PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Illumina, Inc.,** **a corporation,** **and** **GRAIL, Inc.,** **a corporation.**	**DOCKET NO. 9401**

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO MOTION FOR CONFERENCE TO FACILITATE SETTLEMENT

Complaint Counsel opposes Respondents Illumina, Inc. ("Illumina") and GRAIL, Inc.'s ("GRAIL") (collectively, "Respondents") request for a conference to facilitate settlement as a waste of this Court's time and an inappropriate attempt to prematurely litigate the fix.[1] {[redacted]} As such, the only function a settlement conference would serve would be to allow Respondents to prematurely argue in front of this Court that their proposed remedy would mitigate the anticompetitive effects of the Proposed Transaction. To conserve this Court's resources, and in the interest of fairness,

[1] Respondents' initial filing was rejected by the Office of the Administrative Law Judge. Respondents re-filed an identical filing on July 13, 2021 asking this Court to set a settling conference on July 8, 2021. That, of course, is impracticable. Regardless of the date of the settlement conference, Complaint Counsel opposes Respondents' Motion for the reasons set forth herein.

Complaint Counsel respectfully asks this Court to deny Respondents' request for a settlement conference.

BACKGROUND

Illumina, the dominant provider of next-generation genome sequencers ("NGS"), announced that it entered into a definitive agreement to acquire GRAIL, a healthcare company racing to develop multi-cancer early detection ("MCED") tests, for cash and stock consideration of $8 billion. After an investigation, the Commission found reason to believe that, if consummated, Respondents' Proposed Transaction would be anticompetitive and violate Section 7 of the Clayton Act, 15 U.S.C. § 18 and Section 5 of the FTC Act, 15 U.S.C. § 45 and voted 4-0 to issue a Complaint seeking to permanently enjoin Respondents from consummating the Proposed Transaction and set an administrative hearing for August 24, 2021 to decide the merits of this case. (Complaint, *In the Matter of Illumina, Inc. v. GRAIL, Inc.*, Docket No. 9401, p. 1 ("Complaint")).

The Complaint alleges—and discovery has substantiated—that the Proposed Transaction will harm American patients by reducing innovation, potentially raising the price of MCED tests, reducing patient choice, and degrading test quality. (*See e.g.*, Complaint ¶ 48).

{[redacted]}

[2] Respondents' March 17, 2021 remedy proposal included a standardized long-term supply agreement and IVD test kit agreement that they later revised and submitted to the FTC on March 26, 2021. Respondents' March 26, 2021 proposal is nearly identical to the settlement proposal before the Court. As Respondents explain in their Motion, Respondents had also previously submitted Consent Principles, attached as Exhibit F to Respondents' Motion, to FTC staff on February 26, 2021. (See Motion at 4).

[redacted]

Complaint Counsel was surprised when Respondents informed Complaint Counsel on June 30, 2021 that they intended to file a motion for a Rule 3.25(a) settlement conference. When asked by Complaint Counsel whether Respondents had a new settlement proposal, Respondents declined to provide such a settlement proposal or even to meet and confer with Complaint Counsel on the substance of any such proposal. (Exhibit B). [redacted] As such, Complaint Counsel's position regarding this previously rejected remedy remains the same: Respondents' proposal is fundamentally flawed, and Complaint Counsel cannot currently identify any amendments to the proposal or an alternative settlement path that appears likely to remedy the substantial competitive harm resulting from the Proposed Transaction.

[3] This is substantially the same as the "Open Offer" provided to customers on March 30, 2021. (Motion at 4).
[4] [redacted]

ARGUMENT

Rule 3.25 allows this Court at its discretion to order a "conference[] for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement." 16 C.F.R. § 3.25(a). Respondents and Complaint Counsel may either jointly move the Commission to approve any consent agreement or this Court may certify a motion for a consent to the Commission if the Parties cannot reach agreement. 16 C.F.R § 3.25(c). In any event, the Commission must approve any consent decree. *See* 16 C.F.R. § 3.25(c).

{[redacted]}

Complaint Counsel has not and cannot propose any specific changes to Respondents' proposed remedy as it cannot identify how the harm resulting from Illumina's change in incentives from the transaction can be alleviated via contract and consent order. Perhaps knowing that a settlement conference is unlikely to advance a consent decree {[redacted]

[redacted]} Respondents did not attempt to meet and confer to explain why this settlement proposal should now be accepted nor did they even tell Complaint Counsel which proposal they wished to discuss at the conference in advance of filing their motion.

Respondents know that Complaint Counsel will not recommend the Commission accept their current proposal and that settlement of this case generally is unlikely. Given this fact, it is clear that Respondents do not seek to meaningfully engage with Complaint Counsel in front of this Court. Rather, Respondents appear to be trying to bypass the Part 3 rules and the schedule laid out in this Court's Scheduling Order, likely seeking to use a settlement conference to prematurely "litigate-the-fix" in front of this Court and to gain a preview into Complaint Counsel's trial strategy as it relates to this issue. Allowing Respondents to prematurely argue their case to the Court without being grounded by the submission of evidence and allowing them to gain an unfair advantage by exploring Complaint Counsel's strategy as it prepares for trial before the conclusion of expert discovery will unfairly prejudice Complaint Counsel and waste this Court's time under the guise of discussing a clearly inadequate and unacceptable settlement proposal.

CONCLUSION

Complaint Counsel has been and remains willing to consider any good faith settlement proposal adduced by Respondents. But what is before this Court is not a good faith settlement proposal. Rather Respondents' motion appears to be a strategic move designed to give them a tactical advantage, and, if granted, would result in a waste of the Court's time. As such, Complaint Counsel respectfully requests this Court to deny Respondents' Motion for Conference to Facilitate Settlement under Rule 3.25(a).

Dated: July 20, 2021

Respectfully submitted,

By: s/ *Susan A. Musser*
Susan A. Musser

Counsel Supporting the Complaint

EXHIBIT A

CONFIDENTIAL – REDACTED IN ENTIRETY

EXHIBIT B

CONFIDENTIAL – REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2021, 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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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I also certify that I caused the foregoing document to be served via email to:

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