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13 ILLUMINA, INC.

14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16 THE SCRIPPS RESEARCH INSTITUTE,
17 Plaintiff,
18 v.
19 ILLUMINA, INC.,
20 Defendant.

Case No. 16-cv-661 JLS (BGS)

**ILLUMINA’S RESPONSE TO THE
COURT’S NOTICE OF
DISCLOSURE OF CONFLICT
[DKT. 93]**

Judge: Honorable Janis L. Sammartino

1 Defendant Illumina, Inc. (Illumina) submits this response to the Clerk of Court's
2 letter of August 5, 2021 (Dkt. No. 93). In that letter, the Clerk of Court informed the
3 parties that Judge Sammartino discovered "*after* disposition of the case" that a family
4 member owned Illumina stock, raising a financial interest that would have required Judge
5 Sammartino's recusal had she discovered it while the case was pending. Dkt. No. 93 at
6 1 (emphasis added). That letter confirmed that the "financial interest neither affected
7 nor impacted [Judge Sammartino's] decisions in the case" as she was unaware of that
8 interest at the time she presided. *Id.* Because Judge Sammartino was unaware of the
9 financial conflict at the time of her rulings, and her rulings were reviewed *de novo* and
10 affirmed by the United States Court of Appeals for the Federal Circuit, those rulings
11 should stand.

12 While Judge Sammartino presided over the case, she issued a claim construction
13 order regarding certain claims of Plaintiff The Scripps Research Institute's (Scripps)
14 asserted patent. Dkt No. 77. As a result of Judge Sammartino's claim construction order,
15 the parties stipulated to non-infringement by Illumina and jointly requested entry of
16 judgment for Illumina, which the Court granted on May 18, 2018. Dkt. No. 81.

17 As detailed in the Clerk of Court's August 5, 2021 letter, Judge Sammartino did
18 not know of the conflict at the time she made her claim construction rulings in 2018. In
19 such circumstances where recusal is being contemplated retrospectively, the Ninth
20 Circuit has stated that "[i]f a reasonable person would conclude from all the
21 circumstances that the judge did not have knowledge [of the disqualifying conflict] at the
22 time [she] sat, [her] rulings stand." *Davis v. Xerox*, 811 F.2d 1293, 1296 (9th Cir. 1987).

23 In *Davis*, the presiding judge held a small pecuniary interest in the defendant, but
24 had forgotten about that interest. *Id.* at 1294. Before the pecuniary interest was brought
25 to the judge's attention and before he recused himself, he made some discovery rulings
26 and dismissed one of plaintiff's claims. *Id.* The case was then reassigned to another
27 judge and proceeded to trial. *Id.* On appeal, the plaintiff in *Davis* challenged whether the

1 first judge’s discovery rulings and dismissal should stand. *Id.* The Ninth Circuit held
2 that where the pecuniary interest was small and the judge “made it clear he had in fact
3 forgotten” about that interest, the rulings should stand and need not be vacated. *Id.* at
4 1297 (“A reasonable observer would draw from these circumstances the conclusion that
5 the judge during 1980–1983 was unaware of his interests and so did not know of them
6 within the meaning of” 28 U.S.C. § 455.).

7 Here, not only did Judge Sammartino not know about the conflict at the time of
8 her claim construction rulings, Plaintiff Scripps appealed Judge Sammartino’s rulings to
9 the United States Court of Appeals for the Federal Circuit. There, a three judge panel
10 reviewed Judge Sammartino’s claim construction order *de novo*, and a majority affirmed
11 her decision. *See The Scripps Research Institute v. Illumina, Inc.*, 782 Fed. Appx. 1018, 1019
12 (Fed. Cir. Aug. 29, 2019) (“Both parties agree that, if the rulings involving the *a* terms
13 are correct, the district court’s judgment should stand. Because we agree with the district
14 court regarding the *a* terms, we affirm the judgment without reaching the dispute over
15 the *linker molecule* phrase.”); *see also Power Integrations, Inc. v. Fairchild Semiconductor Int’l., Inc.*,
16 904 F.3d 965, 971 (Fed. Cir. 2018) (The Federal Circuit “review[s] claim construction *de*
17 *novo*, except for subsidiary facts based on extrinsic evidence, which [the Federal Circuit]
18 review[s] for clear error.”).

19 Accordingly, because Judge Sammartino was unaware of the conflict at the time
20 of her rulings, and because her rulings were reviewed *de novo* and affirmed, her rulings
21 should stand and no further action is necessary.

22 Respectfully submitted,

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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies that a true and correct copy of the above and
3 foregoing document has been served on August 12, 2021, to all counsel of record who
4 are deemed to have consented to electronic service via the Court's CM/ECF system
5 per Civil Local Rule 5.4. Any other counsel of record will be served by electronic mail,
6 facsimile and/or overnight delivery.

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