

could harm ACS's ability to fulfill its mission to save lives, celebrate lives, and lead the fight for a world without cancer.

In support of this motion, ACS relies on the Declaration of Timothy Phillips, attached as Exhibit C, which provides additional details about the harm that ACS would suffer from the public disclosure of the limited portions of the transcript of Dr. Cance's deposition for which ACS seeks protection.

I. The Confidential Information

The FTC and Respondents informed ACS that they each included the transcript of Dr. Cance's deposition testimony on their final exhibit lists for the upcoming administrative trial. ACS seeks *in camera* treatment for only the following limited portions of the deposition transcript.

- p.35, line 1 through p.36, line 6
- p.39, line 24 through p.43, line 17

A copy of the pages of Dr. Cance's deposition transcript containing the Confidential Information for which ACS seeks *in camera* treatment, with the relevant portions highlighted, is attached as Exhibit D.

II. Legal Standard

Under Commission Rule 3.45(b), an Administrative Law Judge may order that material offered into evidence be placed *in camera* "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." 16 C.F.R. § 3.45(b). The requesting party must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury." *In the Matter of Otto Bock HealthCare N. Am., Inc.*, 2018 FTC LEXIS 111, at *1 (July 6, 2018) (quoting *General Foods Corp.*, 1980 FTC

LEXIS 99, at *10 (Mar. 10, 1980)); *In the Matter of 1-800-Contacts, Inc.*, 2016 FTC LEXIS 146, at *2 (Aug. 8, 2016).

ACS's status as a third party is relevant to the treatment of its Confidential Documents. The Commission 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. 1184, 1186, 1961 FTC LEXIS 368 (Mar. 14, 1961). 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."). ACS's third-party status therefore weighs in favor of granting *in camera* status for the Confidential Information.

III. Argument

ACS seeks *in camera* treatment for only two portions of the transcript of the deposition of Dr. Cance that discuss non-public information about ACS's activities. The limited information for which ACS seeks *in camera* treatment describes certain current ACS processes, activities, and relationships that ACS has not shared publicly. Disclosure of this Confidential Information could invite speculation about the bases for certain ACS decisions and potentially undermine confidence in ACS, certain cancer-testing processes or cancer-treatment therapies, or the capabilities of companies involved in developing cancer treatments or tests. ACS exercises great care to avoid public statements that could be interpreted to reflect its promotion of any particular company or approach to fighting cancer. As explained in the attached Declaration of Timothy Phillips (Exhibit C), ACS worries that disclosure of the portions of the deposition

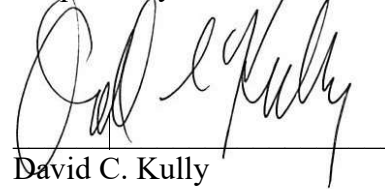
transcript over which ACS seeks *in camera* treatment could be misinterpreted and compromise its important mission, potentially harming current and future cancer patients.¹

IV. Conclusion

For the reasons set forth above and in the accompanying Declaration of Timothy Phillips, ACS respectfully requests that this Court protect ACS's Confidential Information by granting *in camera* treatment for the following portions of the transcript of the deposition of Dr. William Cance: p.35, line 1 though p.36, line 6 and p.39, line 24 through p.43, line 17. ACS requests *in camera* treatment for this Confidential Information for five years from the date of this Order.

Dated: August 4, 2021

Respectfully submitted



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*Counsel for Non-Party American
Cancer Society, Inc.*

¹ ACS believes it could suffer serious harm from the disclosure of the Confidential Information, but recognizes the harm about which it is concerned does not constitute *competitive* harm. This Court has in the past granted motions by non-parties for *in camera* treatment based on concerns unrelated to competitive harm. See *Otto Bock*, 2018 FTC LEXIS 111, at *27 (July 6, 2018) (granting request for *in camera* treatment of a draft research study manual from the Mayo Clinic, without reference to any competitive harm it would suffer from disclosure); *In the Matter of Axon Enterprise, Inc. & Safariland, LLC*, FTC Docket No. 9389, at 4-5 (Oct. 2, 2020) (granting request by the City of Aurora, Colorado, for *in camera* treatment of documents submitted to it in an RFP process, without referencing any competitive harm it would suffer from disclosure), available at https://www.ftc.gov/system/files/documents/cases/d09389_alj_order_on_3dp_mtn_for_icpublic599541.pdf. ACS respectfully submits that the same protection is appropriate here.

CERTIFICATE OF SERVICE

I hereby certify that, on August 4, 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 4, 2021

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*Counsel for Non-Party
American Cancer Society, Inc.*

Exhibit A

**PUBLIC VERSION**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Bureau of Competition
Mergers I Division

July 26, 2021

VIA EMAIL TRANSMISSIONAmerican Cancer Society, Inc.
c/o Timothy Phillips
250 Williams St.
Atlanta, GA 30303
Timothy.phillips@cancer.orgRE: *In the Matter of Illumina, Inc., and GRAIL, Inc., Docket No. 9401*

Dear Mr. Phillips:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intends to offer the documents and testimony referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. For your convenience, a copy of the documents and testimony will be sent to you in a separate email with an FTP link.

The administrative trial is scheduled to begin on August 24, 2021. All exhibits admitted into evidence become part of the public record unless Chief Administrative Law Judge D. Michael Chappell grants *in camera* status (i.e., non-public/confidential).

For documents or testimony that include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45 and 4.10(g). If you do not file an *in camera* motion, your documents will not receive *in camera* treatment and may be publicly disclosed. Judge Chappell may order that materials be placed *in camera* only after finding that their public disclosure will likely result in a clearly-defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018); and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). For your convenience, we included, as links in the cover email, an example of a third-party motion (and the accompanying declaration or affidavit) for *in camera* treatment that was filed and granted in an FTC administrative proceeding. If you choose to move for *in camera*

treatment, you must provide a copy of the document(s) for which you seek such treatment to the Administrative Law Judge.

Also, please be advised, if you intend to file an *in camera* motion, you will need credentials for the Commission's electronic filing system and a Notice of Appearance. The Notice of Appearance must be approved by the Office of the Secretary and can take up to twenty-four ("24") hours to issue. As such, you will need to file your Notice of Appearance at least one day prior to the day on which you intend to file your *in camera* motion. I have attached an e-filing checklist to assist with this process.

Please be aware that under the current Scheduling Order **the deadline for filing motions seeking *in camera* treatment is August 5, 2021**. A copy of the April 26, 2021 Scheduling Order can be found at <https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter>. If you have any questions, please feel free to contact me at (202) 326-2876.

Sincerely,

/s/ Matthew E. Joseph

Matthew E. Joseph

Counsel Supporting the Complaint

Attachment

Attachment A

~~CONFIDENTIAL NOTICE~~
PUBLIC VERSION
 Attachment A

Exhibit No.	Bates - Begin	Bates - End	Date	Full Name
PX7086	PX7086-001	PX7086-055	5/27/2021	Depo Transcript: Dr. William Cance (ACS)
PX8398	PX8398-001	PX8398-004	3/29/2021	Document: Declaration of Dr. William Cance

Exhibit B

From: Xhesi Hysi <xhysi@cravath.com>
Sent: Monday, July 26, 2021 6:03 PM
To: Timothy Phillips
Cc: Michael Zaken; Anna.Rathbun@lw.com
Subject: RE: In the Matter of Illumina Inc. and GRAIL Inc., Docket No. 9401

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Counsel,

As part of the Administrative Trial for *In the Matter of Illumina, Inc. & Grail, Inc.* (Dkt. No. 09401) set to begin on August 24, we have submitted a proposed list of documents and testimony we intend to use as trial exhibits. This list includes third party documents and testimony that have been designated confidential under the protective order entered by the Administrative Law Judge.

Per our obligation under the Scheduling Order, we are providing you with notice that we intend to use the testimony provided by the American Cancer Society witness listed below as a trial exhibit, pursuant to 16 C.F.R. § 3.45(b).

Testimony
Deposition Transcript of William Cance

Under 16 C.F.R. § 3.45(b), if you wish, you may move the Administrative Law Judge to obtain in camera treatment for the documents and testimony listed above. Please note that the deadline for filing such a motion is August 5, 2021, and note the following information set forth in the Scheduling Order about the content of any such motion:

[There are] strict standards for motions for in camera treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018); and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for in camera treatment shall provide one copy of the documents for which in camera treatment is sought to the Administrative Law Judge.

Scheduling Order ¶ 12.

Please confirm receipt of this notice.

Thanks,
 Xhesi
 Xhesi Hysi
 Cravath, Swaine & Moore LLP
 825 Eighth Avenue | New York, NY 10019

PUBLIC VERSION

T: (212) 474-1198
xhysi@cravath.com

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

Exhibit C

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

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

**DECLARATION OF TIMOTHY PHILLIPS IN SUPPORT OF
NON-PARTY AMERICAN CANCER SOCIETY, INC.’S
MOTION FOR *IN CAMERA* TREATMENT**

I, Timothy Phillips, hereby declare as follows:

1. I am Chief Legal and Risk Officer for the American Cancer Society, Inc. (“ACS”). I make this declaration in support of non-party ACS’s Motion for *In Camera* Treatment (the “Motion”). I have personal knowledge of the matters stated herein and, if called upon to do so, could competently testify about them.

2. I have reviewed and am familiar with the transcript of the May 27, 2021 deposition of Dr. William Cance, ACS’s Chief Medical and Scientific Officer, which both the FTC and Respondents have identified on their final exhibit lists for possible use in the upcoming administrative trial.

3. ACS seeks *in camera* treatment of only the following limited portions of the deposition transcript: p.35, line 1 through p.36, line 6 and p.39, line 24 through p.43, line 17. Based on my position at ACS and my knowledge and review of the deposition transcript, I have concluded that it is essential that ACS obtain protection for these limited portions of the deposition transcript to avoid potential harm to ACS and its mission – as well as potential harm to the current and future cancer patients that rely on ACS’s independence and unbiased and objective approach to supporting research into cancer treatments and testing.

4. ACS is a nationwide, community-based voluntary health organization dedicated to eliminating cancer as a major health problem. Our mission is to save lives, celebrate lives, and lead the fight for a world without cancer, and we pursue our mission by seeking to attack cancer from every angle, including researching cancer and its causes to find more answers and better treatments.

5. ACS depends substantially on the financial support of members of the public to pursue its mission, including seeking to foster innovation by investing in cancer research. To ensure that contributors remain confident in ACS and the integrity with which we approach our efforts to fulfill our mission, ACS is committed to remaining unbiased and independent in our fight against cancer. Were ACS to be perceived to be basing research or other decisions on anything other than what is best for the pursuit of the fight against cancer, it could undermine ACS's standing in the eyes of the public, reduce the support we receive from the public, and potentially harm current and future cancer patients.

6. ACS's request for *in camera* treatment for only two portions of the transcript of Dr. Cance's deposition is based on its desire to prevent the disclosure of nonpublic information that could be misunderstood to indicate ACS's promotion of particular activities or companies and its apparent lack of support for others.

a. Page 35, line 1 through page 36, line 6: In this portion of the transcript, Dr. Cance discusses current, non-public ACS activities that could be misinterpreted to convey ACS's views concerning the development of multi-cancer early detection tests, which ACS believes hold great promise.

b. Page 39, line 24 through page 43, line 17: In this portion of the transcript, Dr. Cance discloses non-public information concerning certain relationships that ACS has with companies involved in the development of cancer-detection tests. Public disclosure of this information could be misinterpreted to suggest ACS's promotion of certain companies or approaches over others.

7. Public disclosure of these portions of the transcript of Dr. Cance's deposition, which discuss non-public information about ACS's activities, could lead to misunderstandings that might undercut public confidence in ACS and its independence, potentially reduce investment in deserving treatments and tests, and impede progress in the fight against cancer.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 4, 2021

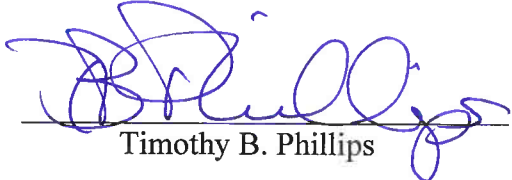

Timothy B. Phillips

Exhibit D

Deposition Pages Omitted from Public Version