

**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

**DECISION AND ORDER GRANTING RESPONDENTS’
APPLICATION FOR A STAY PENDING JUDICIAL REVIEW**

In a March 31, 2023, final decision, the Commission determined that the acquisition by Respondent Illumina, Inc. of Respondent GRAIL, Inc. (now GRAIL, LLC) (“the Acquisition”) violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45. At the time of the decision, Respondents had already consummated the Acquisition. As a remedy for the unlawful Acquisition, the Commission’s Final Order requires Illumina, *inter alia*, to divest GRAIL, hold and maintain GRAIL separate from Illumina pending the divestiture, cooperate with and accept the supervisory services of a monitor, refrain from making certain other acquisitions absent the Commission’s prior approval, and submit compliance reports.

On April 5, 2023, Respondents filed a Petition for Review of the Final Order in the United States Court of Appeals for the Fifth Circuit. Respondents also applied to the Commission for a stay of the Commission’s Final Order pending review by the Court of Appeals. Respondents’ Application for a Stay Pending Review by a United States Court of Appeals (Apr. 4, 2023). The provisions of the Final Order that require divestiture are automatically stayed, *see* 15 U.S.C. § 45(g)(4), but, absent a stay, the Final Order’s non-divestiture provisions will take effect on June 2, 2023. 15 U.S.C. § 45(g)(2). Complaint Counsel agree to staying certain non-divestiture provisions but oppose staying the Final Order as a whole. Complaint Counsel’s Opposition to Respondents’ Application for a Stay Pending Review by a United States Court of Appeals at 1, 5-9 (Apr. 11, 2023). As explained below, the Commission has determined to stay the entire order until the issuance of the mandate by the Fifth Circuit Court of Appeals in connection with Respondents’ April 5, 2023, Petition for Review.

Concurrently with the Commission’s review of the Acquisition, the European Commission has also conducted a review of the Acquisition, under European competition laws. The EC has imposed its own binding hold-separate obligation on Illumina and GRAIL, which continues to apply.¹

We would normally focus on the following factors in determining a stay: (1) the likelihood of success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R. § 3.56(c); *McWane, Inc.*, 157 F.T.C. 1845, 1846 (2014) (citing, *inter alia*, *In re North Carolina Bd. of Dental Exam’rs*, 2012 WL 588756, at *1 (FTC Feb. 10, 2012)).

This case is unusual, however, because the European Commission has already put in place binding measures that provide, on an interim basis, much of the non-divestiture relief that our Final Order provides.² Thus, Respondents must already accept a hold-separate whether we grant or deny a stay, while GRAIL’s competitors and the public will be protected from the irreversible integration of Illumina and GRAIL in either event.

Respondents state that they have complied with the EC hold separate requirements for the past two years. Respondents’ Reply in Support of Application for a Stay Pending Review by a United States Court of Appeals at 3 (Apr. 14, 2023). Complaint Counsel’s Opposition makes no argument that the EC hold-separate requirements have proved inadequate, and Complaint Counsel do not contend that the EC’s interim measures will be ineffective in protecting U.S. consumers or GRAIL’s competitors. Moreover, Respondents raise a concern that “imposition of concurrent and slightly different orders [by the Commission and the EC] will needlessly increase costs and create uncertainty in business operations.” *Id.* Under the unusual circumstances presented here, where the EC’s interim measures prevent Illumina and GRAIL from integrating and monitor Illumina and GRAIL’s compliance, a stay of our Final Order – until the issuance of

¹ EC Press Release, *Mergers: Commission adopts interim measures to prevent harm to competition following Illumina’s early acquisition of GRAIL* (Oct. 29, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5661. See EC Press Release, *Mergers: The Commission adopts a Statement of Objections outlining measures to unwind Illumina’s blocked acquisition of GRAIL* (Dec. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7403; EC Daily News, *Commission renews interim measures to ensure Illumina and GRAIL continue to be kept separate following the prohibition decision* (Oct. 28, 2022), https://ec.europa.eu/commission/presscorner/detail/en/mex_22_6467.

² The EC’s interim measures require GRAIL to be held separate from Illumina and to be run by independent hold-separate managers solely in the interest of GRAIL. EC Daily News (Oct. 28, 2022), https://ec.europa.eu/commission/presscorner/detail/en/mex_22_6467. The measures forbid the sharing of confidential business information between Illumina and GRAIL, subject to limited and controlled exceptions. *Id.* Illumina must provide the funds necessary for GRAIL’s operations and the development of its pipeline cancer tests. *Id.* Illumina and GRAIL must interact on an arm’s length basis, without unduly favoring GRAIL to the detriment of its competitors. *Id.* Compliance with the interim measures will be monitored by a monitoring trustee. *Id.* The interim measures remain in place until the EC notifies any possible decision under Article 8(4) of the EU Merger Regulation ordering unwinding of the Acquisition. *Id.*

the Court of Appeals' mandate – is appropriate.³

Accordingly,

IT IS HEREBY ORDERED THAT enforcement of the Commission's Final Order of March 31, 2023, is stayed until the issuance of the mandate by the United States Court of Appeals for the Fifth Circuit in connection with Respondents' April 5, 2023, Petition for Review.

By the Commission.

April J. Tabor
Secretary

SEAL:

ISSUED: April 24, 2023

³ Of course, should the EC's interim measures be terminated or weakened before the Court of Appeals' mandate has issued in this matter, Complaint Counsel may apply for relief as appropriate.