PUBLIC

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 INVESTIGATIONAL HEARING TRANSCRIPTS

Respondents Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") submit this motion *in limine* for an order excluding from evidence the investigational hearing transcripts listed on Complaint Counsel's Final Proposed Exhibit List as PX7040 through PX7073 (each, an "IHT" and, collectively, the "IHTs").

First, admitting the IHTs would violate Respondents' rights to object, cross-examine and present evidence. ***Second***, admitting the 6,000-plus pages of IHTs—when Complaint Counsel has already designated over 20 trial witnesses and seeks to admit over 50 deposition transcripts into evidence—would be cumulative and wasteful. ***Third***, admitting the IHTs would prejudice Respondents by unfairly allowing the FTC to vastly (and asymmetrically) expand its effective trial time. ***Fourth***, Part 2 investigative transcripts may not be admitted as evidence to prove the truth of the matters asserted. ***Fifth***, the IHTs constitute improper hearsay under 16 C.F.R. § 3.43(b).

ARGUMENT

I. Admitting The IHTs Would Violate Respondents' Rights To Object, Cross-Examine And Present Evidence.

Under 16 C.F.R. § 3.41(c), "[e]very party . . . shall have the right of due notice, ***cross-examination, presentation of evidence, objection,*** motion, argument, and all other rights essential to a fair hearing." (Emphasis added.)

The FTC's Part 2 rules do not afford the "essential" rights mandated by section 3.41(c). ***First***, Part 2 examinations are *ex parte*. ***Second***, there is no right to cross-examination. *See* 16 C.F.R. § 2.9(b)(5). ***Third***, investigational hearings restrict objections to scope and privilege only. 16 C.F.R. § 2.9(b)(2).

Evidence from Part 2 investigational hearings is not automatically incorporated into the Part 3 adjudicatory process. *See Hannah v. Larche,* 363 U.S. 420, 446 (1960) (FTC rules "draw a clear distinction between adjudicative proceedings and investigative proceedings"). In *Hannah*, the Supreme Court noted that the FTC's rules survive due process scrutiny precisely because the respondents' limited rights at the investigative stage will ***not*** prejudice its rights at the adjudicative stage: "We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since ***any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding*** . . . ." *Id.* at 446 (emphasis added).

Complaint Counsel exploited the restrictive Part 2 rules during the investigative hearings:[1]

[redacted]

[1] *See, e.g.*, [redacted]

[redacted]

As the FTC concedes, the IHTs are not "a clear record" (PX7048 at 57:11) because they were not created under the "traditional judicial safeguards" that govern Part 3 proceedings, *see Hannah*, 363 U.S. at 446, which renders the IHTs inadmissible under 16 C.F.R. § 3.41(c).

The trial will not provide an adequate opportunity for Respondents to remedy the unfairness of the IHTs. The IHTs span over ***6,000 pages*** of testimony. If Respondents were to devote just one minute to respond to each page of IHT testimony, that would consume ***more than 100 hours*** of trial time: virtually the entire time allotted to Respondents under by the FTC's rules. Such an effort is not possible within the time constraints of an administrative trial. By offering the IHTs in full, the FTC has ensured, contrary to its prior position, that Respondents will lose their ability to object meaningfully to the testimony elicited in the IHTs.

[2] [redacted]

II. The IHTs Should Be Excluded As Cumulative.

Evidence may be excluded if its admission would result in "needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b). Complaint Counsel's request that the Administrative Law Judge admit into the record 34 IHTs ***in their entirety*** is the very definition of needlessly cumulative evidence.

The contrast between Complaint Counsel's approach here and its approach in the Commission's 2012 investigation of McWane, Inc., is instructive. (*See In re McWane*, Dkt. No. 9351, 2012 WL 3597376, (F.T.C. Aug. 15, 2012), attached hereto as **Ex. A**.) In *McWane*, Complaint Counsel "designated for admission at trial ***portions*** of 19 investigative hearing transcripts". (*Id.* at *2 (emphasis added).) The respondent challenged the designations as cumulative, and Your Honor denied the motion *in limine* on the grounds that the respondent had failed to identify specific cumulative testimony ***within the excerpts designated by Complaint Counsel***. (*Id.* at *4.) Your Honor noted correctly in *McWane* that:

> "The Rules ***do not, however, provide for the automatic admission of IHTs at trial.*** Rather, Rule 3.43 contemplates that investigational hearing testimony, like any other proffered evidence, can be excluded if the testimony is irrelevant, unreliable, ***duplicative***, or otherwise fails to meet the standards for admissibility described in Rule 3.43."

(*Id.* (cleaned up) (emphasis added).) Accordingly, Your Honor denied the motion without prejudice to the *McWane* respondents' ability to object to admission of specific portions of the IHTs at trial. (*Id.*)

There is an enormous difference between designating specific portions of IH testimony, as in *McWane*, and designating ***34 IHTs in their entirety***, as Complaint Counsel has done here. There

is no question that the IHTs, taken as a whole, contain cumulative testimony. As just a few examples:

- ◊ 14 of the IHTs are of witnesses who are ***on the FTC's own witness list***, rendering their entire IHTs cumulative of testimony that can be elicited at trial.[3]
- ◊ 25 of the IHTs are of witnesses who ***were also deposed***, and the FTC is offering all 25 of their deposition transcripts as well.[4]
- ◊ On numerous occasions, Complaint Counsel asked multiple third parties to provide impermissible speculative lay opinion about the same issues. For example:
  - **Impact of increased competition on patients:**
    - [redacted]
    - [redacted]
    - [redacted]
  - **Speculation by nonparties about Illumina's "incentives":**
    - [redacted]
    - [redacted]

[3] [redacted]

[4] *See* PX7040, PX7042, PX7044-7047, PX7049, PX7053, PX7055-7058, PX7060, PX7063-7066, PX7068-PX7073.

- [redacted]
- [redacted]

III. Admitting 34 Entire IHTs Into Evidence Would Prejudice Respondents By Allowing Complaint Counsel Unilaterally To Exceed The FTC's Time Limits.

Complaint Counsel's attempt to admit over 6,000 pages of investigative hearing testimony is unfair because it arrogates nearly unlimited trial time to Complaint Counsel at Respondents' expense.

16 C.F.R. § 3.41(b) caps administrative trials at 210 hours and allots "no more than half" of the trial time to each side. That time limit requires both Complaint Counsel and Respondents to use their time judiciously and avoid cumulative evidence. By seeking to admit all 34 IHTs, the FTC seeks to admit ***over 100 hours*** of its own *ex parte* questioning into the record. Unless Respondents ignore all that evidence, the FTC will also usurp a significant portion of Respondents' time for their response. It would be unfair and prejudicial to force Respondents to use their own scarce trial time to respond to over 6,000 pages of IHTs, in addition to responding to Complaint Counsel's presentation at trial.

IV. The IHTs May Not Be Admitted To Prove The Truth of The Matters Asserted.

Under long-standing FTC precedent, IH testimony should not be admitted to prove the truth of the matters addressed therein. *See In re Resort Car Rental Sys., Inc.*, 83 F.T.C. 234, 1973

[5] Given the 2,500 word limit on non-dispositive motions, it is impossible to set forth all of the duplicative and cumulative testimony spanning 6,000 pages of IHTs. The examples listed herein are illustrative in nature.

WL 165056, at *33 (Jul. 31, 1973) ("Complaint counsel made a request . . . to introduce into evidence excerpts of testimony attained at an investigational hearing, for the truth of the matters contained therein. The administrative law judge rejected this evidence . . . ."); *see also id.* ("No testimony obtained at the investigational hearing was admitted into evidence at the adjudicative hearing for the truth of its contents."). Investigative hearing testimony is properly excluded even when the witness is unavailable for trial. *See id.*

Rule 3.43(b) provides that only "reliable" testimony may be admitted, and that "unfair" evidence such as the IHTs should be excluded, not admitted. 16 C.F.R. § 3.43(b). Rule 3.43(e), provides that investigatory hearing materials "may be disclosed" only "***when necessary*** in connection with adjudicative proceedings", and then "***may*** be offered", but not necessarily received, into evidence. 16 C.F.R. § 3.43(e) (emphasis added).

The IHTs are laden with unfairly obtained and inadmissible evidence that is not "necessary" or "reliable". They contain improper leading questions asked by Complaint Counsel without any effort to establish that the witnesses were, in fact, hostile. The instances of leading questions are too numerous to cite, but the phrase "correct?" appears approximately ***450 times*** across the IHTs, and the phrase "right?" appears approximately ***720 times***. While the instances of leading questions in the IHTs are too numerous to catalog in full within this brief, below are a few representative examples of Complaint Counsel's improper leading of nonparty witnesses in the IHTs:

◊ [redacted]

[redacted]

- ◊ [redacted]
- ◊ [redacted]
- ◊ [redacted]

The IHTs are also riddled with inappropriate questions that seek to elicit speculative and improper lay opinion testimony. For example, during the IH testimony of nonparty [redacted] Complaint Counsel:

---

6 [redacted]

7 [redacted]

8 [redacted]

9 [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Accordingly, the Court should deny admission of the IHTs under Rule 3.43(b) and (e).

V. The 19 Non-Party IHTs Contain Hearsay That Should Be Excluded Under Rule 3.43(b).

Under Rule 3.43(b), hearsay is admissible only if it is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair." Complaint Counsel must establish such hearsay "would not be duplicative, would not present unnecessary hardship to a party or delay to the proceedings, and would aid in the determination of the matter." 16 C.F.R. § 3.43(b). Nineteen

[10] [redacted]

[11] *See id* at 130:12-131:2.

[12] *See id.* 144:5-147:10.

[13] *See id.* at 161:2-169:8.

[14] *See id.* at 170:24-175:6.

of the IHTs are from examinations of nonparties, and thus are inarguably hearsay. [15] (*See* PX7040-7047, 7049-51, 7053-56, 7057-58, 7068, 7070-7071.)

The Court should reject the IHTs as inadmissible hearsay under Rule 3.43(b) for several reasons. ***First***, the IHTs are not necessary to "aid in the determination of the matter", because any testimony contained within them is available to Complaint Counsel by other, non-hearsay means. 16 C.F.R. § 3.43(b). Complaint Counsel had ample opportunity to take depositions of nonparties, and in fact did depose representatives from most of the nonparties represented in the IHTs. Complaint Counsel also had the opportunity to list these individuals as live trial witnesses. ***Second***, the IHTs are not "reliable" or "fair", as required by Rule 3.43(b). As discussed above, the IHTs are replete with improper leading questions, speculation and inadmissible lay opinion. ***Third***, as discussed above, the IHTs should be excluded because they would result in the "needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b).

CONCLUSION

For the foregoing reasons, the Court should deny Complaint Counsel's request to admit the 34 unabridged investigative hearing transcripts (PX7040-7073).

[15] Rule 3.43(b)'s requirements apply to out-of-court statements by parties as well, such as the 15 party IHTs proffered by Complaint Counsel. Although in some cases party statements may be admissible as admissions against a party's interest, such statements may be excluded if they do not "aid in the determination of the matter", are not "reliable" or "fair", or would be "needless[ly] cumulative". 16 C.F.R. § 3.43(b). Here, because Complaint Counsel has proffered even the party IHTs in full, without attempting to designate specific testimony that constitutes admissions against interest, the party IHTs contain inadmissible evidence and should also be excluded.

Dated: August 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 2021, I caused to be delivered via email a copy of Complaint Counsel's Final Proposed Witness List to:

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

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PUBLIC

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

DECLARATION OF KARL HUTH

I, Karl Huth, declare and state:

1. I am a partner at Huth Reynolds 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 Investigational Hearing Transcripts.

3. Attached hereto as Exhibit A is a true and correct copy of *In re McWane, Inc.*, Dkt. No. 9351, 2012 WL 3597376 (F.T.C. Aug. 15, 2012).

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 5, 2021.

Respectfully submitted,

/s/ Karl Huth
Karl Huth

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
McWANE, INC., a corporation, and	)	DOCKET NO. 9351
STAR PIPE PRODUCTS, LTD., a limited partnership, Respondents.	)	

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION *IN LIMINE* TO PRECLUDE COMPLAINT COUNSEL FROM USING PRIVILEGE AS A SWORD AND A SHIELD

I.

On July 27, 2012, Respondent McWane, Inc. ("Respondent" or "McWane") filed a Motion *in Limine* to Preclude Complaint Counsel From Using Privilege as a Sword and a Shield ("Motion"). Complaint Counsel filed an opposition to the Motion on August 7, 2012 ("Opposition"). Having fully considered the Motion and the Opposition, and as more fully explained below, Respondent's Motion is GRANTED IN PART and DENIED IN PART.

II.

Respondent contends that Complaint Counsel will be using privilege as both a "sword and a shield" at trial, by relying upon certain "white papers"[1] and other submissions and testimony provided by McWane, SIGMA Corporation ("SIGMA"), and Star Pipe Products, Ltd. ("Star") during the investigation phase of this matter (the "Part 2 submissions"), while at the same time withholding other Part 2 submissions, or parts thereof, as privileged. Specifically, Respondent contends that Complaint Counsel's expert reviewed, and/or based his opinions in part upon, certain Part 2 submissions; that Complaint Counsel designated as exhibits for trial 19 investigational hearing transcripts ("IHTs") including IHTs that contain questions on some documents submitted during the Part 2 investigation; and that Complaint Counsel's exhibits include six documents obtained from Part 2 submissions, but that Complaint Counsel withheld other Part 2 submissions, including three IHTs. To illustrate, Respondent states that during

[1] A "white paper" is a government or other authoritative report giving information or proposals on an issue. *See* http://www.merriam-webster.com/dictionary/white%20paper.

questioning of a witness from Star at an investigational hearing, the witness identified documents marked as CX0015 and CX0016 as part of Star's August 31, 2010 submission, but that Complaint Counsel also identified as privileged and withheld from discovery other documents dated August 31, 2010, which Respondent surmises constitute parts of the same submission. As another illustration, Respondent asserts that Complaint Counsel withheld three investigative hearing transcripts of waterworks distributors (Tysinger, Himes and Henderson) that Respondent asserts were reviewed and relied upon by Complaint Counsel's expert, but that Complaint Counsel contended was a mistake and continues to refuse to produce these IHTs.

Respondent claims that it has "legitimate concerns" that Star "misled the Commission" with its Part 2 submissions and testimony; that Respondent is entitled to determine if Star made misleading statements during the Part 2 phase; and that Respondent has "a clear interest to know exactly what information" the Commission and Complaint Counsel used in deciding to issue the Complaint in this matter.

Relying on the "sword and shield" doctrine, discussed further *infra*, Respondent seeks an order (1) precluding Complaint Counsel from proffering an expert opinion based on any submission to the FTC by any non-party during the Part 2 investigation, and striking those portions of Complaint Counsel's expert's report that rely on any such submissions, and (2) precluding Complaint Counsel from introducing testimony (including via deposition or investigational hearing transcript designations) regarding any submissions from the FTC's Part 2 investigation. In the alternative, Respondent requests an order compelling Complaint Counsel to produce all submissions made by Star, and others, if any, to the FTC during the Part 2 investigation.

Complaint Counsel responds that, although designated as a motion *in limine*, Respondent's Motion is actually a motion to compel Complaint Counsel to produce documents withheld during discovery as privileged, which motion Complaint Counsel asserts is untimely under the Scheduling Order issued in this case.[2] Complaint Counsel further asserts that, while Complaint Counsel withheld as privileged some documents and testimony obtained during the Part 2 investigation, it produced all non-privileged Part 2 submissions, including any investigational hearing transcripts (and exhibits) for any individuals who appeared on Complaint Counsel's preliminary witness list, and all non-privileged non-party document productions. In addition, Complaint Counsel specifically states that "neither Complaint Counsel nor its expert have relied during discovery -- nor will rely upon at trial -- any Part 2 materials withheld from Respondent," that Respondent has all white papers that Complaint Counsel's expert reviewed, and that Complaint

[2] Paragraph 9 of the Scheduling Order's Additional Provisions states in part: "Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs." Complaint Counsel asserts that on March 30, 2012, after completing its document production in response to Respondent's First Set of Requests for Documents, Complaint Counsel produced its privilege log to Respondent that identified documents and investigational hearing transcripts that Complaint Counsel had withheld from discovery. Complaint Counsel further asserts that Respondent had notice that Complaint Counsel had not produced the documents that are now the subject of the Motion as of March 30, 2012, and a motion to compel is, therefore, untimely.

Counsel assured Respondent's counsel during "meet and confer" discussions that "Complaint Counsel's expert would not review or rely upon any Part 2 materials – either in preparing his expert report or in providing testimony at trial – that were not produced to Respondent." Holleran Decl. ¶ 5. Finally, Complaint Counsel notes that Respondent does not contend that any of the withheld documents were not properly withheld as privileged, and that in any event "exactly what information" was relied upon in deciding to bring suit in this matter is not relevant.

III.

1. *In Limine* standards generally

As stated most recently in *In re POM Wonderful LLC*:

> "Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g., In re Telebrands Corp.*, Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); *In re Dura Lube Corp.*, Docket 9292, 1999 FTC LEXIS 252 (Oct. 22, 1999).
>
> Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL)(AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).

2011 FTC LEXIS 77, at *3-4 (May 5, 2011).

In addition, "*[i]n limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial." *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009) (citations omitted). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Id.* (quoting *Noble v. Sheahan*, 116 F. Supp.2d 966, 969 (N.D. Ill. 2000)).

2. "Sword and shield" doctrine

Respondent's motion to preclude Complaint Counsel from relying on any Part 2 submissions, because some Part 2 submissions have been withheld as privileged, is based upon the "sword and shield" doctrine. As set forth recently in this case, the "sword and shield" doctrine holds that a litigant cannot use privileged documents "as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *In re McWane, Inc.*, 2012 FTC LEXIS 126, at *7-8 (July 13, 2012) (Chappell, ALJ) (quoting *In re Motor Up Corp., Inc.*, 1999 FTC LEXIS 262, *5 (Aug. 5, 1999)) ("July 13 Order"). The July 13 Order continues:

> The operative case law holds that subject matter waiver occurs only where a party attempts to gain a tactical advantage by "us[ing] the disclosed material for advantage in the litigation but [invoking] the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials." *Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at *25-26 (N.D. Ill. Jan. 5, 2011). . . . "The primary inquiry is whether the party claiming privilege will assert the allegedly protected material in aid or in furtherance of its claims or defenses." *Chevron Corp. v. Stratus Consulting, Inc.*, 2010 U.S. Dist. LEXIS 110023, at *32 (D. Co. Oct. 1, 2010) (citation omitted). "In an adversarial proceeding, a process designed to reach the truth of the matter through the presentation of opposing perspectives, justice does not permit one side to inform and facilitate a damages assessment, purposed for the reliance of the court, without permitting its opponent access to the materials and process underlying the assessment." 2010 U.S. Dist. LEXIS 110023 at *33.

2012 FTC LEXIS 126, at *8-9 (quoting *In re OSF Healthcare System*, 2012 FTC LEXIS 70, at *4-6 (March 19, 2012)).

IV.

Respondent has not sufficiently identified any Part 2 submission being proffered as evidence in this case, including any submission reviewed or relied upon by Complaint Counsel's expert, that has been withheld by Complaint Counsel. Respondent's contention, that three withheld IHTs (from Tysinger, Himes and Henderson) were considered by the expert, is not supported by the record. In support of this contention, Respondent cites to Appendix B to the expert report, attached to Respondent's Motion, which is a list of all the materials considered by the expert; however, the three IHTs identified by Respondents do not appear to be listed. Respondent's further reliance on the deposition testimony of Complaint Counsel's expert that he received "all the investigational hearing transcripts" is misplaced, because it does not appear that the expert could have personal knowledge as to whether or not what he received, in fact,

constituted "all the investigational hearing transcripts" in the case. Complaint Counsel's Opposition fails to address this issue. Complaint Counsel maintains that the Part 2 submissions being relied upon by Complaint Counsel are non-privileged and that neither Complaint Counsel nor its expert is relying on any Part 2 submissions that have not been produced to Respondent.

It cannot be determined on the basis of the motion papers and attachments that Complaint Counsel has used, or intends to use, privileged materials as a sword while shielding others from discovery. Because it does not appear that privileged materials are being used as a "sword," the fact that other, assertedly privileged documents are being shielded is insufficient to invoke the "sword and shield" doctrine. *See McWane, Inc.*, 2012 FTC LEXIS 126, at *10 (holding that "sword and shield" did not apply where, although Respondent appeared to be relying on a defense of advice of counsel as a "sword," Complaint Counsel failed to identify evidence Respondent was shielding from Complaint Counsel on the ground of privilege). Respondent raises no basis other than the "sword and shield" doctrine for precluding use of Part 2 submissions. Accordingly, Respondent's request to preclude Complaint Counsel from relying on any Part 2 submissions is unjustified.

Respondent's alternative request that Complaint Counsel be compelled to produce privileged Part 2 materials is similarly based upon the "sword and shield" doctrine. Respondent does not contend that the withheld Part 2 submissions are not subject to a valid privilege, but rather argues that it is fundamentally unfair to permit Complaint Counsel to rely upon some Part 2 submissions while withholding others. However, as noted above, the "sword and shield" doctrine is inapplicable because it has not been demonstrated that Complaint Counsel has used, or intends to use, any privileged Part 2 submissions. Because Respondent has not raised any other valid basis for compelling production of privileged Part 2 submissions, Respondent has failed to justify an order compelling these materials.

In the event that any Complaint Counsel witness, expert or fact, has relied upon any information, including documents, testimony or other information, that was withheld from Respondent, it would be unfair to allow Complaint Counsel to rely upon any such information as evidence at trial. Accordingly, Complaint Counsel will be prohibited from doing so by this Order, as set forth *infra*. In this regard, Respondent's Motion to Preclude Complaint Counsel from Using Privilege as a Sword and a Shield is GRANTED IN PART, but is otherwise DENIED.

V.

Having fully considered the Motion and the Opposition, and for the foregoing reasons, Respondent's Motion *in Limine* to Preclude Complaint Counsel From Using Privilege as a Sword and a Shield Motion is GRANTED IN PART, and it is hereby ORDERED that Complaint Counsel is precluded from offering at trial in this case, by documents or testimony, including deposition testimony, or by any other method or means, including as the basis of opinions or conclusions of its expert, any information,

documents, testimony or other information, from the Part 2 investigation in this matter that Complaint Counsel has withheld from Respondent on the basis of privilege. In all other respects, the Motion is DENIED. This Order is not a determination, and shall not be construed as a ruling, as to the admissibility of any particular Part 2 submission that may be offered at the hearing, or of any expert opinion based thereon, in whole or in part.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 14, 2012

PUBLIC

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

In the Matter of Illumina, Inc., a corporation, and and GRAIL, Inc., a corporation, Respondents.	Docket No. 9401

STATEMENT IN SUPPORT OF RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE INVESTIGATIONAL HEARING TRANSCRIPTS

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/ Karl Huth
Karl Huth
Huth Reynolds LLP

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BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of Illumina, Inc., a corporation, and GRAIL, Inc., a corporation, Respondents.	Docket No. 9401

[PROPOSED] ORDER ON RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE INVESTIGATIONAL HEARING TRANSCRIPTS

On August 5, 2021, Respondents filed a Motion *In Limine* to Exclude Investigational Hearing Transcripts pursuant to Commission Rule 3.43(b) and this Court's Scheduling Order. Having considered Respondents' Motion and attached Exhibit, it is hereby ORDERED that Respondents' motion is GRANTED. Complaint Counsel is precluded from introducing Exhibits PX7040 through PX7073.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: