

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya

In the Matter of

Illumina, Inc.
 a corporation,

 and

GRAIL, Inc.,
 a corporation.

DOCKET NO. 9401

RESPONDENTS' REPLY IN SUPPORT OF APPLICATION FOR A STAY
PENDING REVIEW BY A UNITED STATES COURT OF APPEALS

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Respondents' briefing demonstrates that a stay of the Commission's entire Order is appropriate. This case involves "a difficult legal question" and is based on a "complex factual record"—characteristics the Commission has previously found to warrant a stay. Further, the record shows that the Commission lacked both the statutory and constitutional power to impose the Order. Imposition of the Order's non-divestiture provisions while the appeal is pending will irreparably harm Respondents and the public by interfering with Grail's business and denying the public accelerated access to Galleri. CC does not deny that immediate imposition of the entire Order is inappropriate—agreeing to stay some provisions, while leaving others in place. CC's concessions do not resolve the need to stay the entire Order. The remaining hold separate provisions are largely duplicative, but not identical, to the hold separate currently in place under the EC order. Requiring Respondents to comply with two different hold separate orders will cause needless confusion, delays and costs, a result that CC and Respondents seek to avoid. A stay of the entire Order is appropriate.

A. Respondents Have Shown Likelihood of Success on the Merits.

Respondents have demonstrated likelihood of success on the merits sufficient to justify a stay. CC fail to adequately contend with any of the reasons Respondents identified for why they are likely to succeed on appeal. Instead, CC argues Respondents cannot "show a likelihood of success" because the "factual and legal arguments [] were raised to and rejected by the Commission". (Opp. 2.) CC's extreme position is circular and contrary to law and would prevent any party from receiving a stay; a party that had an order entered against it could never satisfy this factor. To the contrary, even when "[t]he Commission harbors no doubts about its" decision this factor can be met. *In re N.C. Bd. of Dental Exam'rs*, 2012 WL 588756, at *2 (F.T.C. Feb. 10, 2012).

CC argues that the fact that the ALJ found against the Commission is not a basis for finding a likelihood of success on the merits. (Opp. 6.) This ignores the import of the ALJ's decision. The ALJ has decades of experience in adjudicating merger challenges. He heard 66 witnesses and reviewed thousands of pages of briefing, resulting in a 203-page decision finding that the transaction did not negatively affect competition—a first for a defendant in a merger case in an FTC administrative proceeding. At minimum, the ALJ's decision demonstrates that reasonable minds have differed on the appropriate outcome.

CC states that the legal tests the Commission applied are “well grounded in case law”, and therefore Respondents do not raise “a serious question” of law. (Opp. 6-7.) CC is wrong. This case is the first vertical merger challenge fully litigated by the FTC in over 40 years and involves complex questions, including how to analyze vertical mergers in a nascent market, the Open Offer and life-saving efficiencies. The Supreme Court unanimously recognized that constitutional challenges are “distant from the FTC’s ‘competence and expertise’” and the Commission knows “nothing special about the separation of powers”. *Axon Enter., Inc. v. F.T.C.*, 598 U.S. ___, slip op. at 16-17 (Apr. 14, 2023). At a minimum, these issues constitute “difficult legal question[s]” that require a stay. *In re Cal. Dental Ass’n*, 1996 FTC LEXIS 277, at *10 (F.T.C. May 22, 1996).

Finally, CC suggests there can be no likelihood of success given the review standard for factual findings on appeal. (Opp. 6-7.) CC appears to be conflating the Commission's legal conclusions with factual findings, arguing that the Commission's rejections of Respondents' constitutional arguments are factual findings. (Opp. 7.) In any event, the Commission has held that stays are warranted where a case includes “a complex factual record”. *In re Rambus, Inc.*,

2007 WL 901600, at *3 (F.T.C. Mar. 16, 2007). CC cannot credibly dispute the complexity of the factual record here.

B. Respondents Will Suffer Irreparable Harm Absent a Stay.

Permitting this Order, in full or in part, to become final and effective during the appeal will irreparably harm Respondents. (Opening 6-7.) CC has no real response to Respondents' points. Instead, CC has agreed to a stay of certain provisions and argued that the remaining provisions are largely duplicative of the hold separate provisions currently effective in the EC proceedings. But the fact that the orders are duplicative does not counsel against a stay. To the contrary, it is irrational to impose additional hold separate requirements if, as CC contends, the goal is to achieve the same results as the EC order. Over the past two years, Respondents have complied with the EC hold separate requirements. Imposition of concurrent and slightly different orders will needlessly increase costs and create uncertainty in business operations. If the EC provisions are lifted during this appeal, the hold separate provisions here will prevent Illumina from accelerating Galleri. Finally, because numerous constitutional violations were committed in the issuance of the Order, the Order's enforcement causes irreparable harm. (Opening 7.)

C. A Stay Is Necessary to Save Lives.

Respondents have presented extensive scientific and medical testimony showing that many lives would be saved if the efficiencies of this transaction are realized, which can only be achieved through the full integration of Illumina and Grail. Ignoring this evidence, CC argues that the Commission's adoption of CC's economist's "back-of-the envelope" analysis undermines Respondents' rigorous analysis of the lives saved. (Opp. 8.) But CC's analysis is unsupported by record evidence. At trial, CC presented no fact witness, let alone any medical or

scientific expert, who even attempted to rebut Respondents’ robust analysis. And CC’s analysis was based solely on the conjecture of an economist who “is not an expert in MCED tests, clinical trials, any field of chemistry or biological studies, or cancer screening technologies”. (ID 147 n.35.) The ALJ found that “Dr. Fiona Scott Morton’s qualifications to give opinions for this case are minimal”. (*Id.*) The Commission’s Opinion provides no valid basis to contradict the ALJ’s findings.

D. A Stay Is in the Public Interest.

It is in the public interest that Respondents be permitted to fully integrate at the first opportunity, accelerating widespread access to the life-saving Galleri test. CC argues that these benefits should be sacrificed for the risk that there may be harm to Grail or competition. The argument that Illumina might harm Grail or its rivals while this appeal is pending is speculative. CC implicitly conceded that foreclosure is not an imminent risk *two years ago*, when CC abandoned their efforts to seek injunctive relief in federal court. CC made no effort to seek a hold separate or injunctive relief when the transaction closed a few months later. And, as CC conceded during closing arguments, there is no evidence that Illumina has engaged in any foreclosure, even after the transaction closed. Respondents have been operating under the EC hold separate order since then. And the ALJ found that it was a real-world fact that Respondents are abiding by the Open Offer—further evidence that no harm will occur. (ID 153.) Finally, CC opposes Respondents’ efforts to expedite the pending appeal and bring resolution to these issues. CC’s actions undercut any argument that the hold separate provisions are in the public interest *now*. Instead, to protect against purely speculative harm, CC prefers that ordinary Americans bear the costs of delayed access to an existing test that can detect 50 cancer types at an early stage.

CONCLUSION

Respondents request that the Commission stay the entirety of the Order pending resolution of Respondents' pending appeal.

Dated: April 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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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