

Trial - Public Record

Illumina, Inc. and Grail, Inc.

9/24/2021

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1 (The following proceedings continued in
2 public session.)

3 - - - - -

4 JADA: Your Honor, the public is connected.

5 JUDGE CHAPPELL: All right.

6 Proceed.

7 MR. ANDREW: All right. Thank you, Your Honor.

8 CROSS EXAMINATION

9 BY MR. ANDREW:

10 Q. Dr. Fiedler, speaking again about the amended
11 supply agreement between Illumina and FMI, you did not
12 sign the supply agreement. Is that right?

13 A. No, I did not.

14 Q. It was signed by Cynthia Perettie, the then CEO
15 of FMI, right?

16 A. That is correct.

17 Q. And you had very limited involvement in
18 negotiating the supply agreement, correct?

19 A. That is correct.

20 Q. In fact, Cynthia Perettie would be more
21 knowledgeable about the terms of the supply agreement
22 than you. Isn't that right?

23 A. That is right.

24 Q. And Ms. Perettie would be more knowledgeable
25 about how the terms of the supply agreement would

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1 impact FMI. Isn't that right?

2 A. Yes.

3 Q. And then you also mentioned on direct that FMI
4 is a subsidiary of Roche. Isn't that right?

5 A. That is right.

6 Q. And the CEO of Roche you said is Severine
7 Schwan, right?

8 A. That's right.

9 Q. Mr. Schwan does not manage the day-to-day
10 activities of FMI, does he?

11 A. No, he does not.

12 Q. And Mr. Schwan is not involved in any of FMI's
13 purchasing decisions, is he?

14 A. No, he is not.

15 Q. And Mr. Schwan is not involved in FMI's product
16 development efforts, is he?

17 A. No, he is not.

18 Q. And you don't work with Mr. Schwan on a daily
19 basis, do you?

20 A. No, I don't.

21 Q. In fact, you only interact with Mr. Schwan on a
22 quarterly basis at an extended board meeting, right?

23 A. That is correct.

24 Q. Okay.

25 Nothing further, Your Honor.

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1 JUDGE CHAPPELL: Anything further?

2 MR. ZAKEN: Nothing further from Respondents,
3 Your Honor.

4 JUDGE CHAPPELL: Thank you, sir. You're
5 excused. You may stand down.

6 Call your next witness.

7 MS. MUSSER: Your Honor, before we get started,
8 I would just like to introduce my colleague, Dylan
9 Naegele, who I don't believe the Court has met yet.

10 JUDGE CHAPPELL: Hang on, Ms. Musser.

11 Is Mr. Marriott available?

12 MR. MARRIOTT: I am, Your Honor, jacket just
13 coming back on.

14 JUDGE CHAPPELL: All right, get that jacket on.
15 Okay, now we can go.

16 MR. MARRIOTT: Yes, Your Honor.

17 JUDGE CHAPPELL: It occurred to me that if the
18 parties are still negotiating, there is no deadline
19 today regarding JX 3. If it would help to give you
20 more time to confer, negotiate, that can be brought up
21 when we reconvene after the trial depositions.

22 MR. MARRIOTT: All right. That's helpful, Your
23 Honor.

24 JUDGE CHAPPELL: Just letting you know.

25 MR. MARRIOTT: That's helpful, Your Honor. Why

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1 don't we -- can we report back as soon as we are
2 finished with this witness?

3 JUDGE CHAPPELL: Okay, yeah. I just wanted to
4 let you know that there is no deadline today. Let me
5 know what you want to do later.

6 MR. MARRIOTT: Okay. Thank you, Your Honor.

7 MS. MUSSER: Thank you, Your Honor.

8 JUDGE CHAPPELL: Okay, thanks.

9 MS. RATHBUN: Your Honor, I just want to -- oh,
10 I think I froze there. I just want to make sure that
11 our next witness is in the waiting room because we
12 ended a little bit earlier than we had anticipated.
13 I'm not sure if Jada or Bria could let us know if
14 Mr. Velarde and his counsel are in the waiting room.

15 MS. DURIE: This is Daralyn Durie. I am
16 counsel for Mr. Velarde. I have not seen him in the
17 waiting room. Let me text him right now and see if he
18 can join.

19 MS. RATHBUN: Thank you very much, Ms. Durie.
20 (Pause in the proceedings.)

21 MS. DURIE: He indicated that he's logging in
22 now.

23 JADA: All right. I believe he's connected.

24 MS. RATHBUN: Mr. Velarde, could you please
25 turn on your camera when you have a moment? Ah, thank

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1 you.

2 Your Honor, Respondents call Jorge Velarde of
3 Singular Genomics to the stand.

4 MS. DURIE: I think his audio is not working.
5 Jorge, can you hear us?

6 MS. RATHBUN: We can't hear you.

7 Your Honor, perhaps we should take a few
8 minutes to get the technical issues worked out?

9 JUDGE CHAPPELL: Yeah, although those should
10 have been done before now, but we will do that.

11 MS. RATHBUN: Thank you.

12 JUDGE CHAPPELLE: We will take ten. We will
13 reconvene at 11:55 [sic]. We're in recess.

14 (A brief recess was taken.)

15 JUDGE CHAPPELL: Okay, we're back on the
16 record.

17 Is everyone ready to proceed?

18 MS. RATHBUN: Yes, Your Honor.

19 JUDGE CHAPPELL: I was looking at realtime, and
20 I said take ten at 10:53, but I meant to say 11:05. I
21 might have said 11:55, but ten minutes would bring us
22 to about 11:05. So everybody's here. Let's go ahead
23 and swear the witness.

24 Whereupon--

25 JORGE VELARDE

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1 a witness, called for examination, having been first
2 duly sworn, was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MS. RATHBUN:

5 Q. Good morning, Mr. Velarde. Could you please
6 state your name for the record?

7 A. Yeah. It's Jorge Velarde.

8 Q. And, Mr. Velarde, who is your current employer?

9 A. Singular Genomics.

10 Q. And what is Singular Genomics?

11 A. We're a multiomics tools developer company in
12 the genomics space.

13 Q. And if I refer to Singular Genomics as just
14 Singular, will you understand what I mean?

15 A. Yes.

16 Q. What is your current position at Singular?

17 A. Senior vice president of corporate development
18 and strategy.

19 Q. How long have you been the SVP of corporate
20 development and strategy?

21 A. Three years in October.

22 Q. And what are your responsibilities as SVP of
23 corporate development and strategy?

24 A. I oversee all of the external collaborations,
25 evaluations of potential licensing, partnering, a lot

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1 of the commercial aspects of the business.

2 Q. Mr. Velarde, would you please briefly explain
3 your educational background, beginning with college.

4 A. Sure. I have a degree in molecular biology
5 from Loyola University with a minor. I also received a
6 master's in business administration from UC Irvine.
7 That's my educational background.

8 Q. And what was your first professional position
9 after earning your MBA?

10 A. I was a research associate at Gen-Probe, I
11 believe in 1990.

12 Q. And what was your next position after that?

13 A. Yeah, I moved up through the ranks at
14 Gen-Probe, eventually became more of a scientist-level,
15 developed a drug that was taken into human clinical
16 trials for HIV. We spun a company out of Gen-Probe to
17 do that, and then returned back to Gen-Probe to do
18 business development about five or six years later, and
19 I was under that capacity for about five years with
20 Gen-Probe.

21 Q. And then -- I'm sorry.

22 A. Yeah, go ahead.

23 Q. Please continue your answer.

24 A. Sure. And then was recruited over to Illumina
25 in the 2000s, in the early stages of the company. The

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1 company was started in 1998. I joined it in 2001. I
2 was president of business development. I managed all
3 of their corporate business development and alliance
4 management functions for over 11 years.

5 I was also -- I left in 2012. I was then CEO
6 of a company called BaseHealth in San Francisco for
7 over a year and was recruited over to Illumina, as I
8 described earlier, three years ago.

9 Q. When you say you were recruited over to
10 Illumina three years ago, did you mean Singular?

11 A. I apologize, Singular. Singular, yeah, I
12 apologize. Yeah, a little early for me. More coffee.

13 Q. That's okay.

14 So turning back to Singular, does Singular have
15 any products in development currently?

16 A. Yes, we do.

17 Q. And what are those products?

18 A. We have what we are referring to as the G4
19 sequencer and a PX system as well.

20 Q. And is the G4 sequencer a next-generation
21 sequencer?

22 A. It is, yes.

23 Q. And what is the PX system?

24 A. It's a multiomics platform to essentially do
25 single-cell and spatial detection of RNA, DNA, and

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1 proteins.

2 Q. Is Singular a public company?

3 A. It is.

4 Q. Did Singular recently have an IPO?

5 A. Yes.

6 Q. I'd like to show PX 68. Do you recognize this
7 document?

8 A. Yes. That's our S-1 filing.

9 Q. And were you involved in drafting Singular's
10 S-1 filing?

11 A. Yes. I led the team that was involved both
12 internally and working with the external bankers to
13 draft that document.

14 Q. And what were the gross proceeds from
15 Singular's IPO?

16 A. \$258 million.

17 Q. And is \$258 million the amount that Singular
18 was targeting when it initially filed its IPO?

19 A. I think on public record, the initial filing
20 was for 100 million, and then it was updated.

21 Q. Did Singular consider its IPO to be successful?

22 A. Yes, very successful.

23 Q. And to what do you attribute the success of
24 Singular's IPO?

25 A. Well, I think it's just a function of where we

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1 were in our development efforts with our products
2 and -- yep, I think that's the answer, yeah.

3 Q. And when you say where Singular was in its
4 development efforts with its products, could you
5 elaborate on that a bit more, please?

6 A. Yeah. We were stealth up until that point, so
7 we never really had a public-facing -- we were never
8 really public-facing, and so not a lot of people knew
9 about us. And so once we told our story and they
10 understood where we are and how close we were to
11 commercialization, I think it was a very attractive
12 investment proposition, and obviously it's all entailed
13 in the S-1.

14 Q. So I want to turn to Singular's
15 commercialization plans, and I just want to remind you,
16 Mr. Velarde, we are in the public session currently, so
17 if there are any questions that you would feel more
18 comfortable answering in an in camera session, please
19 just let me know, but I believe that all my questions
20 are suitable for the public session.

21 A. Okay.

22 Q. When does Singular plan to launch its G4 NGS
23 system?

24 A. Yeah, we're going to be commercially launching
25 at the end of the year and shipping systems in the

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1 first half of next year.

2 Q. And can you please describe, in general, what
3 is Singular's commercialization strategy? By that I
4 mean, are there phases of the strategy that Singular
5 is -- has decided on?

6 A. Well, yeah, we have a process that we've gone
7 through to get us to where we are today, and that
8 involved developing the system, having early beta sites
9 for that system, and then we're in the process now of
10 having our early access program, which involves
11 shipping the system to early access partners.

12 And then we will, obviously, during that
13 process generate data, tech notes, publications on the
14 system to support the commercial launch at the end of
15 the year and -- for us to be able to ship systems in
16 the first half of next year.

17 Q. Could you please briefly explain Singular's
18 beta test program?

19 A. Yeah. The beta test happened before the IPO.
20 What we did was we placed two different systems
21 independently in Sanford Burnham and Fate Therapeutics,
22 and they ran those systems -- I believe it was three
23 runs with certain expectations of what those -- that
24 output would be for the beta systems. The runs were
25 good, they were successful, and we also published that

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1 data with our IPO. I believe you have some documents
2 around that.

3 Q. And I think you alluded to this, but did
4 Singular's beta test partners use the sequencers
5 themselves?

6 A. They did, yes.

7 Q. And has Singular completed the beta test phase?

8 A. Yes, we have.

9 Q. And does Singular consider that the beta test
10 phase was successful?

11 A. Yes, we do.

12 Q. How about the early access program? Could you
13 please briefly explain the early access system to us?

14 A. Sure. The early access program is a threefold
15 kind of -- strategically, it serves three different
16 purposes for us. One is that we want to work with
17 leading key opinion leaders in the field. Second is
18 for us to generate data that we can use to support our
19 commercial launch, whether that's in the form of just
20 raw data, tech notes, or potential publications. And
21 then third, we're engaged with potential customers as
22 well, ones that would be viable customers when we
23 launch our system commercially.

24 Did that answer your question?

25 Q. Yes, thank you.

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1 A. Yep.

2 Q. And so what is the current status of the early
3 access program?

4 A. Right. We've completed one, we're in the
5 process of another, and we've just recently shipped to
6 a third.

7 Q. And how long will the early access program last
8 for Singular?

9 A. Yeah, we haven't picked a hard stop date for
10 it, but certainly we want to get a number of them done
11 before the end of the year.

12 Q. I'd like to show RDX 18, which is a
13 demonstrative that we provided to Complaint Counsel
14 last night with no objection.

15 Mr. Velarde, who is Drew Spaventa?

16 A. Drew is one of the founders and the CEO of the
17 company.

18 Q. And you can see on this demonstrative, there's
19 a picture. What is -- what is that picture that we see
20 there on this demonstrative?

21 A. That is the G4 NGS sequencer.

22 Q. And who is BIDM Health -- sorry, BIDMC Health?
23 Excuse me.

24 A. Yeah, it's Beth Israel Deaconess Medical
25 Center. It's the medical school with Harvard. Ioannis

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1 Vlachos is a member -- a professor at Harvard. He's
2 the -- he's also an associate member of the Broad MIT
3 Institute, and he's the director of the Spatial
4 Genomics Core Center there at Harvard University.

5 Q. And is BIDMC Health an early access customer of
6 Singular?

7 A. Yes, it is. It's the first that I just
8 mentioned that we completed.

9 Q. And what was -- strike that. We can take this
10 down.

11 How, if at all, does Singular expect the early
12 access program to contribute to the successful
13 commercialization of the G4?

14 A. I'll just repeat what I said previously. The
15 pretense of why we're doing it serves the -- would you
16 like me to repeat what I said previously or --

17 Q. Yes, thank you.

18 A. Okay. Well, the first is that we are engaging
19 what we believe is to be key opinion leaders in the
20 field, which will help support the launch of the
21 system.

22 Second, we're going to be generating data with
23 those EAP sites that will obviously support the
24 commercial launch as well in the form of either tech
25 notes or publications or even presentations,

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1 potentially, by some of the users of the system.

2 And then, third, we believe that some of the
3 EAP partners could potentially be customers for us as
4 well moving down the line, so they get a look at the
5 system early, and they can determine whether the
6 applications that they run on that system is
7 interesting to them from a purchase decision or a
8 customer decision.

9 Q. Thank you.

10 Switching gears slightly, I'd like to talk
11 about other aspects of Singular's commercialization
12 efforts. Mr. Velarde, is Singular building out its
13 sales and marketing force in preparation for the launch
14 of the G4?

15 A. Yes, we are. Yes.

16 Q. And how is that process going?

17 A. It's very -- it's going very well. It's --
18 we're being very aggressive. Initially, what we're
19 focused on is making sure that we support the systems
20 in the field through the BRFASs, field application
21 scientists or customer support and solution
22 individuals, so we're aggressively hiring in that
23 space.

24 And then we're staging our commercial sales
25 group as needed to support when we actually start

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1 shipping systems and selling systems towards the end of
2 the year. So, yeah, I think our current head count is
3 well over 200 right now.

4 Q. All right, thank you.

5 Now I'd like to talk a little bit more about
6 the G4 system. So I think you mentioned, the G4 system
7 includes an NGS sequencing instrument. Is that right?

8 A. I'm sorry. Could you repeat the question?

9 Q. Does the G4 system include a sequencing
10 instrument?

11 A. The G4 system is the sequencing instrument,
12 yeah.

13 Q. And is Singular developing core consumables for
14 use with the G4 NGS instrument?

15 A. Yes, we are.

16 Q. I'd like to look at RX 3750. This is an
17 investor presentation dated August 2021. Are you
18 familiar with this presentation, Mr. Velarde?

19 A. Yes, I am.

20 Q. And let's take a look at page 5. Number 3 on
21 page 5 of RX 3750 says, "G4: A highly versatile
22 benchtop sequencer targeting applications in research
23 and clinical markets where accuracy, speed and
24 flexibility matter most."

25 Do you see that?

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1 A. Yes.

2 Q. And is this an accurate description of the G4
3 system?

4 A. Yes.

5 Q. Is Singular targeting clinical oncology
6 applications for the G4 system?

7 A. Yes.

8 Q. Let's take a look at page 6 of RX 3750, and if
9 you look under "Key Milestones," under the G4 portion
10 there, it says, "Commercial launch expected by 2021YE."

11 Do you see that?

12 A. Yes.

13 Q. And then it says, "First units expected to ship
14 in 1H 2022."

15 Do you see that?

16 A. Yes.

17 Q. And I believe you alluded to this before, but
18 Singular is -- is Singular currently on track to meet
19 those targets?

20 A. Yes.

21 Q. I'd like to talk a little bit about the
22 performance attributes of the G4. So let's turn to
23 page 10 of RX 3750.

24 So the -- this slide is titled "G4 Core
25 Sequencing Technology Targeted Performance Metrics."

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1 Do you see that?

2 A. Yes.

3 Q. And can you please -- well, strike that.

4 So if you look at the different squares on this
5 chart, in the graphs, you can see MySeq D3, NextSeq
6 2000, and NovaSeq SP.

7 Do you see that?

8 A. Yes.

9 Q. What are those, the MySeq D3, the NextSeq 2000,
10 and the NovaSeq?

11 A. Those are some instruments within Illumina's
12 portfolio of products.

13 Q. And what does "SP" refer to after NovaSeq?

14 A. Yeah, the NovaSeq has several iterations of
15 flow cells. SP is one of the flow cells.

16 Q. And I'd like to look at the square on this
17 chart that reads, "Up to 100X better accuracy."

18 Do you see that?

19 A. Yes.

20 Q. Can you please explain to us what this chart is
21 showing?

22 A. Yeah. Traditionally sequencing accuracy has
23 been characterized by Q-scores. It's based on the
24 Phred system that was developed very early on. And so
25 what it means is that, for example, here where you see

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1 Q-30, it's the -- essentially the probability of having
2 an error of 1 in 1000 when you actually generate your
3 sequence. So that equates to about 99.9 percent
4 accuracy.

5 Q. What does the standard mode in this chart refer
6 to?

7 A. Just sequencing on our system or the other
8 systems, just the standard sequencing. The HDSeq,
9 which I think is where you're going, is the -- is a
10 library prep that we have up front that involves
11 detection of very rare variants, and we think that we
12 can achieve greater than Q-30, approaching more Q-50
13 type accuracy with that specific assay on our
14 sequencer.

15 Q. According to this chart, how does the accuracy
16 of the G4 in standard mode compare with the accuracy of
17 the MySeq, the NextSeq 2000, and the NovaSeq SP?

18 A. Yeah, I think they publish -- Illumina
19 publishes Q-30 of greater than 80 percent -- depending
20 on the system and the application, greater than 80
21 percent of the bases sequenced across 150 bases, so
22 this chart basically shows the comparison of what we're
23 targeting at launch to be comparable to Illumina's
24 systems.

25 Q. And what does this show about the accuracy of

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1 the G4 using HD Seq in comparison to the Illumina
2 systems listed here?

3 A. It's -- it's a much more accurate method of
4 sequencing.

5 Q. We can take this down.

6 I'd like to pull up PX 68 at page 103, and,
7 again, PX 68 is Singular's S-1 statement. Do you
8 recall that, Mr. Velarde?

9 A. Yes.

10 Q. And I'd like to look sort of at the bottom of
11 the paragraph that says, "High Accuracy," starting
12 with, "Accuracy is also particularly important for
13 liquid biopsy applications for which the presence of a
14 target is typically very limited amongst the other
15 genetic material present in blood."

16 Do you see that?

17 A. Yes.

18 Q. And then it goes on to say, "Widely adopted
19 approaches to deal with accuracy limitations involve
20 labeling target DNA with unique molecular identifiers,
21 UMIs, and making multiple copies of these labeled
22 molecules. This approach requires sequencing greater
23 number of reads and/or sequencing a smaller number of
24 unique genomic regions. This is a brute force approach
25 and can be costly and inefficient so there is a strong

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1 motivation for using sequencing platforms that provide
2 inherent high accuracy."

3 Do you see that?

4 A. Yes.

5 Q. Can you please explain to us a bit more what
6 Singular meant by the "brute force approach" that it
7 used here in its S-1?

8 A. Yeah. So when you use unique molecular
9 identifiers, you're essentially tagging both the top
10 and the bottom strand of the double-stranded fragments
11 that you're trying to detect, and when you -- you use
12 those to both identify them to each other, but
13 during -- typically during the sequencing process, you
14 then separate them, you sequence them independently,
15 and then informatically match them back together using
16 those unique molecular identifiers.

17 And so what that leads to is potentially
18 inefficient sequencing because you're having to
19 oversequence both the top strand and the bottom strand,
20 and then you have to map those strands back to the
21 genome, and then you have to then map them to each
22 other to eventually find that match, and that leads to,
23 like I said, more sequencing necessary. And the point
24 is that with our method is that we never separate the
25 two strands, so we believe to be -- that method to be

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1 more efficient.

2 Q. Thank you.

3 Now I want to talk about the speed of
4 sequencing for Singular's G4 sequencer. Are you
5 familiar with the term "cycle time" as it relates to
6 NGS sequencers?

7 A. Yes.

8 Q. And what is cycle time?

9 A. Cycle time is the time it takes for a sequencer
10 to finish just one round of determining the base that's
11 present in the DNA or RNA that you're trying to
12 sequence. So it's the addition of one nucleotide and
13 going through that process to determine that base.

14 Q. And what is the cycle time for the G4 Singular
15 that -- the G4 sequencer that Singular is targeting?

16 A. We are targeting a 2.5-minute cycle time.

17 Q. Has Singular achieved this cycle time?

18 A. In our S-1 disclosure, we have shown that we
19 have achieved somewhere between 2.7 and 4 minutes,
20 depending upon the run modes that we -- that we have.

21 Q. With a 2.5-minute cycle time, how long would it
22 take a G4 sequencer to complete a run?

23 A. It's all dependent upon the number of bases
24 that you want to sequence in your run. So you just
25 simply multiply that times the number of bases, then

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1 account for the time it takes to cluster and amplify,
2 very similar to the metrics that Illumina uses on their
3 systems, meaning what you use to measure the entire
4 sequencing time.

5 Q. Let's look again at RX 3750 at page 10, at the
6 square that says "2-3X faster chemistry cycle time."

7 Do you see that?

8 A. Yes.

9 Q. And can you explain what this graph is showing?

10 A. Yeah. It's essentially the cycle times that
11 Illumina publishes across their platforms and what our
12 intended target cycle time is for the G4. So on the
13 MySeq, it's closer to six minutes to achieve a cycle of
14 sequencing; the NextSeq 2000 on a P3 flow cell is about
15 five minutes; and then on the NovaSeq SP, it's a little
16 bit -- well, if you look at the chart, I guess it's
17 about 3 1/2 minutes or so.

18 Q. And based on this chart, how does the target
19 cycle time for the G4 sequencer compare to the cycle
20 time of these Illumina platforms?

21 A. Yeah. So for these specific platforms and
22 those specific flow cells that I mentioned, ours would
23 be faster.

24 Q. Now I'd like to talk a little bit about scale.
25 How many reads per flow cell can the G4 currently

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1 produce?

2 A. Yeah. Currently we're achieving anywhere
3 between 150 million to 200 million reads on a flow
4 cell. Our target is over 300 million per flow cell.

5 Q. And how many flow cells can be used on a G4?

6 A. Four flow cells.

7 Q. So you discussed the target of over 300 million
8 reads per flow cell. If a user was using all four flow
9 cells in a sequencing run, how many reads is Singular
10 targeting for the G4?

11 A. Yeah. So it would be over 1.2 million reads
12 with all four flow cells.

13 Q. Let's look at the data output rate square on
14 RX 3750 at page 10. What is this graph showing?

15 A. Yeah. It's comparing the MySeq, NextSeq 2000
16 P3 and the NovaSeq Flow Cell SP to the G4 on a 24-hour
17 base output. Because we have very fast cycle times, we
18 can actually achieve greater output on a 24-hour basis
19 than you could on those platforms over that same
20 period.

21 So here it shows that we can achieve 600
22 gigabases of output, which is actually higher than the
23 NovaSeq system that generates about 500 in that same
24 period, and to note, the NovaSeq is a million dollar
25 capital X equipment purchase. Ours is more in line

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1 with what you would see in a NextSeq 2000 type price
2 point.

3 Q. And in Singular's -- Singular's view, why is
4 daily output important to NGS customers?

5 A. Well, it's just a -- a function of how well you
6 can utilize your infrastructure, right? So if you have
7 a system that takes a lot longer to generate data,
8 obviously from a capital equipment and a service and a
9 time to result, it's not as beneficial as if you can
10 generate more data over a shorter period of time. In
11 clinical settings, that's very important. One-day
12 turnarounds can be very important when you're waiting
13 on a clinical result.

14 Q. Thank you.

15 And according to this chart, how does the daily
16 output rate for Singular's G4 sequencer compare with
17 the maximum daily output rate of Illumina's sequencers?

18 A. Well, just based on these examples, right, but
19 Illumina has a lot of different platforms and a lot of
20 different flow cells, so their data output rate could
21 be higher, say, on an S4 or an S1, S2 flow cell on the
22 NovaSeq versus what you see here.

23 Q. Okay. Are you familiar with the G 4x4
24 configuration for Singular's sequencers?

25 A. I am, yes.

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1 Q. And what is the G 4x4 configuration?

2 A. G 4x4 is a configuration in which we would
3 essentially have four of the G4s on a single tabletop
4 system with some integration into how they speak to
5 each other and generate data. That allows for a higher
6 output and more flexibility in your -- the way that you
7 would run your lab.

8 Q. And what is the output -- oh, excuse me. I
9 thought I heard somebody. I'm sorry.

10 What is the output level that is available with
11 the G 4x4 configuration?

12 A. Yeah, so the G4 hasn't been launched, and we
13 probably won't do that until the end of next year. So
14 it's not available now, but it's essentially four G4
15 systems, so the same output that you would achieve with
16 one, you would multiply that times four.

17 Q. Do you happen to know the output in terms of
18 terabytes that would be available for the G 4x4
19 configuration?

20 A. Terabytes are all driven by your sequencing
21 cycles that you run, but if you were to take the number
22 of reads, you can simply multiply 1.2 million reads
23 times 4, and then that's how many reads you would
24 essentially achieve on a G 4x4.

25 Q. Okay. Are you familiar with the term

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1 "paired-end sequencing?"

2 A. I am, yes.

3 Q. And just briefly, what is paired-end
4 sequencing?

5 A. Yeah, paired-end sequencing is the ability to
6 sequence on both ends of a Watson Crick strand, so it's
7 both coming from the 3 prime end or the 5 prime end.

8 Q. And will the G4 offer paired-end equivalent
9 sequencing?

10 A. Yes. We have our own proprietary paired-end
11 method.

12 Q. Does Singular believe that the metrics we just
13 discussed make the G4 a viable alternative to
14 Illumina's platforms?

15 A. Certainly, yes.

16 Q. And why is that?

17 A. For all the essential KPIs that we just went
18 through, the key performance indices of the system.

19 Q. Did Singular consider a customer's ability to
20 switch from Illumina platforms to the G4 system when it
21 designed the G4 system?

22 A. Well, we designed our system so that we could
23 meet our customers' needs, and currently one of the
24 things that we would obviously have to overcome is both
25 the up-front library preps that all of our users have

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1 already developed and also the back-end informatics
2 required to analyze data that they've already built,
3 like they have their bioinformatics pipelines.

4 So when we designed our system, we tried to do
5 it in a way that would be the least disruptive to their
6 workflow so we could step in and offer them a system
7 that would work for their needs.

8 Q. I'd like to take a look at the S-1 again at
9 PX 68, this time on page 115, and looking at the third
10 bullet under "Our Growth Strategy," it says,
11 "Recognizing the strength of the current NGS ecosystem,
12 we have designed our G4 Integrated Solution to
13 seamlessly integrate into existing NGS workflows with
14 plug and play interoperability both upstream and
15 downstream."

16 Do you see that?

17 A. Yes.

18 Q. And can you please explain for us what "plug
19 and play interoperability, both upstream and
20 downstream" means?

21 A. It's just what I stated a minute ago, right?
22 So the system's designed so that it could work with a
23 number of the library prep workflows that they've
24 already developed up front, that you have to do prior
25 to sequencing, and then as far as downstream, that

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1 refers to the informatics.

2 So, in other words, customers have developed or
3 are using their own bioinformatic workflows, and we've
4 designed the output of our system to be compatible with
5 those bioinformatic output -- workflows.

6 Q. Thank you.

7 Mr. Velarde, does Singular project that the
8 reacquisition of GRAIL by Illumina will have an effect
9 on Singular's ability to innovate in the NGS space?

10 A. I don't -- I don't think so, no.

11 Q. And does Singular project that the
12 reacquisition of GRAIL by Illumina will slow down
13 Singular's commercialization plans?

14 A. It should not slow us down, no.

15 Q. Okay.

16 I'd like to now move into the in camera
17 session, if I may.

18 JUDGE CHAPPELL: All right. At this time, we
19 will go into an in camera session. The public who are
20 calling in will be moved into a waiting room. You will
21 be brought back into the courtroom after we go back to
22 a public session.

23 I need the lead or questioning counsel for each
24 party to review the list of participants on the Zoom
25 screen, verify there are no participants in the

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1 courtroom who should not be there. If anyone is not
2 authorized to be there, you should instruct that person
3 to use the raise hand function. OpenExchange will then
4 move that person into a waiting room.

5 Let me know after you've reviewed the list. Go
6 ahead.

7 MS. RATHBUN: Your Honor, it looks good from
8 Respondents' perspective.

9 MR. NAEGELE: It looks good to Complaint
10 Counsel as well, Your Honor.

11 JUDGE CHAPPELL: All right.

12 JADA: You are good to proceed.

13 JUDGE CHAPPELL: I didn't hear that.

14 JADA: The public has been moved. You are
15 good.

16 JUDGE CHAPPELL: Okay, thank you. At this time
17 we are in in camera session.

18 (Whereupon, the proceedings were held in
19 in camera session.)

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1 (The following proceedings were held in
2 in camera session.)

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Illumina, Inc. and Grail, Inc.

9/24/2021

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Illumina, Inc. and Grail, Inc.

9/24/2021

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(End of in camera session.)

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Illumina, Inc. and Grail, Inc.

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1 (The following proceedings continued in
2 public session.)

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4 JADA: The public is connected.

5 JUDGE CHAPPELL: Okay. Proceed when ready.

6 CROSS EXAMINATION (cont.)

7 BY MR. NAEGELE:

8 Q. Mr. Velarde, do you recall that counsel for
9 Respondent asked you about Singular's IPO?

10 A. What specifically are you referring to?

11 Q. Singular's initial public offering.

12 A. No. I'm just saying specifically as the
13 question, yeah.

14 Q. Oh, I was just asking if counsel for
15 Respondents had asked you about Singular's initial
16 public offering.

17 A. She had several questions about our initial
18 public offering, yes.

19 Q. It's true that as of this morning, Singular's
20 stock is trading at 46 percent lower than its IPO
21 price, correct?

22 A. I haven't looked at our stock price, but if you
23 say so.

24 Q. All right.

25 Your Honor, I have no more questions for the

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1 witness at this time.

2 JUDGE CHAPPELL: Any redirect?

3 MS. RATHBUN: No, Your Honor.

4 JUDGE CHAPPELL: No further questions for this
5 witness.

6 All right. Thank you, sir. You're excused.
7 You may stand down.

8 THE WITNESS: Thank you.

9 JUDGE CHAPPELL: I think we're going to just
10 take an early lunch break today so we can all get our
11 notes together. We will reconvene at 2:00 p.m. That's
12 2:00 p.m. We're in recess.

13 (Whereupon, at 12:47 p.m., a lunch recess was
14 taken.)

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1 witnesses live at trial.

2 After you've completed the trial depositions,
3 you'll need to have them admitted into the trial
4 record. To make this happen, you're directed to label
5 each trial depo you want admitted with an exhibit
6 number and then list those on a JX 4 and offer those --
7 offer to admit the depositions on JX 4 when we
8 reconvene.

9 We're going to have a recess of the
10 evidentiary hearing until the depositions are
11 completed, transcribed, and finalized. I'll need the
12 parties to inform me when you have completed the
13 depositions and when we have more finality regarding
14 the Caris issue, which I will discuss shortly, and at
15 that time provide me with dates both sides are
16 available to reconvene the trial. You can do this
17 notice by email to oalj@ftc.gov.

18 When we reconvene, you should be ready to
19 offer the depositions into evidence as exhibits on
20 JX 4.

21 Let me talk a little bit about exhibits.

22 At the conclusion of the final prehearing
23 conference, most exhibits were admitted when JX 2 was
24 admitted.

25 Throughout the trial, parties have offered

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Illumina, Inc. and Grail, Inc.

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1 exhibits that have been admitted after JX 2 was
2 admitted. You are directed -- or have been directed to
3 prepare a JX 3 that lists all the exhibits that were
4 admitted after JX 2.

5 I understand you're working on that now. You
6 can offer that now or you can offer it when we
7 reconvene.

8 Does someone want to give me an update on
9 that?

10 MS. MUSSER: Yes, Your Honor.

11 Complaint counsel has been working with
12 respondents and have reached resolution on a majority
13 of issues, but there are some pending that I believe
14 we're at impasse at and are prepared to argue those
15 today at this court's convenience.

16 JUDGE CHAPPELL: How many are there that
17 are -- are they exhibits, are they categories, what,
18 that are at an impasse?

19 MS. MUSSER: There are three categories,
20 speaking on behalf of complaint counsel, where we're
21 at an impasse, I believe 15 documents total that we
22 would like to discuss. My colleague Nic Stebinger is
23 prepared to do that right now if Your Honor would
24 like.

25 JUDGE CHAPPELL: Let me hear from Mr. Marriott

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1 first.

2 MR. MARRIOTT: Thank you, Your Honor.

3 I think our perspective was that it made sense
4 to defer this question as I think there are some of
5 these 15 for which we thought there was an opportunity
6 to reach resolution, certainly I don't think as to all
7 of them. There are some as to which I don't think
8 there's likely to be any resolution. But it had been
9 my understanding that there were several at least as to
10 which there was the prospect of a resolution, and
11 Ms. Goswami is a little closer to that, Your Honor, and
12 will tell me if anything I've said is incorrect.

13 MS. GOSWAMI: That's right. And my
14 understanding from our meet-and-confer with
15 Mr. Stebinger this morning --

16 THE REPORTER: I'm sorry. Ms. Goswami, I can't
17 hear you.

18 MS. GOSWAMI: Sorry. I'll try to speak up.
19 Can you hear (inaudible)

20 THE REPORTER: No.

21 JUDGE CHAPPELL: I don't know what you did, but
22 we heard her before she moved.

23 MR. MARRIOTT: I will yield my spot to her,
24 Your Honor.

25 MS. GOSWAMI: Sorry about that.

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1 So we had a meet-and-confer with Mr. Stebinger
2 this morning, and we understood that there were at
3 least a few documents that if respondents were able to
4 reproduce that complaint counsel was willing to drop
5 those objections.

6 JUDGE CHAPPELL: All right. I'm not going to
7 hear arguments on this right now, so just hold your
8 horses both sides. I'm going to instruct you to keep
9 working, keep conferring, and when you're down to what
10 you absolutely can't agree on, notify my office by the
11 email address you're aware of, and at that time I'll
12 decide whether to reconvene just for that or whether we
13 can do it in writing.

14 Understood?

15 MS. MUSSER: Yes, Your Honor.

16 MR. MARRIOTT: Understood, Your Honor.

17 JUDGE CHAPPELL: Okay. Let me talk about
18 demonstratives.

19 Oh, also, when we do get the JX 3 ready to go,
20 I will need the parties to provide electronic versions
21 of the exhibits to my office once that's done.

22 Demonstratives marked as RXD or CXD that were
23 referred to in the testimony -- and only those that
24 were referred to in testimony -- will be included as
25 part of the record, but they are not in evidence.

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1 Let me talk some more about fact stipulations.

2 As you were advised at the beginning of trial
3 and I think during trial, I do expect the parties to
4 work together to produce an agreed-upon set of facts
5 and certain matters in the form of a joint
6 stipulation.

7 The parties should be able to agree on what the
8 record shows on many issues, such as definitions of
9 relevant terms, names of relevant personnel, their
10 titles over time, and any other undisputed facts.

11 If you agree to any joint stipulations of facts
12 or law by the time we reconvene, you can offer them at
13 the time. If not, you may still file them as you would
14 a brief at any time before or actually at the time you
15 file your posttrial briefs.

16 Any questions on that?

17 MR. MARRIOTT: None here. Thank you.

18 MS. MUSSER: No.

19 JUDGE CHAPPELL: The stipulations, like I say,
20 the cutoff would be the date the briefs are filed, so
21 you can keep working on those if you need to.

22 Let me talk about the status of this discovery
23 from Caris.

24 There was a motion in limine to exclude the
25 investigational hearing testimony of Dr. Spetzler and

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1 any evidence from Caris. There was an opposition by
2 the government.

3 I was forced to defer my ruling on that motion
4 due to the subpoena enforcement request pending before
5 the commission. We now have a commission order
6 directing general counsel to take action to enforce
7 that subpoena.

8 Is there an update on the status of this
9 discovery that I'm unaware of?

10 MS. MUSSER: Your Honor, the only update I
11 have is that the enforcement action was filed two
12 weeks ago in D.C. To date, the federal court has not
13 issued a show cause order or unsealed that filing, and
14 that's the only update we have to provide, Your Honor.

15 JUDGE CHAPPELL: Do you have any idea of how
16 long these usually take once they get to this point?

17 MS. MUSSER: I think the best estimate we had
18 was about four weeks.

19 JUDGE CHAPPELL: Okay.

20 MS. MUSSER: But I'm not sure how precise that
21 is.

22 JUDGE CHAPPELL: Was there an attempt to
23 negotiate with Caris -- and we're on the public
24 record -- after it was decided there was going to be a
25 subpoena coming from district court? Was there an

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1 attempt and was there no progress made?

2 MS. GOSWAMI: Yes, that's right, Your Honor.

3 So we actually repeatedly reached out to Caris,
4 directing them to the order both from Your Honor and
5 from the commission. And actually, we were not aware
6 that it had been filed in the district court because
7 that proceeding is under seal, but we repeatedly
8 raised this, and Caris has been unwilling to cooperate
9 in any way until there actually is a district court
10 order.

11 JUDGE CHAPPELL: Okay. Thank you.

12 Well, because this discovery is outstanding and
13 it's like tentacles on an octopus, there might be
14 additional evidence to be offered into the record
15 depending on where the trails lead when this deposition
16 is taken. In that regard, the hearing record is not
17 complete until this is resolved.

18 Commission rule 3.44(c) requires an order by me
19 closing the record three days after the completion of
20 the hearing.

21 We will reconvene after the trial depositions
22 are completed and after the issue of this Caris
23 discovery is resolved.

24 After we reconvene for the completion of that
25 evidentiary hearing, I will issue an order closing the

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1 record within the three days of that date.

2 And at that time we'll go over deadlines and
3 requirements for the posttrial briefs and proposed
4 findings of fact when we reconvene.

5 And as I said, I may or may not reconvene to
6 deal with any remaining objections on JX 3. Once I see
7 what's remaining after you have come to an impasse,
8 I'll decide whether it needs to be in writing or
9 whether we need to do it live.

10 Anything further before we recess?

11 MS. MUSSER: Not from complaint counsel.

12 MR. MARRIOTT: I don't believe so, Your Honor.
13 I think we've raised -- just looking at my list, I
14 think we've raised -- well, Your Honor is aware of the
15 issue with respect to the witness, and I believe you
16 said you'll deal with that separately.

17 JUDGE CHAPPELL: Yes.

18 MR. MARRIOTT: The only other issue I'm
19 hopeful that we can resolve, Your Honor, and that --
20 so it -- I just don't want to not mention it, which is
21 that Your Honor granted a motion in limine from
22 complaint counsel that excluded from the record a
23 declaration of an expert that had been offered by
24 respondents. And we're just looking to have that
25 declaration -- reference to it redacted from all of

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1 the expert reports. And it's been redacted from our
2 expert reports at the request of complaint counsel,
3 and we have an outstanding request to
4 complaint counsel to redact it from theirs, but it may
5 be that it's a little premature, Your Honor. I just
6 didn't want to let the court know there wasn't
7 something else we're working on, so hopefully we can
8 resolve that, too.

9 And absent that, Your Honor, I have nothing
10 else to raise.

11 JUDGE CHAPPELL: All right. That sounds like
12 that shouldn't be a problem, should it, Ms. Musser?

13 MS. MUSSER: No. We're actually working on
14 that now.

15 JUDGE CHAPPELL: Okay. All right.

16 So until we have more information and more
17 exhibits to introduce, until we reconvene, we're in
18 recess.

19 (Whereupon, the foregoing hearing was adjourned
20 at 2:18 p.m.)

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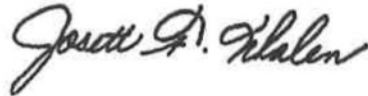
Trial - Public Record

Illumina, Inc. and Grail, Inc. 9/24/2021

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CERTIFICATE OF REPORTER

We, Susanne Bergling and Josett Whalen, do hereby certify that the foregoing proceedings were recorded by us via stenotype and reduced to typewriting under our supervision; that we are neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that we are not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



JOSETT WHALEN, Court Reporter



SUSANNE BERGLING, Court Reporter

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

In the Matter of:)
ILLUMINA, INC.,)
a corporation,)
and) Docket No. 9401
GRAIL, INC.,)
a corporation,)
Respondents.)
-----)

Virtual Proceeding Via Zoom
March 18, 2022
2:25 p.m.
TRIAL VOLUME 19
PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge

Reported by: Josett F. Whalen, Court Reporter

Trial - Public Record
Illumina, Inc. and Grail, Inc.

3/18/2022

1 APPEARANCES:

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Trial - Public Record
Illumina, Inc. and Grail, Inc.

3/18/2022

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Trial - Public Record

Illumina, Inc. and Grail, Inc. 3/18/2022

1 FEDERAL TRADE COMMISSION
2 I N D E X
3 IN THE MATTER OF ILLUMINA, INC. AND GRAIL, INC.
4 TRIAL VOLUME 19
5 PUBLIC RECORD
6 MARCH 18, 2022

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9	EXHIBITS	FOR ID IN EVID	STRICKEN/REJECTED
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11	(none)		
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13	RX		
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16	JX		
17	Number2	4595	
18	Number3	4602	
19	Number4	4603	

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Trial - Public Record

Illumina, Inc. and Grail, Inc.

3/18/2022

1 P R O C E E D I N G S

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3 JUDGE CHAPPELL: Let's go on the record,
4 Docket 9401, In Re Illumina, Inc. and GRAIL, Inc.

5 And again, hello and welcome back on the
6 record.

7 We are reconvening the trial of Docket 9401.
8 This trial is being conducted via videoconference.

9 Hang on a second. Let me check realtime. It
10 is working.

11 I'll take notices of appearance. Let's start
12 with the government.

13 MS. MUSSER: Good morning, Your Honor.

14 Susan Musser with my colleague Jordan Andrew on
15 behalf of complaint counsel.

16 JUDGE CHAPPELL: And respondents.

17 MR. MARRIOTT: Good afternoon, Your Honor.

18 David Marriott and with me Sharon Goswami for
19 Illumina.

20 JUDGE CHAPPELL: I will let you know that there
21 are some technical issues going on. I have newly
22 issued laptops that for some reason keep needing to
23 restart, today of all days, so if my Zoom camera goes
24 off, stand by, and as soon as possible I will join the
25 trial again.

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1 MR. PFEIFFER: Your Honor, just one more
2 appearance for the record, this is Al Pfeiffer on
3 behalf of GRAIL.

4 JUDGE CHAPPELL: Okay. Anyone else?
5 I'm not sure why I see a block for the public
6 line.

7 Quinn, are you there?

8 OPENEXCHANGE: Correct.

9 JUDGE CHAPPELL: Am I supposed to see that?

10 OPENEXCHANGE: You can do the same thing that
11 you just did and hide that box.

12 JUDGE CHAPPELL: I've got enough boxes.

13 Actually, no, I'm scrolling over it and it's
14 not allowing me to hide it, so -- it's asking for a PIN
15 or to show keypad, whatever that means, so...

16 All right. Let's get back to our hearing.

17 We are reconvening to admit evidence and go
18 over posttrial briefing and a few other items.

19 First I want to make sure all parties have
20 rested their case.

21 For the government?

22 MS. MUSSER: Yes, Your Honor, the government
23 has rested its case.

24 JUDGE CHAPPELL: And respondent Illumina?

25 MR. MARRIOTT: We have, Your Honor.

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1 JUDGE CHAPPELL: And respondent GRAIL?

2 MR. PFEIFFER: We have, Your Honor.

3 JUDGE CHAPPELL: Okay. When we recessed the
4 trial, the parties had requested to conduct trial
5 depositions in lieu of calling expert witnesses live at
6 trial.

7 Also, it had been determined that Caris would
8 provide relevant evidence -- could provide relevant
9 evidence and we needed to wait for a subpoena to be
10 enforced.

11 Who wants to inform the court how we ended up
12 here, without that subpoena being enforced and without
13 the Caris evidence?

14 MS. MUSSER: Your Honor, I'm happy to create a
15 record on that at your convenience.

16 JUDGE CHAPPELL: Go ahead.

17 MS. MUSSER: Respondents and complaint counsel
18 had agreed not to rely on any Caris-related evidence.
19 As such, we entered into a joint stipulation that was
20 submitted and approved by this court whereby neither
21 party would rely and submit evidence related to Caris.

22 JUDGE CHAPPELL: Hang on, hang on, hang on. I
23 understand that. And you said "had agreed." I think
24 you meant to say "have agreed" due to circumstances, so
25 let's go back way before you've agreed not to take the

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1 evidence. What the court wants to know, how did we end
2 up here? How did a subpoena not get enforced? How did
3 that even happen?

4 MS. MUSSER: Yes, Your Honor.

5 So, prior to the start of trial, there was a
6 pending subpoena enforcement action to federal -- in
7 federal court as well as a corresponding motion
8 in limine that the court had deferred ruling on.

9 Subsequently, the trial started and an act
10 of -- the Office of General Counsel, on behalf of the
11 FTC, submitted an enforcement action to the district of
12 D.C. court, and it was pending throughout the duration
13 of trial.

14 After the close of -- or after the evidentiary
15 hearing, complaint counsel and respondents met and
16 conferred and agreed to do two things: one, withdraw
17 any Caris-related evidence that had previously been
18 submitted and, second, to not rely on it further.

19 After that agreement, the parties entered into
20 a joint stipulation reflecting that as well as jointly
21 moved the commission to dismiss the pending federal
22 enforcement action in front of federal court. That
23 action has since been dismissed by the Office of
24 General Counsel. As such, there is no longer any
25 pending federal enforcement action, and the parties

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1 have entered and have agreed not to rely on that
2 evidence in this proceeding.

3 JUDGE CHAPPELL: It seems like you left a lot
4 out right there in the middle. You went to something
5 filed in D.C. court and then you jumped to the parties
6 agreed to skip the Caris evidence.

7 What about that middle part you're not
8 telling? Is there any reason why you don't want to
9 tell us that?

10 MS. MUSSER: Respectfully, Your Honor, I'm not
11 quite sure what middle part you're referring to.

12 JUDGE CHAPPELL: The enforcement proceedings
13 in district court, how is it that subpoena never got
14 enforced by the district court? How did that happen?

15 MS. MUSSER: Judge Leon did not rule on that
16 decision.

17 So it was pending before them, both parties had
18 submitted their briefings in front of the federal
19 district court, and there had been no hearing scheduled
20 nor any order at the time of dismissal.

21 As far as why Judge Leon hadn't ruled on that
22 I'm not sure, Your Honor. All I know is that both
23 parties had filed and then, in order to reach efficient
24 resolution on this matter, parties had agreed to seek a
25 joint resolution whereby we would jointly petition the

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1 commission to withdraw its motion enforcement
2 proceeding in federal court.

3 JUDGE CHAPPELL: Is anyone aware of any valid
4 defense to the enforcement of that subpoena?

5 MS. GOSWAMI: No.

6 MS. MUSSER: No. Your Honor, complaint counsel
7 was not party to the underlying enforcement proceeding
8 and so doesn't have any position on that.

9 JUDGE CHAPPELL: Mr. Marriott?

10 MR. MARRIOTT: Your Honor, I'm not aware of any
11 good basis for them not to produce the documents
12 either, which is why I expect the court would have
13 granted it, but we didn't get the order that was
14 sought.

15 JUDGE CHAPPELL: And so, based on the
16 eventuality of things not occurring, we're here without
17 the Caris evidence and everyone has agreed to move on
18 without it for the record; correct?

19 MR. MARRIOTT: Correct.

20 MS. MUSSER: Correct.

21 JUDGE CHAPPELL: I didn't hear you,
22 Ms. Musser.

23 MS. MUSSER: Correct.

24 JUDGE CHAPPELL: And GRAIL?

25 MR. PFEIFFER: That's correct, Your Honor.

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1 JUDGE CHAPPELL: Okay.

2 I'm going to get back to my last day of trial
3 agenda, and so you can follow more easily, I will let
4 you know the topic before I go into it further so you
5 can follow.

6 Let's talk about exhibits. And some of this
7 will be repetitive of what we just went over.

8 At the conclusion of the final prehearing
9 conference, most exhibits were admitted when JX 2 was
10 admitted.

11 Since the conclusion of the trial testimony,
12 the parties filed a joint motion requesting to enter
13 their joint stipulation and neither complaint counsel
14 nor respondents -- that neither complaint counsel nor
15 respondents will rely on any Caris-related material in
16 this matter and each party will withdraw any
17 Caris-related material already in evidence.

18 By order issued February 16, 2022, that request
19 was granted.

20 The parties were then directed to prepare a
21 revised JX 2 that is consistent with the joint
22 stipulation and the exhibit list attached thereto to
23 be admitted at the reconvening of the evidentiary
24 hearing, which is where we find ourselves at the
25 moment.

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1 Do the parties wish to offer the revised JX 2?

2 MS. MUSSER: Your Honor, complaint counsel
3 moves the revised JX 2 into evidence.

4 JUDGE CHAPPELL: Any objection?

5 MR. MARRIOTT: None here, Your Honor.

6 MR. PFEIFFER: No, Your Honor.

7 JUDGE CHAPPELL: Revised JX 2 is admitted.
8 (JX Number 2 was admitted into evidence.)

9 JUDGE CHAPPELL: Let's talk about JX 3.
10 Throughout the trial and after the last
11 witnesses testified, both parties offered numerous
12 exhibits.

13 By order issued March 10, 2022, the remaining
14 evidentiary disputes were resolved and the parties were
15 directed to prepare a revised JX 3 that lists the
16 exhibits that will be admitted per that order.

17 The March 10 order denied the request for
18 admission of several exhibits, including RX 4056.

19 On March 16, respondents filed a motion for
20 reconsideration of the ruling on RX 4056 and, in
21 addition, moved for admission of two new proposed
22 exhibits identified as RX 4057 and 4058.

23 I know you haven't had much time, but does the
24 government have a response to this pending motion?

25 MS. MUSSER: Yes, we do, Your Honor. The

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1 government both objects to the motion -- opposes the
2 motion to reconsider as well as opposes the admission
3 of the remaining two documents. I'm happy to go into
4 additional explanation of our reasoning at this court's
5 convenience.

6 JUDGE CHAPPELL: How much explanation would
7 that -- how much would that be?

8 MS. MUSSER: I'll go very quickly, Your Honor,
9 just to establish a record.

10 JUDGE CHAPPELL: Go ahead.

11 MS. MUSSER: On --

12 JUDGE CHAPPELL: We have -- just so we're
13 clear, the motion and the reasons for the motion and
14 for the admission are in the record in the motion filed
15 by respondents, so we're hearing the government's side
16 now.

17 Go ahead, Ms. Musser.

18 MS. MUSSER: Thank you, Your Honor.

19 First I'd like to start with RX 4056. For the
20 record, this was the exhibit that this court has
21 previously deemed as not admissible. The respondents
22 have requested that this court reconsider, saying that
23 they had not had an opportunity to present facts in
24 support of RX 4056.

25 Complaint counsel's position is, respectfully,

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1 that we do not agree. They notified complaint counsel
2 on March 3 that they intended to seek leave to file an
3 additional exhibit and chose not to include any
4 argument regarding this exhibit on their filing two
5 days later on March 5.

6 Complaint counsel provided its objections to
7 this document, and complaint counsel's position is that
8 this court previously correctly recognized that this
9 document is speculative, provides no context for how
10 consumers may use the alleged sequencer at issue, and
11 has little probative value.

12 As such, the complaint counsel's position is
13 that this court should not reconsider its previous
14 ruling and that this -- that respondents have offered
15 no good cause to admit it and the underlying source
16 material is inherently unreliable for the reasons
17 originally spelled out and has little probative
18 effect.

19 JUDGE CHAPPELL: Okay. Did you cover the other
20 two exhibits?

21 MS. MUSSER: I'll go right -- I'll continue on,
22 Your Honor.

23 The other two exhibits -- first, RX 4058, this
24 is a GenomeWeb Element Biosciences document.

25 First, complaint counsel's position is that

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1 respondents have failed to establish good cause to
2 admit this document.

3 Your Honor, respondents have previously noticed
4 this witness for a deposition and had in fact deposed
5 this witness but chose not to present this witness at
6 trial.

7 As this article recognizes, these sequencers
8 are in development for a long time such that if they
9 had presented this witness at trial, they would have
10 had the opportunity to elicit testimony relating to its
11 sequencers during the course of the administrative
12 hearing. They chose not to and instead seek to admit
13 this underlying web article. As such, we do not
14 believe that they've met their standard to show good
15 cause.

16 Likewise, they've failed to show that this
17 document comports with the requirements of rule
18 4.43(b).

19 First, this is an article from a website
20 containing double hearsay. It's a trade publication
21 showing what the company has allegedly said in a -- in
22 context that's not entirely clear.

23 Moreover, this has little probative effect in
24 that the argument doesn't -- or the article does not
25 talk about what the sequencer is used for or provide

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1 any insight as to whether the sequencer is viable for
2 commercialization of MCED tests. That's what's at
3 issue here, and this argument just general- -- or this
4 article just generally talks about the fact that a
5 sequencer is available but provides no context as to
6 what that sequencer is for and how it may be used.
7 And without that context, this article has no
8 probative effect and was -- can only be used in a
9 misleading way.

10 Third and most problematic is RX 4057, and this
11 is the Natera: Pioneers in Deceptive Medical Billing.

12 Your Honor, Hindenburg Research is a research
13 company that has a short -- is a short seller known for
14 publishing pieces to profit off of short-term stock
15 fluctuations. There was recently a New York exposé
16 that explained that what Hindenburg does is they
17 compile this quasi research and then profit off of any
18 decline in the stock to which they're publishing that
19 research on.

20 In the legal disclaimer language within this
21 document it explains that they have this position and
22 that they may profit from the publication of this
23 document. This is inherently prejudicial irrespective
24 of the fact that it's quoting sources that are unknown,
25 anonymous, and only selectively citing or providing any

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1 context for their underlying sources.

2 Finally, for this document respondents have
3 failed to show good cause in that the underlying events
4 that are purport -- that this article purports to be
5 about take place in 2017, 2018 and 2019. If the
6 respondents had wished to impeach the credibility of
7 this particular MCED witness, they could have done so.
8 They chose not to and should not be able to backdoor
9 that evidence in through unreliable and inherently
10 prejudicial information written by someone who would
11 profit off of any reputational hit that this article
12 would elicit.

13 For all of these reasons, complaint counsel
14 objects to the admission of all three documents.

15 JUDGE CHAPPELL: All right. And I normally
16 wouldn't allow a reply, but since we're going on the
17 fly here, I will ask respondents if you have anything
18 in reply, and by that I mean nothing that was included
19 in your motion, anything new and by way of a brief
20 reply.

21 MS. GOSWAMI: Yes. Just very briefly,
22 Your Honor.

23 So with respect to RX 4058, which is the
24 Element document, so it's not -- it's not right that
25 the document doesn't provide any information that's

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1 relevant to MCED testing. It provides additional
2 details about how the Element sequencing technology
3 works, and that is exactly what's relevant to
4 determining whether the sequencing can -- sequencing
5 technology can be used to support MCED testing, so
6 that's incorrect.

7 And with respect to --

8 JUDGE CHAPPELL: Remember, I said do not repeat
9 anything in your motion.

10 MS. GOSWAMI: And with respect to the other two
11 exhibits I don't have anything else to add.

12 JUDGE CHAPPELL: All right. The request to
13 admit RX 4056, 4057 and 4058 is denied based on the
14 late date it was filed and that the probative value of
15 the exhibits do not outweigh the risk of undue
16 prejudice or undue delay. The March 16 motion is
17 denied.

18 Are the parties prepared to offer the revised
19 JX 3 and the exhibits listed thereon?

20 MS. MUSSER: Yes, Your Honor, with the caveat
21 that we haven't -- that we would provide the JX 3 to
22 the court after the conclusion of this hearing given
23 this latest evidentiary ruling.

24 JUDGE CHAPPELL: All right.

25 MS. MUSSER: But we are prepared to offer the

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1 revised JX 3 into evidence and so move.

2 JUDGE CHAPPELL: Any objection?

3 MR. MARRIOTT: None here.

4 MS. GOSWAMI: No objection.

5 MR. PFEIFFER: No, Your Honor.

6 JUDGE CHAPPELL: Revised JX 3 is admitted.

7 (JX Number 3 was admitted into evidence.)

8 JUDGE CHAPPELL: Let's talk about JX 4, expert
9 deposition transcripts.

10 The parties conducted trial depositions in lieu
11 of calling expert witnesses live at trial. The parties
12 labeled each trial deposition with an exhibit number
13 and were directed to offer to admit them through a
14 JX 4 when we reconvene.

15 In the March 10 order, the parties were
16 directed to revise JX 4 to include only trial
17 depositions as they had been instructed to do.

18 Are the parties prepared to offer a revised
19 JX 4 and the exhibits listed thereon?

20 MS. MUSSER: Yes, Your Honor. We move
21 JX 4 into evidence.

22 JUDGE CHAPPELL: Any objection?

23 MR. MARRIOTT: None.

24 MR. PFEIFFER: No, Your Honor.

25 JUDGE CHAPPELL: Revised JX 4 and the exhibits

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1 listed thereon are admitted.

2 (JX Number 4 was admitted into evidence.)

3 JUDGE CHAPPELL: Regarding providing exhibits
4 to OALJ, the parties may enter into the record --
5 well, before I get to that -- it looks like my heading
6 is incorrect -- let's talk about demonstrative
7 exhibits.

8 Demonstrative exhibits that are in the record
9 may be entered by the parties marked as RXD or CXD, but
10 this would only be those demonstrative exhibits that
11 were referred to in the testimony.

12 Now let's talk about providing exhibits.

13 Please review the record and make sure that you
14 have provided all admitted exhibits plus those
15 demonstrative exhibits I just referred to to the
16 court reporter and to OALJ within seven days. I
17 require only electronic versions of exhibits.

18 Let's discuss fact stipulations.

19 As you were advised before and during trial, I
20 expect the parties to work together to produce an
21 agreed-upon set of facts on certain matters in the form
22 of a joint stipulation.

23 The parties should be able to agree to what the
24 record shows on many issues, such as definitions of
25 relevant terms, the names of relevant personnel and

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1 their titles over time, and any undisputed facts.

2 It would be particularly helpful for the
3 parties to agree on a glossary of medical and other
4 technical terms relevant to the case.

5 You may file any such joint stipulations at any
6 time before or even when you file your posttrial
7 briefs.

8 Closing the record.

9 Pursuant to commission rule 3.44(c), I will be
10 closing the record in three business days.

11 If either party feels the record is not
12 complete or that it needs to be supplemented, I need to
13 be notified by 10:00 a.m. on the third business day
14 after the last day of trial. And based on my plan to
15 adjourn very soon here, that's by 10:00 a.m. on
16 March 23.

17 Now to discuss posttrial briefs, deadlines and
18 requirements.

19 Under rule 3.46(a), proposed findings of fact
20 and posttrial briefs are due within 21 days of the
21 closing of the hearing record, and the replies thereto
22 are due within ten days of the opening briefs.

23 Rule 4.3 allows me to extend those deadlines for good
24 cause.

25 I require the parties to be thorough and

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1 careful in their briefs and especially in the replies
2 to each other's proposed findings. The reply briefs
3 and findings are very helpful to me to review the
4 extensive evidence and transcript.

5 I don't think it can be disputed that this case
6 raises complex issues. Therefore, I've determined that
7 more time is needed than the rule allows for you to
8 prepare your filings.

9 By joint motion the parties requested to file
10 concurrent posttrial briefs, proposed findings of fact
11 and conclusions of law within 25 days after the close
12 of the record and what I interpreted as a request to
13 file replies thereto within 40 days of those initial
14 filings.

15 Is that still the parties' request?

16 MS. MUSSER: Yes, Your Honor, on behalf of
17 complaint counsel.

18 MS. GOSWAMI: Yes, Your Honor, that's right.

19 MR. PFEIFFER: Yes, Your Honor.

20 JUDGE CHAPPELL: I will issue an order setting
21 forth the briefing deadlines after the close of the
22 record. That order will also specify the requirements
23 for posttrial briefs and proposed findings of fact and
24 replies thereto. There will be additional details in
25 the order on posttrial briefs. You're instructed to

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1 read and follow that order.

2 Let me talk about closing arguments.

3 Once your posttrial briefs and replies are in,
4 I will have your arguments in writing in that briefing.
5 The briefs, especially the reply briefs, are extremely
6 helpful.

7 I've been hearing oral closing arguments for
8 many, many years. And in all those years of conducting
9 trials, I've never changed my mind on any disputed
10 issue based on closing argument. Let's face it,
11 they're not evidence.

12 Thus, since I already have your opening and
13 reply arguments in the briefs, oral closing arguments
14 could be considered to be redundant and not an
15 efficient use of time and resources.

16 Oral closing arguments are not required, and
17 you can waive them. If you need it, I'll give you time
18 to consider this and confer. If both sides -- if all
19 sides decide to waive, I'll waive closing arguments; if
20 you don't, we'll have closing arguments. You can let
21 my office know within about two weeks via email what
22 you agree to.

23 Now, in the last case I held, the parties
24 already knew about this and they were ready to give me
25 an answer.

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1 Are you prepared today or do you need time to
2 confer?

3 MS. MUSSER: Complaint counsel would be willing
4 to waive if respondents would also be willing to waive,
5 but I'm happy to meet and confer off the record if you
6 prefer, Mr. Marriott.

7 MR. MARRIOTT: Your Honor, I think it would be
8 wise for us to confer with our clients if you'll give
9 us those two weeks.

10 JUDGE CHAPPELL: The people that are paying the
11 bills. Good move.

12 MR. MARRIOTT: Usually a good idea to keep them
13 in the loop.

14 JUDGE CHAPPELL: Yes. Right. And I'm not
15 forcing anybody to make a decision today. You've got a
16 couple weeks to let me know --

17 MR. MARRIOTT: Thank you.

18 JUDGE CHAPPELL: -- just by email to OALJ.
19 Okay?

20 Anything further?

21 MS. MUSSER: Not from complaint counsel.

22 JUDGE CHAPPELL: Okay. And from Illumina?

23 MR. MARRIOTT: Nothing here, Your Honor.

24 JUDGE CHAPPELL: And from GRAIL?

25 MR. PFEIFFER: No, Your Honor, nothing

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1 further.

2 JUDGE CHAPPELL: And with that, we are
3 adjourned.

4 (Whereupon, the foregoing hearing was concluded
5 at 2:50 p.m.)

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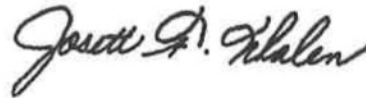
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CERTIFICATE OF REPORTER

I, JOSETT F. WHALEN, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



JOSETT F. WHALEN
Court Reporter