

**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

**COMPLAINT COUNSEL’S MOTION REQUESTING OFFICIAL NOTICE OF THE
DEPARTMENT OF DEFENSE DESIGNATION REGARDING BGI GENOMICS CO., LTD.**

Pursuant to Commission Rules 3.22 (16 C.F.R. § 3.22), 3.43 (16 C.F.R. § 3.43), and 3.54 (16 C.F.R. § 3.54), Complaint Counsel respectfully requests that the Commission take official notice of the following fact: The United States Department of Defense (“DoD”) designated BGI Genomics Co., Ltd. (“BGI”) as one of several “Chinese military companies operating direct or indirectly in the United States” [hereinafter “DoD Designation”], 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.” The DoD designation of BGI as a Chinese military company is material to Respondents’ defense that BGI’s entry could ameliorate the acquisition’s competitive harm. There can be no reasonable dispute about the existence and accuracy of the DoD Designation.

I. FACTUAL BACKGROUND

As the Initial Decision found, Illumina represented to its Board of Directors that { 

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[REDACTED] } Initial Decision, *In re Illumina, Inc., and Grail, Inc.*, No. 9401, at 77 (F.T.C. Sept. 1, 2022) [hereinafter “Initial Decision”] (citation omitted). While Illumina has argued that BGI will be an alternative NGS sequencer for MGED test developers, the Initial Decision concluded that “MGED test developers persuasively testified that they would not consider switching to BGI’s NGS platform because of the perceived low quality of BGI’s NGS instruments, pending intellectual property disputes with Illumina, and *data privacy concerns surrounding BGI’s ties to the government of the People’s Republic of China.*” Initial Decision at 150-51 (citations omitted) (emphasis added).

On October 5, 2022, after the Initial Decision, the DoD issued a press release (Exhibit A) in which it added BGI to a public list of “Chinese military companies operating directly or indirectly in the United States” (Exhibit B). Section 1260H of the National Defense Authorization Act for Fiscal Year 2021 directs the DoD to identify “Chinese military companies” operating directly or indirectly in the United States. Exhibit A at 1. Pursuant to this directive, the DoD maintains a list of Chinese military companies that “appear to be civilian entities” but nevertheless “support the modernization goals of the [Chinese] People’s Liberation Army.” Exhibit A at 1. Executive Order No. 14032 prohibits U.S. persons from making investments in the listed Chinese military companies.¹

II. THE COMMISSION SHOULD TAKE OFFICIAL NOTICE OF THE DOD DESIGNATION

Commission Rule 3.43(f) provides in relevant part that “[o]fficial notice may be taken 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

¹ See Exec. Order No.14032, Addressing the Threat From Securities Investments That Finance Certain Companies of the People’s Republic of China, 86 Fed. Reg. 30145 (June 3, 2021) (prohibiting investments in companies that “operate or have operated in the defense . . . or surveillance technology sector of the economy of the [People’s Republic of China]”); see also Kanishka Singh, *U.S. Widens Investment Ban to China’s BGI Genomics, Drone Maker DJI*, Reuters, Oct. 7, 2022, <https://www.reuters.com/business/us-adds-chinas-bgi-genomics-drone-maker-dji-investment-ban-2022-10-07> (describing how BGI was one of the companies “added . . . to a blacklist that subjects them to an investment ban for Americans”).

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accuracy cannot reasonably be questioned.” Commission Rule 3.43(f) (internal quotation marks omitted). Further, Commission Rule 3.54(a) provides that “[u]pon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented *and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.*” Commission Rule 3.54(a) (emphasis added). Thus, the Commission may take official notice of material facts not subject to reasonable dispute even though the evidentiary record is closed.

Under Commission precedent, official notice may be taken of references “generally accepted as reliable.” *In re Altria Group, Inc.*, No. 9393, 2022 WL 4199470, at *1 (F.T.C. Aug. 24, 2022) (finding facts within FDA documents to be “generally accepted as reliable” and “not subject to reasonable dispute”); *In re Basic Research, LLC*, No. 9318, 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 judicial decisions, statutes, regulations, and ‘records and reports of administrative bodies.’” *In re S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 240 (2004) (citing *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003)); *see also In re Rambus Inc.*, No. 9302, 2003 WL 22064718, at *2 (F.T.C. Aug. 27, 2003) (taking official notice of the existence of patents and information contained on the face of the patent); *In re Kentucky Household Goods Carriers Ass’n*, No. 9309, 2004 WL 2068008, at *21 n.47 (F.T.C. Aug. 31, 2004) (information contained in documents from Oregon Public Utilities Commission and Department of Transportation was appropriate for official notice). Similarly, federal courts have applied Federal Rule of Evidence 201, the federal rule upon which the Commission Rule regarding official notice is based,² to allow judicial notice (a close analogue to official notice) of government documents available from reliable sources. *See, e.g., Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (taking judicial notice of the contents of a District of Columbia Retirement Board document); *Oran v. Safford*, 226 F.3d 275, 289 (3d Cir. 2000) (taking judicial notice of

² *See e.g., Rambus*, 2003 WL 22064718, at *1-2.

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SEC filings). Given this extensive precedent, the DoD Designation is appropriate for official notice: It is the public statement of a government agency and widely available on the DoD's website. The reliability of this information cannot reasonably be called into question.

Moreover, the DoD Designation is a material fact. "A material fact is one 'that might affect the outcome of the suit under governing law.'" *In re Altria Group*, 2022 WL 4199470, at *1 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Specifically, the DoD Designation is material to Respondents' defense that BGI is a likely NGS platform competitor to Illumina that could undermine Illumina's ability to harm Grail's rivals. Respondents claimed that MCED test developers could use BGI's NGS platform to analyze patients' DNA, *see, e.g.*, Resp. Post-Tr. Br. at 77-79, despite MCED test developers persuasively expressing data privacy concerns regarding BGI's affiliation with the Chinese government. *See* Initial Decision at 150-51. The DoD Designation confirms the veracity of MCED test developers' testimony regarding BGI and further disqualifies BGI as a legitimate alternative to Illumina for MCED testing—severely undercutting Respondents' defense that BGI's entry will reduce Illumina's ability to harm Grail's rivals.

Considering the importance of the aforementioned fact to the claims and defenses at issue in this case, it satisfies the standard for materiality under Commission Rule 3.43(f). Based on the reliability of this information and its materiality, this fact is appropriate for official notice by the Commission.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission grant its Motion for Official Notice of the Department of Defense's Designation Regarding BGI Genomics Co., Ltd.

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Dated: November 1, 2022

Respectfully submitted,

s/ Wade D. Lippard

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Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION REQUESTING
OFFICIAL NOTICE OF THE DEPARTMENT OF DEFENSE DESIGNATION REGARDING BGI
GENOMICS CO., LTD.**

Upon consideration of Complaint Counsel’s Motion Requesting Official Notice of the Department of Defense’s Designation Regarding BGI Genomics Co., Ltd., it is hereby ORDERED that the motion is GRANTED.

By the Commission.

April Tabor
Secretary

ISSUED:

**UNITED STATES OF AMERICA
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**STATEMENT OF CONFERENCE
PURSUANT TO PARAGRAPH 4 OF THE SCHEDULING ORDER**

On October 28, 2022, Complaint Counsel offered to meet and confer with Respondents in a good faith effort to resolve by agreement the issues raised in the attached motion. On October 31, 2022, Complaint Counsel offered again to meet and confer with Respondents but did not receive a response. Thus, Complaint Counsel was unable to reach an agreement with Respondents on the issues raised in the attached motion and Complaint Counsel assumes Respondents oppose this motion.

Dated: November 1, 2022




By: s/ Wade D. Lippard
Wade D. Lippard

Counsel Supporting the Complaint

EXHIBIT A

RELEASE
IMMEDIATE RELEASE

DOD Releases List of People's Republic of China (PRC) Military Companies in Accordance With Section 1260H of the National Defense Authorization Act for Fiscal Year 2021

Oct. 5, 2022 |   

Today, the Department of Defense released the names of “Chinese military companies” operating directly or indirectly in the United States in accordance with the statutory requirement of Section 1260H of the National Defense Authorization Act for Fiscal Year 2021.

The Department is determined to highlight and counter the PRC Military-Civil Fusion strategy, which supports the modernization goals of the People’s Liberation Army (PLA) by ensuring its access to advanced technologies and expertise are acquired and developed by PRC companies, universities, and research programs that appear to be civilian entities. Section 1260H directs the Department to begin identifying, among other things, Military-Civil Fusion contributors operating directly or indirectly in the United States.

The Department will continue to update the list with additional entities as appropriate.

The United States Government reserves the right to take additional actions on these entities under authorities other than section 1260H.

The list is available here. [m](#)

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EXHIBIT B

**Entities Identified as Chinese Military Companies Operating in the United States in
Accordance with Section 1260H of the William M. ("Mac") Thornberry National Defense
Authorization Act for Fiscal Year 2021 (Public Law 116-283)**

Tranche 2

Beijing Zhidao Chuangyu Information Technology Co., Ltd (Beijing Kownsec)

BGI Genomics Co., Ltd. (BGI)

China International Engineering Consulting Corporation (CIECC)

China National Chemical Corporation Ltd. (ChemChina)

China National Chemical Engineering Group Corporation (CNCEC)

China State Construction Group Co.

CloudWalk Technology Co., Ltd (CloudWalk)

CRRC Corporation Limited (CRRC)

Dawning Information Industry Co., Ltd (Sugon)

Global Tone Communication Technology Co Ltd (GTCOM)

Shenzhen DJI Innovation Technology Co., Ltd. (DJI)

Zhejiang Dahua Technology Co., Ltd. (Dahua)

360 Security Technology Inc. (Qihoo 360)

Tranche 1 (Initial Release June 3, 2021)

Aerospace CH UAV Co., Ltd

Aerosun Corporation

Aviation Industry Corporation of China, Ltd. (AVIC)

AVIC Aviation High-Technology Company Limited

AVIC Heavy Machinery Company Limited

AVIC Jonhon Optronc Technology Co., Ltd.

AVIC Shenyang Aircraft Company Limited

AVIC Xi'an Aircraft Industry Group Company Ltd.

China Aerospace Science and Industry Corporation Limited (CASIC)

China Communications Construction Company Limited (CCCC)

China Communications Construction Group (Limited) (CCCCG)

China Electronics Corporation (CEC)

China Electronics Technology Group Corporation (CETC)

China General Nuclear Power Corporation (CGN)

China Marine Information Electronics Company Limited

China Mobile Communications Group Co., Ltd.

China Mobile Limited

China National Nuclear Corporation (CNNC)

China National Offshore Oil Corporation (CNOOC)

China North Industries Group Corporation Limited (Norinco Group)

China Railway Construction Corporation Limited (CRCC)

China South Industries Group Corporation (CSGC)

China SpaceSat Co., Ltd.

China State Shipbuilding Corporation Limited (CSSC)

China Telecom Corporation Limited

China Telecommunications Corporation

China Unicom (Hong Kong) Limited

China United Network Communications Group Co., Ltd. (China Unicom)

CNOOC Limited

Costar Group Co., Ltd.

Fujian Torch Electron Technology Co., Ltd.

Hangzhou Hikvision Digital Technology Co., Ltd. (Hikvision)

Huawei Investment & Holding Co., Ltd.

Huawei Technologies Co., Ltd.

Inner Mongolia First Machinery Group Co., Ltd.

Inspur Group Co., Ltd.

Jiangxi Hongdu Aviation Industry Co., Ltd.

Semiconductor Manufacturing International Corporation (SMIC)

Semiconductor Manufacturing International (Beijing) Corporation

Semiconductor Manufacturing International (Shenzhen) Corporation

Semiconductor Manufacturing International (Tianjin) Corporation

Semiconductor Manufacturing South China Corporation

SMIC Holdings Limited

SMIC Hong Kong International Company Limited

SMIC Northern Integrated Circuit Manufacturing (Beijing) Co., Ltd

SMIC Semiconductor Manufacturing (Shanghai) Co., Ltd

Zhonghang Electronic Measuring Instruments Company Limited

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing document to be served via email to:

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Counsel for Respondent Illumina, Inc.

s/ Wade D. Lippard
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Counsel Supporting the Complaint