

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. 9401

THIRD PARTY FREENOME HOLDINGS, INC.'S MOTION FOR
EXTENSION OF TIME TO MOVE FOR *IN CAMERA* TREATMENT
OF PROPOSED TRIAL EXHIBITS

Pursuant to 16 C.F.R. §§ 3.22(f) and 4.3(b), Third Party Freenome Holdings, Inc. (“Freenome”) respectfully requests a four-day extension of the August 5, 2021 deadline for filing motions for *in camera* treatment of proposed trial exhibits, as set in the Administrative Law Judge’s April 26, 2021 Scheduling Order, until Monday, August 9, 2021, for the reasons stated in the Supporting Memorandum below. As required by 16 C.F.R. § 3.22(c), a proposed Order accompanies this Motion.

Supporting Memorandum

On April 26, 2021, the Administrative Law Judge presiding over this matter entered a Scheduling Order setting August 5, 2021, as the deadline for filing motions for *in camera* treatment of proposed trial exhibits. Scheduling Order at 3. In that same Scheduling Order, the Administrative Law Judge also set a deadline of July 26, 2021, for the parties to notify a non-party, such as Freenome, of their intent to offer that non-party’s confidential materials as evidence at the hearing. *Id.* This latter deadline implements Commission Rule 3.45(b),

which requires that “[p]arties who seek to use material obtained from a third party subject to confidentiality restrictions . . . demonstrate that the third party has been given *at least 10 days notice* of the proposed use of such material.” 16 C.F.R. § 3.45(b) (emphasis added). See Scheduling Order at 3 n.1.

On July 26, 2021, Freenome received, through the undersigned counsel and via email, notice from Complaint Counsel and counsel for Respondents Illumina, Inc. and GRAIL, Inc., of their respective lists of proposed trial exhibits using testimony and materials that Freenome has designated as confidential pursuant to the Administrative Law Judge’s March 30, 2021 Protective Order Governing Confidential Material. See Exhibits A and B. Taken together, the testimony and materials from Freenome that the parties intend to use as trial exhibits consist of (1) four transcripts in their entirety – (a) the March 2, 2021 investigational hearing of Michael Nolan (312 pages), (b) the March 4, 2021 investigational hearing of Gabriel Otte (147 pages), (c) the June 1, 2021 deposition of Michael Nolan (310 pages), and (d) the June 24, 2021 deposition of Gabriel Otte (232 pages); and (2) 78 unique documents numbering hundreds of pages.

Although these materials have been collected and reviewed by the undersigned counsel, Freenome has encountered scheduling difficulties within the allotted ten-day window for its CEO, Mr. Michael Nolan, to review and discuss the materials with counsel prior to his signing the required declaration or affidavit explaining the confidential nature of the materials. See *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004); Additional Provision 12, Scheduling Order at 6–7 (citing these cases).

Suffice it to say, Freenome duly acknowledges the Administrative Law Judge’s strict standards for motions for *in camera* treatment but it needs a little additional time

(specifically, four extra days, including weekend days) in order to properly comply with the requirements. Importantly, it does not have internal legal staff to assist with the preparation of its motion for *in camera* treatment and instead must rely exclusively on the coordinated efforts of its outside counsel and its CEO, both of whom have had other commitments on their schedules prior to receiving notice from Complaint Counsel and Respondents of their respective designations of Freenome's testimony and materials as trial exhibits. Additionally, neither Freenome nor its counsel had any forewarning regarding the volume of testimony and materials that would be designated by the parties.

Under the present circumstances, Freenome respectfully requests an enlargement of the ten-day window that it has been given under the Scheduling Order and by the parties' respective notices. The language of Commission Rule 3.45(b) makes clear that ten days is the *minimum* amount of notice that Freenome, as a non-party, is entitled to receive. The four additional days that Freenome is requesting will still ensure that its motion for *in camera* treatment is filed expeditiously. On August 5, 2021, Freenome provided notice to counsel for the parties of its intention to make this Motion. See Exhibit C.

For the foregoing reasons, good cause exists for granting Freenome's Motion.

Dated: August 5, 2021

Respectfully Submitted,

By: /s/ Henry C. Su

Henry C. Su (D.C. Bar No. 441271)
Constantine Cannon LLP
1001 Pennsylvania Ave., N.W.
Suite 1300N
Washington, DC 20004-2579
(202) 204-3504 (O)
(650) 430-2754 (C)
hsu@constantinecannon.com
Counsel for Third Party Freenome Holdings, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I filed the foregoing document electronically using the FTC's Administrative E-Filing System, which will send notification of this filing to:

The Honorable April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Rm. H-110
Washington, DC 20580
oalj@ftc.gov

I also certify that I served the foregoing document by email to the following counsel of record for the parties:

Jennifer Milici
Stephanie C. Bovee
Peter Colwell
U.S. Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580
jmilici@ftc.gov
sbovee@ftc.gov
pcolwell@ftc.gov

Counsel Supporting the Complaint

David Marriott
Christine A. Varney
Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
dmarriott@cravath.com
cvarney@cravath.com
sgoswami@cravath.com

Counsel for Illumina, Inc.

Al Pfeiffer
Michael G. Egge
Marguerite M. Sullivan
Latham & Watkins LLP
555 Eleventh Street, N.W.
Washington, DC 20004
al.pfeiffer@lw.com
michael.egge@lw.com
marguerite.sullivan@lw.com

Counsel for GRAIL, Inc.

By: /s/ Henry C. Su

Counsel for Third Party Freenome Holdings, Inc.

EXHIBIT A TO FREENOME'S MOTION FOR EXTENSION OF TIME

Su, Henry C.

From: Gaskin, Lauren <lgaskin@ftc.gov>
Sent: Monday, July 26, 2021 11:39 AM
To: Su, Henry C.
Cc: Simons, Bridget; Flint, Phoebe; McCollough, James; Martin, Teresa; Allen, Devon; Wint, Corene; Stebinger, Nicolas
Subject: Docket No. 9401
Attachments: Administrative E-Filing System User Guide.pdf; Final Third-Party Doc Admissibility Declaration.docx; E-filing Checklist for Third Parties_ILLUMINA.pdf; Freenome Illumina-Grail In Camera Notice Letter.pdf

Dear Henry:

Attached please find a letter providing notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, of Complaint Counsel's intent to offer certain Freenome material as evidence in the [Illumina/GRAIL](#) administrative trial, which is scheduled to begin on August 24, 2021. Our paralegals will email you a link to download the materials referenced in the letter.

As we discussed over the phone, I attached a draft declaration related to the admissibility of Freenome documents. Please return the signed declaration by August 6, 2021, if possible, as a scanned .pdf attached to an e-mail.

Motions for *in camera* treatment of evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45, and explained in *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018), and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge. As you consider whether to file a motion for *in camera* treatment of Freenome material in this matter, you may find it helpful to consult material from past administrative cases, such as, for example, this non-party [motion](#) for *in camera* treatment and the associated [order](#) from [In re Jerk](#), and this [order](#) on non-parties' motions for *in camera* treatment from [Altria/Juul](#).

Please note that, if you intend to file a motion, you will need credentials for the Commission's electronic filing system and to file a Notice of Appearance, which must be approved by the Office of the Secretary and can take 24 hours to issue. As such, you will need to file your Notice of Appearance at least one day prior to the day on which you intend to file your motion. I attached an e-filing system guide to assist with that process.

Please let me know if you have any questions or want to discuss anything related to this matter.

Sincerely,

Lauren M. Gaskin

Staff Attorney, Federal Trade Commission
Bureau of Competition
400 7th St. SW, Washington DC 20024
Tel: 202.326.3106 | lgaskin@ftc.gov



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Bureau of Competition
Mergers I Division

July 26, 2021

VIA EMAIL TRANSMISSION

Freenome Holdings, Inc.
c/o Henry C. Su
Constantine Cannon LLP
1001 Pennsylvania Ave, NW
Suite 1300N
Washington, DC 20004
hsu@constantinecannon.com

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

Dear Mr. Su:

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

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

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

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

motion (and the accompanying declaration or affidavit) for *in camera* treatment that was filed and granted in an FTC administrative proceeding. If you choose to move for *in camera* treatment, you must provide a copy of the document(s) for which you seek such treatment to the Administrative Law Judge.

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

Please be aware that under the current Scheduling Order **the deadline for filing motions seeking *in camera* treatment is August 5, 2021**. A copy of the April 26, 2021 Scheduling Order can be found at <https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter>. If you have any questions, please feel free to contact me at (202) 326-3106.

Sincerely,

/s/ Lauren Gaskin
Lauren Gaskin
Counsel Supporting the Complaint

Attachment

Attachment A

Exhibit No.	Bates - Begin	Bates - End	Date	Full Name
PX7050	PX7050-001	PX7050-122	3/2/2021	IH Transcript: Michael Nolan (Freenome)
PX7055	PX7055-001	PX7055-062	3/4/2021	IH Transcript: Gabriel Otte (Freenome)
PX7094	PX7094-001	PX7094-150	6/1/2021	Depo Transcript: Michael Nolan (Freenome)
PX7121	PX7121-001	PX7121-110	6/24/2021	Depo Transcript: Gabe Otte (Freenome)
PX8368	FRNM00000002	FRNM00000125	??/??/20	[REDACTED]
PX8369	FRNM00000254	FRNM00000255	10/9/2020	[REDACTED]
PX8370	FRNM00000279	FRNM00000283	1/22/2021	[REDACTED]
PX8371	FRNM00000629	FRNM00000629	10/30/2020	[REDACTED]
PX8372	FRNM00000792	FRNM00000794	1/18/2021	[REDACTED]
PX8373	FRNM00001192	FRNM00001217	1/24/2021	[REDACTED]
PX8374	FRNM00003428	FRNM00003430	1/6/2021	[REDACTED]
PX8375	FRNM00003623	FRNM00003627	2/6/2021	[REDACTED]
PX8377	FRNM00003534	FRNM00003580	1/30/2021	[REDACTED]
PX8378	PX8378-001	PX8378-010	2/26/2021	[REDACTED]
PX8386	PX8386-001	PX8386-023	2/19/2021	[REDACTED]
PX8445	FRNM00003619	FRNM00003620	2/6/2021	[REDACTED]
PX8446	FRNM00000722	FRNM00000740	12/2/2020	[REDACTED]
PX8489	FTC-FREENOME-0000001	FTC-FREENOME-0000001	5/19/2021	[REDACTED]
PX8490	FRNM00000620	FRNM00000623	11/20/2020	[REDACTED]
PX8491	FRNM00001096	FRNM00001098	11/9/2020	[REDACTED]
PX8492	FRNM00001181	FRNM00001183	11/11/2020	[REDACTED]
PX8599	FRNM00003593	FRNM00003616	1/26/2021	[REDACTED]
PX8600	FRNM00003587	FRNM00003592	1/25/2021	[REDACTED]
PX8631	FRNM00003372	FRNM00003373	1/26/2021	[REDACTED]
PX8632	FRNM00003424	FRNM00003425	1/26/2021	[REDACTED]
PX9058	PX9058-001	PX9058-003	2/25/2021	[REDACTED]

EXHIBIT B TO FREENOME'S MOTION FOR EXTENSION OF TIME

Su, Henry C.

From: Michael Zaken <mzaken@cravath.com>
Sent: Monday, July 26, 2021 11:39 PM
To: Su, Henry C.; Retley Locke
Cc: Allison Kempf; Xhesi Hysi
Subject: RE: In the Matter of Illumina, Inc. & GRAIL, Inc. - Notice Regarding Use of Confidential Information

Counsel,

In addition to the materials below, we have included the deposition transcript of Gabriel Otte on our list.

Testimony
Deposition Transcript of Gabriel Otte

Regards,

Michael

Michael Zaken
Cravath, Swaine & Moore LLP
825 8th Avenue
New York, NY 10019
212-474-1888

From: Su, Henry C. <hsu@constantinecannon.com>
Sent: Monday, July 26, 2021 5:22 PM
To: Retley Locke <rlocke@cravath.com>
Cc: Michael Zaken <mzaken@cravath.com>; Allison Kempf <akempf@cravath.com>; Xhesi Hysi <xhysi@cravath.com>
Subject: RE: In the Matter of Illumina, Inc. & GRAIL, Inc. - Notice Regarding Use of Confidential Information

Dear Retley,

I am confirming receipt.

Best,
Henry

From: Retley Locke <rlocke@cravath.com>
Sent: Monday, July 26, 2021 4:35 PM
To: Su, Henry C. <hsu@constantinecannon.com>
Cc: Michael Zaken <mzaken@cravath.com>; Allison Kempf <akempf@cravath.com>; Xhesi Hysi <xhysi@cravath.com>
Subject: In the Matter of Illumina, Inc. & GRAIL, Inc. - Notice Regarding Use of Confidential Information

Counsel,

As part of the Administrative Trial for *In the Matter of Illumina, Inc. & Grail, Inc.* (Dkt. No. 09401) set to begin on August 24, we have submitted a proposed list of documents and testimony we intend to use as trial exhibits. This list includes

Per our obligation under the Scheduling Order, we are providing you with notice that we intend to use the documents
 and any associated family members produced by Freenome and testimony provided by Freenome witnesses listed
 below as trial exhibits, pursuant to 16 C.F.R. § 3.45(b).

Documents	
FRNM00000002	FRNM00000781
FRNM00000126	FRNM00000792
FRNM00000254	FRNM00000902
FRNM00000256	FRNM00001075
FRNM00000279	FRNM00001086
FRNM00000284	FRNM00001143
FRNM00000297	FRNM00001158
FRNM00000298	FRNM00001173
FRNM00000325	FRNM00001192
FRNM00000375	FRNM00001197
FRNM00000403	FRNM00001365
FRNM00000458	FRNM00001582
FRNM00000463	FRNM00001625
FRNM00000475	FRNM00001687
FRNM00000476	FRNM00001706
FRNM00000537	FRNM00001886
FRNM00000568	FRNM00002438
FRNM00000577	FRNM00003402
FRNM00000580	FRNM00003406
FRNM00000586	FRNM00003408
FRNM00000618	FRNM00003414
FRNM00000629	FRNM00003428
FRNM00000702	FRNM00003431
FRNM00000742	FRNM00003480
FRNM00000755	FRNM00003510
FRNM00000770	FRNM00003534
FRNM00000771	FRNM00003534
FRNM00003535	FRNM00003621
FRNM00003558	FRNM00003623
FRNM00003581	FRNM00003685
FRNM00003583	FRNM00003703
FRNM00003587	FRNM00003708
FRNM00003588	FRNM00003709
FRNM00003593	FRNM00003710
FRNM00003595	FRNM00003873
FRNM00003619	
Testimony	
Deposition Transcript of Michael Nolan	

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

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

Scheduling Order ¶ 12.

Please confirm receipt of this notice.

Thank you,

R.G. Locke, Jr.
Cravath, Swaine & Moore LLP
825 Eighth Avenue | New York, NY 10019
T: 1 (212) 474-1943
rlocke@cravath.com

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

EXHIBIT C TO FREENOME'S MOTION FOR EXTENSION OF TIME

Su, Henry C.

From: Su, Henry C.
Sent: Thursday, August 5, 2021 4:30 PM
To: Retley Locke; Anna.Rathbun@lw.com; Gaskin, Lauren
Subject: Matter of Illumina/GRAIL, Docket No. 9401 -- Freenome's motion for in camera treatment

Dear Counsel:

Good afternoon. This is a heads-up that I will be filing today a motion for extension of time until Monday, August 9, 2021, to file Freenome's motion for in camera treatment. I will of course serve you with a copy via email.

The short of it is that Mr. Nolan (Freenome's CEO) and I are the only ones working on this motion, and due to prior commitments, we have not been able to sync during the allotted time window to go over the numerous exhibits designated by the parties. We expect to do so tomorrow and will be in a position to file a motion on the next business day. Please let me know if you have any questions.

Best,
Henry

Henry C. Su

CONSTANTINE | CANNON LLP

direct: 202.204.3504

mobile: 650.430.2754

email: hsu@constantinecannon.com

blog: Antitrust Today <https://bit.ly/2p6xP5G>

1001 Pennsylvania Ave., N.W.
Suite 1300N
Washington, DC 20004
T: 202.204.3500
F: 202.204.3501

150 California St.
Suite 1600
San Francisco, CA 94111
T: 415.639.4001
F: 415.639.4002

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. 9401

**[PROPOSED] ORDER GRANTING THIRD PARTY FREENOME HOLDINGS, INC.'S
MOTION FOR EXTENSION OF TIME TO MOVE FOR
IN CAMERA TREATMENT OF PROPOSED TRIAL EXHIBITS**

This matter comes before the Administrative Law Judge on the Motion of Third Party Freenome Holdings, Inc., pursuant to 16 C.F.R. §§ 3.22(f) and 4.3(b), for a four-day extension of the August 5, 2021 deadline for filing motions for *in camera* treatment of proposed trial exhibits, as set in the April 26, 2021 Scheduling Order. Having considered Freenome's Supporting Memorandum, and for good cause shown, the Motion is hereby GRANTED. Freenome shall have until Monday, August 9, 2021, to file its motion for *in camera* treatment under 16 C.F.R. § 3.45(b).

It is SO ORDERED.

D. Michael Chappell
Chief Administrative Law Judge

Dated: August __, 2021