

Interlocutory Orders, Etc.

IN THE MATTER OF

ILLUMINA, INC.

AND

GRAIL, INC.

Docket No. 9401. Order, August 24, 2021

Order directing general counsel to enforce two nonparty subpoenas.

ORDER DIRECTING GENERAL COUNSEL TO ENFORCE NONPARTY SUBPOENAS

On August 4, 2021, Respondents filed a motion requesting that the Chief Administrative Law Judge (“ALJ”) certify to the Commission, pursuant to Commission Rule 3.38(c), 16 C.F.R. § 3.38(c), Respondents’ request for court enforcement of two subpoenas for documents and testimony to nonparty Caris Life Sciences, Inc. (“Caris”). Caris opposed the Motion, asserting that (1) Respondents waited too long to bring the Motion, risking prejudice to Caris in potentially having to comply with the subpoenas in a short time frame; (2) the information demanded by the subpoenas was unnecessarily broad; and (3) collecting and producing the necessary documents and disclosing Caris’s confidential information to a competitor would be unduly burdensome. On August 16, 2021, the ALJ granted Respondents’ Motion, certifying their request for court enforcement of the subpoenas and recommending that court enforcement be sought. Having reviewed the parties’ filings and the ALJ’s certification and recommendation, we direct the General Counsel to seek enforcement of the subpoenas in federal district court.¹

I. BACKGROUND

This dispute arises in the context of the Commission’s challenge to the proposed acquisition of Respondent GRAIL, Inc. (“GRAIL”) by Respondent Illumina, Inc. (“Illumina”). The following summary is based on allegations in the administrative complaint brought under Section 5 of the FTC Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18.²

¹ We use the following abbreviations for citations to the pleadings:

Motion:	[Sealed] Respondents’ Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences (Aug. 4, 2021)
Opposition:	Non-Party Caris Life Sciences, Inc.’s [Sealed] Response to Respondents’ Motion to Certify to the Commission a Request Seeking Court Enforcement of Document and Testimony Subpoenas Issued to Caris Life Sciences (Aug. 10, 2021)
Goswami Decl.	[Sealed] Declaration of Sharonmoyee Goswami, attached to Motion (Aug. 3, 2021)
ALJ Order:	Order Granting Motion for Certification to the Commission of Request for Court Enforcement of Nonparty Subpoena (Aug. 16, 2021)

² In addition to this administrative proceeding, Complaint Counsel also brought a parallel action in federal court seeking a preliminary injunction against the transaction. *See* Case No. 3:21-cv-800-CAB-BGS (S.D. Cal.), transferred from Case No. 21-cv-873 (D.D.C.). Complaint Counsel have since voluntarily dismissed that action.

Interlocutory Orders, Etc.

According to the Complaint, GRAIL is a diagnostics company that is “racing against several other firms” to develop and commercialize a cancer screening test that relies on blood samples to detect a range of cancers. Complaint ¶¶ 2-4, 21. Such tests, known as “multi-cancer early detection” (“MCED”) tests, are poised to revolutionize how cancer is detected and treated. *Id.* ¶¶ 1-2. If they achieve their promise, MCEDs will allow for earlier and more successful treatment of various cancers, potentially saving thousands of lives. *Id.* ¶¶ 3-4.

The Complaint alleges that GRAIL’s proposed acquirer, Illumina, is a dominant supplier of next-generation genetic sequencing platforms (“NGS platforms”) that are essential inputs to the development and commercialization of MCED tests. *Id.* ¶¶ 3, 5-6. According to the Complaint, both GRAIL and its rivals with MCED tests in development rely on Illumina’s NGS platform to sequence the short fragments of DNA in the bloodstream that may reveal the presence of cancer. *Id.* ¶ 5. Once Illumina acquires GRAIL, the Complaint alleges, Illumina’s incentives as a supplier will change. Specifically, Illumina allegedly will gain the incentive to disadvantage GRAIL’s MCED competitors who pose a threat to GRAIL by raising their costs for NGS or otherwise disrupting their efforts to develop and commercialize their products. *Id.* ¶¶ 11-12. GRAIL’s MCED competitors, the Complaint alleges, lack alternative NGS suppliers to whom they could turn in the event that Illumina engages in these tactics. *Id.* ¶ 13. If Illumina follows through on its changed incentives, the transaction allegedly would cause reduced innovation in MCED tests, as well as potentially higher costs and reduced quality and choice in such tests. *Id.* ¶ 14. Of particular relevance to the subpoenas at issue here, the Complaint alleges that [REDACTED]

[REDACTED] would be disadvantaged if Illumina were to engage in anticompetitive strategies post-transaction. *Id.* ¶¶ 46, 72. The Complaint alleges that [REDACTED]

Id. at ¶ 46.

Respondents raise a number of defenses to the Complaint, including asserting that the proposed transaction will accelerate, not retard, the development of blood-based cancer screening tests. Answer at 1. Respondents assert that GRAIL’s test is unique in that no other company has publicly disclosed a test in development that can identify such a broad range of cancers in asymptomatic patients. *Id.* at 3. Further, Respondents state that “[t]here are no ‘rivals’ to GRAIL” because “no NGS-based cancer screening tests have been launched on the market anywhere in the world.” *Id.* Respondents specifically deny the Complaint’s allegation that [REDACTED] *Id.* ¶72.

II. DISCOVERY TAKEN OF CARIS

Some discovery of Caris has occurred. In December 2020, before any case was filed, Complaint Counsel served a Civil Investigative Demand on Caris. Motion at 3; Goswami Decl. Ex. 1. In response to the CID, Caris asserted that [REDACTED]

Interlocutory Orders, Etc.

Goswami Decl. Ex. 3 at 3.³ During the pre-filing investigation, Complaint Counsel convened an investigational hearing of Dr. David Spetzler, Caris's President and Chief Scientific Officer, at which Dr. Spetzler testified under oath that [REDACTED]

[REDACTED]. Goswami Decl. Ex. 2. By rule, Respondents' counsel did not attend the investigational hearing and were not able to cross-examine Dr. Spetzler.⁴ Respondents' counsel received copies of the CID response and the investigational hearing transcript after the Complaint was filed.

On April 8, 2021, Respondents issued a subpoena *duces tecum* to Caris in the parallel district court action. Goswami Decl. Ex. 4. The subpoena sought, *inter alia*, documents relating to [REDACTED]. Respondents re-served the subpoena in the administrative proceeding after the voluntary dismissal of the federal case. Goswami Decl. Ex. 17. In the intervening four months, the parties met and conferred repeatedly in an effort to resolve disputes over the scope of the subpoena. In total, Caris states that [REDACTED]

[REDACTED] Opposition at 3. Caris asserts that such documents are confidential and proprietary and need not be produced. Goswami Decl. Ex. 14 p. 1; Opposition at 3, 8-9.

On May 21, 2021, Respondents served an administrative subpoena for a deposition of Dr. Spetzler. Goswami Decl. Ex. 18. The deposition has not yet taken place, and Caris's counsel has stated that Caris would not only withhold the responsive documents but would forbid Dr. Spetzler from testifying on the topic [REDACTED]. Goswami Decl. Ex. 23 (Emails, S. Jones to S. Goswami *et al.* (Jun. 17 and 22, 2021); S. Goswami to S. Jones *et al.* (Jun. 22, 2021)).

III. RESPONDENTS' MOTION TO CERTIFY, CARIS'S RESPONSE, AND THE ALJ'S ORDER

Facing an impasse on both subpoenas, Respondents filed the Motion seeking certification to the Commission for enforcement. Respondents' Motion explained that the Complaint referenced [REDACTED] and asserted that [REDACTED]. Motion at 1. Respondents explained that [REDACTED] but declined to cooperate with Respondents in their efforts to validate and flesh out this information. Motion at 2-4.

³ Caris also appears to have produced certain documents in response to the CID, with copies produced to Respondents. However, Respondents' counsel characterized the documents as [REDACTED]. Goswami Decl. Ex. 10 at 2.

⁴ See Commission Rule 2.7(f)(3), 16 C.F.R. § 2.7(f)(3) ("For investigational hearings [for] 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.").

Interlocutory Orders, Etc.

In response to Respondents' Motion, Caris asserted that Respondents had refused reasonable attempts at compromise regarding the scope of their requests and had instead chosen to file an "eleventh hour" Motion nine business days before trial. Opposition at 1-2. Caris also claimed that Respondents' information requests were irrelevant and excessive, particularly with regard to [REDACTED] *Id.* at 7. According to Caris, Respondents should have no need for [REDACTED] *Id.* at 8. Finally, Caris asserted that Respondents' requests imposed an undue burden on Caris because (1) Respondents sought [REDACTED] and (2) the requests would require Caris to conduct time-consuming document searches on an expedited basis. *Id.* at 8-9. Finally, although Caris acknowledged the existence of a protective order covering proprietary information of non-parties, Caris asserted that Respondents had demonstrated a lack of concern about the terms of this order by improperly supplying confidential Caris documents to a GRAIL-affiliated consultant. Opposition at 5.

The ALJ granted the Motion and recommended that the Commission seek enforcement of the subpoenas, as narrowed to the scope that Respondents' counsel indicated willingness to accept during the meet-and-confer process with Caris.⁵ Under that narrowed scope, the subpoenas would cover (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. ALJ Order at 6 n.8.

Regarding relevance, the ALJ found that the Complaint alleges Caris to be [REDACTED] [REDACTED] is among those entities whose ability to compete will allegedly be adversely affected by the acquisition. *Id.* at 4. Regarding timeliness, the ALJ determined that, while it would have been better for Respondent to have filed earlier, the record revealed that the parties were actively attempting to reach agreement on documents, and then on deposition topics, up until impasse was finally reached on August 2, 2021, with the Motion filed two days later. *Id.* at 5. Regarding alleged burden, the ALJ's reasoning was twofold. On the matter of the alleged protective order violation, Respondents had denied violating the order and had represented, among other things, that the consultant subsequently destroyed the materials; that he would not rely on them for any opinions; and that, except for outside counsel, Respondents had not received the material provided to the consultant. *Id.* Finally, as to Caris's concerns about the document search, the ALJ found that Caris's assertions of burden were conclusory and did not go beyond the imposition on subpoenaed parties that "is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* at 5-6, quoting *FTC v. Dresser Indus., Inc.*, Misc. No. 77-44, 1977 WL 1394 at *5 (D.D.C. Apr. 26, 1977).

⁵ See, e.g., Goswami Decl. Ex. 23 p. 1 (Email, S. Goswami to S. Jones *et al.*, Jun. 22, 2021); Goswami Decl. Ex. 24 p. 4 (Email, S. Goswami to S. Jones *et al.*, Jun. 8, 2021).

Interlocutory Orders, Etc.

IV. ANALYSIS

The subpoenas, as narrowed, seek documents and testimony that are relevant to allegations and defenses in the case. The Complaint alleges that [REDACTED]

and that [REDACTED]

[REDACTED] is close to competing with GRAIL. The materials that Caris seeks to withhold are likely to help resolve this dispute. Therefore, we agree with the ALJ's conclusions.

Caris's objection that the materials include confidential and trade secret information does not carry the day. The traditional solution to confidentiality issues is for materials to be produced to outside counsel under a protective order similar to that in place here. *See FTC v. Dresser Indus.*, 1977 WL 1394 at *5 ("The mere fact that some of the subpoenaed material may be confidential does not, however, excuse compliance with the subpoena"; FTC protective order deemed adequate); *Dean v. Anderson*, No. 01-2599-JAR, 2002 WL 1377729, at *3 (D. Kan. June 6, 2002) ("[I]t is well settled that confidentiality does not act as a bar to discovery and is generally not grounds to withhold documents from discovery. Confidentiality concerns in many cases may be addressed with an appropriate protective order.") (citations omitted); *Barrington v. Mortgage IT, Inc.*, No. 07-61304-CIV, 2007 WL 4370647, at *1 (S.D. Fla. Dec. 10, 2007) (accord); *Aquastar Pool Prod. Inc. v. Paramount Pool & Spa Sys.*, No. CV-19-00257-PHXDWL, 2019 WL 250429, at *4 (D. Ariz. Jan. 17, 2019) ("Paramount is not entitled to withhold those materials [that contain confidential information] from Aquastar because a protective order is already in place that will prevent Aquastar from misusing the information."); *FTC v. Rockefeller*, 441 F. Supp. 234, 242 (S.D. N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (stating that an objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement"). As for the claimed protective order infraction, we concur with the ALJ. As far as the record before us shows, a violation of the protective order may not have occurred; Caris's materials apparently were not disclosed to Respondents' personnel, and the documents have since been destroyed and will have no impact on the case. Opposition Ex. 3.

Finally, we are unpersuaded by Caris's argument that Respondents are barred from enforcing the subpoenas by their delay or by having taken putatively unreasonable positions in meet-and-confer negotiations. Respondents' counsel met and conferred with Caris numerous times, reasonably compromising and reducing the scope of their requests down to what appears to be a minimum. *See, e.g.*, Goswami Decl. Ex. 12 at 1 (Email, S. Goswami to S. Jones *et al.* (May 21, 2021) stating that "we have a clear need for at least *some* documents sufficient to describe

[REDACTED] "We are not looking for every single document" [REDACTED])⁶ In response, Caris's counsel disagreed that any of the requested information regarding [REDACTED] was relevant, and stated that Caris would not only withhold the responsive documents, but would forbid

⁶ *See also*, Goswami Decl. Ex. 19 at 1 (Email, S. Goswami to S. Jones (Jun. 1, 2021), explaining that the request for [REDACTED])

Interlocutory Orders, Etc.

Dr. Spetzler from testifying on the topic. Goswami Decl. Ex. 23 (Emails, S. Jones to S. Goswami *et al.* (Jun. 17 and 22, 2021)). While we agree with the ALJ that Respondents could usefully have declared an impasse and brought the Motion earlier, we also note (as he did) that under Commission Rule 3.44(c), the evidentiary record remains open until three business days after the conclusion of trial, unless supplementation is required. Furthermore, under Commission Rule 3.51(e), “At 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.” Thus, there are multiple mechanisms by which Caris’s evidence can enter the trial record. We conclude that it is appropriate to seek enforcement of the subpoenas.

Accordingly,

IT IS HEREBY ORDERED that the General Counsel take appropriate action to enforce in federal district court (1) Respondents’ subpoena *duces tecum* to Caris Life Sciences, Inc., narrowed to cover documents sufficient to describe [REDACTED] and (2) Respondents’ subpoena for the deposition of Dr. David Spetzler, with document production to be completed within one week of the district court’s order and the deposition of Dr. Spetzler to take place promptly thereafter.

By the Commission.

Interlocutory Orders, Etc.

IN THE MATTER OF

FLEETCOR TECHNOLOGIES, INC.

AND

RONALD CLARKE

Docket No. 9403. Order, August 25, 2021

Order granting to stay the administrative proceeding.

ORDER STAYING ADMINISTRATIVE PROCEEDING

On August 13, 2021, Complaint Counsel moved to stay this administrative proceeding pending resolution of the Federal Trade Commission's motion to stay or dismiss without prejudice an action the Commission is litigating against FleetCor Technologies, Inc. and its CEO Ronald Clarke (collectively, "Respondents") in federal court, *FTC v. FleetCor Technologies, Inc.*, No. 1:19-cv-5727-AT (N.D. Ga.). Complaint Counsel's Unopposed Motion to Stay Administrative Proceedings ("Motion to Stay"). Complaint Counsel state that Respondents do not oppose the Motion to Stay. *Id.* at 1. On August 17, 2021, the Chief Administrative Law Judge certified the Motion to Stay for disposition by the Commission. We have determined to grant the requested stay.

Complaint Counsel explain that, seeking to avoid duplicative actions against Respondents in federal court and in the FTC's administrative adjudication, they have filed in the pending federal court action a motion to stay that proceeding or to dismiss it without prejudice. Motion to Stay at 2. The federal court motion will not be fully briefed until September. *Id.* Absent a stay of the administrative proceeding, the parties will have to spend resources litigating the same case in two forums. Complaint Counsel state that once the status of the federal court action has been resolved, there will be no need for duplicative litigation. *Id.* at 3.

Commission Rule 3.41(f) provides that a pending "collateral federal court action that relates to the administrative adjudication shall not stay the proceeding [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f). In this instance, where a stay at the start of the administrative proceeding will avoid unnecessary burden and expense while a pending motion to stay or dismiss without prejudice a duplicative action in federal court is resolved, we find that there is good cause to stay the Commission's administrative proceeding. Accordingly,

IT IS HEREBY ORDERED that Complaint Counsel's Unopposed Motion to Stay Administrative Proceedings is **GRANTED**;

IT IS FURTHER ORDERED that all proceedings before the Commission and the Chief Administrative Law Judge in this matter, including all filing deadlines and the evidentiary hearing currently scheduled to commence on January 25, 2022, are hereby stayed pending further order by the Commission; and