PUBLIC[1]

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,	)
Respondents.	)

ORDER GRANTING MOTION FOR CERTIFICATION TO THE COMMISSION OF REQUEST FOR COURT ENFORCEMENT OF NONPARTY SUBPOENA

I.

On August 4, 2021, Respondents Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") filed a Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Deposition Subpoenas Issued to Caris Life Sciences, Inc. ("Motion"). Caris Life Sciences, Inc. ("Caris"), a nonparty, filed an opposition to the Motion on August 10, 2021 ("Opposition").

[1] Respondents and Caris designated much of the information in their filings as "confidential material." "[A]lthough Commission Rule 3.45(d) provides that parties shall not disclose confidential information, it specifically provides that the Rule does not preclude references in briefs to 'confidential information or general statements based on the content of such information.' 16 C.F.R. § 3.45(d)." *In re ECM BioFilms, Inc.*, 2014 FTC LEXIS 16, *6 (Jan. 14, 2014). This Order reveals only general statements based on the content of information that has been designated as confidential. *See also In re Bristol-Myers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977) (An Administrative Law Judge may reveal information if "public disclosure is required in the interests of facilitating public understanding" of decisions.).

On August 13, 2021, Respondents filed a motion for leave to file a reply to the Motion, together with a proposed reply ("Motion for Leave"). The Motion for Leave is DENIED.[2]

The Motion is GRANTED, as set forth below.

II.

The Complaint in this case, issued March 30, 2021, challenges the proposed acquisition of GRAIL by Illumina. According to the Complaint, the acquisition, if consummated, will substantially lessen competition in an alleged United States multi-cancer early detection ("MCED") test market. Complaint ¶ 1. As stated in the Complaint, Illumina is the dominant provider of next-generation sequencing ("NGS") platforms, which is an "essential input" for the development and commercialization of MCED tests. Complaint ¶¶ 3, 5-6. The Complaint alleges that GRAIL's MCED test, Galleri, as well as MCED tests allegedly under development by competitors, rely on Illumina's NGS platform. Complaint ¶ 6. Post-acquisition, the Complaint contends, Illumina will have the incentive and ability to place competitors at a disadvantage, by, for example, raising the price of the NGS platform, impeding research and development by denying technical assistance, or refusing or delaying execution of necessary license agreements. Complaint ¶ 11.

Respondents deny that the proposed acquisition will lessen competition, and assert that the proposed acquisition will not have any adverse effects on competition and will result in substantial pro-competitive efficiencies. Answer at 3-14.

III.

A.

In the investigative phase of this case, Caris provided documents and other information in response to the Federal Trade Commission's ("FTC") Civil Investigative Demand ("CID") to Caris. Motion Exhibit 1, 3. Caris produced its chief science officer, Dr. David Spetzler, to testify in an investigational hearing ("IH"). Motion Exhibits 1-3. Among other things, Dr. Spetzler testified that [redacted] Motion Exhibit 2.

In addition, Caris is named in the Complaint as one of several firms alleged to be developing [redacted] Complaint ¶ 41. *See also* Complaint ¶ 46 (alleging that Caris and others [redacted]

[2] Pursuant to FTC Rule 3.22(d), a reply "shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's . . . attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." 16 C.F.R § 3.22(d). Respondents' proposed reply does not meet this standard. Respondents' argument to support the timeliness of the Motion, raised in the proposed reply, could have been raised in Respondents' principal brief. Indeed, Respondents' factual support relies on documentary exhibits Respondents submitted with the Motion.

[redacted]); ¶ 72 (naming Caris as one of several Illumina customers that [redacted] Complaint Counsel provided Respondents with Caris' response to the CID and the transcript of Dr. Spetzler's IH testimony after the Complaint was issued.

Pursuant to FTC Rule 3.34,[3] on May 1, 2021, Respondents' counsel issued a document subpoena to Caris and issued a deposition subpoena for Dr. David Spetzler (collectively "Subpoenas"). Declaration of Sharonmoyee Goswami ("Goswami Decl.") ¶¶ 18-19; Motion Exhibits 17-18. The Subpoenas were identical to those Respondents served on Caris in early April 2021, in connection with the FTC's federal court litigation against Illumina and GRAIL, which has since been dismissed at the request of the FTC. Goswami Decl. ¶¶ 18-19; Motion Exhibit 4.

Caris objected to the Subpoenas as overbroad and unduly burdensome, and asserted that complying would expose Caris' proprietary information and trade secrets to Respondents. Caris did not file a motion to quash, as permitted by FTC Rule 3.34(c).[4]

For the next four months, Respondents negotiated with Caris to narrow the scope of the requested documents and testimony. Pursuant to those negotiations, and through their Motion, Respondents have agreed to narrow the scope of the Subpoenas to focus on [redacted] As stated in the Motion: "Illumina only seeks ordinary-course documents that are sufficient to show the critical information about [redacted] . . . to assess or clarify Dr. Spetzler's testimony, and to ask Dr. Spetzler about [redacted] and the other topics that were addressed in his investigational hearing and relied upon by the FTC's [expert witness], Dr. Scott Morton." *See also* Motion, Proposed Order (requesting production of "documentary material sufficient to describe [redacted] and deposition of Dr. Spetzler; Motion at 9

[3] Rule 3.34 states in pertinent part:

> (a) Subpoenas ad testificandum. Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena or to attend and give testimony at an adjudicative hearing.
>
> (b) Subpoenas duces tecum; subpoenas to permit inspection of premises. Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, . . .

16 C.F.R. § 3.34(a), (b).

[4] Rule 3.34(c) states in relevant part:

> Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of 10 days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, . . .

(Respondents ask only for documents "sufficient to show" [redacted] and for the deposition of one witness").

Notwithstanding Respondents' narrowing of the requested discovery, Caris maintained its objections to providing information regarding [redacted] and the parties reached an impasse. This motion followed.

B.

"Parties may obtain discovery 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). The FTC Rules also require that discovery be limited when the Administrative Law Judge determines that:

> (i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
>
> (iii) The 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).

Rule 3.38(c) states that "in instances where a nonparty fails to comply with a subpoena or order, the [Administrative Law Judge] shall certify to the Commission a request that court enforcement of the subpoena or order be sought." 16 C.F.R. § 3.38(c); *see also In re Axon Enter., Inc.*, 2020 WL 5543022, at *3, *5 (Sept. 4, 2020) (certifying a request for court enforcement where the nonparty recipient failed and refused to comply with the subpoena).

IV.

The information sought by Respondents is relevant. As noted above, Caris is alleged in the Complaint to be a competitor that is [redacted] and therefore, Caris is among those entities whose ability to compete will allegedly be adversely affected by the acquisition. Caris has refused to provide the discovery requested by Respondents, even as narrowed by the parties' negotiations and the Motion. Caris argues that Respondents' Motion should be denied for three reasons: Respondents delayed the filing of the Motion; the information sought from Dr. Spetzler is overbroad; and providing the requested documents would be unduly burdensome.

While it would have been preferable for Respondents to seek enforcement of the Subpoenas earlier in these proceedings, the Motion will not be denied as untimely. It is clear

from the voluminous correspondence submitted with the Motion and Opposition that, in the period prior to Respondents' filing the Motion, Respondents and Caris were actively attempting to reach agreement on a reduced scope of documents and limited topics for a deposition of Dr. Spetzler.[5] When the parties appeared to reach an impasse on documents in late June 2021, Respondents continued negotiating with Caris regarding the deposition. Those talks appeared to reach an impasse on August 2, 2021. The Motion was thereafter promptly filed on August 4, 2021. Attempting to resolve a disputed issue through negotiation should be encouraged, not discouraged. In addition, Caris' assertion that the ultimate determination as to enforcement of the Subpoenas and any resulting production of discovery are unlikely to occur before the August 24, 2021 commencement of trial does not mandate denial of the Motion. Pursuant to Rule 3.46(c), the evidentiary record will remain open until three business days after the conclusion of trial, unless supplementation is required.[6] Moreover, under Rule 3.51(e), "[a]t any time from the close of the hearing record pursuant to § 3.44(c) until the filing of his or her initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown." 16 C.F.R. § 3.51(e).

Caris' argument that the Subpoenas are overbroad is without merit. Caris ignores Respondents' agreed narrowing of the Subpoenas to matters that are unquestionably relevant. The fact that Dr. Spetzler has already provided some testimony in his IH about [redacted] is not a reason to bar a deposition, as Caris argues, but is a reason to allow it, given that Respondents were not permitted to be present at the IH to question Dr. Spetzler. *See* 16 C.F.R. § 2.7(f)(3) ("For investigational hearings conducted pursuant to a CID for the giving of oral testimony, the hearing official shall exclude from the hearing room all persons other than the person being examined, counsel for the person being examined, Commission staff, and any stenographer or other person recording such testimony.").

Finally, Caris' argument that the requested discovery is unduly burdensome is unpersuasive. Caris first contends that there is a heightened risk that Respondents will not protect Caris' confidential information from disclosure, as required under the Protective Order issued in this case, alleging a prior violation by Respondents. According to documents submitted by Caris with its Opposition, however, Respondents denied violating the protective order in providing certain materials to a consultant, and represented, among other things, that the consultant subsequently destroyed the materials, that the consultant will not rely on the documents for any opinions, and that, except for outside counsel, Respondents had not received the material provided to the consultant. Opposition Exhibit 3. Caris further asserts that it has already produced so-called "high-level" documents regarding [redacted] and to require Caris to search for and produce additional detailed information would require "lab personnel and senior management . . . to suspend

[5] Respondents also offered as an alternative to deposing Dr. Spetzler for Caris to name a corporate designee to provide testimony on the relevant topics.

[6] *See* 16 C.F.R. § 3.44(c) ("Upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record after giving the parties 3 business days to determine if the record is complete or needs to be supplemented.").

some of their day-to-day work and spend significant time" to identify and produce responsive material. The declaration submitted on this point is conclusory and provides no further quantification or documentary support. *See* Declaration of Russ Farr ("Farr Decl.") ¶ 15 (Opposition Exhibit B). Furthermore, "'[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest.' *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977)." *In re N. Texas Specialty Physicians*, No. 9312, 2004 WL 527340, at *3 (Jan. 30, 2004).[7]

V.

As shown above, Respondents have demonstrated that the information sought through the Subpoenas, as narrowed herein, is relevant and that Caris has refused to produce the requested documents or produce Dr. Spetzler, or any other Caris employee, for deposition, despite months of attempted compromise. Caris' alleged justifications are without merit.

Accordingly, the Motion is GRANTED. It is hereby ORDERED that Respondents' request for court enforcement of the Subpoenas, as narrowed herein, is certified to the Commission, with the recommendation that district court enforcement be sought.[8]

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 17, 2021

[7] Caris notes that in *North Texas Specialty Physicians,* the Administrative Law Judge permitted the nonparty to produce competitively sensitive information in summary form, which the nonparty maintained in the ordinary course of business, rather than ordering an exhaustive search and production of all the requested documents. 2004 WL 527340, at *6. This citation is inapposite, as Caris readily admits that it does not maintain the requested information in summary form in the ordinary course of business, and would thus have to prepare such summaries. Opposition at 4; Farr Decl. ¶ 15.

[8] The Subpoenas are narrowed to (1) the production of documentary material sufficient to [redacted] and (2) the deposition of Dr. David Spetzler, within one week of the district court order.