

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Noah Joshua Phillips
 Rebecca Kelly Slaughter
 Christine S. Wilson
 Alvaro M. Bedoya

In the Matter of

**Illumina, Inc.,
a corporation,**

and

**Grail, Inc.,
a corporation.**

PUBLIC

DOCKET NO. 9401

**MOTION OF THE AMERICAN ANTITRUST INSTITUTE AND THE HON. WILLIAM
J. BAER FOR LEAVE TO FILE AN *AMICUS* BRIEF AND REQUEST FOR AN
EXTENSION OF TIME TO FILE THE BRIEF**

The American Antitrust Institute (“AAI”) and the Hon. William J. Baer (collectively, “Proposed *Amici*”) respectfully move for leave to file an *amicus* brief and request an extension of time to file the brief. The proposed brief would address the role of the merging parties’ Open Offer in the Initial Decision and aspects of Judge Chappell’s approach to “litigating the fix” that have important implications for the future of merger law and sound antitrust enforcement. Proposed *Amici* submit that the brief is desirable and that an extension of time is warranted.

STATEMENT OF INTEREST

AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See <http://www.antitrustinstitute.org>.¹

The Hon. William J. Baer is a visiting fellow in Governance Studies at the Brookings Institution. He is the former Director of the Bureau of Competition of the Federal Trade Commission and former Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. He has twice been named by Global Competition Review as the best competition lawyer in the world and twice been recognized by Best Lawyers as the best antitrust lawyer in Washington. He was named by The National Law Journal as one of “The Decade’s Most Influential Lawyers.” In 2015 the Federal Trade Commission honored him with the Miles W.

¹ Individual views of members of AAI’s Board of Directors or Advisory Board may differ from AAI’s positions.

Kirkpatrick Lifetime Achievement Award, and in 2017 AAI presented him with the Alfred E. Kahn Award for Antitrust Achievement.

Proposed *Amici*'s interest in this matter is that they are public interest advocates who seek to improve the administration of the antitrust laws and ensure that antitrust enforcement best serves the interests of competition and consumers. The Commission's decision in this matter affects the Proposed *Amici* because those goals cannot be achieved without appropriate analysis of merging parties' attempts to litigate the fix.

ARGUMENT

I. THE PROPOSED *AMICUS* BRIEF IS DESIRABLE

Leave to file *amicus* briefs is appropriate when a putative *amicus* has “a sufficient ‘interest’ in the case and [its] brief is ‘desirable’ and discusses matters that are ‘relevant to the disposition of the case.’” *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 128 (3d. Cir. 2002) (Alito, J.); *see* Fed. R. App. P. 29(a)(3)(B). “[I]t is preferable to err on the side of granting leave.” *Id.* at 132-33. Federal appellate courts “grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet [the enumerated] criteria as broadly interpreted.” *Id.* at 133; *see Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999) (Boudin, J.) (“[A]

court is usually delighted to hear additional arguments from able *amici* that will help the court toward right answers . . .”).

Here, Proposed *Amici* submit that their brief would be useful and desirable because it emphasizes the problematic consequences for antitrust enforcement if mergers are litigated “as-remedied” by a voluntary “fix” rather than on the basis of the merger agreement. Proposed *Amici*’s brief puts a spotlight on the legal and practical considerations that belie Judge Chappell’s rationale for this aspect of the Initial Decision, as well as the problematic implications of this aspect of the Initial Decision for the effective enforcement of the antitrust laws.

II. AN EXTENSION OF TIME IS WARRANTED

Proposed *Amici* submit that an extension of time for filing the brief should be granted because the Commission should exercise its broad discretion to grant extensions of time to receive further information, and also because it grants leave to make late filings for cause. *See* Fed. Trade Comm’n, Rules of Practice and Procedure, 16 C.F.R. § 3.54 (“In those cases where the Commission believes that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Commission, in its discretion, may withhold final action pending the receipt of such additional information or views.”); *id* § 3.52 (“The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be

filed.”); *see also id.* § 3.22 (“The Commission, for good cause, may extend the time allowed for a ruling.”).

The Commission should exercise its broad discretion to grant an extension of time to receive further information, because, for all of the reasons the brief is useful and desirable, discussed *supra*, the brief will also assist the Commission in preparing its order on appeal of the Initial Decision.

An extension of time also is warranted for cause. The redacted version of the 203-page Initial Decision became available to the public on September 9, 2022. Since that time, one of AAI’s two full-time, licensed attorneys has left the organization. The remaining attorney is responsible for two federal appellate briefs due to be filed by October 10, 2022. Because the timing of staff changes affecting the workload of AAI attorneys corresponded with the release of the redacted public version of the Initial Decision and unforeseeably impeded AAI from pursuing its interest in this matter, good cause exists to allow an extension of time.

Proposed *Amici* respectfully request an extension of time to file the proposed *amicus* brief on or before October 24, 2022.

CONCLUSION

For the foregoing reasons, Proposed *Amici*'s Motion for Leave to File an *Amicus* Brief and Request for an Extension of Time to File the Brief should be granted.

Respectfully submitted,

/s/ Randy M. Stutz

RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

Counsel to Proposed Amici Curiae

Dated: October 3, 2022

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Khan, Chair**
 Noah Joshua Phillips
 Rebecca Kelly Slaughter
 Christine S. Wilson
 Alvaro M. Bedoya

In the Matter of

**Illumina, Inc.,
a corporation,**

and

**Grail, Inc.,
a corporation.**

PUBLIC

DOCKET NO. 9401

**[PROPOSED] ORDER GRANTING LEAVE TO FILE AN *AMICUS* BRIEF AND
EXTENSION OF TIME TO FILE THE BRIEF**

This matter comes before the Commission on the Motion of the American Antitrust Institute (AAI) and the Hon. William J. Baer (“Proposed *Amici*”) for Leave to File an *Amicus* Brief and Request for Extension of Time to File the Brief. Having considered the proposed *amici*’s Motion, and for good cause shown, the Motion is hereby GRANTED. Proposed *Amici* shall file any *amicus* brief no later than October 24, 2022.

By the Commission

April J. Tabor
Secretary of the Commission

SEAL:
DATED:

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I requested to file the foregoing document electronically by email and requested that it be accepted for filing in the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

David Marriott
Christine A. Varney
Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1140
dmarriott@cravath.com
cvarney@cravath.com
sgoswami@cravath.com

Counsel for Illumina, Inc.

Al Pfeiffer
Michael G. Egge
Marguerite M. Sullivan
Anna M. Rathbun
Latham & Watkins LLP
555 Eleventh Street, NW
Washington, DC 20004
(202) 637-2285
al.pfeiffer@lw.com
michael.egge@lw.com
marguerite.sullivan@lw.com
anna.rathbun@lw.com

Counsel for GRAIL, Inc.

Susan A. Musser
Federal Trade Commission
Bureau of Competition
Washington, DC 20580
(202) 326-2122
smusser@ftc.gov

Complaint Counsel

By: /s/ Randy M. Stutz
American Antitrust Institute
1025 Connecticut Avenue, NW, Suite. 1000
Washington, DC 20036
(202) 905-5420
rstutz@antitrustinstitute.org

Counsel to Proposed Amici Curiae