

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Christine S. Wilson
 Alvaro M. Bedoya

In the Matter of

**Illumina, Inc.,
a corporation, and**

**GRAIL, Inc.,
a corporation.**

DOCKET NO. 9401

**ORDER TAKING OFFICIAL NOTICE OF THE DEPARTMENT OF DEFENSE
DESIGNATION REGARDING BGI GENOMICS CO., LTD.**

On November 1, 2022, Complaint Counsel moved for the Commission to take official notice of the fact that “[t]he United States Department of Defense . . . designated BGI Genomics Co., Ltd. (“BGI”) as one of several ‘Chinese military companies operating direct[ly] or indirectly in the United States’ . . . , which U.S. persons may not invest in because the companies advance China’s ‘Military-Civil Fusion strategy’ that ‘supports the modernization goals of the People’s Liberation Army.’” Complaint Counsel’s Motion Requesting Official Notice of the Department of Defense Designation Regarding BGI Genomics Co., Ltd. at 1 (“Motion”). Respondents Illumina, Inc. and GRAIL, LLC have filed a response to rebut certain assertions in Complaint Counsel’s filing, but do not oppose the Motion. Respondents’ Response to Complaint Counsel’s Motion Requesting Official Notice of the Department of Defense Designation Regarding BGI Genomics Co., Ltd. at 1 (Nov. 14, 2022) (“Response”).

Commission Rule 3.43(f), 16 C.F.R. § 3.43(f), authorizes the Commission to take official notice of any material fact that is not subject to reasonable dispute in that it is either generally known within the Commission’s expertise, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. A material fact is one “that might affect the outcome of the suit under the governing law[.]” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

We find that the Department of Defense’s designation of BGI Genomics Co., Ltd. as a “Chinese military compan[y] operating in the United States” is not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy

cannot reasonably be questioned, as required by Rule 3.43(f). Under our precedent, official notice may be taken of references “generally accepted as reliable.” *In re Basic Research, LLC*, 2006 WL 271518, at *1 (F.T.C. Jan. 23, 2006) (citing *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984)). “Matters of official notice include those contained in public records, such as . . . records and reports of administrative bodies.” *In re S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 240 (2004) (internal citation omitted). Here the fact of BGI’s designation as a Chinese military company operating in the United States is recorded in a statement released on October 5, 2022, by the Department of Defense, Motion at Exhs. A and B, and Respondents raise no challenge as to that fact.

Commission Rule 3.43(f) also requires that a fact be material for us to take official notice of it. Respondents have argued that BGI is a viable alternative to Illumina’s NGS platform for MCED developers, Respondents’ Post-Trial Brief at 77-79, but the Initial Decision found that MCED developers were resistant to switching to BGI because of, *inter alia*, “data privacy concerns surrounding BGI’s ties to the government of the People’s Republic of China.” ID 150-51. Complaint Counsel argue that the Department of Defense’s designation confirms the testimony regarding privacy concerns and cuts against treating BGI as a legitimate alternative to Illumina. Motion at 4. Respondents reply that Complaint Counsel have not offered any evidence that the designation would force BGI to exit the United States market or would otherwise affect BGI’s viability, Response at 2-3, but Respondents do not directly address the asserted privacy concerns. Without deciding any of the disputed issues, we find that the Department of Defense designation might bear on our assessment of BGI’s potential competitive impact on Illumina and of the likelihood that Illumina’s acquisition of GRAIL will harm competition.

We therefore find the Department of Defense designation of BGI as a Chinese military company operating in the United States to be material within the meaning of Rule 3.43(f). Given that we also have found that the designation is not subject to reasonable dispute, it is properly subject to official notice.

Accordingly,

IT IS HEREBY ORDERED THAT the Commission takes official notice of the fact that the United States Department of Defense has designated BGI Genomics Co., Ltd. as a Chinese military company operating in the United States.

By the Commission.

April J. Tabor
Secretary

SEAL:

ISSUED: November 29, 2022