PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

RESPONDENTS' SUPPLEMENTAL MOTION TO REOPEN THE RECORD AND ADMIT TWO ADDITIONAL EXHIBITS

Pursuant to 16 C.F.R. § 3.43(b), 3.51(e)(1) and the April 26, 2021 Scheduling Order, Respondents Illumina, Inc. ("Illumina") and GRAIL, LLC ("GRAIL") ("Respondents"), respectfully request that the Court reopen the proceeding to admit RX4065 and RX4066 (the "Additional Exhibits") into evidence. The Additional Exhibits should be admitted because they are relevant, not cumulative and admitting them will not cause undue prejudice to Complaint Counsel. (July 6, 2022 Order on Resps.' Motions to Reopen Evidentiary Record (reopening the record to admit exhibits because they are "relevant, not cumulative", and would not cause undue prejudice to Complaint Counsel); Mar. 10, 2022 Order on Admissibility of Exhibits at 6 (admitting certain Open Offer Exhibits because they were "offered to show additional Open Offer signatories that did not exist at the time of trial" and which did not require "any additional discovery . . . to avoid undue prejudice").

On July 29, 2022, [redacted] became the eleventh Illumina customer (and putative MCED developer) to sign Illumina's Open Offer (RX4065 (Illumina) at 1), as well as an addendum to the Open Offer to include additional benefits for [redacted] (RX4066

(Illumina) at 1.) Up until this point, and in the run-up to trial, [redacted] and Illumina had been unable to come to terms on a supply agreement. [redacted] Now, nearly a year after trial began and on the eve of this Court's initial decision, [redacted] has decided to sign the Open Offer.

[redacted]

The fact that [redacted] has now signed the Open Offer is a significant development that the Court should consider in determining whether this Transaction is substantially likely to lessen competition. Complaint Counsel must account for the "real world effects" of the Open Offer to show that such alleged competitive harm is likely. *United States v. AT&T Inc. (AT&T I)*, 310 F. Supp. 3d 161, 241 n.51 (D.D.C. 2018), *aff'd (AT&T II)*, 916 F.3d 1029 (D.C. Cir. 2019). Such a showing requires proving that, notwithstanding the Open Offer, Illumina has an incentive and ability to foreclose GRAIL's putative rivals. As Respondents addressed at length in their post-trial papers, the Open Offer addresses, point-by-point, each of the foreclosure concerns raised by Complaint Counsel and customers. (*See* Resps.' Post-Trial Br. at 154–70.) Courts have found similar proposals sufficient to address alleged anticompetitive harm in vertical mergers. *See, e.g., AT&T II*, 916 F.3d at 1042–43 (holding that "Turner Broadcasting's

irrevocable offers of no-blackout arbitration agreements" made the merger "unlikely to afford Turner Broadcasting increased bargaining leverage", the government's primary theory of harm). [redacted] signing of the Open Offer is relevant and probative evidence that bears on whether Illumina has the incentive and ability to foreclose GRAIL's putative rivals, and that yet again reflects customer interest in the manifest benefits and robust protections of the Open Offer.

I. LEGAL STANDARD

Under Commission Rule 3.51(e)(1), at any time from the close of the hearing record until the filing of the initial decision, the Court may reopen the proceeding for the reception of further evidence for good cause shown. 16 C.F.R. § 3.51(e)(1); *see also In re Polypore Int'l, Inc.*, 2009 WL 3775105, at *2 (Oct. 22, 2009). To determine whether to reopen the proceeding under Rule 3.51(e)(1), this Court has considered the same four factors the Commission considers when it must determine whether to reopen proceedings: "(1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party." *Polypore*, 2009 WL 3775105, at *5 (citing *In re Brake Guard Prods., Inc.*, No. 9277, 125 F.T.C. 138, 248 n.38 (Jan. 15, 1998)).

II. ARGUMENT

A. Respondents Can Demonstrate Due Diligence.

Respondents can demonstrate due diligence in admitting the Additional Exhibits now. Since [redacted] only signed the Open Offer late last week, Respondents could not have included this exhibit at any earlier time despite their diligence. *See In re Otto Bock HealthCare N. Am., Inc.*, 2018 WL 4627651, at *2 (Sept. 18, 2018) ("Respondent has demonstrated that it could not have included [the additional exhibits] on its Final Proposed Exhibit List by the

[deadline] despite its diligence, and thus has established 'good cause' for adding these exhibits.").

B. The Additional Exhibits Are Probative of the Open Offer's "real world effects" on Alleged Competitive Harm.

The Additional Exhibits are also probative. *See* 16 C.F.R. § 3.43(b). The Open Offer will "allay any concerns relating to the Transaction, including that Illumina would disadvantage GRAIL's potential competitors after the Transaction by increasing their sequencing prices or by withholding access to Illumina's latest innovations" in NGS. (PX0064 (Illumina) at 1.) Complaint Counsel argues that even though [redacted] have signed the Open Offer, or signed supply agreements that incorporate elements of the Open Offer, "a mere signature does not mean that the competitive intensity pre-Acquisition has been restored."[1] (CC Post-Trial Br. at 168, n.111.) But the fact that [redacted] *has* signed the Open Offer, is relevant evidence showing that Complaint Counsel's concerns about the Open Offer are unfounded and demonstrating sustained customer interest in the Open Offer.

As Complaint Counsel emphasized in its post-trial papers, [redacted]

[1] Complaint Counsel took this position only after [redacted] had signed the Open Offer. In its pretrial brief, Complaint Counsel had argued that because [redacted] had signed the Open Offer, it could not remedy the alleged competitive harm. (CC Pretrial Br. at 5.)

[redacted]

Complaint Counsel must also account for the "real world effects" of the Open Offer to show that such alleged competitive harm is likely. *AT&T I*, 310 F. Supp. 3d at 241 n.51. That [redacted] has signed the Open Offer is probative of the fact that Illumina is legally obligated to refrain from disadvantaging [redacted] in the ways Complaint Counsel has alleged. The agreement is also probative of [redacted] views of the viability of the Open Offer, as it casts new light on [redacted]

These are "critical elements for evaluating" Complaint Counsel's claims. *See Polypore*, 2009 WL 3775105, at *6 ("If Daramic has, after the close of the record, potentially lost a significant customer, as proffered by Respondent, such evidence would directly bear on Respondent's market share and power to control prices -- critical elements for evaluating the Section 7 and monopolization charges.").

C. The Additional Exhibits Present New Facts.

The Additional Exhibits are not cumulative. Because [redacted] did not sign the Open Offer until just last week, the Additional Exhibits present new facts that did not exist at the time of trial. *See United States v. Magleby*, 241 F.3d 1306, 1316 (10th Cir. 2001) ("Evidence is cumulative if repetitive, and if the small increment of probability it adds may not warrant the time spent in introducing it.").

D. The Additional Exhibits Will Not Prejudice Complaint Counsel.

Finally, the admission of the Additional Exhibits will not unfairly prejudice Complaint Counsel, who took extensive discovery about [redacted] views of the Open Offer and was able to freely question [redacted] about the Open Offer and its concerns with the Transaction. [redacted] *See Otto Bock*, 2018 WL 4627651, at *3 (noting that Complaint Counsel would not be prejudiced by admission of additional exhibits when they had elicited testimony about said topic). The Additional Exhibits provide additional relevant context to testimony Complaint Counsel elicited; if a customer has taken the position in Court that the Open Offer is inadequate—as [redacted] did during the Trial—it is relevant evidence that the customer subsequently agreed to those terms. The Court should not allow Complaint Counsel to avoid these facts simply because the evidence did not manifest until now.

III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this motion be granted and the Additional Exhibits be admitted.

Dated: August 6, 2022

Respectfully submitted,

/s/ Sharonmoyee Goswami

Christine A. Varney
David R. Marriott
Sharonmoyee Goswami
Jesse M. Weiss
Michael J. Zaken
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000
cvarney@cravath.com
dmarriott@cravath.com
sgoswami@cravath.com

Counsel for Respondent Illumina, Inc.

Michael G. Egge
Marguerite M. Sullivan
Anna M. Rathbun
David L. Johnson
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, D.C. 20004
Telephone: (202) 637-2200
michael.egge@lw.com

Alfred C. Pfeiffer
505 Montgomery Street
Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
al.pfeiffer@lw.com

Counsel for Respondent GRAIL, LLC

PUBLIC

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

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

[PROPOSED] ORDER

Upon consideration of Respondents Illumina, Inc. and GRAIL, LLC's ("Respondents") Supplemental Motion to Reopen the Record and to Admit into Evidence Two Additional Exhibits, it is hereby

ORDERED, that Respondents' motion is GRANTED, and it is further

ORDERED, that good cause exists for Respondents to amend its Final Exhibit List and to admit RX4065 and RX4066 into evidence.

Date: _____

D. Michael Chappell
Chief Administrative Law Judge

RX4065
FILED *IN CAMERA*

RX4066
FILED *IN CAMERA*

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

Complaint Counsel
U.S. Federal Trade Commission
Susan Musser
Stephen A. Mohr
Jordan S. Andrew
Sarah Wohl
Stephanie Bovee
Peter Colwell
Eric Edmondson
Paul Frangie
Samuel Fulliton
Lauren Gaskin
David Gonen
James Wells Harrell
Matthew Joseph
Wade D. Lippard
Sebastian Lorigo
Dylan P. Naegele
Joseph Neely
Brian O'Dea
Nicolas Stebinger
Nicholas Widnell

Counsel for Respondent Illumina, Inc.
Cravath, Swaine & Moore LLP
Christine A. Varney
David R. Marriott
Sharonmoyee Goswami
Jesse M. Weiss
Michael J. Zaken

Counsel for Respondent GRAIL, LLC
Latham & Watkins LLP
Michael G. Egge
Marguerite M. Sullivan
Alfred C. Pfeiffer, Jr.
Anna M. Rathbun
David L. Johnson

August 9, 2022

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

Counsel for Respondent Illumina, Inc.