

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

AFFYMETRIX, INC.,

Plaintiff/Counter-  
Defendant,

v.

ILLUMINA, INC.,

Defendant/Counter-  
Plaintiff.

C.A. No. 04-901-JJF

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DISTRICT OF DELAWARE

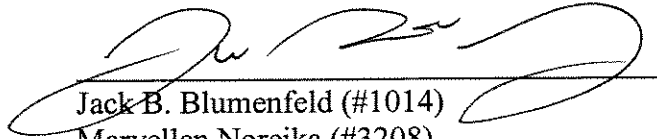
**MOTION BY THIRD-PARTY THE ASSOCIATION OF CORPORATE COUNSEL  
FOR LEAVE TO FILE THE ATTACHED AMICUS SUBMISSION  
IN CONNECTION WITH THE MOTIONS FOR ENTRY OF A PROTECTIVE ORDER**

The Association of Corporate Counsel ("ACC") moves for leave to file the attached submission for the Court's consideration in connection with the motions for entry of a protective order pending before the Court. ACC is the in-house bar association, which serves the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. ACC promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys and encourages advancements in standards of corporate legal practice. Since its founding in 1982, ACC has grown to have more than 17,500 members in 51 countries who represent 7000 organizations.

ACC has experience and expertise involving the issue of access of in-house litigation counsel to confidential documents and information produced during litigation. ACC understands this to be an issue raised in the pending motions before this Court. The attached document includes a summary of ACC's experience and the bases for its position that in-house

litigation counsel should not be discriminated against in connection with access to documents produced in litigation. ACC believes this document will be helpful to the Court, and thus requests that the Court grant ACC leave to file it.

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December 22, 2004



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December 21, 2004

The Honorable Joseph J. Farnan, Jr.  
United States District Court  
844 King Street  
Wilmington, DE 19801

Re: Affymetrix, Inc. v. Illumina Inc.  
D.Del., C.A. No. 04-CV-901 JJF

Dear Judge Farnan:

This letter is submitted amicus curiae by the Association of Corporate Counsel for the court's consideration in the above-entitled case. We seek permission to address the court to provide background and expert perspective on the issue of in-house counsel access to documents provided to attorneys in litigation. It is our understanding that the court is considering these issues in the above captioned matter.

It is ACC's position that courts should not discriminate against in-house counsel who are litigators before the court on behalf of their employer-clients. If litigators for clients in a case are allowed access to documents, that access should be available to all litigators on the case who are properly licensed and admitted. The fact that a litigator is in-house counsel should not prevent that counsel from reviewing sensitive or protected information that is available to all other litigators for the parties. Indeed, counsel (and their client) denied access to documents available to other lawyers is at an inherent and unfair disadvantage. Arguments that in-house counsel are – by their status – not eligible to appropriately handle such access require a court to inappropriately assume that such a counsel is more likely than an outside counsel peer to commit an ethical violation of the court's rules and inappropriately share confidential files with their clients. This is unwarranted and inappropriate for a court to presume.

## **INTRODUCTION**

The Association of Corporate Counsel (ACC), formerly known as the American Corporate Counsel Association or ACCA, is the in-house bar association, serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector

organizations worldwide. The association promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. Since its founding in 1982, the association has grown to over 17,500 members in 51 countries who represent 7,000 organizations, with 45 chapters and 12 practice area committees serving the membership.

ACC and its members have consistently advanced the principle that the privileges and obligations of the legal profession apply equally to all attorneys, regardless of their practice setting. ACC believes that the interests of in-house counsel, their clients, and the legal community as a whole are enhanced by encouraging the use of in-house lawyers because of their ability to deliver high-quality legal services in a cost-effective manner, and their unique positioning by which they can influence the creation of a more ethical and compliant corporate culture from the inside.

Some clients find additional benefits from their choice of an in-house legal staff because the nature of some of their legal needs is largely repetitive or highly specialized, and constantly training and paying the higher expense of a passing parade of outside lawyers/firms makes no sense. For some entities with regular, repetitive or highly specialized litigation needs, an in-house litigation team is an obvious solution. In-house litigators are not the norm in the in-house profession, but they are commonplace in a variety of industries: with manufacturers that have repetitive class action or product liability questions, in publishing entities that face regular First Amendment or related cases, or in certain high-tech industries wherein not many lawyers are capable of easily grasping the substance of the underlying matters because of its technical complexity, to name a few.

In-house positions are highly coveted in the profession. Lawyers who are tapped to go in-house are not those who can't find employment elsewhere or whose credentials are in some way suspect. On the contrary, they are chosen from a highly competitive pool of applicants who generally have the best credentials, established reputations, and long years of experience in top law firms or the highest levels of government service. They are known for their professional accomplishments. It is irrational and without factual basis to assume that this segment of the legal profession is somehow more likely to "check" their professional duties at the front door when they begin an in-house job, whether as in-house litigators, executive counselors, compliance experts, or transactional specialists. Indeed, the in-house segment of the profession is the least likely to commit ethical violations of their professional obligations of any kind of any segment of the profession, according to the National Organization for Bar Counsel (NOBC).

#### **WHY IN-HOUSE LAWYERS WHO ARE LITIGATING THE CLIENT'S CASES SHOULD BE ALLOWED ACCESS TO DOCUMENTS IN LITIGATION.**

We are not knowledgeable about, nor do we wish to become entangled in the factual arguments of the parties in the case before you. We write today only to inform the court of our concern that the court avoid issuing a ruling that would restrict access to confidential information in litigation to outside counsel litigators because of a concern that in-house litigators on the case might somehow be unable to manage their professional obligations of maintaining the confidentiality of the files. We encourage the Court to recognize that disparate treatment of fully licensed and qualified legal professionals who work as in-house litigators is inherently inappropriate and

short-sighted. This recognition is of critical importance to the members of ACC who are expert and highly professional litigators, as well as to the organizations they represent.

There is no need for the court to issue a ruling which has the effect of denying an organization the right to select the counsel of their own choosing. Denying such a right casts unjustified aspersions on employed counsel and the corporation's decision to hire them. Such policies create unwarranted obstacles to the effective and economical provision of legal services to an organization, and perpetuate arbitrary and artificial distinctions between employed and retained attorneys which have no factual basis. Such policies place organizations that consciously select employed counsel as their counsel of record at a distinct disadvantage in conducting litigation, both economically and strategically.

This court should not presume that employed counsel's professional and ethical responsibilities and obligations are any different from outside counsel's. The court should entertain concerns regarding the relationship between any lawyer and their client only if there is a factual basis upon which to ground greater scrutiny. The mere fact that an in-house lawyer is employed, rather than retained by the client, is an insufficient reason to presume that the lawyer is without the ethical character to uphold the rules of the court and the profession. will behave something that. If for some reason the court is not persuaded, and doubts the in-house lawyer's ability to live up to the court's trust because of her proximity to her client, then we would suggest that the court must equally apply that rationale to the outside counsel.

In today's world, many outside lawyers are as close to their in-house clients as are employed lawyers, and just as dependent upon them for their continued livelihoods. While outside counsel may not share office space, they are just as likely (or unlikely) to work hard to uphold the professional obligations and protect the trust that the courts and society places in them. No one suggests that outside lawyers are inherently unable to understand or perform to the standards of independence and objectivity required of all lawyers who are permitted access to sensitive files that are requested and produced in litigation. It is just as hard for an outside lawyer who represents a corporate client over the long term to erect barriers in his mind between the information he is and is not allowed to use to advise the client in the future.

Since employed counsel are subject to the same rules of professional conduct (and sanctions for violations thereof) as outside lawyers who are retained to litigate for the client, they should be afforded the same presumption of professional competence and character until it is proved that such confidence in their capacities is unfounded. To deny employed counsel access to confidential documents because the other side fears they MIGHT treat confidential information in a less than professional fashion is inappropriate and insulting to the hard-earned reputation of the in-house lawyer who is so maligned. It suggests that a large and growing segment of the bar – in-house counsel – are inherently unqualified to conduct litigation. It denies clients the right to select and retain in-house counsel as their litigators if they so choose. It implies that the in-house lawyer is ethically unable to perform to professional standards simply by virtue of the location of their office and their focus on a single client's service. And it presumes that outside counsel are not subject to many of the same client confidentiality concerns, when the opposite is in fact true.

Our system should respond by trusting that lawyers appearing before the court are professionally and ethically upright, and by punishing with sanctions or debarment those who behave otherwise. Our system should not presume that highly competent, reputable and ethical lawyers are

inherently incompetent and unprofessional once they move in-house to continue to represent their client's litigation needs.

If there is evidence of unethical behavior by a lawyer engaged by a party in a litigation, or if there are other factors that should be considered by a court before access to sensitive information can be granted, then those arguments and proofs may be presented for the court's consideration. But the mere fact that one lawyer receives a paycheck for her work while another receives a check in response to an invoice should have no influence on the court's consideration of the matter: the lawyer's status as an employee of a client or a partner or associate in a law firm should have no ethical impact on the lawyer's ability to professionally handle required obligations to the court, the profession, and the parties.

The Association of Corporate Counsel thanks the Court for their consideration of our perspective and respectfully requests that the Court protect the freedom of organizations to choose the counsel of their choice, rejecting any assertions that employed counsel should be denied access to confidential information based solely on their status as in-house lawyers.

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan Hackett" followed by a small flourish.

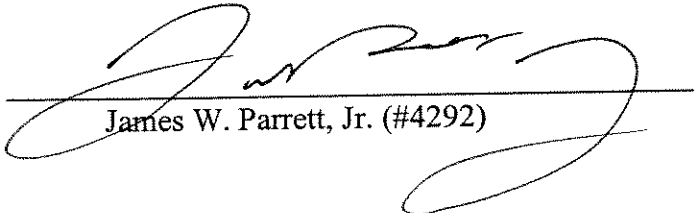
Susan Hackett  
Senior Vice President and General Counsel  
Association of Corporate Counsel

**CERTIFICATE OF SERVICE**

I, James W. Parrett, Jr., hereby certify that copies of the foregoing were caused to be served this 22<sup>nd</sup> day of December, 2004 upon the following in the manner indicated:

**BY HAND DELIVERY**

Richard K. Herrmann  
Mary B. Matterer  
BLANK ROME LLP  
1201 N. Market Street, Suite 800  
Wilmington, DE 19801

  
James W. Parrett, Jr. (#4292)