PUBLIC

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

In the Matter of **Illumina, Inc.,** **a corporation,** **and** **GRAIL, Inc.,** **a corporation.** **Respondents.**	**DOCKET NO. 9401**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' SUPPLEMENTAL MOTION TO REOPEN THE RECORD AND ADMIT TWO ADDITIONAL EXHIBITS

Respondents move for the fourth time since the record closed in March 2022 to admit untimely, highly misleading, and prejudicial documents that lack probative value and have not been subject to cross examination. Like Respondents' previous motions to reopen the record, the documents they now seek to admit fail to meet the threshold requirements of Rule 4.34(b), and Respondents again fail to meet their burden to show good cause for its late admission. Complaint Counsel respectfully requests that this Court deny Respondents' latest motion to reopen the record.

I. The Minimal Probative Value Is Far Outweighed by Prejudice and Tendency to Mislead

Respondents seek to admit a copy of Illumina's Open Offer and an associated amendment signed by {[redacted]} without context or explanation. Resp. Mot. at 1-2. Under Rule 3.34(b), this Court excludes evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, of if the evidence would be misleading, or… needless presentation of cumulative evidence." 16 C.F.R. §3.43.

Respondents' assertions regarding the exhibits' probative value are not only inaccurate but also elucidate the prejudicial nature of these exhibits. Respondents claim that {[redacted]} signing the Open Offer shows that (1) {[redacted]} prior concerns regarding the transaction and the Open Offer were both unfounded and not credible; (2) Illumina does not have the ability and incentive to disadvantage Grail's rivals; and (3) Complaint Counsel's concerns about the Open Offer are unfounded. Contrary to Respondents' arguments, however, the only probative value of the exhibits is that before signing the Open Offer, {[redacted]} did not have a supply agreement with Illumina (in large part due to Respondents' gamesmanship), and now it does. Additional conclusions that Respondents ask the Court to infer from these exhibits are against the weight of the evidence in the record and are misleading. Whether {[redacted]} has entered into a supply agreement is not a fact at issue in this case and has no bearing as to the ultimate issue, i.e., Illumina's ability and incentive to disadvantage Grail's rivals. The minimal probative value is therefore substantially outweighed by the prejudice to Complaint Counsel.

Respondents seek to create a false narrative that, because {[redacted]} signed the Open Offer, both {[redacted]} and Complaint Counsel's concerns regarding the transaction must be assuaged. Nothing in RX4065 or RX4066, however, demonstrates that {[redacted]} concerns about Illumina's purchase of {[redacted]} primary competitor, Grail, have been resolved. This conclusion is also contrary to the record evidence. The Court heard from multiple representatives of {[redacted]} (CCFF ¶¶4277-4302, 4955-4959, 5005, 5007-12). For instance, {[redacted]} (CCFF ¶¶4277-78, 4301). Moreover, {[redacted]

[redacted] } (CCFF ¶4299).

Similarly, { [redacted] } execution of Illumina's Open Offer is not, as Respondents claim, "relevant evidence showing that Complaint Counsel's concerns about the Open Offer are unfounded." *See* (CCFF ¶¶4500, 4537, 4584-86, 4605-06, 4619-23, 4625-27). In fact, testimony from { [redacted] } demonstrates that the Open Offer *cannot* resolve its concerns. { [redacted] } (CCFF ¶5008). { [redacted] } (CCFF ¶5009, *see also* CCFF ¶¶5010-12). Nevertheless, Respondents suggest that the exhibits are probative of "{ [redacted] } views of the viability of the Open Offer," even though neither exhibit contains any statement from { [redacted] } regarding whether or not the Open Offer is "viable."[2] Resp. Mot. at 5. The testimony of { [redacted] } regarding why the Open Offer is insufficient to resolve its concerns is more probative. *See* (CCFF ¶¶4484-5013). { [redacted]

[1] In their motion, Respondents take a partial quote from { [redacted] } out of context in an attempt to make it appear that the risk of not signing a supply agreement with Illumina was { [redacted] } sole concern. Resp. Mot. at 2, 4 (citing CCFF ¶4300). The full quote reads { [redacted] } (CCFF ¶4300).

[2] Respondents also claim in their motion that the proposed exhibits reflect "customer interest in the manifest benefits and robust protections of the Open Offer." Resp. Mot. at 3. To the contrary, { [redacted] } and others have signed the Open Offer because they believed that they had no other choice. (*See, e.g.,* { [redacted] }.

[redacted] (CCFF ¶4955). Similarly, [redacted] (CCFF ¶5005).

Respondents also misleadingly claim that the exhibits are evidence that Illumina now lacks the ability and incentive to foreclose Grail's rivals. Resp. Mot. at 2-3. As described in Complaint Counsel's post-trial papers, however, the transaction gave Illumina the ability and incentive to disadvantage Grail's rivals notwithstanding the Open Offer. *See* (CC Post-Tr. Br. at 79-119). Dr. Scott Morton testified that [redacted] (CCFF ¶4176). MCED test developers corroborated Dr. Scott Morton's testimony, explaining that even with the Open Offer Illumina would still have the incentive to disadvantage Grail's rivals. *See* (CCFF ¶¶2608-3569). For instance, the Open Offer does not address [redacted] (CCFF ¶¶4730-31). [redacted] signing of the Open Offer also does not address the myriad ways in which Illumina has the ability to foreclose its rivals. For example, [redacted] will still have no way to guarantee that it is being provided "access to the same product services and support services… to which Grail or any For-Profit Entity has access," as the Open Offer requires. (CCFF ¶¶4500-01, 4511-17, 4521). [redacted] (CCFF ¶4585). Moreover, [redacted] (CCFF ¶4577).

Finally, Respondents argue that RX4065 and RX4066 are evidence that the "real world effects" of the Open Offer are that Illumina is legally obligated to refrain from disadvantaging {[redacted]} or other MCED test developers. The exhibits do not support such a legal conclusion, nor are they probative of whether the Open Offer sufficiently protects {[redacted]} or any other MCED test developer's interests, whether Illumina will act in accordance with the Open Offer, or whether the Open Offer is enforceable. Respondents' unsupported theoretical version of the "real world effects" of the Open Offer contradicts voluminous testimony and seeks to substitute their lawyers' advocacy for the facts adduced from MCED test developers about Illumina's actual ability and incentive to harm them and the Open Offer's inability to resolve their concerns. *See* (CCFF ¶¶ 4271-4337). {[redacted]} (CCFF ¶4994, *see also* CCFF ¶¶4271-76). {[redacted]} (CCFF ¶4993, *see also* CCFF ¶¶4303-19). {[redacted]} (CCFF ¶4321, *see also* CCFF ¶¶4320-22).

Due to their tendency to mislead and prejudice Complaint Counsel, Respondents' proposed exhibits fail to meet the basic, threshold requirement under Rule 4.34(b) and should not be admitted for that reason alone. However, even assuming that these exhibits meet the admissibility requirements under Rule 4.34(b), Respondents have failed to show good cause to reopen the record to admit them.

II. Respondents Failed to Establish Good Cause to Reopen the Record

Under the FTC Rules of Practice, an "Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown." *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 173, at *3 (Sept. 8, 2009) (citing 16 C.F.R. §3.51(e)). When deciding whether to reopen the record for supplemental evidence, this Court considers: "(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." *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 207, *10–11 (Oct. 22, 2009). Here, these factors all weigh against allowing Respondents to admit the proposed exhibits.

A. Respondents' Untimely Exhibits Lack Probative Value

Respondents' proposed exhibits lack context and fail to support the propositions for which Respondents seek to admit them, giving both exhibits little probative value. The exhibits demonstrate only that {[redacted]} signed Illumina's Open Offer agreement, not that {[redacted]} or Complaint Counsel's concerns have been resolved or that Illumina's ability and incentive to disadvantage Grail's rivals has been meaningfully diminished.[3] They also do nothing to demonstrate the "real world effects" of the Open Offer. Moreover, the exhibits are not probative of the credibility of {[redacted]} concerns, as Respondents suggest. As the record amply demonstrates, {[redacted]} had been seeking a supply agreement with Illumina since late 2020, and the

[3] Respondents claim that {[redacted]} "became the eleventh Illumina customer (and putative MCED developer) to sign Illumina's Open Offer." Resp. Mot. at 1. To the extent that Respondents' claim implies that all (or even most) of the eleven companies are developing MCED tests, it is inaccurate. Complaint Counsel understands that six of those customers, {[redacted]} are not actually developing MCED tests.

two sides have failed to reach an agreement until recently, primarily due to Illumina's delay tactics, rather than any intransigence on the part of {[redacted]}. (CCFF ¶¶4338-4399). Accordingly, the exhibits lack probative value and should not be admitted.

B. Reopening the Record Would Be Highly Prejudicial to Complaint Counsel

Admitting Respondents' exhibits would be highly prejudicial to Complaint Counsel, who will have no opportunity to respond to the exhibits. Without testimony to put this document in proper context, RX4065 and RX4066 have no probative value and can only be used in a misleading manner, to the prejudice of Complaint Counsel. Under similar circumstances in *Polypore*, this Court denied admission of an exhibit the respondent sought to admit "at this late date, after the completion of all post trial briefs, proposed findings of facts, replies thereto, and closing arguments," ruling that it "would be prejudicial, as Complaint Counsel was not able to . . . respond to the exhibit." *Polypore*, 2009 FTC LEXIS 173, *4.

C. Respondents Failed to Conduct Due Diligence

Respondents, through greater diligence, could have obtained the signed Open Offer prior to the close of the record. Respondents were able to {[redacted]} prior to the start of trial, although {[redacted]}[4] {[redacted]} attempted to secure a supply agreement with Illumina, but {[redacted]} (CCFF ¶¶4395-99). Respondents instead suggest that {[redacted]} did not negotiate in good faith and accused {[redacted]} of "opportunistic use of FTC scrutiny

[4] {[redacted]}

to exert negotiating pressure on Illumina." Resp. Mot. at 5. However, RX4065 and RX4066 contain no evidence suggesting that {[redacted]} leveraged the FTC process to gain an upper hand on Illumina in negotiations. Rather, the fact that {[redacted]} signed the Open Offer while still concerned about the transaction suggests that Illumina continues to have significant leverage over {[redacted]} as its sole supplier of a critical input. *See* (CCFF ¶¶4277-4302).[5]

D. Respondents' Untimely Exhibits Are Cumulative

Respondents' exhibits are needlessly cumulative of evidence already in the record. RX4065 and RX4066 add nothing to the copious amount of evidence already submitted to this Court given their lack of probative value to any key issue in this case.

III. Conclusion

For the foregoing reasons, Respondents have failed to meet their burden to show good cause to open the record at this late date. Moreover, Respondents have failed to meet their threshold requirement to show that the probative value of these exhibits outweigh their prejudicial effect. Complaint Counsel respectfully requests that this Court deny Respondents' motion.

[5] Illumina previously requested that {[redacted]} sign a letter in support of its acquisition of Grail, but {[redacted]} refused to do so. (CCFF ¶4366).

Dated: August 17, 2022

Respectfully submitted,

s/ Lauren M. Gaskin

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CERTIFICATE OF SERVICE

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