PUBLIC

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' MOTION TO REOPEN EVIDENTIARY RECORD

I.

On July 25, 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 one additional exhibit ("Motion").[1] Federal Trade Commission ("FTC") Complaint Counsel filed an opposition on August 3, 2022 ("Opposition"). As set forth below, the Motion is GRANTED.

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, Respondents request that the record be reopened to admit one additional document, identified by Respondents as RX4064.

Rule 3.51(e)(1) provides:

[1] By Order issued July 6, 2022, previous motions by Respondents to admit additional exhibits were granted in part and denied in part.

> 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.

RX4064 is a Form 8-K filing made by Illumina to the United States Securities and Exchange Commission in which Illumina reported it had entered into a settlement and license agreement between Illumina and BGI Genomics Technology Co. ("BGI") on July 14, 2022 ("July 14 Settlement Agreement"). In the Form 8-K filing, Illumina states that the July 14 Settlement Agreement resolves certain patent and antitrust claims between the two companies. Complaint Counsel asserts that the Form 8-K filing consists of vague statements about a litigation settlement and a temporary pause in future litigation between Illumina and BGI. Complaint Counsel further asserts that once the litigation standstill provided under the Settlement terminates in 2025, Illumina is free to sue BGI again.

Respondents have satisfied the requirement of due diligence because RX4064 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). Further, RX4064 is sufficiently reliable to show that Illumina and BGI entered into a Settlement Agreement on July 14, 2022, that resolves certain patent and antitrust claims between the two companies. However, RX4064 is not probative of whether the July 14 Settlement Agreement resolves all patent and antitrust claims between Illumina and BGI, whether Illumina may sue BGI in the future, or whether, as claimed by Respondents, BGI can launch its sequencers in the United States without concerns about patent litigation. The fact that Illumina and BGI entered into the July 14 Settlement Agreement is not cumulative and reopening the record to admit RX4064 for this limited purpose will not cause undue prejudice to Complaint Counsel.

Accordingly, the record will be reopened to receive RX4064 for the limited purpose 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' Motion is GRANTED. It is hereby ORDERED that the record in this matter is reopened and RX4064 is admitted for the limited purpose described in this Order and for no other purpose.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 8, 2022