

**UNITED STATES OF AMERICA
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 OPPOSITION TO NON-PARTY ANTITRUST, PATENT,
AND LAW-AND-ECONOMICS SCHOLARS AND JURISTS MOTION FOR LEAVE TO
FILE BRIEF AS AMICI CURIAE SUPPORTING RESPONDENTS**

On October 22, 2021, Non-Party Antitrust, Patent, and Law-and-Economics Scholars and Jurists (“Amici”) filed a Motion for Leave (hereinafter “Amici’s Motion”) to file a brief as amicus curiae supporting Respondents in the present matter under 16 C.F.R. § 3.22(a).¹ But Amici’s Motion is flawed and therefore should be denied without prejudice.

First, the Court should deny Amici’s Motion for Leave without prejudice because Amici’s Motion provides nothing more than vague proclamations of their interest. The Commission’s Rules and other courts contemplate amicus curiae participation when they have some interest, unique or useful information, or a novel perspective to bring to a litigation. But Amici fail to provide sufficient information to allow this Court to assess whether their briefing is useful. This requirement is especially important here where Respondents have engaged in a widespread public relations campaign apparently in an effort to impact this litigation. Although

¹ On October 13, 2021, Amici filed their original Motion relying on 16 C.F.R. § 3.52(j). On October 22, 2021, Amici submitted a revised Motion relying on 16 C.F.R. § 3.22(a).

they aver that they were not directly compensated to provide this brief, Amici do not state whether they—or the institutions they represent—have an otherwise meaningful relationship to Respondents. Amici therefore should state precisely what their interest is in this litigation and whether they personally, or their organizations, have been directly or indirectly funded or otherwise incentivized by Respondents in order to allow the Court to properly assess any bias and ascertain whether this briefing is useful.

Second, Amici file their brief in advance of any post-trial briefing. Compare that to the Section 3.52(j), which requires amici to “file [their] brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support.” *Id.* At a minimum, Amici should file their brief at a time that is consistent with the only rule setting forth a timeline for amicus curiae participation and follow the post-trial briefing schedule once it is set.²

As a result, Amici’s Motion should be **DENIED WITHOUT PREJUDICE**.

ARGUMENT

A. Amici’s Statement of Interest Fails to Provide a Clear Explanation of Their Interest

Amici’s Motion should be denied without prejudice because Amici’s statement of interest fails to provide a clear and adequate explanation of how they have unique information or a novel perspective to offer this Court and whether they have any pecuniary or non-pecuniary relationship to Respondents. The only place in the Commission’s Rules that entertain the possibility of an amicus curiae participation is Section 3.52(j), which relates to appeals from an initial decision. Section 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

² Although Amici revised their Motion to cite Section 3.22(a), Section 3.52(j) remains the only rule that explicitly contemplates amicus curiae participation and provides a concrete framework for amicus curiae participation.

desirable.” *Id.* Other courts considering whether to entertain Statements of Interest in trial court proceedings (essentially, an amicus curiae brief filed with the district court) have observed 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). As one treatise observes, “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.

But Amici’s Motion for Leave fails to provide any information that would allow this Court to assess this brief’s utility. First, Amici’s Motion does not explain how this brief will provide any new or useful information or analysis that would allow the Court to grapple with the record before it. At the outset, Amici have disclaimed any personal knowledge of the MCED test market. Nor do they describe any personal knowledge of any other market that would be affected by this case. Rather, they vaguely claim an “interest in promoting antitrust enforcement that is informed by modern economics and that protects the public’s access to new technologies,” Amici Mot. 1, and express a “hope to serve the Court by elaborating the complex legal and economic principles at the case’s center.” *Id.*

Second, Amici do not explain how they provide a distinctive viewpoint that would aid the Court. Their views and interests, as lawyers and economists, already are well represented by the litigants: Respondents have been represented by five law firms containing thousands of lawyers. Indeed, thirty-four lawyers have entered notices of appearance in this matter on behalf of Respondents. Respondents have presented expert testimony from three industrial organization economists and from four other experts. Amici say nothing about how Respondents’ lawyers,

economists, and other experts participating in this case are insufficient to represent the views of Amici in this matter.

Nor do Amici state how the signatory economists have useful information to provide beyond what Respondents' economists have already provided.³ Indeed, in contrast to the economic experts in this matter, none of the signatory economists has access to the vast amount of information from the parties and third parties that has been admitted into evidence and has been granted *in camera* treatment by this Court. As a result, the signatory economists' views are naturally more limited and lack a certain degree of probative value.

Compare Amici's stated interest to other amicus briefs that this Court has accepted in the past. In *Ticor Title Insurance Co*, this Court permitted the Insurance Department of the Commonwealth of Pennsylvania to submit an amicus brief. But this Court only accepted the brief "for the purpose of offering its construction of the Pennsylvania insurance statute applicable to the regulation of title insurance rates." *In the Matter of Ticor Title Ins. Co.*, No. 9190, 1986 WL 293200 (Jan. 8, 1986). In *Kellogg Company*, the Commission upheld this Court's denial of the American Federation of Grain-Millers' ("AFL-CIO") Motion to Intervene but allowed the AFL-CIO to submit an amicus brief. *In the Matter of Kellogg Comp.*, 92 F.T.C. 351, 1978 WL 206517 (Sept. 13, 1978). In that matter, there was a remedy proposal requiring five corporate entities to be spun off from the various respondents. No provision, however, was made in that remedy proposal to require those divested entities to hire the employees currently working for those respondents or to adopt or maintain the benefits bargained for under the operative collective bargaining agreements. In both the *Tico Title Insurance* and *Kellogg*

³ Moreover, to the extent Amici's economists purport to provide expert opinions, such opinions would appear to circumvent this Court's Scheduling Order, which limits expert opinions to those provided in either party's expert reports. Scheduling Order ¶ 21.

Company, the amici had a personal stake and/or unique knowledge to provide this Court that neither party was well-situated to provide.

Indeed, even the federal district court case that Amici cite, *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005), highlights the deficiencies in Amici's statement of interest. In that case, the court noted: "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.'" *Id.* (citing *Corbell v. Nelson*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)). There, the court noted that it was 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. *Id.* at 1068.⁴

In contrast to two previous instances where this Court has entertained amicus participation and the one federal district court case that they cite, Amici disclaim any stake in this matter and make zero effort to explain how they have unique information or a novel perspective outside of what Respondents already provide. As a result, Amici's statement of interest does not meet the standards that this Court has applied in prior cases for accepting amicus briefs; nor does Amici's statement meet the standard of the federal district court that they cite to support their position.

The haziness of Amici's interest in this matter is particularly concerning in light of Respondents' efforts to engage in a widespread lobbying campaign to shape perceptions of this

⁴ Amici also cite *Evanston Nw. Healthcare Corp.*, 2006 WL 367352 at*2 (Jan. 24, 2006) as authority for this Court to entertain their brief, but *Evanston* does not help their position. In that matter, the Commission considered whether to accept the brief of amicus curiae on appeal from this Court's Initial Decision; that decision does not speak to whether this Court should entertain a brief at this stage in the litigation.

matter. *See, e.g.,* Ben Remaly, *Illumina and Grail seek to win over the court of public opinion*, Global Competition Rev. (Sept. 2, 2021), <https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/illumina-and-grail-seek-win-over-the-court-of-public-opinion>; Mike Scarcella, *Sidley, DLA Piper lobby for Illumina against FTC merger challenge*, Reuters (July 30, 2021), <https://www.reuters.com/legal/litigation/sidley-dla-piper-lobby-illumina-against-ftc-merger-challenge-2021-07-30/>. For example, Illumina has publicly disclosed that it has paid thousands of dollars to lobbying groups such as Avenue Solutions, Rampy Northup, DLA Piper, and Sidley Austin. Ben Remaly, *Illumina and Grail seek to win over the court of public opinion*, Global Competition Rev. (Sept. 2, 2021), <https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/illumina-and-grail-seek-win-over-the-court-of-public-opinion>. These lobbying efforts often include op-eds as part of the “public relations battle either in support or of against a merger.” *Id.* Indeed, Sidley Austin senior counsel Timothy Muris published an op-ed (with George Mason University economist Bruce Kobayashi) relating to this very merger, presumably connected to Respondents’ paid lobbying activities. *Id.*

Although Amici state that they were not specifically compensated to write this brief, there are many ways in which Respondents may compensate Amici or use their ties to Amici to influence them to write a supportive brief. In light of Respondents’ public-relations activities, which involve seeking to present as unbiased paid for or solicited third-party opinions, it is crucial that Amici disclose any direct or indirect ties that they or their institutions have with Respondents to help the Court evaluate the merits of their arguments. Specifically, Amici must disclose at minimum: whether Amici specifically were asked to prepare this amicus brief by Respondents, or any other organization or entity on their behalf, including or not limited to any public relations or lobbying firm retained by Respondents; whether Respondents provided

funding directly or indirectly to any of the signatories of the brief or any of the organizations that employ them; all non-pecuniary ties with the brief's signatories or the organizations that employ them and Respondents; and the identity of the entities or person that are paying Amici's counsel—Paul Hasting. Amici also must make some effort to explain how they have unique information or a novel perspective to offer this Court. Without context, the Court will not have all the information that it needs to assess the credibility and utility of the brief's assertions.

B. Amici's Brief is Untimely

The only rule that expressly contemplates amicus participation, Section 3.52(j), imposes the following requirement for the timing of submitting an amicus brief: "Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. 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." 16 C.F.R. § 3.52(j). Stated plainly, Section 3.52(j) requires any amicus curiae to file its brief contemporaneously with the parties' briefing schedule. Moreover, Section 3.52 (j) requires amicus curiae to make a "for cause" showing for any out-of-time submission. Here, Amici's brief predates any post-trial briefing, which only highlights this brief's lack of probative value, as Amici do not purport to address Complaint Counsel's post-trial brief. Amici also fail to state why there is cause for its out-of-time submission. At a minimum, Amici should be required to follow the parties' briefing schedule.

CONCLUSION

For the foregoing reasons, Amici's Motion for Leave should be **DENIED WITHOUT PREJUDICE**.

PUBLIC

Date: October 29, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 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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 Washington, DC 20580

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

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