

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

In the Matter of

**Illumina, Incorporated,
a corporation,**

And

**GRAIL, Incorporated,
a corporation.**

Docket No. 9401

**NON-PARTY ELEMENT BIOSCIENCES, INCORPORATED'S
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 Element Biosciences, Inc. ("Element") respectfully moves this court for *in camera* treatment of seven competitively sensitive and confidential business documents ("Confidential Documents") in response to subpoenas from the Federal Trade Commission ("FTC") and Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") (collectively, "Respondents"). In addition, Element moves for *in camera* treatment of portions of the deposition of its co-founder and Chief Executive Officer, Molly He ("Confidential Testimony" and, together with the Confidential Documents, the "Confidential Materials").

The FTC has informed Element that it intends to offer the Confidential Testimony into evidence in the administrative trial in the above-captioned matter. *See* Letter from the Federal Trade Commission dated July 26, 2021 (attached as Exhibit A). Additionally, Respondents have informed Element that they intend to offer the Confidential Materials into evidence in the same proceeding. *See* Email from Respondents dated July 26, 2021 (attached at Exhibit B).

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The Confidential Materials contain highly confidential and competitively sensitive information that, if disclosed to the public or to Element’s competitors, could cause serious and significant competitive injury to Element. In support of this motion, Element relies upon the Declaration of Molly He, co-founder and Chief Executive Officer of Element (attached at Exhibit C) (the “He Declaration”), which provides additional details on the documents for which Element is seeking confidential treatment.

I. CONFIDENTIAL MATERIALS FOR WHICH *IN CAMERA* PROTECTION IS REQUESTED

Element seeks *in camera* protection for the following Confidential Materials. Copies of these materials are attached as Exhibits D–K.

Exhibit No.¹	Bates/PX Range	Document Title/Description	Date	Requested Duration of <i>In Camera</i> Treatment
N/A	ELEMENT_00001 to ELEMENT_00017	Presentation, [REDACTED] Introduction *Confidential*	Oct. 29, 2020	Five years
N/A	ELEMENT_00018 to ELEMENT_00032	Presentation, Element Biosciences	Sept. 24, 2019	Five years
N/A	ELEMENT_00033 to ELEMENT_00046	Presentation, [REDACTED] Introduction	Jan. 6, 2021	Five years
N/A	ELEMENT_00047 to ELEMENT_00063	Presentation, [REDACTED] Introduction *Confidential*	Dec. 2, 2020	Five years
N/A	ELEMENT_00261 to ELEMENT_00321	Presentation, Leadership Offsite	April 16, 2021	Five years
N/A	ELEMENT_00339 to ELEMENT_00365	Presentation, [REDACTED] Follow-Up *Confidential*	Dec. 28, 2020	Five years
N/A	ELEMENT_00366 to ELEMENT_00385	Presentation, [REDACTED] Introduction	Oct. 20, 2020	Five years

¹ Counsel for Respondents did not identify exhibit numbers for the documents they intend to offer as trial exhibits.

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Exhibit No.¹	Bates/PX Range	Document Title/Description	Date	Requested Duration of <i>In Camera</i> Treatment
PX7124 ²	PX7124-001 to PX7124-065	Deposition of Dr. Molly He	June 25, 2020	Five years

II. DISCLOSURE OF THE CONFIDENTIAL DECLARATION WOULD CAUSE SIGNIFICANT INJURY TO ELEMENT

A. LEGAL STANDARD

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 proponent 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). In this context, courts generally attempt “to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

In considering both 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).

² Exhibit K includes two copies of PX7124 – a copy with proposed redactions indicated with yellow highlighting, and a copy with the proposed redactions applied.

B. CONFIDENTIAL DOCUMENTS

The Confidential Documents contain proprietary, secret, and competitively sensitive data and information regarding Element's business. Within Element, access to these documents is limited and provided only on a need-to-know basis. He Declaration at ¶ 16. Some of the Confidential Documents have been shared with third parties, but only under non-disclosure agreements with the third party to ensure confidentiality. He Declaration at ¶ 16. In producing the Confidential Documents to the FTC and Respondents, Element made sure to designate them as "Confidential" and produced them pursuant to the Protective Order in this proceeding and the FTC's statutes and rules regarding confidentiality.

The Confidential Documents are both secret and material to Element's business, as described in detail in the He Declaration. In sum, they contain information regarding Element's pricing strategies, product strategies, marketing strategies, competitive analysis, market analysis, and proprietary sequencing technologies. He Declaration at ¶¶ 8-14. Element is a start-up company that is developing a DNA sequencing platform, but currently has no product on the market. He Declaration at ¶ 17. Element is developing proprietary technologies for its sequencing platform that will allow for decreases in sequencing run cost and capital cost while delivering high-quality sequencing data. He Declaration at ¶ 6. Details of Element's proprietary technology and its plans to enter into DNA sequencing are thus extremely valuable to the company and are not shared outside the company (except under the protection of an NDA). Disclosure of the Confidential Documents would provide Element's competitors with valuable insights into its technology and market strategies and would cripple Element's ability to compete on the merits before it is even able to enter the market.

C. CONFIDENTIAL TESTIMONY

The Confidential Testimony consists of testimony given by Element's co-founder and CEO, Dr. Molly He. During her deposition, Dr. He testified regarding her deep knowledge of Element's business and of DNA sequencing more generally, including (1) product development timelines and challenges faced by Element prior to commercial launch; (2) market entry analyses; (3) pricing analyses and direction; (4) Element differentiators (including cost and proprietary technology and chemistry); (5) confidential communications with potential partners; and (6) targeted customer segments and partnerships. He Declaration at ¶ 15. Certain parts of Dr. He's testimony concerned information about Element that is highly competitively sensitive and known to Dr. He by virtue of her leadership position at Element. Disclosure of this information would be competitively harmful to Element by providing detailed and sensitive information about Element's internal documents (including the Confidential Documents) and business strategies.

Again, Element has taken steps to maintain the secrecy of such information, including by limiting the disclosure of such information to senior employees with a need to know such information, like Dr. He. Similar to the Confidential Documents, Element has taken all measures to protect the secrecy of the Confidential Testimony, including an on-the-record request during the deposition to provide the transcript with the highest level of confidentiality possible and to limit distribution to outside counsel eyes only. *See* PX7124 at 23:16-25.

The page and line numbers for which Element seeks *in camera* treatment are as follows: 4:20-21; 4:23-24; 5:3-4; 22:20-22; 23:7-11; 23:12; 23:15; 24:2-25; 25:18-25; 26:2-25; 27:1-3; 9-25; 28:1; 28:4-12; 15-18; 23-25; 29:2-20; 23-25; 30:1-15; 24-25; 31:1-10; 13-16; 22-25; 32:1; 14-15; 17-20; 22-25; 33:1-25; 34:3-5; 7-16; 35:11-21; 36:4-10; 43:8-25; 44:1; 3-7; 10-20; 22-25;

45:4-5; 10-13; 15-16; 18-25; 46:1-5; 10-11; 13-14; 16-25; 47:1-7; 11-12; 16-19; 23-25; 48:1-8; 10-15; 51:18-23; 25; 52:1-4; 10; 12-13; 53:16-19; 22; 57:7-19; 24-25; 58:1-10; 18-25; 59:1-3; 60:6-7; 11-16; 18; 61:5-12; 62:4-14; 18-21; 64:5-23; 65:6-22; 66:3-11; 13-14;16-19; 22-23; 67:9-15; 20-21; 24-25; 68:1-2; 9-10; 12-13; 20-23; 25; 69:1-2; 12; 16-20; 70:5-6; 11-13; 71:4-5; 72:3-16; 19-24; 74:20-23; 75:20-22; 25; 77:1-7; 78:6-7; 11-12; 14-25; 79:1-5; 19-22; 81:1; 9; 14; 82:11-13; 83:11-22; 25; 84:7; 85:6-9; 13-19; 86:2-4; 15-16; 87:17; 21-22; 88:8; 89:23; 90:13; 20; 23; 24; 91:1; 24; 92:2; 14; 95:18-25; 96:6-8; 12-16; 97:1-2; 24; 98:14; 15; 99:18-19; 100:1-7; 10-12; 18-19; 101:1-2; 4-5; 21-25; 102:1-3; 103:16-17; 104:9-15; 105:21; 24-25; 106:1-5; 11; 12-16; 107:6-8; 10; 12-13; 16; 23-25; 108:1-4; 7-10; 14; 15-17; 24-25; 109:1-6; 12-14; 110:6-8; 111:3-7; 116:5-6; 8; 19; 20-24; 117:5-7; 10-18; 21-24; 118:5-8; 119:5; 6-8; 9; 120:20; 126:6.

III. ELEMENT’S STATUS AS A THIRD PARTY WEIGHS IN FAVOR OF *IN CAMERA* TREATMENT

Additionally, Element’s status as a third party is relevant to the treatment of the Confidential Materials. 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.”). Element’s third-party status therefore weighs in favor of granting in camera status to the Confidential Materials.

IV. CONCLUSION

For the reasons set forth above and in the accompanying He Declaration, Element respectfully requests that this Court grant *in camera* treatment to portions of the Confidential Declaration for a period of five years.

Dated: August 5, 2021

Respectfully submitted,

/s/ Matthew McDonald

Matthew McDonald

WILSON SONSINI GOODRICH & ROSATI, P.C.

1700 K Street, N.W.

Washington, DC 20006

Telephone: (202) 791-8035

Email: mmcDonald@wsgr.com

Counsel for Non-Party Element Biosciences Inc.

EXHIBIT A

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Bureau of Competition
Mergers I Division

July 26, 2021

VIA EMAIL TRANSMISSION

Element Biosciences, Inc.
c/o Seth Silber
Wilson Sonsini Goodrich & Rosati
1700 K Street NW, Fifth Floor
Washington, DC 20006
ssilber@wsgr.com

RE: *In the Matter of Illumina, Inc., and GRAIL, Inc., Docket No. 9401*

Dear Mr. Silber:

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

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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) 326-3623.

Sincerely,

/s/ Ricardo Woolery

Ricardo Woolery

Counsel Supporting the Complaint

Attachment

Attachment A

Confidential Notice
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Attachment A

Exhibit No.	Bates - Begin	Bates - End	Date	Full Name
PX7124	PX7124-001	PX7124-062	6/25/2021	Depo Transcript: Molly He 30(b)(6) (Element Biosciences)

EXHIBIT B

McDonald, Matthew

From: Xhesi Hysi <xhysi@cravath.com>
Sent: Monday, July 26, 2021 5:55 PM
To: McDonald, Matthew
Cc: Michael Zaken; Anna.Rathbun@lw.com
Subject: In the Matter of Illumina Inc. and GRAIL Inc., Docket No. 9401

[External]

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 documents and any associated family members produced by Element Biosciences Inc. and testimony provided by Element Biosciences Inc. witnesses listed below as trial exhibits, pursuant to 16 C.F.R. § 3.45(b).

Documents
ELEMENT_00001
ELEMENT_00018
ELEMENT_00033
ELEMENT_00047
ELEMENT_00261
ELEMENT_00339
ELEMENT_00366
Testimony
Deposition Transcript of Molly He

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.

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Please confirm receipt of this notice.

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

And

**GRAIL, Incorporated,
a corporation.**

Docket No. 9401

**DECLARATION OF MOLLY HE IN SUPPORT OF NON-PARTY ELEMENT
BIOSCIENCES, INCORPORATED'S MOTION FOR *IN CAMERA* TREATMENT**

I, Molly He, declare as follows:

1. I am the Co-Founder and Chief Executive Officer of Element Biosciences, Inc. ("Element"). I make this declaration in support of non-party Element'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. Element produced documents in the above-captioned matter in response to subpoenas from the Federal Trade Commission ("FTC"), and from Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") (collectively, "Respondents"). In addition, I provided deposition testimony to the FTC and Respondents in response to a subpoena *ad testificandum* from the FTC and Respondents in the same proceeding.
3. Element has been notified by the FTC that the FTC intends to offer my deposition transcript into evidence in the administrative trial in the above-captioned matter. In addition, Element has been notified by Respondents that they intend to offer seven

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documents produced by Element, as well as my deposition transcript, into evidence in the same proceeding.

4. I have reviewed and am personally familiar with all of the documents and testimony which the parties intend to offer into evidence at trial. Based on my review of these materials, my position at Element, my deep knowledge of Element’s business, and my familiarity with the confidentiality protections normally afforded to this type of information by Element, I submit that disclosure of these documents (the “Confidential Documents”) and portions of my deposition testimony (the “Confidential Testimony”) and, together with the Confidential Documents, the “Confidential Materials”) to the public or competitors of Element would cause serious competitive injury to Element.
5. The Confidential Materials are as follows:

Exhibit No.¹	Bates/PX Range	Document Title/Description	Date	Requested Duration of In Camera Treatment
N/A	ELEMENT_00001 to ELEMENT_00017	Presentation, [REDACTED] Introduction *Confidential*	Oct. 29, 2020	Five years
N/A	ELEMENT_00018 to ELEMENT_00032	Presentation, Element Biosciences	Sept. 24, 2019	Five years
N/A	ELEMENT_00033 to ELEMENT_00046	Presentation, [REDACTED] Introduction	Jan. 6, 2021	Five years
N/A	ELEMENT_00047 to ELEMENT_00063	Presentation, [REDACTED] Introduction *Confidential*	Dec. 2, 2020	Five years
N/A	ELEMENT_00261 to ELEMENT_00321	Presentation, Leadership Offsite	April 16, 2021	Five years
N/A	ELEMENT_00339 to ELEMENT_00365	Presentation, [REDACTED] Follow-Up *Confidential*	Dec. 28, 2020	Five years
N/A	ELEMENT_00366 to ELEMENT_00385	Presentation, [REDACTED] Introduction	Oct. 20, 2020	Five years

¹ Counsel for Respondents did not identify exhibit numbers for the documents they intend to offer as trial exhibits. Consequently, this Declaration uses the beginning Bates number of each document to identify the document in the discussion below.

Exhibit No.¹	Bates/PX Range	Document Title/Description	Date	Requested Duration of <i>In Camera</i> Treatment
PX7124	PX7124-001 to PX7124-065	Deposition of Dr. Molly He	June 25, 2020	Five years

6. Element is a San Diego, California-based startup company developing a next generation DNA sequencing platform. Element is still developing its first sequencing platform and has not yet commercialized any product. Element's sequencing platform will incorporate a proprietary approach to sequencing that will allow for decreases in run cost and capital cost while delivering high-quality sequencing data.
7. The Confidential Materials contain proprietary, secret, and competitively sensitive data and information including but not limited to Element's pricing strategies, product strategies, marketing strategies, competitive analysis, market analysis, and proprietary sequencing technologies. The Confidential Materials also include discussions of Element's product launch timelines, issues Element faces ahead of these launches, partnership strategies, and aspects of Element's technology that differentiate Element from other NGS providers. A detailed discussion of the Confidential Materials that the parties propose to offer at trial follows.
8. ELEMENT_00001 is a presentation titled "Element Biosciences Company Overview, [REDACTED] Introduction *Confidential*" dated October 29, 2020. The presentation was provided to [REDACTED] under a non-disclosure agreement. This document contains discussion of several competitively sensitive aspects of Element's business, including pricing information, competitive positioning, and descriptions of Element's proprietary technology. Element redacted information in the presentation detailing its technical trade secrets prior to production,

but the remaining information is highly competitively sensitive. Element took steps to secure this information, including by marking the document as “company confidential” and by executing an NDA with [REDACTED]. This type of information is not otherwise shared with competitors or the public in the ordinary course of business. Making this information public would harm Element by giving competitors valuable insight into Element’s strategies for pricing and market positioning before Element is able to commercialize its product.

9. ELEMENT_00018 is a presentation titled “Element Biosciences” dated September 24, 2019. This presentation was provided to [REDACTED] under a non-disclosure agreement. This document contains discussion of several competitively sensitive aspects of Element’s business, including pricing information, plans for market entry, competitive positioning, and descriptions of Element’s proprietary technology. Element redacted information in the presentation detailing its technical trade secrets prior to production, but the remaining information is highly competitively sensitive. Element took steps to secure this information, including by marking the document as “company confidential” and by executing an NDA with [REDACTED]. This type of information is not otherwise shared with competitors or the public in the ordinary course of business. Making this information public would harm Element by giving competitors valuable insight into Element’s strategies for pricing, market positioning, and proprietary technology before Element is able to commercialize its product.
10. ELEMENT_00033 is a presentation titled “Element/[REDACTED] Introduction” dated January 6, 2021. The presentation was provided to [REDACTED], under a non-disclosure agreement. This document contains discussion

of several competitively sensitive aspects of Element's business, including pricing information, competitive positioning, and descriptions of Element's proprietary technology. Element redacted information in the presentation detailing its technical trade secrets prior to production, but the remaining information is highly competitively sensitive. Element took steps to secure this information, including by marking the document as "company confidential" and by executing an NDA with [REDACTED]. This type of information is not otherwise shared with competitors or the public in the ordinary course of business. Making this information public would harm Element by giving competitors valuable insight into Element's strategies for pricing and market positioning before Element is able to commercialize its product.

11. ELEMENT_00047 is a presentation entitled "Element Biosciences Company Overview, [REDACTED] Introduction *Confidential*" dated December 2, 2020. The presentation was provided to [REDACTED], under a non-disclosure agreement. This document contains discussion of several competitively sensitive aspects of Element's business, including pricing information, competitive positioning, and descriptions of Element's proprietary technology. Element redacted information in the presentation detailing its technical trade secrets prior to production, but the remaining information is highly competitively sensitive. Element took steps to secure this information, including by marking the document as "company confidential" and by executing an NDA with [REDACTED]. This type of information is not otherwise shared with competitors or the public in the ordinary course of business. Making this information public would harm Element by giving competitors valuable insight into

Element's strategies for pricing and market positioning before Element is able to commercialize its product.

12. ELEMENT_00261 is a presentation entitled "Leadership Offsite: Overview of the commercial strategy, timeline, organization design, and forecast" dated April 16, 2021. This presentation contains discussion of several competitively sensitive aspects of Element's business, including strategic planning, market sizing analysis, competitive analysis, pricing strategies, marketing strategies, and potential customers. This presentation was only provided to Element's functional leaders. This presentation and the information contained within it is not shared with competitors or the public in the ordinary course of business. Making this information public would harm Element by giving competitors valuable insight into Element's pricing and marketing strategies before Element is able to commercialize its product.
13. ELEMENT_00339 is a presentation titled "Element Biosciences Company Overview, [REDACTED] Follow-up *Confidential*" dated December 28, 2020. The presentation was provided to [REDACTED], under a non-disclosure agreement. This document contains discussion of several competitively sensitive aspects of Element's business, including pricing information, competitive positioning, and descriptions of Element's proprietary technology. Element redacted information in the presentation detailing its technical trade secrets prior to production, but the remaining information is highly competitively sensitive. Element took steps to secure this information, including by marking the document as "company confidential" and by executing an NDA with [REDACTED]. This type of information is not otherwise shared with competitors or the public in the ordinary course of business. Making this

information public would harm Element by giving competitors valuable insight into Element's strategies for pricing and market positioning before Element is able to commercialize its product.

14. ELEMENT_00366 is a presentation titled "Element Biosciences Company Overview, [REDACTED] Introduction" dated October 20, 2020. The presentation was provided to [REDACTED] under a non-disclosure agreement. This document contains discussion of several competitively sensitive aspects of Element's business, including pricing information, competitive positioning, and descriptions of Element's proprietary technology. Element redacted information in the presentation detailing its technical trade secrets prior to production, but the remaining information is highly competitively sensitive. Element took steps to secure this information, including by marking the document as "company confidential" and by executing an NDA with [REDACTED]. This type of information is not otherwise shared with competitors or the public in the ordinary course of business. Making this information public would harm Element by giving competitors valuable insight into Element's strategies for pricing and market positioning before Element is able to commercialize its product.

15. PX7124 is a transcript of my deposition in this matter, which was taken on June 25, 2021 in response to a subpoena *ad testificandum*. In my deposition, I provided competitively sensitive information on topics including but not limited to: (1) product development timelines and challenges faced by Element prior to commercial launch; (2) market entry analyses; (3) pricing analyses and direction; (4) Element differentiators (including cost and proprietary technology and chemistry); (5) confidential communications with potential partners; and (6) targeted customer

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segments and partnerships. The transcript also contains discussion of many of the Confidential Documents and my competitively sensitive views on those documents.

16. The Confidential Materials are non-public, and Element has undertaken significant efforts to preserve their confidentiality. Within Element, access to these materials is limited and provided only on a need-to-know basis. Further, the Confidential Materials are only shared outside of Element under non-disclosure agreements to ensure the information remains confidential.

17. Disclosure of the Confidential Materials to the public or Element's competitors would cause significant competitive harm to the company. Element is a start-up company that has not yet commercially launched its sequencing platform. Disclosure of the Confidential Materials would give Element's competitors valuable insight into the company's strategies and proprietary technology, crippling Element's ability to compete before it can even reach the market.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.



Molly He

Dated: _____

EXHIBIT D

Confidential – Redacted in Entirety

EXHIBIT E

Confidential – Redacted in Entirety

EXHIBIT F

Confidential – Redacted in Entirety

EXHIBIT G

Confidential – Redacted in Entirety

EXHIBIT H

Confidential – Redacted in Entirety

EXHIBIT I

Confidential – Redacted in Entirety

EXHIBIT J

Confidential – Redacted in Entirety

EXHIBIT K

Confidential – Redacted in Entirety

CERTIFICATE OF SERVICE

I certify that on August 5, 2021, I filed a copy of the foregoing 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 St. SW, 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
oyalj@ftc.gov

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

Complaint Counsel:

Ricardo Woolery (rwoolery@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-3623

Counsel for Respondent Illumina, Inc.

Xhesi Hysi (xhysi@cravath.com)
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Washington, D.C. 20004-1304
(202) 637-3381

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Dated: August 5, 2021

Respectfully submitted,

/s/ Matthew McDonald

Matthew McDonald

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