

**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, INC.’S
SECOND MOTION FOR *IN CAMERA* REVIEW OF CERTAIN TRIAL EXHIBITS**

On August 5, 2021, Respondent Illumina filed its first motion for *in camera* review of certain trial exhibits and sought *in camera* treatment for 2,485 documents. On August 12, 2021, Complaint Counsel filed its opposition to Respondent’s motion. In the same day, the Court denied Respondent’s motion without prejudiced (hereinafter “August 12 Order”). In its Order, the Court observed that “[t]he sheer number of documents for Respondent [Illumina] seeks *in camera* treatment far exceeds the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45.” August 12 Order at 4. The Court further noted that “[a] cursory review of the documents indicates that many do not meet the standards for *in camera* treatment.” *Id.* On August 17, 2021, Respondent filed a second motion for *in camera* review and designated over 1,300 documents for confidential treatment.

Respondent once more fails to satisfy Rule 3.45(b)’s strict standard for seeking *in camera* treatment here. If Respondent’s motion is granted, the public would be deprived of access to virtually the entire trial record in this matter. Complaint Counsel therefore respectfully requests that the Court deny Respondent’s second motion for *in camera* treatment without prejudice until

Respondent 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 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).

On August 12, 2021, the Court denied Respondent’s motion without prejudice with respect to most confidentiality designations. The Court, however, granted Respondent’s motion with respect to sensitive personal information—provided Respondent redacted that information where practical.

On August 17, 2021, Respondent submitted a second motion seeking *in camera* treatment for certain trial exhibits and grouped documents by the same nine categories as the first motion. This motion lists, to Complaint Counsel’s best accounting, 64 trial exhibits that have been redacted, and it provides a basic description of what information it deems confidential in each document. For the remainder of those documents, Respondent requests complete *in camera* treatment.

II. ARGUMENT

Respondent’s request for *in camera* treatment is overbroad and fails to meet “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 Fails to Satisfy Its Burden of Clearly Showing Disclosure Would Result in Serious Injury under Rule 3.45

Respondent seeks *in camera* treatment for over 1,300 documents. The sheer number of documents for which Illumina seeks *in camera* treatment “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); *see also* Order on Respondent GRAIL, Inc.’s Motion for *In Camera* Treatment at

[REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

Respondent’s motion seeks *in camera* treatment for over 270 documents that are over three years old, including nearly 150 documents that are over five years old, and includes documents dating back to 2011. 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. *1-800 Contacts*, 2017 FTC LEXIS 55, at *3. 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). Respondent has failed to

camera treatment. For example, { [REDACTED]
[REDACTED]
[REDACTED] }. If Respondent's proposed designations are granted, this would result in significant portions of the examinations of Respondent's executives to be conducted in camera.

Even after a second review, Respondent continues to designate documents confidential that are not. Although some material may be awkward, unhelpful to Respondent, or contain vague references to information that might be confidential, Respondent "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). Awkward, unhelpful, or vague material is not necessarily equivalent to material that would lead to serious competitive injury.

Complaint Counsel does not claim to have identified every deficiency in Respondent Illumina's confidential screening. Nor should we have to. Respondent has the burden to show why *in camera* treatment is merited, and as the above-cited materials show, they fall well-short of the high standard required. *In re Otto Bock HealthCare North America, Inc.*, 2018 FTC LEXIS 123, at *3 (Jul. 2, 2018). Moreover, the cursory effort that Respondent Illumina apparently put into reviewing these documents shows that their process for identifying confidential materials is deficient and that they have ignored this Court's August 12 Order.

III. CONCLUSION

For the foregoing reasons, 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).

Date: August 20, 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)

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 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