PUBLIC

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**

MOTION IN OPPOSITION TO RESPONDENTS' REQUEST TO REOPEN THE RECORD TO ADMIT ADDITIONAL EXHIBITS AND FOR THE COMMISSION TO TAKE OFFICIAL NOTICE

Respondents seek to admit prejudicial and irrelevant evidence—not to elucidate relevant issues but to obfuscate them—in contravention of FTC Rules 3.43(b), 3.43(f), 3.51(e)(1), and 3.54(a), as well as sound judicial policy. Respondents have failed to meet their burden to show good cause to reopen the record at this late date or satisfy the requirements necessary for this Commission to take official notice of RX4067 and RX4068. Accordingly, Complaint Counsel respectfully asks the Commission to deny Respondents' motion to reopen the record or take official notice of Respondents' prejudicial and untimely evidence.

STATEMENT OF FACTS

Throughout the five-week administrative hearing in this case, Complaint Counsel introduced (and the ALJ admitted) extensive evidence of current and future competition between Grail and its MCED rivals. Page after page of documentary evidence—including from

Respondents themselves—as well as testimony from nearly a dozen witnesses show that Grail, Exact, Natera, Guardant, Freenome, Singlera, Helio, and {[redacted]} are currently engaged in intense innovation competition to develop tests that will compete commercially across multiple dimensions, including test design, performance, price, and service. *See, e.g.*, CCFF 605-10, 1902-2606, 3294-3307, 3335-50, 3358-61, 3370-75, 3381-84, 3389-93, 3424-68, 3471-92; CCAB 20-21, 26-27; CCB § II.E.1.b.ii.; CCRB § I.B.

Grail admits {[redacted]}. To respond to this competition, Grail created its {[redacted]} to report to Grail's Executive Leadership Team with assessments of its {[redacted]} competitors, including {[redacted]}, and others. *See, e.g.*, {[redacted]} Grail also engaged in {[redacted]}

Record evidence—including Grail's internal documents—also reveals {[redacted]} The prospect of Exact/Thrive earning FDA approval sooner led one Grail executive to say, {[redacted]} {[redacted]}

[redacted]} This competition has already inured to the benefit of American patients by improving Galleri and expediting development of this life-saving test. *See, e.g.*, {[redacted]}

Instead of rebutting this evidence, Respondents have continually sought to distract with two arguments: (1) competition is not worthy of protection under the antitrust laws unless it involves multiple commercialized products, and (2) MCED commercialization begins (and ends) when an MCED is offered as an LDT. As Complaint Counsel's extensive post-trial briefing explains, both case law and economic theory recognize the value of protecting robust, pre-commercial competition. *See, e.g.*, CCRB 70-73; CCAB 12-20; Complaint Counsel's Reply to Respondents' Answering Brief at 5-11. The factual record is likewise clear that selling an MCED test as an LDT—while technically permissible—is only available to a limited number of patients who are willing to pay out of pocket for a non-FDA approved test. CCFF § II.E.2. As such, selling an LDT is not a benchmark for full commercialization but rather merely one step in the road toward commercialization. Respondents' motion to reopen the record is yet another attempt to push its legally and factually deficient narrative in violation of the rules of this Commission. Complaint Counsel therefore respectfully requests that this Commission deny Respondents Motion to Reopen the Record and take Official Notice.

ARGUMENT

Courts recognize that admission of "cherry picked" evidence not subject to fulsome discovery prejudices the opposing party. *FTC v. Qualcomm*, 2018 WL 6576041, at *2 (Dec. 13, 2018) ("[A]ny evidence related to post-discovery events must derive from full discovery and not 'cherry picked data' or 'cherry picked custodians'"). In recognition of this underlying principle, this Commission has noted that "[r]eopening the record to admit supplemental evidence . . . should

only be done in compelling circumstances." *In the Matter of Rambus Inc.,* 2005 WL 1416300, at *2 (May 13, 2005). No such circumstances exist here.

(a) *The Record Should Not be Reopened Under Rule 3.54(a)*

To reopen the record, Respondents must show the following: (1) that they acted with due diligence; (2) the evidence is relevant, probative, and non-cumulative; and (3) the evidence can be admitted without undue prejudice to the other party. *Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977). Respondents fail to meet their showing for either proposed exhibit.

i. Respondents Have Failed to Establish Good Cause for the Admission of RX4067

After a five-week trial, admission of thousands of exhibits, and over one hundred pages of appellate briefing, Respondents ask this Commission to exercise its authority to admit RX4067, claiming that "[Mr.] Conroy's statement {[redacted]} and shows that "pre-commercial competition is nonexistent." Resp. Mot. to Reopen the Record at 2, 5 (Jan. 19, 2023). Respondents' arguments are without merit.

First, RX4067 is not probative. Kevin Conroy, Exact's CEO, testified for nearly a full day at the administrative hearing regarding Exact's plans for development and commercialization of its MCED test and the myriad of ways that Exact's CancerSEEK test is competing and will compete with Grail's Galleri test. Conroy (Exact) Tr. 1525-1761. Mr. Conroy also projected that {[redacted]} Respondents now seek to admit RX4067 as proof that competition between CancerSEEK and Galleri is nonexistent because CancerSEEK did not launch as an LDT in 2022. This is a red herring. As a fulsome review of the record reflects, competition between MCED tests is not conditioned on launching an MCED as an LDT. Rather, as Mr. Conroy explained, and as Grail's own documents show, there is robust innovation competition that happens prior to

commercialization. {[redacted]}. Nor do Mr. Conroy's statements indicate that commercialization of CancerSEEK is somehow "years away from launch" but rather states that Exact will have additional details "this year." Resp. Mot. to Reopen the Record at 6 (Jan. 19, 2023); RX4067 at 9. RX4067 adds nothing to the extensive record evidence regarding the competitive dynamic between Galleri and CancerSEEK.

Likewise, Mr. Conroy's statements are not probative to his credibility. {[redacted]}. Mr. Conroy's investor statements do not say they have abandoned that strategy, but instead, merely noted that Exact *may* not make CancerSEEK available as an LDT as well. RX4067 at 9. Moreover, even if Exact changed its commercialization strategy (which is unclear from RX4067), that does not mean that Mr. Conroy testified untruthfully or inaccurately as to Exact's plans at the time of the administrative hearing.

RX4067 clarifies nothing. Rather, it only serves to confuse and obfuscate. As such, this Commission has no need to admit this evidence to "resolve" any issue presented given RX4067's lack of probative value to the fundamental competitive dynamics of the MCED market or to Mr. Conroy's credibility. 16 C.F.R. § 3.54(a) ("Upon 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.").

Respondents' contentions to the contrary show why admission of this document is also prejudicial to Complaint Counsel. In its briefing, Respondents go so far as to say that RX4067 shows that Grail's rivals "are years away from launch, and may not launch a competitive test at all" and that it {[redacted]}

[redacted]} and therefore asks this Commission to disregard all of Mr. Conroy's "testimony about pre-commercial competition." Resp. Mot. to Reopen the Record at 6-7 (Jan. 19, 2023). But RX4067 says no such thing, as explained above. Allowing Respondents to cherry pick a single statement with no context and substitute their unsupported explanation for that of the witness is inherently prejudicial to Complaint Counsel, who has no ability to test the veracity of Respondents' interpretation.[1] In sum, admitting RX4067 does not clarify any issue relevant to this proceeding and instead injects confusion into the proceeding to the prejudice of Complaint Counsel and contrary to the efficient administration of justice. Therefore, Respondents have failed to meet their burden to show good cause to reopen the record to admit their cherry-picked, post-trial evidence.

ii. Respondents Have Failed to Establish Good Cause for Admission of RX4068

Respondents similarly fail to demonstrate good cause to admit RX4068. RX4068 is a statement by Steve Chapman from Natera regarding investment in "early cancer detection." RX4068 at 11. Respondents, however, did not call this witness to testify at trial, nor did they include him on any witness list. Instead, Complaint Counsel called Dr. Rabinowitz from Natera to testify. Respondents offer no explanation for their failure to call Mr. Chapman to testify at the hearing and thus cannot show that they exercised due diligence in obtaining this information. *In the Matter of Polypore Int'l Inc.*, 2010 WL 3053866, at *1-2 (Jul. 28, 2010) (denying Respondents'

[1] Admitting additional evidence into the record cannot cure this prejudice. Instead, it risks delaying efficient resolution of this case which, as this Commission recognized in *Polypore*, is a reason on its own not to reopen the record. *In the Matter of Polypore Int'l, Inc.*, 2010 WL 3053866, at *2 (Jul. 28, 2010) ("Furthermore, the Commission is mindful that in any litigation involving a consummated merger, unnecessary procedural delays may increase the risk of ongoing injury to consumers and competition.").

motion to reopen the record because Respondents failed to explain why it "did not call this witness at trial"). Respondents' motion fails on this basis alone.

Respondents also cannot show that RX4068 is probative and not prejudicial. Respondents argue that Mr. Chapman's statement contradicts testimony from other Natera executives, Dr. Rabinowitz and Mr. Fesko, and, specifically, casts doubt on Natera's commercialization plans. Resp. Mot. to Reopen the Record at 7 (Jan. 19, 2023). Respondents' arguments are nonsensical. First, it is unclear what early cancer test Mr. Chapman is referencing in the document. RX4068 at 11 (discussing "early cancer" tests). Second, even assuming that all three Natera executives are discussing the same test, Mr. Chapman's statements are consistent with Dr. Rabinowitz's and Mr. Fesko's prior testimony. For example, Mr. Chapman's statements regarding their current investment of $5 million per year is consistent with Dr. Rabinowitz's testimony regarding total research and development spend. {[redacted]}. Likewise, Mr. Chapman's explanation that Natera wants to ensure that clinical testing supports its commercialization plans is unremarkable, as successful MCED commercialization involves prior clinical research, testing, and validation. Finally, admitting a statement from Mr. Chapman—a witness who did not appear on Respondents' witness lists and who Complaint Counsel has not had an opportunity to depose or cross-examine—is inherently prejudicial to Complaint Counsel. Therefore, Respondents have failed to meet their burden to show a single factor required to establish good cause to reopen the record to admit RX4068.

(b) *The Commission Should Not Take Official Notice Under Rule 3.43(f)*

Commission Rule 3.43(f) allows the Commission to take "official notice" of any material fact that is "not subject to reasonable dispute in that it is either generally known within the Commission's expertise or capable of accurate and ready determination by resort to sources whose

accuracy cannot reasonably be questioned." 16 C.F.R. § 3.43 (f); *see generally*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Respondents' request for official notice of RX4067 and RX4068 in their entirety fails out of the gate. Resp. Mot. to Reopen the Record at 8 (Jan. 19, 2023) ("The Commission Should Take Official Notice of the Additional Exhibits"). As *In the Matter of Basic Research* explained—a case Respondents themselves cite—Rule 3.43(f) requires movants to identify specific "facts" in their request for official notice. *In the Matter of Basic Research*, 2006 WL 271518 (Jan. 23, 2006) (denying motion for official notice of documents for failing to specify any facts for notice).

In an attempt to shoehorn their request into the purview of Rule 3.43(f), Respondents identify "facts" regarding Exact and Natera's commercialization timeline.[2] However, these statements are not "facts" contained within the documents at all, but rather Respondents' own faulty conclusions regarding what the statements within the documents mean. Specifically, Respondents' own conclusions are not "generally known," nor can they "be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." *Davis v. City of Clarksville*, 492 F. App'x 572, 578 (6th Cir. 2012). Thus, Respondents fail to meet the official notice requirements.

Respondents' cited cases are inapposite; they do not involve official notice of facts contained *within* the documents, but instead, involve official notice of the fact that particular document was sent or issued. *N.Y. Times Co. v. U.S. Dept' of Just.*, 756 F.3d 100, 110 n.8 (2d Cir. 2014) (seeking judicial notice of the existence of public disclosures in the midst of a FOIA

[2] Exactly what Respondents ask this Commission to take official notice of is unclear. At times, Respondents appear to be arguing that this Commission should take notice of the entire exhibit, and at others arguing that the Commission should take notice of purported "facts." Either way, their motion fails.

litigation); *SEC v. Mozilo*, 2009 WL 3807124, at *7 n.2 (C.D. Cal. Nov. 3, 2009) (seeking notice of the existence of particular statements). Here, Respondents are not asking the Commission to take notice that the investor statements were issued but rather are seeking official notice of Respondents' own (inaccurate) conclusions from statements within the documents, in contravention of the purpose of official notice. *Davis*, 492 F. App'x at 578. Complaint Counsel therefore asks this Commission to deny Respondents' request for official notice of RX4067 and RX4068 in whole or in part.

CONCLUSION

For the reasons stated herein, Complaint Counsel respectfully requests that this Commission deny Respondents' request to reopen the record and take official notice of RX4067 and RX4068.

Dated: January 31, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2023, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I caused the foregoing document to be served via email to:

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