

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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In the Matter of	)	
	)	
Illumina, Inc.,	)	
a corporation,	)	Docket No. 9401
	)	
and	)	
	)	
GRAIL, Inc.,	)	
a corporation,	)	
	)	
Respondents.	)	

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**ORDER DENYING MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

**I.**

On October 22, 2021, Professors Richard Epstein, Adam Mossoff, and other signatories (“Movants”) filed a motion seeking leave to file a brief as amici curiae, pursuant to Federal Trade Commission (“FTC”) Rule 3.22(a) (“Motion”). 16 C.F.R. § 3.22(a).<sup>1</sup> FTC Complaint Counsel filed an opposition on October 29, 2021. For the reasons set forth below, the Motion is DENIED.

**II.**

The Movants state that they are scholars and other jurists specializing in antitrust, patent law, and law and economics; that they have no personal stake in the outcome of the proceeding; and that they have an interest in promoting antitrust enforcement that is informed by modern economics and that protects the public’s access to new technologies. The Movants further assert that although they are not privy to the confidential evidence in this case, they hope to be helpful in this matter by elaborating on the legal and economic principles at issue in this case. Complaint Counsel argues that the Motion provides nothing more than vague proclamations of the Movants’ interest. Complaint Counsel further argues that the Movants’ brief is untimely, as they seek to file it in advance of any post-trial briefing.

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<sup>1</sup> The Movants originally submitted a motion for leave to file an amicus brief on October 13, 2021, relying on FTC Rule 3.52(j). 16 C.F.R. § 3.52(j).

### III.

FTC Rule 3.22(a) states that “[d]uring the time a proceeding is before an Administrative Law Judge, all other motions [besides those expressly designated for Commission decision or referral] shall be addressed to and decided by the Administrative Law Judge[.]” The only provision in the Commission’s Rules that entertains the possibility of an amicus curiae brief is Rule 3.52(j), which relates to appeals from an initial decision. Rule 3.52(j) requires: “A motion for leave shall identify the interest of the applicant and state how a Commission decision in the matter would affect the applicant or persons it represents. The motion shall also state the reasons why a brief of an amicus curiae is desirable.” 16 C.F.R. § 3.52(j). While the Commission’s rules do not expressly contemplate an amicus brief filed at this stage, they do not prohibit it. *See In the Matter of Ticor Title Ins. Co.*, No. 9190, 1986 WL 293200 (Jan. 8, 1986) (permitting the Insurance Department of the Commonwealth of Pennsylvania to submit an amicus brief “for the purpose of offering its construction of the Pennsylvania insurance statute applicable to the regulation of title insurance rates”).

“District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has ‘unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.’” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (finding it appropriate to consider amicus curiae’s brief because of “its involvement in the events leading to this case” and its interest in certain agreements at issue in the case). In this case, the Motion does not clearly or adequately explain how the Movants have unique information or a novel perspective to offer.

Courts considering whether to permit statements of interest in trial court proceedings (essentially, an amicus curiae brief filed with the district court) have stated that such filings may be considered if “the information is timely, useful, or otherwise necessary to the administration of justice.” *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695, 703 (D. Minn. 2018). The Movants fail to provide any information that would allow an assessment of the utility of their proposed amicus brief. The Motion does not explain how the brief will provide any new or useful information or analysis. Indeed, the Movants do not describe any personal knowledge of any multi-cancer early detection systems or relevant regulations.

As one treatise states, “an amicus ought to add something distinctive to the presentation of the issues, rather than serving as a mere conduit for the views of one of the parties.” Wright & Miller, *Fed. Prac. & Proc.* § 3975. The Movants’ views and interests, as lawyers and economists, already are well represented. Respondents Illumina, Inc. and GRAIL, Inc. have been represented by five law firms containing thousands of lawyers and have presented expert testimony from three industrial organization economists and from four other experts. In contrast to the economic experts in this matter, none of the signatory economists has access to information from the parties and third parties that has been admitted into evidence and has been granted *in camera* treatment. Further, to the extent the Movants’ economists purport to provide expert opinions, such opinions would circumvent the Scheduling Order issued in this case, which limits expert opinions to those provided in either party’s expert reports. Scheduling Order ¶ 21.

**IV.**

For the reasons set forth above, an amicus brief from Movants will not be particularly useful in this matter. Accordingly, the Motion is DENIED.

ORDERED:



D. Michael Chappell  
Chief Administrative Law Judge

Date: November 5, 2021