

**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**

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ EXPEDITED  
MOTION TO ALLOW DIRECT EXAMINATION TO PROCEED BEFORE CROSS-  
EXAMINATION OF PARTY WITNESSES**

Complaint Counsel maintains the burden of persuasion on the claim advanced at trial and therefore has broad discretion to select its witnesses, decide the sequence of the presentation, and set the agenda for trial. Here, Complaint Counsel plans to conduct direct examination of adverse party and third-party witnesses as a part of its case-in-chief and then allow Respondents to conduct their examination.<sup>1</sup> This natural presentation of evidence at trial follows the procedure that this Court has employed in every case before that Complaint Counsel is aware of.

Respondents seek to invert the ordinary presentation of evidence so they can question their executives that appear on both Complaint Counsel’s and Respondents’ witness lists first. To justify this inverted arrangement, Respondents wrongly label Complaint Counsel’s direct examination of adverse witnesses as “cross-examination” and then rely on this flip-flop to argue that Respondents should go first with witnesses that Complaint Counsel calls in its case-in-chief.

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<sup>1</sup> Complaint Counsel intends to conduct a direct examination of certain expert witnesses by trial deposition.

But Respondents' motion misunderstands the purpose of direct examination: to elicit testimony to support a party's case-in-chief. Respondents' motion seeks to interfere with Complaint Counsel's prerogative to present its case-in-chief in favor of a clumsy framework that this Court has never employed before on the grounds that this Court would be unable to follow evidence presented in the usual order. Because it unnecessarily jettisons standard practice, interferes with Complaint Counsel's presentation of its case-in-chief, and is impractical, Respondents' motion should fail.

### STATEMENT OF FACTS

Six witnesses that appear on both sides' witness lists are Respondents' employees. Exh. A at 8. Complaint Counsel advised Respondents that the Court's past practice was to present witnesses once for the convenience of the Court and the witnesses. Nevertheless, Complaint Counsel indicated that they would not object if Respondents chose to have those six witnesses appear twice. Respondents averred that they would agree to call these six witnesses at one time if they can question them first. *Id.* at 8. Complaint Counsel explained that this was not the normal practice in Part 3 trials and cited prior examples of matters where Complaint Counsel has presented adverse party testimony first before turning the witness over to Respondents. *Id.* at 5, 7. Respondents indicated that they intend to seek relief with this Court. *Id.* at 6. On August 14, 2021, Respondents submitted their expedited motion.

### ARGUMENT

#### **I. Respondents' Motion Wrongly Characterizes Complaint Counsel's Direct Examination of Adverse Party Witnesses as Cross-Examination**

Complaint Counsel maintains the burden of persuasion on the claim advanced at trial and therefore sets the agenda at trial. *See In the Matter of Otto Bock Healthcare NA, Inc.*, 2019 FTC LEXIS 33, at \*32-33 (F.T.C. May 6, 2019) (quoting *United States v. Baker Hughes Corp.*, 908

F.2d 981, 983 (D.C. Cir. 1990); *see also* Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:61 (4th ed. 2021). As a result, Complaint Counsel has considerable freedom to select its witnesses and decide the sequence of the presentation. *Id.*

“The proper time to introduce evidence is in the party’s case-in-chief,” Stephen E. Arthur & Robert S. Hunter, *Order of Proof*, *Fed. Trial Handbook Civil*, § 19.3 (4th ed. 2020), and Complaint Counsel intends to call (among other witnesses) six adverse party witnesses, using leading questions as appropriate, to introduce testimonial evidence on topics that will buttress Complaint Counsel’s case-in-chief. Contrary to Respondents’ contention that their proposal will “minimize duplicative testimony,” the focus of Complaint Counsel’s questions likely will not be the same as those covered by Respondents.

In their motion, Respondents seek to invert the natural presentation of evidence at trial by presenting their case first through questioning of the party witnesses on Complaint Counsel’s witness list, then turning over the witness to Complaint Counsel to conduct its examination, followed by a re-direct by Respondents. *Contra* Stephen E. Arthur & Robert S. Hunter, *Order of Proof*, *Fed. Trial Handbook Civil*, § 19.1 (4th ed. 2020) (“Most civil actions adhere to the following order of proof. The plaintiff presents its case-in-chief. The defendant presents its case-in-chief (including evidence negating plaintiff’s claims and supporting defendant’s affirmative defenses, counterclaims, crossclaims, or third-party claims). The plaintiff presents rebuttal evidence.”); Mueller & Kirkpatrick, *Fed. Evidence* § 6:61 (explaining the summary of trial phases normally proceed as follows: the plaintiff or prosecutor presents its case-in-chief, defendant presents its case-in-chief or case-in-defense, and then plaintiff or prosecutor presents its case-in-rebuttal).

In an effort to muddle the manner in which their motion capsizes the normal presentation of evidence, Respondents rebrand Complaint Counsel’s questioning of the adverse party witnesses on both witness lists as “cross-examination.” This is wrong. “Cross-examination may be used to elucidate, modify, explain, contradict, or rebut the direct examination testimony of a witness.” Arthur & Hunter, Fed. Trial Handbook § 45:1. But Complaint Counsel intends to call certain adverse party witnesses to support its case-in-chief—not specifically to respond to testimony elicited through Respondents’ direct examination. Complaint Counsel’s questioning of adverse party witnesses is a form of direct examination and therefore does not merit a novel reverse presentation at trial.

## **II. There is No Need to Deviate From This Court’s Standard Practice**

This Court has discretion to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.” 16 C.F.R. § 3.43(d)(2). To Complaint Counsel’s knowledge, the standard practice in this Court has always been for Complaint Counsel to conduct the questioning of a witness it calls first, even if the witness is on both parties’ final witness list. *E.g., Altria Group*, Case No. 9393, Tr. at 659 (Testimony of Nick Pritzker, Member of the Board, JUUL Labs, Inc.); *Otto Bock*, No. 9378, Tr. at 1818 (Testimony of Andreas Kannenberg, Executive Medical Director for Otto Bock HealthCare North America).<sup>2</sup> This is consistent with the practice in federal court. *See, e.g., Negrete v. Allianz Life Ins. Co. of N. Am.*, 2013 WL 6535164, at \*3 (C.D. Cal. Dec. 9, 2013) (allowing plaintiffs to conduct direct examination of defendants’ executives on both parties’ witness lists while declining to rule on whether defendants may question witnesses during plaintiffs’ case-in-chief); *see generally* F.R.C.P. 611(c)(2) (noting that courts should allow a party to lead an adverse party witness

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<sup>2</sup> Relevant excerpts of both transcripts are included in Exhibits B and C.

during direct examination). Complaint Counsel is unaware of any instance, at least in the past 15 years, in which a respondent has asserted that it should first question a witness that Complaint Counsel calls to testify just because the respondent happened to include that witness on its final witness list.<sup>3</sup>

Moreover, Respondents provide no evidence that the Court's standard practice has suffered in the "ascertainment of truth," resulted in "the needless consumption of time," and has led to the misunderstanding of witness testimony. *See* Resp. Mot. 3. Indeed, contrary to their position, Respondents' proposal likely will lead to judicial diseconomy and a less logical presentation of evidence. Under their proposal, Respondents would bandy back and forth with Complaint Counsel responsibility for leading the presentation of their case-in-chief based on whether Complaint Counsel is calling an adverse party witness or a third-party witness or is offering expert testimony through a trial deposition. This hardly seems like an economical and logical presentation of material.<sup>4</sup> As a result, there is no need to stray from the Court's standard practice of hearing witness testimony.

### **III. Other Courts Have Rejected Respondents' Prescribed Presentation of Witnesses**

Although Respondents claim their proposal will lead to a clearer presentation of witnesses, other courts dealing with similar situations have come to a different conclusion. For instance, in *Argentine v. United Steelworkers of Am., AFL-CIO*, 287 F.3d 476, 486 (6th Cir. 2002), the Sixth Circuit rejected the argument that a district court abused its discretion by denying defendants the ability to cross-examine an adverse witness directly after Plaintiffs

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<sup>3</sup> Because Complaint Counsel must serve its final witness list first, a respondent could simply include in its final witness list the names of all of its employees identified by the Complaint Counsel as witnesses. As a result, if Respondents' position were adopted, it would give respondents the ability to question all of their current employees first.

<sup>4</sup> Indeed, Respondents' Motion follows a series of other motions designed—not to promote a fair and efficient trial—but rather to discard standard Part 3 practices and procedures.

elicited testimony from the witness in their case-in-chief. The district court determined that the party employee was “a party where cross examination would only be in form and not in fact.”

*Id.* As a result, the district court required defendants to call their employee as a part of their case after the close of the plaintiff’s case-in-chief rather than after plaintiff’s examination or—as Respondents would have it—before plaintiff’s examination. In *Nat’l R.R. Passenger Corp. v. Certainty Temp. Easements Above R.R. Right of Way in Providence, R.I.*, 357 F.3d 36, 42 (1st Cir. 2004), the First Circuit rejected the argument that a district court abused its discretion by allowing the plaintiff to call in its case-in-chief a defendant’s expert as an adverse witness. There, the First Circuit saw no prejudice to defendants where, in their case-in-chief, plaintiffs elicited testimony from the defendant’s expert witness to satisfy plaintiffs’ burden of proof. *Id.* Two sets of federal appellate and district courts saw no issue with plaintiffs’ presenting an adverse party witness first in their case-in-chief that both parties intended to call at trial.

Respondents’ motion, on the other hand, does not meaningfully explain why the approach taken by this Court and other courts should be rejected. Instead, Respondents provide vague cites to a set of transcripts from the Delaware Court of Chancery without providing any of those transcripts to give full context. Certainly, citations to vague, inapposite authorities should not warrant upending this Court’s longstanding practice.

### CONCLUSION

For the reasons expressed above, Complaint Counsel respectfully requests that this Court deny Respondents’ motion.

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Date: August 18, 2021

Respectfully submitted,

/s/ Nandu Machiraju

Nandu Machiraju

Federal Trade Commission

Bureau of Competition

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*Counsel Supporting the Complaint*

**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 Respondents' Expedited Motion to Allow Direct Examination to Proceed Before Cross-Examination of Party Witnesses, it is hereby:

ORDERED that Respondents' Motion is DENIED.

ORDERED:

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D. Michael Chappell  
Chief Administrative Law Judge

Date: August \_\_, 2021



# Exhibit A

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**From:** [Musser, Susan](#)  
**To:** [Sharonmoyee Goswami](#)  
**Cc:** [Andrew, Jordan S.](#); [Mohr, Stephen A.](#); [Joseph, Matthew](#); [Gonen, David](#); [Illumina Trial Team](#); [LWVALORANTITRUST.LWTEAM@lw.com](#); [Naegele, Dylan](#); [McNeil, Betty](#); [Gaskin, Lauren](#); [Milici, Jennifer](#)  
**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order  
**Date:** Sunday, August 15, 2021 8:12:36 PM

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Sharon:

As you know, Complaint Counsel bears the burden of proof and is entitled to present its evidence in the order and manner it sees fit within the parameters provided by the Court. As a courtesy, we have attempted to do our best to accommodate your clients' schedule, even when you have provided extremely limited dates of availability. But what we cannot agree to is to allow Respondents to unilaterally refuse to make their clients available during the first week of trial. As you have noted in your own filings, most of our third party witnesses had both their deposition and their investigational hearing taken in this case. It's absolutely nonsensical that you would be unable to prepare your clients to testify during the first week based on the wealth of evidence that you have available to you. The goal of having a witnesses appear once is for the convenience of that witness and the Court. In the event you want to seek leave of the Court for your clients to appear once in our case-in-chief (at which time we would do our adverse direct, followed by your cross) and then call them a second time in your case-in-chief (at which time you would do your direct, followed by our cross), we would not object. However, we cannot and will not agree to your proposal.

Given that we are at impasse, we will be re-issuing trial subpoenas to your clients tomorrow with an updated date of appearance. Please note, that date may not necessarily be the dates offered below. To the extent your position is that you will not present your client on that date please let us know after you receive the updated subpoenas and we can prepare a motion to compel.

Best,

Susan

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**From:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>  
**Sent:** Sunday, August 15, 2021 4:39 PM  
**To:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>  
**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[IlluminaTrialTeam@cravath.com](mailto:IlluminaTrialTeam@cravath.com)>; LWVALORANTITRUST.LWTEAM@lw.com; Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>; Milici, Jennifer <[jmilici@ftc.gov](mailto:jmilici@ftc.gov)>  
**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Susan:

We have already provided our blackout dates for these witnesses, and have endeavored to accommodate the dates that you have requested. Indeed, Mr. Della Porta and Mr. Friedin agreed to

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accommodate Complaint Counsel's requested dates even though they fell outside of the dates proposed. Complaint Counsel's own proposed dates required Mr. Della Porta and Mr. Friedin to testify after Mr. Bishop, so Complaint Counsel's refusal to accept those dates now is without basis.

We are happy to have Respondents' witnesses testify on the dates we have provided in our August 13 email, provided that Complaint Counsel confirm those dates.

The primary issue with the new dates that you have proposed for Mr. Della Porta and Ms. Berry is that they will now need to testify before most of the third party witnesses. While Mr. Della Porta and Ms. Berry obviously will not be aware of the third party testimony, given the protective order, Respondents will necessarily need to prepare their own witnesses to respond to the issues raised in Complaint Counsel's affirmative case. Respondents will have no opportunity to do so if their witnesses are forced to testify at the beginning of Complaint Counsel's presentation. Accordingly, Respondents will need to present their testimony again, which we understand to be different from the Court's traditional practice. Given the scheduling issues that you raise, if the parties are unable to reach agreement on the dates of testimony during Complaint Counsel's case, we propose that all of the party witnesses who appear on both sides' witness lists appear only once, during Respondents' responsive case. Consistent with our motion, we propose that Respondents will first present their direct testimony, followed by Complaint Counsel's cross-examination. We propose that Complaint Counsel's case be held open until the last party witness on Complaint Counsel's list testifies.

Best,

Sharon

**Sharonmoyee Goswami**

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**From:** Musser, Susan <smusser@ftc.gov>

**Sent:** Friday, August 13, 2021 10:20 PM

**To:** Sharonmoyee Goswami <sgoswami@cravath.com>

**Cc:** Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Joseph, Matthew <mjoseph1@ftc.gov>; Gonen, David <dgonen@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com; Naegele, Dylan <dnaegele@ftc.gov>; McNeil, Betty <bmcneil@ftc.gov>; Gaskin, Lauren <lgaskin@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>

**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Sharon:

Thank you for your response. As we explained at the July 9<sup>th</sup> meet and confer referenced below, prior to providing a witness order or dates we needed to understand if your clients had any "black out" dates. To date, we still have not received this information. Instead you provided us with limited dates your clients are available and only now tell us that Mr. Bishop and Mr. deSouza are unavailable on the dates that Complaint Counsel seeks to call them with no explanation as to the

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reason for said unavailability. Respondents have known the date of the hearing since March 30, 2021 when this Complaint issued. Mr. deSouza and Mr. Bishop were also aware that they were listed on Complaint Counsel's preliminary witness list (issued on May 11) and the final witness list (issued on July 16). As such, they have had more than sufficient notice to plan around this administrative hearing.

The FTC has the right to call witnesses in the order it so chooses. That being said, we would be willing to try to accommodate Mr. deSouza's and Mr. Bishop's schedule. We will only do so if Mr. Della Porta can testify on August 25 and Ms. Berry can testify on August 26. If Mr. Della Porta and Ms. Berry are testify on those dates, we would be willing to plan to have Mr. Bishop's testify on August 30 and Mr. deSouza's testify on September 8.

In addition, to rearrange our witness schedule in order to accommodate your request, we will need to have Aaron Freidin available to testify on September 2. This is within the range of available dates that you provided in your previous email. We will still aim to have Alex Aravanis testify on September 7. All of the dates listed above may need to be adjusted depending how things progress during trial and we reserve our right to call any of the above witnesses on an alternative date, if necessary. Please let us know by noon on Sunday whether you will make your clients available on those dates.

Best,

Susan

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**From:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>

**Sent:** Friday, August 13, 2021 12:03 PM

**To:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>

**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[IlluminaTrialTeam@cravath.com](mailto:IlluminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>

**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Susan:

Thank you for providing these tentative dates, which Respondents' counsel requested from the FTC more than a month ago, during a meet and confer on July 9, 2021. We had requested those dates well in advance to avoid the situation that has now arisen, where the Complaint Counsel seeks to call Respondents' witnesses at times when those witnesses are unavailable.

Please see below our responses to the date that Complaint Counsel has proposed for each witness:

- Mr. Hans Bishop: August 27. Mr. Bishop is unavailable on August 27, but is available to testify on August 30, August 31, or September 1.
- Ms. Nicki Berry: August 30. This date will work for Ms. Berry. Ms. Berry is also available to

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testify on September 1 and 3.

- Mr. Francis deSouza: September 1. Mr. deSouza is unavailable on September 1, but is available to testify on September 8, 9 or 10.
- Dr. Alex Aravanis: September 7. This date will work for Dr. Aravanis. Dr. Aravanis is also available to testify on September 9 and 10.
- Mr. Chris Della Porta: September 10. This date will work for Mr. Della Porta.
- Mr. Aaron Freidin: September 13. This date will work for Mr. Freidin.

This information is more than sufficient for Complaint Counsel to provide their proposed witness order according to the parties' August 10 agreement. We therefore expect to receive the witness order for the week of August 24 on Monday, August 16 at 5pm, as Complaint Counsel proposed and the parties have agreed.

With respect to the order of examination, thank you for identifying those cases. As stated, we reserve all rights to seek relief from the ALJ.

Best,

Sharon

**Sharonmoyee Goswami**

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[sgoswami@cravath.com](mailto:sgoswami@cravath.com)

---

**From:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>

**Sent:** Friday, August 13, 2021 11:07 AM

**To:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>

**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[IlluminaTrialTeam@cravath.com](mailto:IlluminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>

**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Sharon:

Do Respondents plan on providing the requested information below? As you know, the trial begins in a little over a week in this case and it is in our joint interest to present witnesses in an efficient and uninterrupted manner so as not to waste the Court's time with any delays.

If Respondents have not provided this information by Monday at 10:00 EST, Complaint Counsel will re-issue its subpoenas with specific appearance dates so to ensure witness availability on every trial day. Moreover, Complaint Counsel's offer to provide a witness order was made under the assumption that Respondents would provide its clients' black-out dates. In the event that

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assumption was incorrect, it is difficult to provide any meaningful witness order as Respondents' witness constitute almost half of the fact witnesses on Complaint Counsel's Final Witness List .

Happy to discuss,

Susan

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**From:** Musser, Susan

**Sent:** Wednesday, August 11, 2021 1:47 PM

**To:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>

**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[IlluminaTrialTeam@cravath.com](mailto:IlluminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>

**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Sharon:

It is Complaint Counsel's position that it inures to the benefits of both parties to work together regarding witness scheduling for the convenience of the parties, the witnesses, as well as the Court. Now that we are closer to trial, and in a continued effort to work with Respondents, please see below tentative dates for Respondents' witnesses:

- Mr. Hans Bishop: August 27
- Ms. Nicki Berry: August 30
- Mr. Francis deSouza: September 1
- Dr. Alex Aravanis: September 7
- Mr. Chris Della Porta: September 10
- Mr. Aaron Freidin: September 13

Please note the above is Complaint Counsel's good faith estimate based on the assumption that Judge Chappell will have a black-out date on Thursdays as well as a general estimate of the length of Respondents' examinations. Complaint Counsel reserves all rights to change or modify this schedule as needed during the course of the trial. Please let us know by the end of day tomorrow if your client has any black-out days from two days prior to the date listed above to two days after the date listed above. If you assert your client is unavailable, please provide an explanation of his or her unavailability.

Regarding the order in which the witnesses will be presented, we direct you to the Ottobock matter in which your firm represented a respondent (*see, e.g.*, examinations of Maynard Carkhuff and Cali Solorio) as well as the recent Altria/Juul case (*see, e.g.*, Joseph O'Hara, Jody Begley, Richard Jupe). As you can see from those matters (as well as every other matter before this court), Judge Chappell's practice is consistent with the examination order I described below. Respondents are, of course, welcome to raise this to the Court if you wish.

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Best,

Susan

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**From:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>  
**Sent:** Tuesday, August 10, 2021 9:40 PM  
**To:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>  
**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[illuminaTrialTeam@cravath.com](mailto:illuminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>  
**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Susan:

Thank you for your email. Despite Complaint Counsel's continued insistence on providing its proposed witness order only a week in advance, Respondents have provided multiple dates when Illumina and GRAIL witnesses are available. As you know, the period when Complaint Counsel is scheduled to present its case in chief is when vacations and other personal obligations are typically planned, particularly as many of these vacations could not be scheduled earlier this year. Nonetheless, Respondents are happy to consider any requests by Complaint Counsel to present a witness on an alternative date. Please provide any such requests by the end of this week.

We disagree with Complaint Counsel's position on the order in which party witnesses' testimony should be presented. It will be confusing to have a witness cross-examined by Complaint Counsel before they present their direct testimony. Please provide us with the legal authority for your position. We reserve all rights to seek relief with the ALJ.

Best,

Sharon

**Sharonmoyee Goswami**

Cravath, Swaine & Moore LLP

825 Eighth Avenue, New York, NY 10019

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**From:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>  
**Sent:** Tuesday, August 10, 2021 12:33 PM  
**To:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>  
**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[illuminaTrialTeam@cravath.com](mailto:illuminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan

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<[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>

**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Sharon:

Thank you for your email and agreeing to disclose each week's witness list and their respective order the proceeding Monday at 5:00 pm. Regarding the other points raised in your email, we seem to be suffering from a disconnect. First, in an attempt to accommodate your clients' schedules, we asked for dates they were unavailable. Instead of providing limited "black-out" dates, you provided limited dates of availability. We are still willing to work with you to accommodate your clients' schedules, but you need to work with us: providing two days of availability over a three-week period is not doing so. Please provide us with your clients' black-out dates, and we will do our very best to accommodate those dates. Finally, you misunderstand how testimony works at a Part 3 trial. Given that Complaint Counsel is putting your clients on as part of its case in chief, Complaint Counsel presents your client first. Respondents then follow with its direct. Finally, our understanding is that Mr. Leite is now represented in this matter by Goodwin Proctor.

Please let us know if you have any further questions.

Best,

Susan

---

**From:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>

**Sent:** Monday, August 9, 2021 1:52 PM

**To:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>

**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[IlluminaTrialTeam@cravath.com](mailto:IlluminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>

**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Susan:

We disagree with Complaint Counsel's contention that providing a set witness order for the entire hearing well in advance of the August 24 is impracticable. It has been three weeks since Complaint Counsel served its witness list and we understand that Complaint Counsel has been in communication with the third parties on its witness list regularly, and is well-positioned to know their respective availabilities. However, in the interest of compromise, we agree that each side will provide its proposed witness order for the upcoming week by 5:00 PM Monday the preceding week, e.g., Complaint Counsel will provide its good faith list of the witnesses and the order in which it intends to present them on Monday, August 16 at 5:00 PM for the week of trial starting Tuesday, August 24.



Below we provide the availability for Respondents' witnesses who appear on Complaint Counsel's witness list. As you know, we are still working to obtain dates for John Leite.

Francis deSouza: 9/8-9/10

Alex Aravanis: 9/9 and 9/10

Nicole Berry: 8/30; 9/1; 9/3; 9/7

Hans Bishop: 8/30-9/1

Chris Della Porta: 8/30-9/3

Aaron Freidin: 8/25-9/3

We understand that while these party witnesses appear on the witness lists for both sides, they will be presented only once at trial. Therefore, while these witnesses will testify during Complaint Counsel's case, we expect that Respondents will first present the direct testimony of each of these witnesses, which will be followed by Complaint Counsel's examination of each witness. Please confirm that this is your understanding.

Further, we understand that William Cance of the American Cancer Society and Matthew Strom of Morgan Stanley appear on both sides' witness lists. For these two witnesses, we are amenable to having Complaint Counsel complete the examination of these witnesses first, followed by Respondents' examination.

Please let us know if you would like to meet and confer to discuss any of the above.

**Sharonmoyee Goswami**

Cravath, Swaine & Moore LLP

825 Eighth Avenue, New York, NY 10019

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---

**From:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>

**Sent:** Friday, July 30, 2021 8:27 AM

**To:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>

**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[IlluminaTrialTeam@cravath.com](mailto:IlluminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>

**Subject:** RE: In re Illumina & Grail (No. 9401) - witness order

Sharon:

Thank you for your proposal. Providing a set witness order on August 7, 2021 is impracticable for several reasons. First, we are still in the process of gathering third party availability and don't even have black-out dates for your clients. Second, witness order is likely to change quite significantly as some witnesses are on the stand longer or shorter than anticipated and Complaint Counsel

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anticipates having to adjust witness order throughout the course of the trial to accommodate scheduling issues. As an alternative, we propose that each side provide its proposed witness order for the upcoming week by 5:00 PM Monday the proceeding week. As an example, we would provide you with a good faith list of the witnesses and the order in which we intend to present them on Monday, August 16 for the week of trial starting Tuesday, August 24.

Regarding third party black-out dates, we are happy to provide witness availability for the third parties that each side has designated on their witness list assuming that we have permission from the third party to do so. For witnesses that are only on Complaint Counsel's witness list, we will not provide their availability given that (a) it is not our information to provide; and (b) there is no reason that Respondents need that information given they are not calling those witnesses. Finally, when do you anticipate providing black-out dates for the Illumina/GRAIL employees listed on Complaint Counsel's witness list?

Thank you,

Susan

---

**From:** Sharonmoyee Goswami <[sgoswami@cravath.com](mailto:sgoswami@cravath.com)>  
**Sent:** Tuesday, July 27, 2021 1:49 PM  
**To:** Musser, Susan <[smusser@ftc.gov](mailto:smusser@ftc.gov)>  
**Cc:** Andrew, Jordan S. <[jandrew@ftc.gov](mailto:jandrew@ftc.gov)>; Mohr, Stephen A. <[smohr@ftc.gov](mailto:smohr@ftc.gov)>; Joseph, Matthew <[mjoseph1@ftc.gov](mailto:mjoseph1@ftc.gov)>; Gonen, David <[dgonen@ftc.gov](mailto:dgonen@ftc.gov)>; Illumina Trial Team <[IlluminaTrialTeam@cravath.com](mailto:IlluminaTrialTeam@cravath.com)>; [LWVALORANTITRUST.LWTEAM@lw.com](mailto:LWVALORANTITRUST.LWTEAM@lw.com); Naegele, Dylan <[dnaegele@ftc.gov](mailto:dnaegele@ftc.gov)>; McNeil, Betty <[bmcneil@ftc.gov](mailto:bmcneil@ftc.gov)>; Gaskin, Lauren <[lgaskin@ftc.gov](mailto:lgaskin@ftc.gov)>  
**Subject:** In re Illumina & Grail (No. 9401) - witness order

Susan:

Further to our call last week, Respondents propose that each side exchange, on August 7, 2021, the proposed order of the witnesses that will be presented live during the Part 3 administrative hearing. This will allow each side to obtain clarity about preparations for the hearing.

Please also provide to us the availability of any of the third party witnesses who appear on the FTC's witness list.

Best,

Sharon

**Sharonmoyee Goswami**

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# Exhibit B

**In the Matter of:**

**Altria Group and JUUL Labs**

*June 7, 2021  
Trial - Public Record  
Vol. 4*

**Condensed Transcript with Word Index**



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Trial - Public Record

PUBLIC

Altria Group and JUUL Labs

6/7/2021

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1 UNITED STATES OF AMERICA  
 2 FEDERAL TRADE COMMISSION  
 3 OFFICE OF ADMINISTRATIVE LAW JUDGES  
 4  
 5 In the Matter of: )  
 6 ALTRIA GROUP, INC., )  
 7 a corporation; ) Docket No. 9393  
 8 and )  
 9 JUUL LABS, INC., )  
 10 a corporation. )  
 11 -----)  
 12  
 13  
 14 Virtual Proceeding Via Zoom  
 15 Monday, June 7, 2021  
 16 9:45 a.m.  
 17 Trial Volume 4  
 18 PUBLIC SESSION  
 19  
 20 BEFORE THE HONORABLE D. MICHAEL CHAPPELL  
 21 Chief Administrative Law Judge  
 22  
 23  
 24  
 25 Reported by: Sally Jo Quade, CERT

1 APPEARANCES (CONT.):  
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737

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1 APPEARANCES:  
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 4 MARIBETH PETRIZZI, ESQ.  
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Trial - Public Record

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Altria Group and JUUL Labs

6/7/2021

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1 APPEARANCES (CONT.):  
 2  
 3 ON BEHALF OF RESPONDENT ALTRIA GROUP, INC.:  
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 5 JONATHAN MOSES, ESQ.  
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1 CONTENTS  
 2  
 3 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR  
 4 PRITZKER 748 760 887 897  
 5 VALANI 899 953  
 6 BEGLEY 960  
 7  
 8  
 9 EXHIBITS FOR ID IN EVID  
 10 PX  
 11 None  
 12  
 13 RX  
 14 None  
 15  
 16 JX  
 17 None  
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 19  
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 21  
 22  
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1 ON BEHALF OF JUUL LABS, INC.:  
 2 DAVID I. GELFAND, ESQ.  
 3 JEREMY CALSYN, ESQ.  
 4 JESSICA HOLLIS, ESQ.  
 5 MATTHEW BACHRACK, ESQ.  
 6 LINDEN BERNHARDT, ESQ.  
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 8 2112 Pennsylvania Avenue, N.W.  
 9 Washington, DC 20037  
 10 (202) 974-1690  
 11 dgelfand@cgsh.com  
 12  
 13 ALSO PRESENT:  
 14 Michael Guzman, Esq.  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
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1 PROCEEDINGS  
 2 - - - - -  
 3 (Proceeding called to order at 9:55 a.m.)  
 4 (Public Session.)  
 5 (Sidebar discussion proceeded as follows:)  
 6 JUDGE CHAPPELL: We are on the record. Go  
 7 ahead.  
 8 MS. WILKINSON: Thank you, Your Honor. I  
 9 wanted to advise you of a mistake I made with respect  
 10 to some in camera material. We filed our pretrial  
 11 briefs in a redacted form on the public record, and we  
 12 filed -- after we filed them in camera with the  
 13 original version, and when we did that, we didn't put  
 14 anything in that brief that was supposed to be in  
 15 camera, but we attached two exhibits which were  
 16 Complaint Counsel's expert report, and there were a few  
 17 attachments to that that had references to in camera  
 18 material, and because I didn't understand the rules --  
 19 it was my fault -- we thought we had to put the  
 20 exhibits to our public pretrial motion on the public  
 21 record.  
 22 We've now learned that we did not have to do  
 23 that, Complaint Counsel doesn't do that, that we could  
 24 have provided it directly to you, and so we put  
 25 redacted exhibits on the public record and those

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1 that's me, yes.  
 2 JUDGE CHAPPELL: We are on the record -- oh,  
 3 there's the witness.  
 4 Mr. Pritzker, it's been a weekend. I will  
 5 remind you are you are under oath, sir.  
 6 THE WITNESS: Yes, Your Honor, I understand.  
 7 JUDGE CHAPPELL: Proceed when ready.  
 8 Whereupon --  
 9 NICHOLAS PRITZKER  
 10 a witness, called for examination, having previously  
 11 been duly sworn, was examined and testified further as  
 12 follows:  
 13 DIRECT EXAMINATION (cont.)  
 14 BY MS. LEVERT:  
 15 Q. My apologies. Can you hear me now?  
 16 A. I can hear, yes.  
 17 Q. All right, great.  
 18 Good morning, Your Honor and good morning,  
 19 Mr. Pritzker.  
 20 A. Good morning, Ms. Levert.  
 21 Q. Mr. Pritzker, when we ended on Friday, we had  
 22 been looking at PX 2022, which we will pull up again  
 23 right now.  
 24 And this was the October 25th, 2018 email from  
 25 Mr. Willard to you, attaching Mr. Willard's letter to

749

1 the FDA. Do you recall looking at this on Friday  
 2 afternoon?  
 3 A. Yes, I do.  
 4 Q. All right. If we could go to the page ending  
 5 in 003, and if we could zoom in on the third paragraph.  
 6 This is the paragraph that begins, "Based on the  
 7 publicly available information..."  
 8 We talked about this paragraph on Friday. Do  
 9 you recall that, Mr. Pritzker?  
 10 A. Yes, I do.  
 11 Q. And I just want to ask you one additional  
 12 question before we move on. I want to specifically  
 13 focus on the first sentence of this paragraph, which  
 14 reads, "Based on the publicly available information  
 15 from FDA and others, we believe that pod-based products  
 16 significantly contribute to the rise in youth use of  
 17 e-vapor products."  
 18 Do you see that language?  
 19 A. I do.  
 20 Q. The fact that Altria made this statement about  
 21 pod-based products to the FDA surprised you, didn't it?  
 22 A. Yes, it did.  
 23 Q. You thought this language was surprising in  
 24 light of the fact that Altria was negotiating to  
 25 acquire an interest in JLI, correct?

750

1 A. Umm, yes.  
 2 Q. We are going to now put up a document that is  
 3 marked as PX 2322.  
 4 Your Honor, PX 2322 has already been admitted  
 5 into evidence as part of JX 2.  
 6 Mr. Pritzker, let me know when you have found  
 7 the hard copy of that.  
 8 A. I have it. Thank you.  
 9 Q. All right, great. This is a one-page email  
 10 from you to Mr. Willard and Mr. Gifford, correct?  
 11 A. Correct.  
 12 Q. And the email is dated October 29, 2018,  
 13 correct?  
 14 A. Correct.  
 15 Q. And the subject line is, "Thanks!" Do you see  
 16 that?  
 17 A. Yes.  
 18 Q. You write, "Howard/Billy: Thanks so much for  
 19 your tenacity, flexibility and creativity. We couldn't  
 20 be more exited at the prospect of a partnership with  
 21 you and your team. To the future! Best wishes.  
 22 Nick."  
 23 Do you see the language I just read?  
 24 A. I do.  
 25 Q. You sent this email after a meeting with Altria

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1 representatives in New York City, correct?  
 2 A. That's right.  
 3 Q. And Mr. Willard attended that meeting in New  
 4 York, correct?  
 5 A. Correct.  
 6 Q. And Mr. Gifford attended that meeting in New  
 7 York, correct?  
 8 A. Correct.  
 9 Q. And the meeting in New York took place after --  
 10 it took place after Altria had sent its October 25th,  
 11 2018, letter to the FDA, correct?  
 12 A. Correct.  
 13 Q. And at the meeting in New York, Altria  
 14 indicated that, despite what it had said in its letter  
 15 to the FDA, that it still -- they still wanted to  
 16 invest in JLI, correct?  
 17 A. I'm sorry. Could you repeat the language of  
 18 the question, please?  
 19 Q. Sure. I'd be happy to.  
 20 A. Yeah, thank you.  
 21 Q. At the meeting in New York, Altria's  
 22 representatives indicated that, despite what they said  
 23 in their letter to the FDA, they still wanted to invest  
 24 in JLI, correct?  
 25 A. They actually had said that at an earlier date,



# Exhibit C

**In the Matter of:**

Otto Bock HealthCare North America, Inc.

*August 8, 2018*

*Trial - Public*

*Vol. 9*

**Condensed Transcript with Word Index**



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<p style="text-align: right;">1655</p> <p>1 UNITED STATES OF AMERICA                  FEDERAL TRADE COMMISSION                  2 OFFICE OF ADMINISTRATIVE LAW JUDGES                  3                  4 In the Matter of: )                  5 Otto Bock HealthCare North America, Inc., )                  6 a corporation, ) Docket No. 9378                  7 Respondent. )                  8 -----)                  9                  10                  11                  12 August 8, 2018                  13 9:50 a.m.                  14 TRIAL VOLUME 9                  15 PART 1, PUBLIC RECORD                  16                  17 BEFORE THE HONORABLE D. MICHAEL CHAPPELL                  18 Chief Administrative Law Judge                  19 Federal Trade Commission                  20 600 Pennsylvania Avenue, N.W.                  21 Washington, D.C.                  22                  23                  24 Reported by: Josett F. Whalen, Court Reporter                  25</p>	<p style="text-align: right;">1657</p> <p>1 FEDERAL TRADE COMMISSION                  2 I N D E X                  3 IN THE MATTER OF                  4 OTTO BOCK HEALTHCARE NORTH AMERICA, INC.                  5 TRIAL VOLUME 9                  6 PART 1, PUBLIC RECORD                  7 AUGUST 8, 2018                  8                  9 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR                  10 ELL 1658 1752 1814 1815                  11 KANNENBERG 1818                  12                  13                  14 EXHIBITS FOR ID IN EVID STRICKEN/REJECTED                  15 PX                  16 (none)                  17                  18 RX                  19 (none)                  20                  21 JX                  22 (none)                  23                  24                  25</p>
--	--

<p style="text-align: right;">1656</p> <p>1 APPEARANCES:                  2                  3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:                  4 DANIEL K. ZACH, ESQ.                  5 STEPHEN A. MOHR, ESQ.                  6 MEGHAN IORIANNI, ESQ.                  7 DYLAN BROWN, ESQ.                  8 Federal Trade Commission                  9 Bureau of Competition                  10 Constitution Center                  11 400 7th Street, S.W.                  12 Washington, D.C. 20024                  13 (202) 326-2118                  14 dzach@ftc.gov                  15                  16 ON BEHALF OF OTTO BOCK HEALTHCARE NORTH AMERICA:                  17 WAYNE A. MACK, ESQ.                  18 SEAN P. McCONNELL, ESQ.                  19 SEAN S. ZABANEH, ESQ.                  20 SARAH O'LAUGHLIN KULIK, ESQ.                  21 Duane Morris LLP                  22 30 South 17th Street                  23 Philadelphia, Pennsylvania 19103-4196                  24 (215) 979-1152                  25 wamack@duanemorris.com</p>	<p style="text-align: right;">1658</p> <p>1 P R O C E E D I N G S                  2 - - - - -                  3 JUDGE CHAPPELL: Okay. We're back on the                  4 record.                  5 Next witness.                  6 MS. IORIANNI: Your Honor, Meghan Iorianni for                  7 complaint counsel.                  8 Complaint counsel calls as its next witness                  9 Tracy Ell.                  10 Your Honor, I have a copy for your attorney                  11 adviser and respondent of a binder that contains                  12 exhibits that I may use today during the examination.                  13 May I distribute the exhibits?                  14 JUDGE CHAPPELL: Go ahead.                  15 - - - - -                  16 Whereupon --                  17 TRACY DUNCAN ELL                  18 a witness, called for examination, having been first                  19 duly sworn, was examined and testified as follows:                  20 DIRECT EXAMINATION                  21 BY MS. IORIANNI:                  22 Q. Good morning, Mr. Ell.                  23 A. Good morning.                  24 Q. Mr. Ell, will you please introduce yourself by                  25 stating your full name.</p>
--	--

1815

1 **cost of good targets?**  
 2 A. Yes.  
 3 **Q. And do you recall when complaint counsel -- or**  
 4 **when respondent counsel was asking you about**  
 5 **reimbursement to cover those cost of goods?**  
 6 A. Yes, ma'am.  
 7 **Q. When you fit a patient with a C-Leg 4, do you**  
 8 **get to bill for all of the above-the-knee prosthetic**  
 9 **when you fit a patient with the C-Leg 4?**  
 10 A. Only if it's ordered as an entire prosthetic.  
 11 **Q. And so when you're looking at that cost of**  
 12 **goods number, are you looking at the margin solely on**  
 13 **the reimbursement that you get from the C-Leg 4 or are**  
 14 **you looking at the margin that you receive from the**  
 15 **entire above-the-knee prosthesis that you bill for?**  
 16 A. Of the entire above-the-knee prosthetic that I  
 17 bill for.  
 18 MS. IORIANNI: Thank you, Mr. Ell.  
 19 I have no further questions, Your Honor.  
 20 JUDGE CHAPPELL: Anything further?  
 21 MR. MACK: Just real quickly, Your Honor.  
 22 - - - - -  
 23 RE-CROSS-EXAMINATION  
 24 BY MR. MACK:  
 25 **Q. When you are fitting a prosthetic on a**

1816

1 **transfemoral amputee and that includes an MPK --**  
 2 A. Yes, sir.  
 3 **Q. -- isn't it correct that the MPK is the most**  
 4 **expensive part of that prosthetic?**  
 5 A. It generally is.  
 6 **Q. And the MPK represents more than 50 percent of**  
 7 **the total cost of the prosthetic?**  
 8 A. Generally, it does. I'd agree with that.  
 9 MR. MACK: Thank you.  
 10 JUDGE CHAPPELL: All right. At this time we'll  
 11 take our lunch break. We'll reconvene at 3:10.  
 12 We're in recess.  
 13 (Whereupon, at 1:55 p.m., a lunch recess was  
 14 taken.)  
 15 (The prior witness was excused, per the court.)  
 16  
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1 AFTERNOON SESSION  
 2 (3:13 p.m.)  
 3 JUDGE CHAPPELL: Okay. We're back on the  
 4 record.  
 5 Next witness.  
 6 MR. BROWN: Good afternoon, Your Honor.  
 7 Dylan Brown representing complaint counsel.  
 8 Complaint counsel calls as its next witness  
 9 Andreas Kannenberg of Otto Bock.  
 10 JUDGE CHAPPELL: Did Mr. Ell take his toys or  
 11 did he leave them?  
 12 MR. ZACH: The toys are right here, Your Honor.  
 13 We will keep them, and they're accessible to you  
 14 whenever you would like them.  
 15 JUDGE CHAPPELL: Put the Plié and the C-Leg  
 16 right up here (indicating).  
 17 Just anywhere that inquiring minds can come  
 18 look at them during breaks. I said during breaks.  
 19 MR. MACK: Your Honor, you will be pleased to  
 20 know we are going to have some more for you.  
 21 JUDGE CHAPPELL: About to give up on you there,  
 22 Mr. Mack.  
 23 MR. MACK: You might have this whole thing  
 24 filled up by the time we're done.  
 25 JUDGE CHAPPELL: Bring it. Can't have too many

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1 of these things.  
 2 - - - - -  
 3 Whereupon --  
 4 ANDREAS KANNENBERG  
 5 a witness, called for examination, having been first  
 6 duly sworn, was examined and testified as follows:  
 7 JUDGE CHAPPELL: Go ahead.  
 8 MR. BROWN: Your Honor, may I approach the  
 9 bench to give a copy of the binder to your attorney  
 10 adviser?  
 11 JUDGE CHAPPELL: Yes. Go ahead.  
 12 - - - - -  
 13 DIRECT EXAMINATION  
 14 BY MR. BROWN:  
 15 **Q. Good afternoon, Dr. Kannenberg.**  
 16 A. Good afternoon.  
 17 **Q. Thank you for being here today.**  
 18 **My name is Dylan Brown. We met previously at**  
 19 **your deposition in this matter.**  
 20 A. Yes.  
 21 **Q. Could you please spell your first and last name**  
 22 **for the record.**  
 23 A. My first name is Andreas, that is  
 24 A-N-D-R-E-A-S, last name Kannenberg,  
 25 K-A-N-N-E-N-B-E-R-G.

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1 **Q. Thank you.**  
 2 **Before we proceed, is there any reason that you**  
 3 **are unable to provide truthful and complete testimony**  
 4 **today?**  
 5 A. No.  
 6 **Q. And Dr. Kannenberg, there should be a binder of**  
 7 **exhibits to your left, as well as water.**  
 8 A. Yes.  
 9 **Q. And Dr. Kannenberg, you provided testimony in**  
 10 **this matter at a deposition in April; is that correct?**  
 11 A. That is correct.  
 12 **Q. A transcript of that deposition is included in**  
 13 **your binder as well as additional exhibits. And that**  
 14 **deposition has been admitted into evidence pursuant to**  
 15 **JX 2. And I may refer to that from time to time**  
 16 **today.**  
 17 **Dr. Kannenberg, you are the executive medical**  
 18 **director for Otto Bock HealthCare North America; is**  
 19 **that correct?**  
 20 A. That is correct, yes.  
 21 **Q. You have held that position since the summer of**  
 22 **2013?**  
 23 A. That is also correct, yes.  
 24 **Q. I'd like to briefly run through your**  
 25 **background.**

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1 **You received an M.D. in 1989 and a Ph.D. in**  
 2 **1992?**  
 3 A. That's correct.  
 4 **Q. Both from Humboldt University of Berlin?**  
 5 A. Yes.  
 6 **Q. You joined Otto Bock in 2003; is that correct?**  
 7 A. That's correct, yes.  
 8 **Q. That was your first job involving the**  
 9 **prosthetics industry?**  
 10 A. I had some responsibilities in a previous job.  
 11 I was working for a company called Bauerfeind. They  
 12 are the market leader in orthotics in Germany, but at  
 13 the time they also had a small prosthetic division.  
 14 JUDGE CHAPPELL: So you received your M.D. in  
 15 Berlin in '89?  
 16 THE WITNESS: Yes.  
 17 JUDGE CHAPPELL: Exciting year in Berlin.  
 18 THE WITNESS: Yeah. Absolutely.  
 19 JUDGE CHAPPELL: You were on the west side;  
 20 correct?  
 21 THE WITNESS: Yes.  
 22 BY MR. BROWN:  
 23 **Q. The company that you mentioned, Bauerfeind, did**  
 24 **they manufacture microprocessor devices?**  
 25 A. They don't manufacture or market any

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1 microprocessor control components, no.  
 2 **Q. Thank you.**  
 3 **When you joined Otto Bock, you worked at the**  
 4 **German headquarters; correct?**  
 5 A. That is correct.  
 6 **Q. And your title was director of medical**  
 7 **affairs?**  
 8 A. That is correct.  
 9 **Q. That was your position until you came to**  
 10 **Otto Bock North America in the summer of 2013?**  
 11 A. Yes, sir.  
 12 **Q. As director of medical affairs in Germany, you**  
 13 **established Otto Bock's clinical research department?**  
 14 A. That is correct. I started it in 2003 as a  
 15 one-man show, and meanwhile it has grown -- it has  
 16 grown to a department of about 20 people.  
 17 **Q. One primary function of that department is to**  
 18 **develop the science around Otto Bock's products for**  
 19 **reimbursement purposes?**  
 20 A. Yes, sir.  
 21 **Q. You're gathering existing evidence and**  
 22 **developing new evidence that could be used in**  
 23 **convincing payers to reimburse for Otto Bock products?**  
 24 A. Yes.  
 25 **Q. This included organizing and supervising**

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1 **clinical research concerning Otto Bock's prosthetics**  
 2 **products?**  
 3 A. Yes.  
 4 **Q. Another of your responsibilities as director**  
 5 **of medical affairs was to provide education and**  
 6 **training to prosthetists and orthotists?**  
 7 A. That's correct, too, yeah.  
 8 **Q. And also to physical therapists and**  
 9 **physicians?**  
 10 A. Sometimes.  
 11 **Q. And to payers?**  
 12 A. Also sometimes.  
 13 **Q. You provided education about the evidence**  
 14 **supporting use of various Otto Bock products?**  
 15 A. Yes, that's correct.  
 16 **Q. You provided this training globally; correct?**  
 17 A. Yes.  
 18 **Q. Including to prosthetists and payers in the**  
 19 **United States?**  
 20 A. Yes.  
 21 **Q. In the course of this work, you've learned the**  
 22 **process by which prosthetists select the products they**  
 23 **recommend to patients?**  
 24 A. I learned how the clinical team works to select  
 25 the products for the patients, yes.

**CERTIFICATE OF SERVICE**

I hereby certify that on August 18, 2021, I filed the foregoing document electronically using the FTC’s E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell  
 Administrative Law Judge  
 Federal Trade Commission  
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 Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

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/s/ Nandu Machiraju  
 Nandu Machiraju

*Counsel Supporting the Complaint*