

**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

NON-PARTY EXACT SCIENCES' MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), non-party Exact Sciences, Corp. ("Exact") respectfully moves this Court for *in camera* treatment of various competitively-sensitive, confidential business documents (the "Confidential Documents"). Exact produced these documents, among others, in response to third-party subpoenas issued by the Federal Trade Commission ("FTC") and the respondents, Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") (collectively, "Illumina" or the "Respondents"). The FTC and Illumina have now notified Exact that they intend to introduce over 100 of Exact's produced documents, including the Confidential Documents, into evidence at the administrative trial in this matter. *See* Letter from the Federal Trade Commission dated July 26, 2021 (attached as Exhibit A); Email from M. Zaken dated July 26, 2021 (attached as Exhibit B).

All of the materials for which Exact is seeking *in camera* treatment are confidential business documents and, if they were to become part of the public record, Exact would be

significantly harmed in its role as both a customer of Illumina and a competitor to GRAIL. For the reasons discussed in this motion, Exact requests that this Court afford its confidential business documents *in camera* treatment indefinitely, or for no less time than ten years. In support of this motion, Exact relies on the Affidavit of Scott Coward, Executive Vice President, General Counsel, Chief Administrative Officer and Secretary of Exact (“Coward Declaration”) (attached as Exhibit C), which provides additional details on the documents for which Exact seeks *in camera* treatment.

I. EXACT SCIENCES/THRIVE IS A DIRECT COMPETITOR TO GRAIL AND LIKELY OTHER THIRD-PARTY SUBPOENA RESPONDENTS

Exact is a leading global cancer screening and diagnostics company that has developed some of the most impactful brands in cancer diagnostics and is currently developing additional tests in the cancer screening space, including the multi-cancer early detection (“MCED”) space. Thrive is a fully integrated business unit of Exact that is primarily responsible for developing Exact’s MCED test. Exact began a diligence process to consider acquiring Thrive in October 2020, and the acquisition closed in January 2021.

Exact is a direct competitor to respondent GRAIL and is likely a competitor of other third-party subpoena recipients whose identity Exact does not know. Furthermore, as the developer of an MCED and other cancer screening and diagnostic tests, Exact is a customer of Illumina and may be a customer or potential customer of other third-party subpoena recipients whose identity Exact does not know.

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II. THE DOCUMENTS FOR WHICH PROTECTION IS SOUGHTExact seeks *in camera* treatment for the following Confidential Documents¹:

Documents for which Exact Seeks <i>In Camera</i> Treatment in Their Entirety	
Produced Document Label	File Name
ES_III_Subp_00000001 Exact III Resp_00000148	BD Leadership Review.pdf
ES_III_Subp_00000017 Exact III Resp_00000164	Business Development Update & Long Range Plan Evolution.pdf
ES_III_Subp_00000042 Exact III Resp_00000189	Exact Sciences Overview.pdf
ES_III_Subp_00000093 Exact III Resp_00000240	Multi-cancer Screening.pdf
ES_III_Subp_00000116 Exact III Resp_00000263	multi-cancer trial data - DRAFT.pdf
ES_III_Subp_00000208 Exact III Resp_00000355	████████████████████.pdf
ES_III_Subp_00000218 Exact III Resp_00000365	████████████████.pdf
ES_III_Subp_00000220 Exact III Resp_00000367	████████████████.pdf
ES_III_Subp_00000249 Exact III Resp_00000396	Thrive Discussion Materials.pdf
ES_III_Subp_00000263 Exact III Resp_00000410	Thrive investment proposal.pdf
ES_III_Subp_00000284 Exact III Resp_00000431	Thrive Series B Investment.pdf
ES_III_Subp_00000369 Exact III Resp_00000516	Board I&T Committee Meeting.pdf
ES_III_Subp_00000398 Exact III Resp_00000545	Corporate Presentation.pdf
ES_III_Subp_00000430 Exact III Resp_00000577	████████████████.xlsx
ES_III_Subp_00000433 Exact III Resp_00000580	October 2020 Board of Directors Meeting.pdf
ES_III_Subp_00000493 Exact III Resp_00000640	████████████████.pdf
ES_III_Subp_00000506 Exact III Resp_00000653	████████████████.pdf
ES_III_Subp_00000538 Exact III Resp_00000685	Thrive Overview Discussion.PDF

¹ In order to comply with file size limitations, Exact provided individuals identified in the Certificate of Service with copies of the Confidential Documents for which it seeks *in camera* treatment through FTP link transmitted by email.

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ES_III_Subp_00000616 Thrive III Resp 00000061	[REDACTED].PDF
ES_III_Subp_00000677 Thrive III Resp 00000122	Thrive 10yr LRP.XLSX
ES_III_Subp_00000710 Exact III Resp 00000750	[REDACTED].pptx
ES_III_Subp_00000746 Exact III Resp 00000751	Pipeline Review Jan 2021 BOD meeting [REDACTED] edits.pptx
ES_III_Subp_00000754 Exact III Resp 00000752	EXAS Overview [REDACTED] vfinal.pptx
ES_III_Subp_00000808 Exact III Resp 00001414	[REDACTED].msg
ES_III_Subp_00000812 Exact III Resp 00001418	[REDACTED].ocx
ES_III_Subp_00001845 Exact III Resp 00000144	[REDACTED].pptx
ES_III_Subp_00001974 Thrive III Resp 00000032	Long Range Revenue Summary.xlsx
ES_III_Subp_00001984 Thrive III Resp 00000035	Q4 2020 COGS Analysis.pptx
ES_III_Subp_00002008 Thrive III Resp 00000159	[REDACTED].pptx
ES_III_Subp_00002045 Thrive III Resp 00000176	[REDACTED]
ES_III_Subp_00002078 Thrive III Resp 00000179	[REDACTED].pptx
ES_III_Subp_00002109 Thrive III Resp 00000190	[REDACTED].pptx
ES_III_Subp_00002323 Thrive III Resp 00000196	201202_CS_v1p1.pptx
ES_III_Subp_00002879 Thrive III Resp 00000336	[REDACTED]
ES_III_Subp_00002881 Thrive III Resp 00000338	[REDACTED]
ES_III_Subp_00459990	Thrive Board_9June2020_PRESENTATION.pdf
ES_III_Subp_00447529	[REDACTED]
ES_III_Subp_00434871	RE: exciting times, for sure
ES_III_Subp_00003952	RE: [REDACTED]
ES_III_Subp_00434894	[REDACTED]
ES_III_Subp_00004035 Thrive III Resp 00000375	[REDACTED]
ES_III_Subp_00004036 Thrive III Resp 00000376	[REDACTED]

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ES_III_Subp_00004058 Thrive_III_Resp_00000398	[REDACTED]
ES_III_Subp_00004080 Thrive_III_Resp_00000420	[REDACTED]
ES_III_Subp_00004089 Thrive_III_Resp_00000429	[REDACTED]
ES_III_Subp_00004095 Thrive_III_Resp_00000435	[REDACTED]
ES_III_Subp_00004105 Thrive_III_Resp_00000445	[REDACTED]
ES_III_Subp_00004153 Thrive_III_Resp_00000493	[REDACTED]
ES_III_Subp_00004155 Thrive_III_Resp_00000495	[REDACTED] DOCX
ES_III_Subp_00004176 Thrive_III_Resp_00000516	[REDACTED]
ES_III_Subp_00004651 Thrive_III_Resp_00000985	Illumina [REDACTED]
ES_III_Subp_00004652 Thrive_III_Resp_00000986	[REDACTED]
ES_III_Subp_00004673 Thrive_III_Resp_00001007	[REDACTED]
ES_III_Subp_00005057 Exact_III_Resp_00000835	Re: Thank you
ES_III_Subp_00005061 Exact_III_Resp_00000839	[REDACTED]
ES_III_Subp_00005063 Exact_III_Resp_00000841	[REDACTED]
ES_III_Subp_00005409 Exact_III_Resp_00001135	RE: Exact Sciences
ES_III_Subp_00005428 Exact_III_Resp_00001154	[REDACTED]
ES_III_Subp_00005475 Exact_III_Resp_00001201	RE: Exact Sciences
ES_III_Subp_00005495 Exact_III_Resp_00001221	[REDACTED]
ES_III_Subp_00005525 Exact_III_Resp_00001251	[REDACTED]
ES_III_Subp_00005654 Exact_III_Resp_00001380	Follow up
ES_III_Subp_00008161	Pipeline BU LRP input 3-24-21.pptx
ES_III_Subp_00633532	RE: October BOD Deck_v3 PS Edits 10-17.pptx
ES_III_Subp_00633540	October BOD Deck_v10.pptx

ES_III_Subp_00633599	Board background material_October.pptx
ES_III_Subp_00436550	Pre-read plus program plans - April Exact I&T Committee Meeting.pptx
ES_III_Subp_00728203	[REDACTED]
ES_III_Subp_00448832	[REDACTED]
ES_III_Subp_00441714	[REDACTED]
ES_III_Subp_00222815	[REDACTED]
ES_III_Subp_00777489	[REDACTED] ELT presentation 5-5-2021.pptx
PX9016	[REDACTED]
PX9017	[REDACTED]
PX9018	[REDACTED]
PX9031	[REDACTED]
PX9035	[REDACTED]
PX9037	[REDACTED]
PX9039	[REDACTED]
PX9040	[REDACTED]
PX9041	[REDACTED]
PX9042	[REDACTED]
PX9050	[REDACTED]
Documents for which Exact Seeks Partial <i>In Camera</i> Treatment	
Produced Document Label	File Name
PX7051	IH Transcript of [REDACTED]: pg. 27: 1 - 25 pg. 28: 1 - 16 pg. 29: 19 - 25 pg. 30: 1- 25 pg. 31: 1 -25 pg. 32: 24 - 25 pgs. 33 - 39: 1 - 25 pg. 40: 1 - 15 pg. 41: 12 - 25

	pg. 42: 1 - 25
	pg. 43: 21 - 25
	pg. 44: 1 - 25
	pg. 45: 18 - 25
	pg. 46: 1 - 25
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	pg. 56: 1 - 20
	pg. 57: 15 - 25
	pg. 58: 1 - 3
	pg. 62: 17 - 25
	pg. 63: 1 - 25
	pg. 64: 1 - 20
	pg. 66: 21 - 25
	pgs. 67 - 71: 1 - 25
	pg. 72: 5 - 7; 18 - 25
	pg. 73: 1 - 25
	pg. 74: 1 - 5; 15 - 25
	pgs. 75 - 78: 1 - 25
	pg. 79: 1 - 22
	pgs. 80 - 89: 1 - 25
	pg. 90: 1 - 3; 18 - 25
	pgs. 91 - 97 : 1 - 25
	pg. 98: 1 - 16
	pg. 99: 5 - 25
	pg. 100 - 125: 1 - 25
	pg. 126: 1 - 16
	pg. 127: 2 - 25
	pg. 128: 1 - 16
	pg. 129: 2 - 15
	pg. 133: 8 - 25
	pg. 134 - 144: 1 - 25
	pg. 146: 21 - 25
	pgs. 147 - 148: 1 - 25
	pg. 149: 1 - 13
	pg. 150: 12 - 25
	pgs. 151 - 159: 1 - 25
	pg. 160: 1; 11 - 25
	pgs. 161 - 172: 1 - 25
	pg. 173: 1 - 21
	pg. 174: 12 - 25
	pgs. 175 - 202: 1 - 25
	pg. 203: 1 - 19

	<p>pgs. 204 - 207: 1 - 25 pg. 208: 1 - 7</p>
<p>PX7058</p>	<p>IH Transcript of [REDACTED]: pg. 22: 4 - 25 pg. 23: 1 - 19 pg. 27: 6 - 25 pg. 28: 1 - 25 pg. 29: 1 - 9 pg. 35: 14 - 25 pg. 36 - 49 : 1 - 25 pg. 40: 1 - 6; 14 - 25 pgs. 41 - 42: 1 - 25 pg. 43: 1- 2 pgs. 45 - 57: 1 - 25 pg. 58: 1 - 13 pg. 60: 6 - 25 pgs. 61 - 70: 1 - 25 pg. 71: 1 - 6 pg. 72: 14 - 25 pgs. 73 - 87: 1 - 25 pg. 88: 1 - 16; 20 - 25 pgs. 89 - 90: 1 - 25 pg. 91: 1-2; 10 - 25 pgs. 92 - 131: 1 - 25 pg. 132: 1 - 6; 12 - 25 pg. 133: 1 - 7; 10 - 25 pgs. 134 - 153: 1 - 25 pg. 154: 1 -9; 21 - 25 pgs. 155 - 163: 1 - 25 pg. 164: 1 - 12; 19 - 25 pgs. 165 - 191: 1 - 25 pg. 192: 1 - 21 pg. 193: 3 - 25 pg. 194: 1-8; 19 - 25 pgs. 195 - 196: 1 - 25 pg. 197: 1 - 22 pg. 198: 3 - 25 pgs. 199 - 207: 1 - 25 pg. 208: 1 - 13; 22 - 25 pgs. 209 - 248: 1 - 25 pg. 249: 1 - 15</p>
<p>PX7085</p>	<p>Deposition Transcript: [REDACTED]: pg. 18: 6 - 24 pg. 19: 1 - 24 pg. 20: 1 - 6; 24 pg. 21: 1 - 24</p>

	pg. 22: 1 - 13; 17 - 24
	pg. 23: 4 - 8
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	pg. 52: 1 - 14
	pgs. 53 - 54: 1 - 24
	pg. 55: 1 - 18
	pgs. 56 - 72: 1 - 24
	pg. 74: 4 - 24
	pgs. 75 - 78: 1 - 24
	pg. 79: 22 - 24
	pgs. 80 - 88: 1 - 24
	pg. 89: 1 - 15
	pg. 90: 15 - 24
	pg. 92: 9 - 24
	pgs. 93 - 101: 1 - 24
	pg. 102: 1 - 7
	pg. 103: 17 - 24
	pgs. 104 - 113: 1 - 24
	pg. 114: 1 - 16
	pg. 115: 5 - 17
	pg. 116: 12 - 24
	pgs. 117 - 133: 1 - 24
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	pgs. 136 - 137: 1 - 24
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	pg. 139: 6 - 24
	pgs. 140 - 151: 1 - 24
	pg. 152: 1 - 17
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	pgs. 154 - 160: 1 - 24
	pg. 162: 7 - 24
	pg. 164 - 180: 1 - 24
	pg. 181: 1 - 3
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	<p>pgs. 219 - 234: 1 - 24 pg. 235: 1 - 18 pg. 236: 7 - 24 pgs. 237 - 257: 1 - 24 pg. 258: 1 - 18 pg. 259: 6 - 24 pgs. 260 - 281: 1 - 24 pg. 283: 11 - 24 pgs. 284 - 285: 1 - 24 pg. 286: 1 - 5; 16 - 24 pgs. 287 - 289: 1 - 24 pg. 290: 1 - 21</p>
<p>PX7091</p>	<p>Deposition Transcript: [REDACTED] : pg. 13: 14 - 25 pgs. 14 - 17: 1 - 25 pg. 18: 10 - 25 pgs. 19 - 27: 1 - 25 pg. 28: 1 - 14; 21 - 24 pgs. 29 - 52: 1 - 24 pg. 53: 1 - 2; 18 - 25 pgs. 54 - 72: 1 - 25 pg. 73: 1 - 4; 8 - 22 pgs. 74 - 86: 1 - 25 pg. 87: 1 - 16 pg. 88: 5 - 25 pgs. 89 - 96 pg. 97: 1 - 6 pgs. 99 - 100: 1 - 25 pg. 101: 11 - 25 pgs. 102 - 114: 1 - 25 pg. 115: 1 - 21 pg. 116: 3 - 25 pgs. 117 - 119: 1 - 25 pg. 120: 1 - 12 pg. 121: 18 - 25 pgs. 122 - 124: 1 - 25 pg. 125: 1 - 12 pg. 126: 16 - 25 pgs. 127 - 150: 1 - 25 pg. 151: 1 - 10; 14 - 25 pgs. 152 - 153: 1 - 25 pg. 154: 1 - 15 pg. 155: 15 - 25 pgs. 156 - 158: 1 - 25 pg. 159: 1 - 15 pgs. 160 - 179 1 - 25</p>

	<p>pg. 180: 1 - 7 pgs. 181 - 203: 1 - 25 pg. 204: 1 - 6; 11 - 15 pgs. 205 - 211: 1 - 25 pg. 212: 1 - 11 pgs. 213 - 216: 1 - 25 pg. 217: 20 - 25 pgs. 218 - 235: 1 - 25 pg. 236: 1 - 20 pgs. 237 - 241: 1 - 25 pgs. 243 - 255: 1 - 25 pg. 256: 1 - 18 pgs. 257 - 269: 1 - 25 pg. 270: 13 - 25 pgs. 271 - 272: 1 - 25 pg. 273: 1 - 19</p>
<p>PX7109</p>	<p>Deposition Transcript: [REDACTED]:</p> <p>pg. 16: 3 - 25 pg. 17: 1 - 25 pg. 18: 1 - 17 pg. 19: 8 - 25 pgs. 20 - 26: 1 - 25 pg. 27: 1 - 11 pgs. 28 - 33: 1 - 25 pg. 34: 1 - 15, 24 - 25 pg. 35: 1 - 25 pg. 36: 1 - 6; 17 - 25 pgs. 37 - 41: 1 - 25 pg. 42: 1 - 16 pg. 43: 6 - 25 pgs. 44 - 49: 1 - 25 pg. 50: 1 - 6 pg. 51: 10 - 25 pg. 52: 10 - 15 pgs. 53 - 73: 1 - 25 pg. 74: 1 - 10 pg. 77 - 6 - 25 pg. 79: 14 - 25 pgs. 80 - 82: 1 - 25 pg. 83: 1 - 18 pg. 84: 6 - 25 pgs. 85 - 89: 1 - 25 pg. 90: 16 - 25 pg. 91: 9 - 25 pgs. 92 - 94: 1 - 25 pg. 96: 22 - 25</p>

	<p>pgs. 97 - 115: 1 - 25 pg. 116: 1 - 9 pg. 117: 1 - 12 pg. 118: 12 - 25 pgs. 119 - 129: 1 - 25 pg. 130: 1 - 19 pg. 131: 18 - 25 pg. 132: 1 - 25 pgs. 134 - 138: 1 - 25 pg. 139: 17 - 25 pgs. 140 - 143: 1 - 25 pg. 144: 12 - 25 pgs. 145 - 148: 1 - 25 pg. 149: 1 - 5 pgs. 150 - 174: 1 - 25 pg. 175: 1 - 16 pgs. 176 - 198: 1 - 25 pgs. 200 - 201: 1 - 25 pg. 202: 1 - 10 pg. 203: 8 - 25 pgs. 204 - 216: 1 - 25 pg. 217: 1 - 9 pgs. 220 - 234: 1 - 25 pg. 235: 1 - 6 pg. 236: 21 - 25 pgs. 237 - 238: 1 - 25 pg. 239: 1 - 19</p>
<p>PX7110</p>	<p>Deposition Transcript: [REDACTED] : pg. 9: 9 - 25 pgs. 10 - 11: 1 - 25 pg. 12: 1 - 3; 16 - 25 pgs. 13 - 15: 1 - 25 pg. 16: 9 - 25 pgs. 17 - 24: 1 - 25 pg. 25: 1 - 7; 24 - 25 pgs. 26 - 30: 1 - 25 pg. 31: 1 - 9 pg. 32: 22 - 25 pgs. 33 - 35: 1 - 25 pg. 36: 1 - 9 pg. 37: 16 - 25 pgs. 38 - 62: 1 - 25 pg. 63: 1 - 13 pg. 64: 3 - 25 pg. 65: 1 - 23 pg. 66: 10 - 25</p>

	<p>pgs. 67 - 68: 1 - 25 pg. 69: 1 - 2; 17 - 25 pg. 70: 1 - 6; 16 - 25 pgs. 71 - 79: 1 - 25 pg. 80: 1 - 24 pg. 81: 13 - 25 pgs. 82 - 90: 1 - 25 pg. 91: 1 - 10 pgs. 97: 17 - 25 pgs. 98 - 100: 1 - 25 pg. 101: 1 - 16 pgs. 103 - 112: 1 - 25 pg. 113: 1 - 16 pg. 114: 12 - 25 pgs. 115 - 123: 1 - 25 pg. 124: 1 - 18 pgs. 125 - 129: 1 - 25 pg. 130: 1 - 16 pg. 131: 19 - 25 pgs. 132 - 139: 1 - 25 pg. 140: 11 - 25 pg. 141: 1 - 17; 22 - 25 pgs. 142 - 150: 1 - 25 pg. 151: 1 - 10 pg. 152: 10 - 25 pgs. 153 - 157: 1 - 25 pg. 159: 3 - 25 pgs. 160 - 167: 1 - 25 pg. 168: 14 - 25 pgs. 169 - 174: 1 - 25 pg. 175: 1 - 6; 21 - 25 pgs. 176 - 179: 1 - 25 pgs. 182 - 188: 1 - 25 pg. 190: 2 - 25 pg. 191: 23 - 25 pg. 192: 1 - 19 pg. 194: 21 - 25 pgs. 195 - 197: 1 - 25 pg. 198: 10 - 19 pg. 199: 11 - 25 pgs. 199 - 204: 1 - 25 pg. 205: 13 - 25 pgs. 206 - 215: 1 - 25 pg. 216: 1 - 19 pg. 217: 6 - 25 pgs. 218 - 222: 1 - 25</p>
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	pg. 223: 1 - 17 pg. 225: 17 - 25 pg. 226: 2 - 7; 15 - 25 pgs. 227 - 233: 1 - 25 pg. 237: 14 - 25 pgs. 238 - 255: 1 - 25 pg. 256: 1 - 4 pgs. 257 - 262: 1 - 25 pg. 263: 1 - 12 pgs. 264 - 269: 1 - 25 pg. 270: 1 - 12
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III. EXACT'S DOCUMENTS ARE SECRET AND MATERIAL, AND DISCLOSURE WOULD RESULT IN SERIOUS INJURY

In camera treatment of material is appropriate when its “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting” such treatment. 16 C.F.R. § 3.45(b). The movant demonstrates serious competitive injury by showing that the documents are secret and that they are material to the business. *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, *5 (1999). Courts generally attempt “to protect confidential business information from unnecessary airing.” *HP. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

To determine secrecy and materiality, the Court may consider: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-457 (1977). Further, “The likely loss of business advantages is a good example

of a ‘clearly defined, serious injury.’” See *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at *7 (Dec. 23, 1999).

The Confidential Documents are both secret and material to Exact’s business as discussed in detail in the Coward Declaration. The materials at issue contain information of competitive significance to Exact, such as Exact’s active development of a MCED test, its active development of other cancer screening and diagnostic tests, its marketing and business strategies, potential acquisitions, strategies for FDA clearance and commercialization of pipeline products, R&D, and other confidential information that strikes at the heart of Exact’s business. Such information and processes are proprietary to Exact and not publicly known outside of Exact. Indeed, the information is known only to Exact employees and others involved in Exact’s business, such as outside scientists involved in the development of Exact’s cancer diagnostic and screening tests. Exact takes steps to guard the secrecy of this information by not disclosing it publicly and limiting the circulation of the information only to those that require access in order to perform their job functions. Exact has spent billions of dollars in R&D, and Exact’s suppliers and competitors would obtain a competitive advantage over Exact allowing them to undermine the value of those R&D expenses if they obtained access to the Confidential Documents.

The potential risk of competitive harm and loss of business advantage is substantial if the Confidential Documents do not receive *in camera* treatment. Thus far, materials produced by Exact have been available to the Respondents on an outside-counsel-only basis. That has been necessary because Illumina is a key supplier of NGS equipment to Exact, and GRAIL is a direct competitor. If Illumina and GRAIL business people – or business people affiliated with other competitors or suppliers – obtain access to the Confidential Documents, they will have specific insight into Exact’s current and future products, strategic plans, and pricing decisions. The need

to protect this information is precisely why Exact designated the documents “Confidential,” and Exact would have sought protection from this Court from any third-party subpoena if it did not believe that material marked “Confidential” would continue to receive protection.

Exact’s status as a third party particularly justifies *in camera* treatment of the Confidential Documents. The FTC has held that “[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” *H.P. Hood & Sons*, 58 F.T.C. at 1186. This is especially so in the case of a third party, which deserves “special solicitude” in its request for *in camera* treatment for its confidential business information. *See In re Kaiser Aluminum & Chem. Corp.*, 103 FTC 500, 500 (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.”). Exact’s third-party status therefore weighs in favor of granting *in camera* status to the Confidential Documents.

IV. THE CONFIDENTIAL DOCUMENTS CONTAIN TRADE SECRETS, WHICH WILL REMAIN SENSITIVE OVER TIME AND WARRANT PERMANENT *IN CAMERA* TREATMENT

Given the highly sensitive and technical nature of the information contained in the Confidential Documents, Exact requests that they be given *in camera* treatment indefinitely, or for no less than ten years. The trade secret information contained in the Confidential Documents “is likely to remain sensitive or become more sensitive with the passage of time” such that the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 1999 FTC LEXIS at *7-8. “Trade secrets” - such as secret formulas and secret technical information – in fact are granted more protection than ordinary business documents. *Id.* at *5. Here, as described in the Coward Declaration, the Confidential Documents contain business and trade secrets in the

form of current and future cancer diagnostic and screening test specifications, product pricing plans, supplier and customer negotiations, and strategy plans at the heart of Exact's business. The competitive significance of the Confidential Documents is unlikely to decrease over time and thus, indefinite protection from public disclosure is appropriate. At the very least, the Confidential Documents should continue to receive *in camera* review for no less than 10 years (which is the typical length of Exact's long-range plans).

V. THE DOES FTC NOT OPPOSE *IN CAMERA* TREATMENT

The FTC does not oppose this motion for *in camera* treatment of the Confidential Documents. Respondents did not respond to Exact's enquiry whether they would oppose this motion.

VI. CONCLUSION

For the reasons set forth above and in the accompanying Coward Declaration, Exact respectfully requests that this Court grant permanent *in camera* treatment for the Confidential Documents in their entirety.

Date: August 5, 2021

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Office of the Secretary
Federal Trade Commission
Constitution Center
400 Seventh Street, .S.W., Suite 5610
Washington, DC 20024
electronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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Dated: August 5, 2021

/s/ Derek W. Kelley
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PUBLIC

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**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

[PROPOSED] ORDER

Upon consideration of Non-Party Exact Sciences Corp.’s (“Exact”) Motion for *In Camera* Treatment, it is HEREBY ORDERED that the following documents be provided permanent *in camera* treatment from the date of this Order in their entirety.

It is further HEREBY ORDERED that the following portions of documents be provided permanent *in camera* treatment from the date of this Order as identified below.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

Public

EXHIBITS A, B, AND C DESIGNATED
CONFIDENTIAL AND INCLUDED IN
NON-PUBLIC FILING