

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

ORDER DIRECTING FILING OF A STATUS REPORT

By a decision issued on December 15, 2023, the United States Court of Appeals for the Fifth Circuit rejected all but one aspect of the petition for review filed by Respondents Illumina, Inc. (“Illumina”) and GRAIL, Inc. (now GRAIL, LLC) (“GRAIL”) and remanded to the Commission for further consideration of that one issue.

The Court rejected each of Illumina’s four constitutional challenges to the Commission. Specifically, the Court upheld the constitutionality of Congress’ delegation of authority to the Commission; the constitutionality of the Commission’s administrative process; the constitutionality of the clearance process between FTC and DOJ’s Antitrust Division; and the constitutionality of the President’s removal power over Commissioners. In reviewing the antitrust substance of the lawfulness of Illumina’s acquisition of GRAIL, the Court affirmed the Commission’s finding of a product market for the research, development, and commercialization of multi-cancer early detection tests; affirmed the Commission’s finding that Complaint Counsel proved a *prima facie* case of likely anticompetitive effects from this vertical acquisition; and rejected Illumina’s efficiencies claims, including its claim that the acquisition would eliminate double marginalization. The one issue on which the Court found error was the Commission’s analysis of the Open Offer, a supply arrangement that Illumina offered to rival multi-cancer early detection test customers. The Court held that the Commission must consider whether Illumina had shown that the Open Offer “sufficiently mitigated the merger’s effect such that it was no longer likely to substantially lessen competition.” Slip op. at 29 (emphasis omitted). The Court vacated the Commission’s order and remanded for the Commission to evaluate the Open Offer under this standard. On February 6, 2024, the Court of Appeals issued its mandate. The

Commission is now prepared to address the one remaining issue remanded by the Court of Appeals.

After the Fifth Circuit issued its opinion, Illumina announced its decision to divest GRAIL. *See* Press Release, Illumina, Inc., Illumina Announces Decision to Divest GRAIL (Dec. 17, 2023), <https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=fcc14ca0-2c74-4925-aabd-0ed940ee8c29>. The parties, however, have not apprised the Commission, via any filing in this proceeding, of the nature and timing of the planned divestiture. Consequently, we are directing the parties to file a status report regarding Illumina's divestiture efforts, including steps taken toward such divestiture, and any interaction between Illumina's divestiture efforts and the Commission's activity on remand. The parties may file jointly or separately.

Accordingly,

**IT IS HEREBY ORDERED THAT** Complaint Counsel and Respondents are directed within 10 days of the issuance of this Order to file with the Commission a status report or status reports apprising the Commission of the nature and timing of the planned divestiture of GRAIL LLC, including steps taken toward such divestiture, and any interaction between Illumina's divestiture efforts and consideration by the Commission of the issue remanded by the Court of Appeals.

By the Commission.



April J. Tabor  
Secretary

SEAL:  
ISSUED: 2/27/2024