

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

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In the Matter of)	
)	
Illumina, Inc.,)	
a corporation,)	Docket No. 9401
)	
and)	
)	
GRAIL, Inc.,)	
a corporation,)	
)	
Respondents.)	
_____)	

ORDER ON PENDING MOTIONS

I.

Three interrelated filings are currently pending: (1) an Unopposed Motion to Withdraw Prior Motions Related to Nonparty Caris Life Sciences (“Caris”), filed by Respondents Illumina, Inc. and Grail, Inc. on February 9, 2022 (“Motion to Withdraw”), in which Respondents request an order withdrawing Respondents’ pending motion *in limine* to preclude evidence related to Caris and withdrawing certain discovery motions and enforcement orders related to Caris; (2) a Joint Stipulation to Exclude Caris Material from the Record, filed February 9, 2022 (“Joint Stipulation”), in which the Federal Trade Commission (“FTC”) Complaint Counsel and Respondents jointly request an order approving the stipulation and withdrawing or redacting previously admitted exhibits related to Caris; and (3) a Joint Motion to Close the Record and Set a Briefing Schedule, filed February 9, 2022 (“Motion to Close the Record”) (collectively, “Pending Motions”).

By way of background, on August 5, 2021, prior to the commencement of the evidentiary hearing in this case, Respondents filed a motion *in limine* to preclude admission of certain Caris-related exhibits proffered by Complaint Counsel, based upon Caris’ alleged refusal to comply with valid subpoenas issued to Caris during discovery to produce relevant documents and deposition testimony. The ruling on this motion was deferred in light of the subpoena enforcement request, referenced below, that was then before the Commission. August 25 Bench Order at 2; Final Prehearing Conference transcript, August 23, 2021, pp. 50-51.

On August 4, 2021, Respondents filed a motion to certify to the Commission a request for court enforcement of the document and deposition subpoenas issued to Caris. By Order

issued August 16, 2021, the motion was granted and Respondents' request for court enforcement of the subpoenas was certified to the Commission, with the recommendation that district court enforcement be sought. On August 24, 2021, the Commission ordered that the Commission's General Counsel take appropriate action to enforce the Caris subpoenas in federal district court. On September 9, 2021, the Commission's General Counsel filed a petition to enforce the Caris subpoenas in the U.S. District Court for the District of Columbia. Thereafter, the district court issued a show cause order and set a briefing schedule. Respondents state that as of the filing of the Motion to Withdraw on February 9, 2021, that action was still pending.

The adjudicative hearing in this matter commenced on August 24, 2021. On September 24, 2021, the parties completed their presentation of live testimony, but several evidentiary items remained to be completed, including obtaining discovery from Caris and resolving the related motion *in limine*; completing and admitting trial depositions of expert witnesses and any related exhibits; and completing required redactions to certain expert reports to be admitted into evidence. *See* Trial Tr. 4574-75. Accordingly, the trial was recessed on September 24, 2021 to allow completion of the above items, after which the evidentiary hearing would reconvene to resolve any pending issues and admit remaining exhibits into evidence. Since the recess, the parties have completed trial depositions of expert witnesses and have identified additional documents that each party wishes to have admitted as exhibits, including a substantial number that are subject to objections by the opposing party. The parties acknowledge in their Motion to Close the Record that there are still pending disputes regarding exhibits that will need to be resolved prior to the close of the record.

II.

As set forth in the Joint Stipulation, the parties have agreed that neither Complaint Counsel nor Respondents will rely on any Caris-related material in this matter, and each party will withdraw any Caris-related material already in evidence. The parties also request to file revised pre-trial briefs consistent with the Joint Stipulation. The parties' request to enter the Joint Stipulation is GRANTED, and the requested withdrawals or redactions of exhibits will be allowed. However, filing revised pre-trial briefs as requested by the parties is unnecessary, given that the trial has largely concluded and post-trial briefing will not, pursuant to the Joint Stipulation, rely on any Caris-related material. Accordingly, the request to file revised pre-trial briefs is DENIED.

Based on the Joint Stipulation, Respondents' request to withdraw the pending motion *in limine* as to Caris-related materials is GRANTED. However, Respondents' additional requests to withdraw their previously ruled-on motion to certify the request for court enforcement and the issued certification order are unsupported. Accordingly, because the motion to certify was previously granted and an order was issued, the request to withdraw these documents from the record is DENIED. To the extent the FTC's pending district court subpoena enforcement action is now moot based on the parties' stipulation, the appropriate remedy lies with the Commission and/or the district court.

The Joint Motion to Close the Record is DENIED as premature because the evidentiary record is presently incomplete. As explained in the procedural history above, the evidentiary

hearing must be reconvened for the purpose of admitting additional exhibits and resolving objections to those exhibits and any other outstanding evidentiary disputes.


III.

As set forth above, the pending motions are resolved as follows:

1. Respondents' Motion to Withdraw is GRANTED IN PART. Respondents are hereby permitted to file a notice withdrawing their August 5, 2021 motion *in limine* related to Caris. The Motion to Withdraw is otherwise DENIED.
2. The parties' request to enter their Joint Stipulation that neither Complaint Counsel nor Respondents will rely on any Caris-related material in this matter, and each party will withdraw any Caris-related material already in evidence, is GRANTED. It is further ORDERED that the parties shall prepare a revised JX2 that is consistent with the Joint Stipulation and the exhibit list attached thereto, to be admitted at the reconvening of the evidentiary hearing.
3. The Joint Motion to Close the Record and Set a Briefing Schedule is DENIED.

It is FURTHER ORDERED that the date for reconvening the evidentiary hearing for the purpose of completing admission of exhibits in preparation for closing the record and setting a briefing schedule shall be determined and announced after the parties have satisfactorily resolved and effectuated the withdrawal or dismissal of the Caris subpoena enforcement action. The parties are encouraged to confer and resolve all outstanding evidentiary objections before the trial reconvenes. The parties shall, by February 22, 2022, provide a Joint Status Report verifying the withdrawal or dismissal of the Caris subpoena enforcement action, or the status thereof; providing an update on any redactions to expert reports; and justifying in detail any remaining evidentiary objections.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: February 16, 2022