

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

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

**ORDER ON RESPONDENTS' MOTIONS
TO REOPEN EVIDENTIARY RECORD**

I.

On June 7, 2022, Respondents Illumina, Inc. (“Illumina”) and Grail, Inc. (“Grail”) filed a motion to reopen the evidentiary record in this matter for the purpose of admitting additional exhibits (“Motion”). Federal Trade Commission (“FTC”) Complaint Counsel filed an opposition on June 17, 2022 (“Opposition”). Respondents filed a supplement to the Motion on June 24, 2022, seeking admission of one additional proposed exhibit, which has also been opposed by Complaint Counsel on July 5, 2022 (“Supplemental Motion”). As set forth below, the Motions are GRANTED IN PART.

II.

On March 23, 2022, after completion of a multi-week evidentiary hearing, an order was issued in accordance with FTC Rule 3.44(c), 16 C.F.R. 3.44(c), closing the evidentiary record. The parties completed briefing on May 25, 2022, including submission of post-trial briefs, proposed findings of fact and conclusions of law, and replies thereto. Closing arguments were heard on June 8, 2022.

In their Motion and Supplemental Motion, Respondents request that the record be reopened to admit certain documents, identified by Respondents as RX4059 through RX4063.

Rule 3.51(e)(1) provides:

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.

16 C.F.R. § 3.51(e)(1).

The “good cause” standard in Rule 3.51(e)(1) is interpreted to “require a showing that the action sought could not have been achieved despite the diligence of the party making the request.” *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 207, at *10 (Oct. 22, 2009). Demonstrating due diligence in this context means demonstrating “a bona fide explanation for the failure to introduce the evidence” at the trial. *In re Polypore Int'l, Inc.*, 2010 FTC LEXIS 62, *2-3 (July 19, 2010).

In connection with a request to reopen the record, it is also appropriate to consider the probative value of the proffered evidence, whether the evidence is cumulative, and whether reopening the record would be prejudicial to the opposing party. *Polypore*, 2009 FTC LEXIS 207, at *17. Moreover, “[t]he purpose of reopening the record before a final decision has been reached is to enable the fact finder to ‘have all of the facts upon which it can render full justice on the merits’ of the action.” *Polypore*, 2009 FTC LEXIS 207, at *16 (citation omitted). Thus, reopening the record to admit newly discovered, relevant evidence that becomes available prior to issuance of a decision, may be appropriate to further the interests of fairness and justice. *Id.* at *16-17.

III.

In summary, RX4059, RX4060, and RX4061 are recently issued reports reciting information released by Ultima Genomics, Inc. (“Ultima”) describing Ultima’s next generation sequencing (“NGS”) instruments, including the specifications and Ultima’s claims as to performance and costs. RX4062 is a recent report of an announcement by BGI Genomics Co., Ltd. (“BGI”)’s U.S. affiliate MGI Tech Co., Ltd. (“MGI”) that it will make certain sequencing products available in the United States beginning August 29, 2022. RX4063 is a recent press release issued by Exact Sciences Corp. (“Exact”) announcing it has entered into a long-term supply agreement with Ultima. Respondents assert that the proposed exhibits constitute “relevant and probative evidence that impending NGS entry is imminent and will constrain Illumina’s” alleged ability to harm competition. Motion at 3; *see also* Supplemental Motion at 3.

Respondents have satisfied the requirement of due diligence for each of the proposed exhibits because each constitutes newly available information. *See Polypore*, 2009 FTC LEXIS 207, at *13 (holding that due diligence met where evidence was not available before the close of the record).

Respondents have failed to provide a sufficient basis for reopening the record with respect to RX4059-RX4061. These proposed exhibits are not reliable for the truth of the matters asserted in them, and therefore cannot be considered probative. For example, RX4059 appears to be an industry analyst report, expressly “prepared solely for the use of” an identified, unknown individual. The report recites Ultima’s assertions and claims and includes an analyst’s opinion on Ultima’s potential impact. The truth of the claims made in the document, similar to those

reported in RX4060 and 4061, cannot be assumed. In addition, the opinions of lay observers based on those claims are not relevant. *See, e.g.*, RX4061 (asserting that “Genomics Startup [is] Exiting Stealth” mode by releasing NGS sequencer information for the first time). Moreover, because the hearing has been completed, such multi-level hearsay cannot be appropriately tested by cross-examination. Ultimately, any probative value of these documents is outweighed by the potential prejudice in admitting the documents at this late stage of proceedings.

RX4062 is an internet article reciting, among other things, BGI’s announcement of its intent to “make its CoolMPS sequencing chemistry and DNBSeg-G400 sequencer commercially available in the US starting Aug. 29, the day a certain Illumina patent is set to expire.” RX4062. The likelihood that BGI will in fact begin sales, as asserted in the article, and the truth of other details reflected therein, cannot be tested, and Complaint Counsel cannot respond on the merits at this late stage of the proceedings without suffering prejudice. However, RX4062 is sufficiently reliable to show that BGI, in fact, intends to begin making sales as announced, which has some independent relevance on the issue of the availability of alternatives to Illumina’s NGS. Moreover, the fact of BGI’s announcement is not cumulative, and reopening the record to admit RX4062 for this limited purpose will not cause undue prejudice to Complaint Counsel.

RX4063, a press release issued publicly and directly by Exact, is sufficiently reliable to constitute evidence that Exact and Ultima have, in fact, entered into a long-term supply agreement under which Ultima will provide Exact access to its NGS products. This evidence is relevant, not cumulative, and allowing the document for this limited purpose will not cause undue prejudice to Complaint Counsel.

Accordingly, the record may be reopened to receive RX4062 and RX4063 for the limited purposes discussed herein. *Polypore*, 2009 FTC LEXIS 207, at *16-17 (holding that “[t]he purpose of reopening the record before a final decision has been reached is to enable the fact finder to ‘have all of the facts upon which it can render full justice on the merits’ of the action” . . . and admitting “newly discovered, relevant evidence” to further the “‘interest[s] of fairness and justice’”) (citation omitted).

IV.

In accordance with the foregoing, Respondents’ Motions are GRANTED IN PART. It is hereby ORDERED that the record in this matter is reopened and RX4062 and RX4063 are admitted for the limited purposes described in this Order and for no other purpose. Respondents’ Motions are otherwise DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 6, 2022