PUBLIC

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

In the Matter of	)	
ILLUMINA, INC. **a corporation,**	)	
and	)	Docket No. 9401
GRAIL, INC., **a corporation.**	)	

NON-PARTY CARIS LIFE SCIENCES, INC.'S RESPONSE TO RESPONDENTS' MOTION TO CERTIFY TO THE COMMISSION A REQUEST SEEKING COURT ENFORCEMENT OF DOCUMENT AND TESTIMONY SUBPOENAS ISSUED TO CARIS LIFE SCIENCES

Caris Life Sciences, Inc. ("Caris") files this Opposition to Respondents' Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences (the "Motion").

I. SUMMARY

Respondents want third party Caris to bear the burden of their strategic decision to pursue a fishing expedition [redacted] For months, Caris has attempted to negotiate a reasonable scope of discovery, and Respondents have declined every attempt at compromise. Less than three weeks ago, they responded to Caris's proposal for a corporate representative deposition with [redacted] Now, with just nine business

days remaining before trial, Respondents say that they need [redacted] – and want Caris to pay the price for their own strategic decision not to either appropriately narrow their requests or timely file a motion for relief. Whether Respondents' Motion is a fishing expedition or litigation tactic,[1] Caris should not have to bear the significant burden of searching for and producing documents and preparing a witness for deposition on a broad swathe of irrelevant topics – all in a highly compressed timeframe – simply because Respondents waited until the eleventh hour to file their Motion.

II. BACKGROUND

The FTC's complaint alleged that multiple companies, including Caris, are developing products that might compete with GRAIL's MCED test. (Compl. ¶¶ 46, 51, 77.) Respondents subpoenaed documents from Caris and issued a deposition subpoena to Dr. David Spetzler in the FTC's parallel court action.[2] [redacted] (RX4 at 13-15.)[3] Caris objected to the subpoena, but offered to meet and confer. (RX6.) Caris and Respondents then spent months discussing the scope of discovery in response to the federal subpoenas and the similar subpoenas they later issued in this proceeding.

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1 [redacted]

2 Caris has primarily communicated with Illumina's counsel. For convenience, this Response refers generally to "Respondents."

3 "RX" refers to Respondents' exhibits to the Motion and "CX" refers to Caris's exhibits to Noelle Reed's Declaration (Ex. A). Page references are to the PDF page.

[redacted]

[redacted]

In yet another meet and confer on July 20, Caris asked again if Respondents would consider taking a 30(b)(6) deposition in lieu of other discovery. This time, Respondents indicated they would consider the compromise, and Caris's counsel asked them to send that day an informal, "bullet list" of topics tailored to the action. Respondents waited another day, then sent a "non-exhaustive" list of 11 proposed deposition topics. (CX2 at 2.) [redacted]

[redacted] Despite the breadth of the list, Caris responded with a counterproposal that included a narrower set of eight deposition topics. (RX29 at 2.) On August 2, Respondents flatly rejected Caris's proposal without making a counterproposal, contending among other things that "the Protective Order adequately protects Caris's interests here." (RX30 at 2.)

[redacted] (CX3 at 2; Complaint Counsel's Opposition to Respondents' Motion for Leave to Allow Two Additional Testifying Experts (Doc. No. 602088 at 4, 8.).) Respondents intended to rely on Dr. Abrams to testify about, among other things, whether "blood-based tests with other characteristics could substitute for GRAIL's Galleri test and vice-versa." (Doc. No. 602088 at 43.) [redacted]

III. ARGUMENT

A. Respondents' delay in filing the Motion warrants denying additional discovery.

The parties have been negotiating the scope of Caris's discovery since April, and Respondents have been threatening to file a motion to compel against Caris since mid-May. (RX10 at 3.) For instance, on May 24, Respondents said they would "file a motion to compel no later than tomorrow, on an emergency basis given the close of discovery." (RX14 at 4.) Nonetheless, Respondents did not file the Motion until August 3, after summarily rejecting multiple alternative proposals from Caris, including Caris's proposed 30(b)(6) topics. Having waited until the eve of trial, granting Respondents' Motion now would require the following to happen in less than two weeks:

- this Court to recommend that the Commission seek enforcement of two subpoenas in federal court;
- the Commission to agree with the Court's recommendation;
- Respondents to file a federal court action to enforce the subpoenas;
- Respondents to obtain a federal court order enforcing the subpoenas; and
- Caris to produce the requested documents and present Dr. Spetzler for a deposition.

Respondents did not even seek expedited consideration of the Motion. Compounding matters, one of Caris's lead attorneys will be in court hearings out of the country beginning on August 21. Caris could not reasonably locate and produce documents or prepare Dr. Spetzler for a deposition on Respondents' proposed timeline. Respondents' delay in seeking this Court's relief alone justifies denial of the Motion. *See, e.g., Grassi v. Information Res., Inc.*, 63 F.3d 596, 603-04 (7th Cir. 1995) (affirming district court's denial of discovery motion filed two weeks before trial as untimely).

B. Respondents are seeking unnecessarily broad information from Dr. Spetzler and Caris.

Discovery is permitted only "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). In particular, "[i]t is a generally accepted rule that standards for non-party discovery require a stronger showing of relevance than for party discovery." *Pinehaven Plantation Props., LLC v. Mountcastle Family LLC*, No. 1:12-cv-62, 2013 WL 6734117, at *2 (M.D. Ga. Dec. 19, 2013) (citation omitted). Yet much of what Respondents seek is irrelevant.

First, while Respondents now tell this Court that they need discovery only on [redacted], the 30(b)(6) deposition topics they recently proposed went far beyond those subjects. If Respondents are permitted to take Dr. Spetzler's deposition, they will undoubtedly spend considerable time questioning him on these irrelevant and ancillary details of Caris's business. But discovery has "never been a license to engage in an unwieldy, burdensome, and speculative fishing expedition." *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1163 (10th Cir. 2010).

Second, the document discovery that Respondents seek on [redacted] goes beyond what is truly relevant. As Caris understands it, the issue is whether, post-acquisition, Illumina might cut off supply to potential competitors of GRAIL's MCED test. [redacted]

[redacted]

Respondents do not explain why they need more granular details, [redacted] After all, even the Complaint acknowledges that "Grail and its rivals are currently at different stages of development." (Compl. ¶ 29.)

C. Respondents' requested discovery is also unduly burdensome.

Even if Respondents are seeking some marginally relevant information, requiring Caris to disclose it to a competitor is unduly burdensome because (1) producing confidential information to a competitor creates enormous business risk for Caris, and (2) the logistical challenges of providing the requested discovery within the few days remaining before trial will be substantial, if not impossible. The Court "shall" limit discovery if "[t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2). The Court may deny or limit discovery as necessary to protect a non-party from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. 16 C.F.R. § 3.31(d).

First, because Caris is a non-party, there is a greater need to "be particularly cautious with respect to its proprietary materials." *Rambus Inc.*, No. 9302, 2003 WL 21485858, at *2 (F.T.C. June 11, 2003). A non-party's rights and "the public interest in minimizing disclosure of confidential documents" can "outweigh[] mere relevance." *Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *14 (F.T.C. Aug. 18, 2003). Even under a generous reading of relevance, Respondents' requested discovery [redacted]

Respondents do not dispute that [redacted] are confidential and proprietary trade secrets. (Ex. B ¶ 5) Instead, Respondents contend that the Protective Order will protect Caris and point out that Caris has already produced documents pursuant to the order. (Motion at 2, 8.) [redacted] Caris should not have to assume the risk of this happening again. Under these circumstances, requiring Caris to disclose these trade secrets to a competitor not only undermines Caris's extensive research and development, but heightens the risk that Respondents may act on this competitive information.

Second, the logistical burden of collecting the requested information on an expedited schedule is unduly burdensome. [redacted] For instance, Caris's IT system cannot run keyword searches across servers. (Ex. B ¶ 15.) To find Respondents' requested documents, lab personnel and senior management would have to suspend some of their day-to-day work and spend significant time reviewing a variety of potential sources, identifying responsive material, and preparing them for production. (*Id.*) The Court should not order Caris to conduct this search. *See N. Tex. Specialty Physicians*, No. 9312, 2004 WL 527340, at *6 (F.T.C. Jan. 30, 2004) (limiting non-party's production of "competitively sensitive information" to only summary information that the non-party kept in the ordinary course of business).

IV. CONCLUSION

The Motion should be denied.

Dated: August 10, 2021

Respectfully submitted,

/s/ Julia K. York

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Counsel for Non-Party Caris Life Sciences, Inc.

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CARIS EXHIBIT A

[REDACTED]

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

In the Matter of	)	
ILLUMINA, INC. **a corporation,**	)	
and	)	Docket No. 9401
GRAIL, INC., **a corporation.**	)	

DECLARATION OF NOELLE REED
IN SUPPORT OF NON-PARTY CARIS LIFE SCIENCES, INC.'S
RESPONSE TO RESPONDENTS' MOTION TO CERTIFY

1. My name is Noelle M. Reed. I am over the age of 18, of sound mind, am competent to make this declaration, and every statement herein is based upon my personal knowledge and is true and correct. I am a partner in the law firm of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"), resident in the firm's Houston office. I represent Caris Life Sciences, Inc. ("Caris") in the above-captioned matter.

2. I submit this declaration in support of Non-Party Caris Life Sciences, Inc.'s Response to Respondents' Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences.

3. Attached as Exhibit 1 is a true and correct copy of an email exchange between Illumina, Inc.'s counsel and Caris's former counsel on April 26-28, 2021 that was forwarded to Skadden when it was retained by Caris. We have redacted the privileged email to Caris's in-house counsel at the top of the chain.

4. Attached as Exhibit 2 is a true and correct copy of an email exchange that I had with Illumina's counsel on July 21, 2021.

5. Attached as Exhibit 3 is a true and correct copy of an email (excluding the attachment) that I received from Complaint Counsel on July 29, 2021.

6. Attached as Exhibit 4 are true and correct excerpts from [redacted]

7. [redacted]

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

Executed on August 9, 2021.

/s/ Noelle M. Reed
Noelle M. Reed

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CARIS EXHIBIT 1

[REDACTED IN ITS ENTIRETY]

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CARIS EXHIBIT 2

[REDACTED IN ITS ENTIRETY]

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CARIS EXHIBIT 3

[REDACTED IN ITS ENTIRETY]

PUBLIC

PUBLIC

CARIS EXHIBIT 4

[REDACTED IN ITS ENTIRETY]

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CARIS EXHIBIT B

[REDACTED]

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

In the Matter of	)	
ILLUMINA, INC. **a corporation,**	)	
and	)	Docket No. 9401
GRAIL, INC., **a corporation.**	)	

DECLARATION OF RUSS FARR
IN SUPPORT OF NON-PARTY CARIS LIFE SCIENCES, INC.'S
RESPONSE TO RESPONDENTS' MOTION TO CERTIFY

1. My name is Russ Farr. I am over the age of 18, of sound mind, am competent to make this declaration, and every statement herein is based upon my personal knowledge and is true and correct.

2. I am the Senior Vice President and General Counsel of Caris Life Sciences, Inc. ("Caris").

3. I understand that Illumina, Inc. and GRAIL, Inc. ("Respondents") are seeking an order requiring Caris to produce certain information in the above-captioned proceeding. [redacted] Given my position at Caris, I am familiar with the type of information sought, and its competitive significance to Caris.

4. Based on my knowledge of Caris's business, and my familiarity with the confidentiality protection afforded this type of information by Caris, the disclosure of this information to Respondents would cause serious, irreparable competitive injury to Caris and would be unduly burdensome to Caris as a non-party.

5. Caris keeps secret any details about [redacted] and its other products under development. Many aspects of Caris's products are proprietary, and Caris takes substantial efforts to protect this intellectual property.

6. This research and other work reflects Caris' innovation and substantial effort. Caris spends millions of dollars on developing its products, [redacted]

7. Caris has both physical measures and electronic measures in place to limit access to its confidential and proprietary information. These include, but are not limited to, use of key-card access across its facilities, with many areas limited to only a select number of company employees; strict computer login requirements; and the use of encryption and passwords on disks, computers, and networks. Further, only certain necessary Caris employees have physical access to Caris's labs, where development of Caris's MCED product and other tests occurs – all other employees need to be escorted by security. These measures ensure that only those Caris employees with a "need to know" have access to Caris' confidential and proprietary information, [redacted] and other proprietary products, and only then to the extent necessary to perform their jobs.

8. Additionally, every document created by Caris is document-controlled. This means that employees have only department-specific server access and can access only the documents housed on that specific server. A employee in procurement, for example, would not have access to the molecular lab server and therefore would not have access to lab-related documents stored on that server. Further, an employee in the molecular lab responsible for NGS testing cannot see documents created or maintained on the IHC testing lab server. Access to these servers are governed by an employee's role and title, and only a few very high-level individuals have access across servers.

9. Caris also maintains a single log-in system that requires every employee to use his or her Caris email address to access any outside software necessary to perform their work-related duties. Caris does this so it can easily remove employee's access to its sensitive research and work product once the employees leave Caris.

10. As part of Caris's process to limit information on a "need to know" basis, only two employees at Caris have access to and knowledge of how Caris's blood-related products work.

11. Caris also routinely maintains contractual restrictions in its agreements with employees to protect its intellectual property rights. These contractual restrictions restrict the disclosure of confidential and proprietary information both inside and outside of the company. For example, one such agreement states that any Inventions or Invention IP – which includes, among other things, inventions, research data and results, research techniques and methodology, and any resulting intellectual property – "are highly confidential and are proprietary to Employer. EMPLOYEE shall not disclose Inventions and/or Invention IP to any third party. EMPLOYEE shall limit discussion of Inventions and Invention IP to discussions with: (i) immediate supervisor(s) of EMPLOYEE, or (ii) other person(s) on a strictly need-to-know basis and only as

designated by Employer. The EMPLOYEE's obligations of confidentiality and non-disclosure under this Section 2 shall apply at all times during Employment and survive termination or expiration of EMPLOYEE's Employment by Employer, up to and until such a time that any applicable Inventions and/or Invention IP are made public by Employer, such as through a scientific publication, patent application publication, or through other lawful act."

12. For example, as a condition of his employment as President and Chief Scientific Officer overseeing research, testing and development of proprietary technologies, Dr. David Spetzler was required to enter into a confidentiality agreement with Caris relating to the protection of Caris's confidential information and trade secrets, as well as other matters. Similarly, other employees responsible for research, testing, and development of Caris's proprietary technologies are required to enter into such agreements with Caris. This is of the utmost importance to Caris because the Company is committed to investing millions of dollars into developing innovative products. Caris needs to protect its substantial investment in developing that product and in guarding the Company's confidential information.

13. Caris's competitors could not obtain Caris's proprietary research, testing or development information, or other trade secrets by lawful means. Caris does not disclose this information to third parties except in limited circumstances to regulators where obligated by law or compulsory process.

14. Disclosing Caris's confidential, trade secret information about product design, development, and research to its competitors could undermine all of Caris's work and cause serious, irreparable competitive injury to Caris. GRAIL, Inc. is also developing a MCED test that might compete with Caris's MCED test. Disclosure of these trade secrets to a competitor would

be especially harmful to Caris, because the competitor could use the information to develop an MCED test that would compete more effectively with Caris's planned MCED test.

15. [redacted] If Caris needed to produce additional high-level overview documents containing this information, it would have to create summary documents. In addition, identifying and producing a set of commercial and technical documents that collectively contained this information would seriously disrupt Caris's business – particularly if Caris had to do so on a highly compressed schedule. Caris's IT system cannot run keyword searches across servers. Instead, lab personnel and senior management would have to suspend some of their day-to-day work and spend significant time reviewing a variety of potential sources, identifying responsive material, and preparing them for production.

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

Executed on August 9, 2021.

Russ Farr

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, and caused this document to be served on the parties listed below via electronic mail:

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

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Dated: August 10, 2021

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

August 10, 2021

By: /s/ *Julia K. York*
Julia K. York

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	**DOCKET NO. 09401**

[PROPOSED] ORDER

After considering Respondents' Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences and the response, it is HEREBY ORDERED that Respondents' Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____