

**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 GRANTING RESPONDENTS' MOTION
TO REOPEN EVIDENTIARY RECORD**

I.

On August 8, 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 two additional exhibits (“Motion”). Federal Trade Commission (“FTC”) Complaint Counsel filed an opposition on August 17, 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 two additional documents, identified by Respondents as RX4065 and RX4066.

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.

Respondents request admission of RX4065, a copy of a supply agreement, referred to in the record as the “Open Offer,” signed by a particular customer on July 29, 2022, and of RX4066, an addendum to that supply agreement with provisions specific to that customer, also dated July 29, 2022. Respondents have satisfied the requirement of due diligence because RX4065 and RX4066 constitute newly available information. *See Polypore*, 2009 FTC LEXIS 207, at *13 (holding due diligence was met where evidence was not available before the close of the record). RX4065 and RX4066 are not cumulative, as they are new evidence that this specific customer signed the Open Offer.

Complaint Counsel argues that RX4065 and RX4066 are not probative of this customer’s views of the viability of the Open Offer or of whether this customer’s signing of the Open Offer addresses the ways in which Illumina has the ability to foreclose this customer’s access to Illumina’s products and services. Complaint Counsel further argues admitting these exhibits would be highly prejudicial to Complaint Counsel who will have no opportunity to respond to the exhibits.

Complaint Counsel’s arguments go to the weight to be given to the exhibits. Complaint Counsel has not demonstrated that it will be unduly prejudiced by the admission of RX4065 and RX4066. First, Respondents’ Open Offer and testimony regarding it are already part of the record in this case. The proposed exhibits are offered to show an additional Open Offer signatory that did not exist at the time of trial. Second, it is not apparent that any additional discovery is required to avoid undue prejudice. Complaint Counsel took extensive discovery and elicited testimony at trial from this particular customer regarding the Open Offer. Accordingly, the record will be reopened to receive RX4065 and RX4066. *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 RX4065 and RX4066 are admitted.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 18, 2022