDINGS**

Respondents Illumina, Inc. (“Illumina”) and GRAIL, Inc. (“GRAIL”) (collectively, “Respondents”), through undersigned counsel, respectfully submit this motion *in limine* pursuant to Commission Rule of Practice 3.43(b) and the Federal Rules of Evidence 402 and 403, to exclude evidence of, reference to and argument concerning the divorce proceedings of Francis deSouza, the Chief Executive Officer of Illumina. Complaint Counsel has included a record from Mr. deSouza’s divorce proceedings as an exhibit on their proposed exhibit list. Because evidence regarding Mr. deSouza’s divorce has no bearing on any fact at issue in this case and would serve no legitimate purpose in these proceedings, the proposed exhibit and any evidence of, reference to or argument concerning the divorce proceedings should be excluded as irrelevant and unduly prejudicial.

I. BACKGROUND

This case arises out of Illumina’s proposed acquisition of GRAIL. Illumina is a leading provider of sequencing products for genetic and genomic analyses, with a mission to improve human health by unlocking the power of the genome. (*See* Respondents’ Answer to Administrative Complaint dated April 5, 2021 (Answer) at 2.) Illumina originally founded GRAIL in 2016 with the goal of developing a screening test for multiple cancers to detect cancer at an early stage, when it can most easily be cured. (*Id.*) GRAIL was spun out as a standalone company in 2017 to invest in the extensive, population-scale clinical trials needed to develop its multi-cancer screening test, Galleri. (*Id.*) Illumina retained a 14.5% equity interest in GRAIL and the right to receive a percentage royalty on GRAIL’s future revenues. (*Id.*) Illumina and GRAIL announced that they had reached an agreement to fully reunify the two companies on September 20, 2020. (*Id.* at ¶ 26.)

The FTC has sought to block the proposed transaction, alleging that it will have anticompetitive effects in an alleged relevant product market of “multi cancer early detection” or “MCED” tests. (Administrative Complaint dated March 30, 2021 (Compl.) ¶ 1.) However, the reunification of Illumina and GRAIL will not have any adverse effects on competition, and, to the contrary, will result in enormous pro-competitive efficiencies that will save thousands of lives. (Answer at 11–13.) Any theoretical competitive concerns are resolved by Illumina’s offer to current and prospective oncology customers of contract terms (an “Open Offer”) that include a 12-year commitment to enter into a supply agreement that provides robust pricing, supply and service guarantees, which directly address the FTC’s competitive concerns. (Answer at 3–4, 10–11 & ¶¶ 54-55.)

In its Final Proposed Witness List, the FTC disclosed Illumina’s CEO, Mr. deSouza, as a witness who “will testify about Illumina’s operations, Grail including Illumina’s formation and sale of Grail, the proposed transaction and due diligence related to the proposed transaction, the competitive effects of the proposed transaction, market definition, market size, efficiencies, finances, strategic plans and forecasts, pricing, costs, customer relationships, any alleged efficiencies, synergies, or dis-synergies relating to the transaction, and other topics . . .”. (See Ex. A, Complaint Counsel’s Final Proposed Witness List at 3.)¹

On July 16, 2021, Complaint Counsel served its Final Proposed Exhibit List. (See Ex. C.) The FTC disclosed more than 65 exhibits that were produced in this litigation from Mr. deSouza’s custodial files, including correspondence, articles and presentations relating to the topics on which Mr. deSouza is expected to testify. (*Id.*) The FTC also included in its exhibit list (as PX9225) a decision from the Court of Appeal of the State of California dated August 10, 2020, rendered as part of divorce proceedings between Mr. deSouza and his former wife. (See Ex. C at 77; Ex. D, PX9225.) In this decision, the Court of Appeal affirmed a 2018 post-judgment order finding that Mr. deSouza failed to disclose certain “material information about his bitcoin investments”, which he purchased in 2013 after being served with a petition for dissolution of marriage. (PX9225 at 14–15.) Mr. deSouza disclosed his ownership of 1,062.21 bitcoins in connection with the divorce proceedings, but the court found he did not disclose that a portion of the bitcoins was tied up in the bankruptcy of an exchange that he had used to purchase them. (*Id.* at 12–13.)

¹ Mr. deSouza is also disclosed as a witness on Respondents’ Final Proposed Witness List. See Ex. B.

As set forth below, this exhibit is irrelevant to this litigation and serves no legitimate purpose. PX9225 and any related testimony the FTC may seek to elicit from Mr. deSouza should thus be excluded.

II. LEGAL STANDARD

Commission Rule of Practice 3.43(b) governs the admissibility of evidence in this proceeding, providing in relevant part that:

Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Additionally, the Federal Rules of Evidence are routinely referenced in administrative proceedings before the Federal Trade Commission, including by this Court. *See, e.g., In the Matter of Pom Wonderful LLC & Roll Glob. LLC*, No. 9344, 2011 WL 2160775, at *1 (May 5, 2011) (Chappell, J.); *see also In the Matter of Evanston Nw. Healthcare Corp., & ENH Med. Grp., Inc., Respondents.*, No. 9315, 2005 WL 400731, at *4 (Jan. 13, 2005) (applying Federal Rules of Evidence 403 and 611); *In the Matter of Intel Corp.*, No. 9341, 2010 WL 1989988, at *3 (May 6, 2010) (applying Federal Rule of Evidence 803(8)(C)).

III. ARGUMENT

The FTC has called Mr. deSouza to testify in his capacity as the CEO of Illumina about the proposed acquisition of GRAIL. The only conceivable purpose in introducing a decision from Mr. deSouza's divorce case is to intimidate him with the prospect of questions about sensitive personal matters, which are plainly irrelevant and prejudicial. Evidence regarding Mr. deSouza's divorce should be excluded because (1) it has no bearing on any fact at

issue in this case, and (2) even it was somehow relevant, its probative value would be substantially outweighed by the prejudicial nature of the evidence.

First, it is well established that “[i]rrelevant evidence is not admissible”. Fed. R. Evid. 402.² The FTC claims this exhibit is relevant as to whether “Illumina’s top executives” will adhere to the terms of the Open Offer and otherwise abide by Illumina’s agreements. (*See* Email from S. Musser to A. Kempf et al. dated August 4, 2021.) The Court of Appeal decision concerns a personal matter unrelated to Illumina, however, and nothing in the decision relates to Mr. deSouza’s role at Illumina, the GRAIL spinoff or Illumina’s decision to re-acquire GRAIL.³ Nor does the exhibit relate to the FTC’s alleged MCED market or the anticipated competitive effects of the proposed transaction. Mr. deSouza’s divorce records are not referenced in any of the documents produced in this case and were not the subject of testimony in his investigatory hearing or deposition. The records thus have no probative value with respect to any fact about which Mr. deSouza may be called on to testify at trial.

The Court of Appeal decision is also not probative with respect to Mr. deSouza’s credibility as a witness, contrary to the FTC’s view. (*See id.*) Federal Rule of Evidence 608 provides that “the court may, on cross-examination, allow [specific instances of a witness’s conduct] to be inquired into if they are probative of [the witness’s] character for truthfulness or untruthfulness”. *See* Fed. R. Evid. 608(b)(1). But the issue before the Court of Appeal was not Mr. deSouza’s truthfulness, but rather the materiality of information about his bitcoin

² Relevant evidence is defined as evidence “ha[ving] any tendency to make a fact [that is of consequence in determining the action] more or less probable than it would be without the evidence”. Fed. R. Evid. 401.

³ Indeed, the fact that this is the only document that the FTC can purportedly point to for the proposition that Illumina will not abide by its contracts underscores the weakness of the FTC’s argument. Testimony from third parties also states the opposite, with third parties stating that they can trust Illumina to adhere to its contracts. [REDACTED]

investments as a matter of law under California Family Code section 1100. (*See* PX9225 at 12.) Moreover, the Court of Appeal evaluated Mr. deSouza’s conduct in the specific context of California Family Code section 721, which imposes a “fiduciary . . . duty of the highest good faith and fair dealing on each spouse” (*Id.* at 8-9.), and requires “strict transparency” between spouses after separation and before the final division of community property. (*Id.* at 9-10.) The court’s finding is simply not relevant to Mr. deSouza’s character for truthfulness or his credibility as the CEO of Illumina. The sole effect of introducing Mr. deSouza’s divorce records will be to needlessly embarrass Mr. deSouza and accordingly, there is no basis to admit them. *See, e.g., In the Matter of Rambus Inc., A Corp.*, No. 9302, 2003 WL 21223850, at *1 (F.T.C. Apr. 21, 2003) (noting motion *in limine* should be granted where it will “eliminate plainly irrelevant evidence”).

Second, even if evidence concerning Mr. deSouza’s divorce were somehow relevant—and it is not—it should be excluded because its probative value would be, at most, minimal and substantially outweighed by the prejudicial nature of the evidence. *See* Fed. R. Evid. 403.⁴ As discussed above, the evidence would pry into sensitive personal matters and serve no legitimate purpose in these proceedings. *Compare Herbert v. Architect of Capitol*, 920 F. Supp. 2d 33, 39-40 (D.D.C. 2013) (evidence of “objectively taxing” “stress factors” such as divorce was “highly probative” as to plaintiff’s entitlement to recover damages for emotional pain and suffering) *with Lanni v. State of N.J.*, 177 F.R.D. 295, 304 (D.N.J. 1998) (finding “the prejudicial fact of [plaintiff’s] divorce, through either testimony or divorce complaints, substantially outweigh[ed] any probative value” with respect to discrimination claims at issue).

⁴ Rule 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, . . . undue delay, wasting time, or needlessly presenting cumulative evidence”. Fed. R. Evid. 403.

Because this evidence is inadmissible on all potential grounds, it should be excluded along with any related testimony. *See In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (Chappell, J.).

CONCLUSION

For the reasons set forth above, Respondents respectfully submit that their motion *in limine* to exclude exhibit PX9225, and any other evidence of, reference to or argument concerning Mr. deSouza's divorce proceedings, should be granted.

Dated: August 5, 2021

Respectfully submitted,

/s/ Sharonmoyee Goswami

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I also certify that I caused the foregoing document to be served via email to:

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August 5, 2021

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

August 5, 2021

By: /s/ Sharonmoyee Goswami
Sharonmoyee Goswami

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Docket No. 9401

**STATEMENT IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO
EXCLUDE EVIDENCE OF A FACT WITNESS'S DIVORCE PROCEEDINGS**

Pursuant to Paragraph 4 of the Scheduling Order entered on April 26, 2021, Respondents hereby represent that counsel for the moving parties has conferred with Complaint Counsel by email in an effort in good faith to resolve by agreement issues raised by the motion. The parties corresponded by email on August 4 and August 5, 2021 to discuss a potential agreement with respect to the evidence that Respondents seek to exclude in this motion, but were unable to reach an agreement.

Dated: August 5, 2021

Respectfully submitted,

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

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DECLARATION OF SHARONMOYEE GOSWAMI

I, Sharonmoyee Goswami, declare and state:

1. I am a partner at Cravath, Swaine & Moore LLP and counsel for Respondent Illumina, Inc (“Illumina”) in this matter.
2. I make this declaration pursuant to 28 U.S.C. § 1746 in support of Respondents’ Motion *In Limine* to Exclude Evidence of a Fact Witness’s Divorce Proceedings.
3. Attached hereto as Exhibit A is a true and correct copy of Complaint Counsel’s Final Proposed Witness List, which was served on July 16, 2021.
4. Attached hereto as Exhibit B is a true and correct copy of the Respondents’ Final Proposed Witness List, which was served on July 23, 2021.
5. Attached hereto as Exhibit C is a true and correct copy of Complaint Counsel’s Final Proposed Exhibit List, which was served on July 16, 2021.
6. Attached hereto as Exhibit D is a true and correct copy of the exhibit bearing bates number PX9225, which was included in the FTC’s Final Proposed Exhibit List.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this
5th day of August, 2021 in New York, New York.

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

Exhibit A

Filed In Camera

Exhibit B

Filed In Camera

Exhibit C

Filed In Camera

Exhibit D

Filed In Camera

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In the Matter of

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Docket No. 9401

**[PROPOSED] ORDER ON RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE OF A FACT WITNESS'S DIVORCE PROCEEDINGS**

On August 5, 2021, Respondents filed a Motion *In Limine* to Exclude Evidence of a Fact Witness's Divorce Proceedings pursuant to Commission Rule 3.43(b) and this Court's Scheduling Order. Having considered Respondents' Motion and attached Exhibits, it is hereby ORDERED that Respondents' motion is GRANTED. Complaint Counsel is precluded from introducing Exhibit PX9225 and any other evidence of, reference to or argument concerning the divorce proceedings that are the subject of that Exhibit.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: