UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M. Bedoya

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

COMPLAINT COUNSEL'S MOTION IN OPPOSITION TO RESPONDENTS' REQUEST TO REOPEN THE RECORD TO ADMIT ADDITIONAL EXHIBITS AND FOR EXPEDITED BRIEFING

Respondents again seek to reopen the record to admit irrelevant documents in an attempt to inject superfluous issues into this proceeding and distract from the merits. This time, Respondents propose to admit RX4069, RX4070, and RX4071 (the "Additional Exhibits") not to support the merits of the case but instead to argue they were denied due process because FTC staff and Commissioners allegedly conspired with government officials from both the European Commission ("EC") and the U.K. Competition and Markets Authority ("CMA") in order to enable the FTC to file a motion to dismiss without prejudice its complaint seeking a temporary restraining order ("TRO") and preliminary injunction ("PI") in federal court.

Respondents' implausible conspiracy theory is completely unsupported by evidence. All that the Additional Exhibits show is that FTC staff and Commissioners communicated with their foreign counterparts, which is not only permitted, but is a routine practice for competition agencies

worldwide when reviewing the same mergers. The U.S. Department of Justice and FTC Antitrust Guidelines for International Enforcement and Cooperation (2017) (the "International Cooperation Guidelines") § 5.1.4 explicitly allow for such communications among international enforcement authorities:

> If a transaction or conduct under antitrust investigation in the United States is also being investigated by a foreign authority, the Department or the Commission may contact the authority. The Agencies may share with these foreign authorities relevant publicly available information. Similarly, it remains in the Agencies' discretion whether to share with cooperating foreign authorities agency non-public information, which is information that the Agencies are not statutorily prohibited from disclosing, but that the Agencies normally treat as non-public and withhold from public disclosure.

Further, Respondents themselves sanctioned and facilitated these communications by voluntarily granting the FTC a waiver to share confidential information with the EC regarding the investigation. Resp. Mot. to Reopen the Record ("Resp. Mot.") at 3 n.1, 5 n.4 (Mar. 4, 2023). Respondents have therefore failed to meet their burden to show good cause to reopen the record under 16 C.F.R. §§ 3.43(b), 3.51(e)(1), and 3.54(a). Accordingly, Complaint Counsel respectfully asks the Commission to deny Respondents' motion.

STATEMENT OF FACTS

On March 30, 2021, the Commission voted 4-0 to issue an administrative complaint challenging the proposed transaction. At that time, the EC had not yet publicly announced that Respondents were required to notify the EC and obtain clearance prior to closing. Pl.'s Ex Parte Appl. to Dismiss the Compl. (Exhibit A) at 7. As such, the Commission understood that Respondents would be able to close the transaction after March 30, 2021, absent preliminary injunctive relief, and therefore authorized Complaint Counsel to file a complaint for a TRO and PI in federal district court. Ex. A at 7. After the EC publicly announced that it had opened an investigation into the proposed transaction, which included a standstill obligation preventing

Respondents from closing the transaction, Complaint Counsel's federal complaint was mooted, Ex. A at 6, and accordingly, dismissed without prejudice by the federal district court. Judgment on Mot. to Dismiss (June 1, 2021) (Exhibit B).

Respondents, having reviewed redacted versions of communications between the FTC, the EC, and the CMA, now claim that: (1) FTC staff and certain Commissioners are "biased"; (2) the FTC, EC, and CMA were "potentially improperly" coordinating with each other; (3) the FTC "influenced foreign processes to avoid federal judicial scrutiny"; and (4) the FTC claimed privilege to "protect the agency from embarrassment." These evidence-free claims largely mirror allegations made by the Chamber of Commerce (the "Chamber"), which obtained the aforementioned communications through a lawsuit pursuant to a Freedom of Information Act ("FOIA") request. None of these communications suggest any impropriety, much less any due process violations.

First, nothing in the Additional Exhibits reveals any evidence of bias among FTC staff or Commissioners. Respondents do not—and cannot—point to any specific portions of the Additional Exhibits as evidence of bias among FTC staff, and nowhere do Respondents explain the source of any alleged bias or how such alleged bias affected any action related to the investigation or litigation. To the extent Respondents suggest that the mere existence of communications between FTC staff and EC and CMA officials establishes bias, such a claim is incorrect, as the FTC has "authority to cooperate with foreign authorities" that "is inherent in [its] ability to act in furtherance of [its] mandates," and therefore "has the discretion to cooperate, including when it furthers its enforcement interests." Int'l Cooperation Guidelines § 5.1.3. Examples of non-public information that FTC staff may disclose (even absent confidentiality waivers from parties) include "the existence of an open investigation and [] staff views as to the

merits of a case, market definition, competitive effects, substantive theories of harm, and remedies." Int'l Cooperation Guidelines § 5.1.4. Respondents' claim of bias against former Commissioner Chopra and Commissioner Slaughter are particularly puzzling. Commissioner Chopra resigned his position at the FTC more than a year ago and is not adjudicating the appeal of the ALJ's Initial Decision in this matter. Commissioner Slaughter appeared on a total of three emails in the Additional Exhibits, all of which involved communications with the CMA rather than the EC. Unlike the EC, the CMA has not challenged the proposed transaction, undermining any claim that Commissioner Slaughter "influenced" foreign processes.

Second, there is no evidence that the FTC, EC, or CMA were "improperly" coordinating. Again, FTC staff has the "discretion to cooperate, including when it furthers its enforcement interests." Int'l Cooperation Guidelines § 5.1.3. The Chamber itself has consistently recognized the value of this cooperation. For example, in its public comments submitted to the FTC and DOJ in connection with the International Cooperation Guidelines in 2016, the Chamber stated:

> The Chamber welcomes the fact that the guidelines extend beyond enforcement and now include cooperation. Antitrust cooperation between jurisdictions is increasingly important, particularly with regard to merger review.[1]

Further, "[w]hile confidentiality obligations generally prohibit the Agencies from disclosing to foreign authorities confidential information submitted by a person, that person can enable the Agencies to engage in more meaningful cooperation with foreign authorities by granting the Agencies a waiver of confidentiality as to information that may be otherwise protected from disclosure." Int'l Cooperation Guidelines § 5.1.4. And here, recognizing the value of that cooperation, Respondents voluntarily granted the FTC a waiver to share such confidential information related to the proposed transaction with the EC. Resp. Mot. at 3 n.1, 5 n.4.

[1] U.S. Department of Justice and Federal Trade Commission, *Antitrust Guidelines for International Enforcement and Cooperation*, Issued Jan. 13, 2017, Comments of the U.S. Chamber of Commerce at 3 (Dec. 1, 2016).

Third, Respondents' claim that the FTC somehow influenced the EC review process to avoid a hearing in federal court is baseless. Respondents' accusation implies that the EC is not an independent, sovereign authority and instead follows the FTC's direction. This, of course, is preposterous. The FTC has no authority over the EC and thus no power to coerce the EC into taking any action. Nor was the EC's assertion of jurisdiction over the proposed transaction improper. In fact, after Respondents appealed the EC's claim of jurisdiction over the proposed transaction, the EU General Court affirmed the EC's decision, concluding that the EC's exercise of jurisdiction to review the proposed transaction was proper. Case T-227/21, Illumina, Inc. v. European Commission (July 13, 2022).

Similarly, there is no evidence that the FTC sought to avoid a trial in federal district court. As explained above, Complaint Counsel sought to dismiss its TRO and PI complaint only after learning of the EC's decision to open an investigation and impose a standstill obligation on Respondents, thus mooting the federal court action. Ex. A at 11 ("[N]ow that the EC has opened an investigation there is no additional relief that this Court can provide, accordingly there is no live case or controversy and this case is moot."); *see FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 218-19 (D.D.C. 2018) ("Until foreign regulators approved the proposed merger, there was no imminent threat to competition, so a request for injunctive relief would have likely been unripe."). That Respondents closed the transaction despite the EC's standstill obligation does not change the fact that the FTC believed the federal court proceeding had been mooted at that time. As stated in its application to dismiss the federal complaint, "based on this new, post-Complaint information from the EC—*and our assumption that Defendants will abide by the laws of all jurisdictions in which they operate*—the FTC's understanding is that Defendants cannot currently close this transaction." Ex. A at 7-8 (emphasis added). Proceeding to a full administrative trial on the merits

did not prejudice Respondents, as the federal district court recognized in dismissing the TRO and PI complaint. Tr. of MTD Hearing (May 28, 2021) (Exhibit C) at 25-26. Subsequent to the dismissal of the federal court complaint, Respondents had the opportunity to present their arguments in the appropriate forum—a five-week evidentiary hearing before the ALJ. It strains credulity to argue now that Respondents' due process rights were violated because they were afforded a *longer* trial, involving more witnesses and evidence, than they would have enjoyed if the complaint for a TRO and PI had not been mooted.

Finally, there is no evidence suggesting that the FTC's claims of privilege over portions of its communications with the EC and CMA were made to protect the FTC from embarrassment. As noted above, the FTC lacks authority to force a foreign antitrust authority to take any action, and the FTC did not shield itself from judicial scrutiny. Moreover, the FTC's privilege claims are not a "sham," as Respondents characterize them. The FTC Act exempts from mandatory disclosure under FOIA "any material obtained from a foreign law enforcement agency or other foreign government agency, if the foreign law enforcement agency or other foreign government agency has requested confidential treatment, or has precluded such disclosure under other use limitations, as a condition of providing the material." 15 U.S.C. § 57b-2(f)(2)(A)(i); *see generally* CC's Mot. for *In Camera* Treatment of Certain Trial Exhibits (detailing the FTC's confidentiality obligations pursuant to various MOUs and agreements). The purpose of international cooperation would be frustrated if all communications between foreign authorities, the confidentiality of which is protected by statute, would nonetheless subject to discovery by the companies being investigated. Additionally, Respondents did not challenge Complaint Counsel's assertion of privilege during the administrative hearing before the ALJ.

ARGUMENT

Respondents seek to admit additional irrelevant documents near the deadline for a decision on the appeal of the ALJ's Initial Decision. 16 C.F.R. § 3.52(b)(2). The Commission has noted that "[r]eopening the record to admit supplemental evidence . . . should only be done in compelling circumstances." *In the Matter of Rambus Inc., A Corp.*, 2005 WL 1416300, at *2 (May 13, 2005). The disclosure of emails demonstrating only that the FTC communicated with its foreign counterparts—many of which occurred after Respondents issued a waiver permitting the sharing of certain confidential information—does not qualify.

(a) *The Record Should Not be Reopened Under Rules 3.51(e)(1) and 3.54(a)*

To reopen the record under Commission Rules 3.51(e)(1) and 3.54(a), Respondents must show the following: (1) that they acted with due diligence; (2) the evidence is probative; (3) the evidence is non-cumulative; and (4) the absence of prejudice to the non-moving party. *In the Matter of Rambus Inc., A Corp.*, 2006 WL 2522715, at *2 (Aug. 1, 2006) (citing *In the Matter of Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998)). Respondents fail to meet the requisite showing for the Additional Exhibits.

i. Respondents Cannot Demonstrate Due Diligence

Respondents had ample opportunity to seek production of communications between the FTC and other foreign antitrust authorities during discovery. Instead, Respondents claim not to have challenged the FTC's claim of privilege during discovery because they accepted the claim "at face value." Resp. Mot. at 4. Yet, in their current motion, Respondents specifically take issue with the FTC's claims of privilege under the common-interest doctrine, which is the same doctrine that Respondents admit the FTC relied on in discovery. Respondents simply chose not to challenge the FTC's privilege claims at that time. They should not get a second bite at the apple now.

Moreover, the emails that Respondents appear to believe are most relevant to their due process arguments, those that involve former Commissioner Chopra and Commissioner Slaughter, were all created prior to April 2021, when discovery in this proceeding began, and were noted in the FTC's previously produced privilege log. Respondents therefore could have sought to introduce these exhibits at that time or at any other point in the last two years.

ii. The Additional Exhibits Are Not Relevant or Probative

Nothing about the Additional Exhibits is relevant to Respondents' arguments on the merits. Moreover, nothing in the Additional Exhibits is relevant or probative of Respondents' due process arguments. Respondents cannot point to *any* communications between the FTC and foreign antitrust authorities that suggest bias against Respondents, influence over a foreign investigation, or an attempt to avoid judicial scrutiny. Instead, Respondents refer to "potentially improper" coordination between the FTC and the EC, without explaining what conduct was improper or why such conduct would have been improper. Resp. Mot. at 3, 7. Respondents' arguments amount to little more than idle conjecture. Given their lack of probative value, the Commission has no need to admit the Additional Exhibits to "resolve" any issue presented in this matter. 16 C.F.R. § 3.54(a).

iii. The Additional Exhibits Are Cumulative

The Additional Exhibits do not present any facts that were unavailable at the time of trial. By the time of trial, Respondents were aware that the FTC was communicating with the EC, having sanctioned and facilitated that communication through a voluntary grant of waivers in June 2021. Resp. Mot. at 3 n.1, 5 n.4. Respondents cannot point to any new facts that somehow make these communications "improper." They simply conclude that it was improper because of "wide-scale" coordination between the FTC and EC. Respondents' accusations are unfounded. The Additional

Exhibits do not clarify any relevant issue and instead inject unsupported speculation into the proceeding. Therefore, Respondents have failed to meet their burden to show good cause to reopen the record to admit the Additional Exhibits.

CONCLUSION

For the reasons stated herein, Complaint Counsel respectfully requests that the Commission deny Respondents' request to reopen the record to admit RX4069, RX4070, and RX4071.

Dated: March 15, 2023

Respectfully submitted,

s/ Jordan S. Andrew

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EXHIBIT A

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ILLUMINA, INC. and GRAIL, INC.,

Defendants.

Case No.: 3:21-cv-00800-CAB-BGS

PLAINTIFF'S *EX PARTE* APPLICATION TO DISMISS THE COMPLAINT WITHOUT PREJUDICE

Judge: Hon. Cathy Ann Bencivengo
Magistrate: Hon. Bernard G. Skomal
Courtroom: 15A
Hearing Date:

PLAINTIFF'S *EX PARTE* APPLICATION TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(A)(2)

Pursuant to Rule 41(A)(2) of the Federal Rules of Civil Procedure, and for the reasons set forth in the accompanying memorandum of law, Plaintiff Federal Trade Commission (hereinafter, "FTC"), by and through its undersigned counsel, hereby moves this Court for an order dismissing without prejudice and without condition the Federal Trade Commission's Complaint for a Preliminary Injunction and Temporary Restraining Order. Plaintiff's met and conferred with Illumina, Inc. and GRAIL, Inc. and understand that Defendants will oppose this motion.

The FTC respectfully requests an expedited briefing schedule and to stay all deadlines during the pendency of a decision on this *ex parte* application. Defendants oppose the FTC's request for both a temporary stay and for an expedited briefing schedule.

Dated: May 21, 2021

Respectfully submitted,

/s/ Susan A. Musser
Susan Musser
Counsel for Federal Trade Commission

INDEX OF EXHIBITS	
Exhibit Number	**Description**
1	European Commission Merger Case – Illumina/Grail
2	Docket entry for appeal to the European General Court
3	April 22, 2021, email from Susan Musser to Defendants' Counsel re: Illumina/GRAIL | European Commission's Investigation
4	May 18, 2021 email from Susan Musser to Defendants' Counsel re: Illumina/GRAIL | M&C
5	Excerpt of Tronox Limited/Cristal USA (Dkt. 9377) Pretrial Conference (Dec. 20, 2017)
6	Letter from FTC and Defendants' Counsel to Chief Judge Sabraw and Mr. Morrill re: F.T.C. v. Illumina Inc. et al., No. 1:21-cv-00873-RC (Apr. 20, 2021)
7	In re Illumina/Grail (Dkt. 9401) Scheduling Order (Apr. 26, 2021)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 21, 2021, I served the foregoing on the following counsel via electronic mail and the Court's CM/ECF system:

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ILLUMINA, INC. and GRAIL, INC.,

Defendants.

Case No.: 3:21-cv-00800-CAB-BGS

MEMORANDUM IN SUPPORT OF PLAINTIFF'S *EX PARTE* APPLICATION TO DISMISS THE COMPLAINT WITHOUT PREJUDICE

Judge: Hon. Cathy Ann Bencivengo
Magistrate: Hon. Bernard G. Skomal
Courtroom: 15A
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MEMORANDUM IN SUPPORT OF PLAINTIFF'S *EX PARTE APPLICATION* TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 41(A)(2)

The Federal Trade Commission ("FTC" or "Commission") moves to voluntarily dismiss its Complaint for Preliminary Injunction and Temporary Restraining Order ("PI Complaint") under Federal Rule of Civil Procedure 41(A)(2). Fed. R. Civ. P. 41(A)(2). The FTC filed its PI Complaint on March 31, 2021 to maintain the *status quo* and prevent Illumina, Inc. and GRAIL, Inc. (collectively, "Defendants") from consummating their proposed transaction before the administrative trial on the merits could be conducted.[1] (PI Complaint, p. 1). Since the FTC filed the PI Complaint, the European Commission ("EC") announced that it has accepted requests from member states to assess Defendants' proposed transaction and publicly stated that Illumina and GRAIL cannot "implement the transaction before notifying and obtaining clearance from the Commission."[2] Although Defendants appear to be appealing the EC's exercise of jurisdiction,[3] unless either the EC completes its investigation and allows the proposed transaction to proceed, or the European General Court determines that the EC lacks jurisdiction to investigate, Defendants are prohibited from closing.[4] Currently, the EC has not accepted Defendants'

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[1] The Administrative Complaint was issued by the Commission on March 30, 2021. The administrative trial is scheduled to begin on August 24, 2021.

[2] *Mergers: Commission to assess proposed acquisition of GRAIL by Illumina*, European Commission (April 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.

[3] *Illumina Files Action for Annulment of European Commission's Decision Asserting Jurisdiction to Review GRAIL Acquisition*, Illumina.com (April 29, 2021, 9:05 AM), https://investor.illumina.com/news/press-release-details/2021/Illumina-Files-Action-for-Annulment-of-European-Commissions-Decision-Asserting-Jurisdiction-to-Review-GRAIL-Acquisition/default.aspx.

[4] European Commission Communication, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (March 26, 2021), at 7; 2004 O.J. (L 24), art. 7; 2004 O.J. (L 24), art. 14(2)(b).

Form CO filing[5]—nor is there a notice of briefing schedule for the Defendants' appeal to the European General Court.[6] The FTC is authorized to seek a preliminary injunction or temporary restraining order only if necessary to preserve the *status quo*. The EC's prohibition on closing now moots the FTC's PI Complaint as no temporary restraining order or preliminary injunction is currently needed to maintain the *status quo* pending the administrative trial. Therefore, the FTC moves to dismiss its Complaint without prejudice because relief is not necessary at this time.

BACKGROUND

Illumina, Inc., the dominant provider of next-generation genome sequencers, announced that it entered into a definitive agreement to acquire GRAIL, Inc., a healthcare company racing to develop multi-cancer early detection tests, for cash and stock consideration of $8 billion (hereinafter, "Proposed Transaction").[7] After an investigation, the Commission found reason to believe that, if consummated, Defendants' merger 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 an Administrative Complaint to permanently enjoin Defendants 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.*, FTC Docket No. 9401, p. 1. (hereinafter "Administrative Complaint").

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[5] At the time of filing this application, the EC's database shows that the EC has not accepted a Form CO. The Form CO filing initiates the EC's merger review process. Exhibit 1 (showing no entry for the Form CO Filing).

[6] The docket entry for Illumina's appeal shows that a briefing and hearing schedule has not even been set for that proceeding. Exhibit 2 (listing no hearing or briefing schedule).

[7] *Illumina to Acquire GRAIL to Launch New Era of Cancer Detection*, Illumina.com (September 21, 2020, 7:00 AM), https://investor.illumina.com/news/press-release-details/2020/Illumina-to-Acquire-GRAIL-to-Launch-New-Era-of-Cancer-Detection/default.aspx.

At the time the Commission voted to issue the Administrative Complaint, the EC had not yet announced that Defendants had to notify the EC and obtain clearance prior to closing. As such, the FTC understood that Defendants would be able to close the transaction after March 30, 2021 absent preliminary injunctive relief.[8] Twenty days later, however, the EC announced that it "has accepted the requests submitted by Belgium, France, Greece, Iceland, the Netherlands, and Norway to assess the proposed acquisition of GRAIL by Illumina under the EU Merger Regulation."[9] The EC's investigation was initiated pursuant to an Article 22(1) referral request to the Commission.[10] "[Article 22(1)] allows Member States to request the Commission to examine a merger that does not have an EU dimension but affects trade within the single market and threatens to significantly affect competition within the territory of the Member States making the request."[11]

The EC has clearly and publicly stated that it has an open investigation and the parties must obtain clearance prior to closing.[12] As Latham and Watkins—attorneys for GRAIL, Inc.—have explained in other contexts, after the EC accepts referral (as it has done here) the "EUMR applies and the parties can no longer close their deal . . .if they want to avoid fines of up to a maximum of 10% of their worldwide turnover."[13] Based

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[8] During the FTC's investigation, Defendants refused to waive the confidentiality provisions of the Hart Scott Rodino Act and the FTC Act to allow the FTC to discuss its investigation with other foreign regulators. 15 U.S.C. § 18a; 15 U.S.C. § 41.

[9] *Mergers: Commission to assess proposed acquisition of GRAIL by Illumina*, European Commission (April 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.

[10] *Id.*

[11] *Id.*

[12] *Id*.

[13] *Article 22 EU Merger Referrals: Analysis of Commissioner Vestager's announcement to accept referrals from NCAs for non-reportable concentrations*, Latham Watkins (September 18, 2020), https://www.lw.com/thoughtLeadership/article-22-eu-merger-referrals; European Commission Communication, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to

on this new, post-Complaint information from the EC—and our assumption that Defendants will abide by the laws of all jurisdictions in which they operate—the FTC's understanding is that Defendants cannot currently close this transaction.[14] As such, at this time a preliminary injunction in no longer needed to maintain the *status quo* pending the completion of the administrative trial on the merits.

STANDARD OF REVIEW

The FTC asks this Court to dismiss this case under Federal Rule of Civil Procedure 41(A)(2) without prejudice or condition. Fed. R. Civ. P. 41(A)(2). Rule 41(A)(2) states that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(A)(2). Plaintiff's request to dismiss an action should be granted unless Defendants can show they will suffer plain legal prejudice as a result of the dismissal. *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982) ("In ruling on a motion for voluntary dismissal, the District Court must consider whether the defendant will suffer some plain legal prejudice as a result of the dismissal."). Dismissal is favored when it secures the "just, speedy, and inexpensive determination of every action and proceeding." *HANGINOUT, Inc. v. Google, Inc.*, 2015 WL 11254688, at *2 (S.D. Cal. Apr. 22, 2015); *see also*, Fed R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

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certain categories of cases (March 26, 2021), at 7; 2004 O.J. (L 24), art. 7; 2004 O.J. (L 24) art. 14(2)(b).

[14] The FTC has invited Defendants to provide additional detail regarding the EC's process and its impact on the investigation. Defendants have steadfastly refused to provide meaningful detail. Moreover, Defendants have failed to correct any misunderstanding of fact or law. (Exhibit 3; Exhibit 4; Musser Decl.)

ARGUMENT

I. Dismissal of the PI Complaint is Appropriate Under Rule 41(A)(2)

The FTC requests that this Court dismiss the PI Complaint because (a) the relief sought in the PI Complaint is no longer necessary; (b) dismissing the PI Complaint is in the public interest; and (c) Defendants will not suffer legal prejudice from dismissal. This dismissal should be without prejudice and with no conditions.

(a) A Preliminary Injunction is no Longer Necessary to Preserve the Status Quo

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), permits the FTC to seek interim, injunctive relief to preserve the *status quo pendente lite* and protect the Commission's ability to conduct its administrative adjudicatory proceeding on the ultimate merits of whether the Defendants violated the antitrust laws. *See, e.g.*, *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984) ("The Federal Trade Commission brought an action seeking a preliminary injunction under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) to block the proposed merger until the completion of administrative proceedings."); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008) ("Section 53(b), codifying the ability of the FTC to obtain preliminary relief, preserves the 'flexibility' of traditional 'equity practice.'") (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082, 1084 (D.C. Cir. 1981)).[15] "The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first

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[15] The administrative trial is scheduled to begin on August 24, 2021, during which the parties collectively, can present up to 210 hours of testimony, present opening statements and closing statements (each can be up to two hours long), and introduce evidence into the record. 16 C.F.R. § 3.41. The administrative law judge will then issue a proposed opinion which the Commission may review and adopt. 16 C.F.R. § 3.51 *et seq*. If the Commission finds that the proposed merger violates the antitrust laws, it may order such relief as is necessary and appropriate, including a prohibition against the consummation of the proposed merger. 15 U.S.C. §§ 21, 45. Either party may appeal that ruling to a federal, appellate court. 15 U.S.C. § 45(c).

instance.'" *FTC v. H. J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001), 714 (quoting *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976)). "The *only* purpose of a proceeding under § 13 is to preserve the status quo until [the] FTC can perform its function." *Food Town*, 539 F.2d at 1342 (emphasis added).

Since filing the PI Complaint, the FTC has learned that the EC has opened an investigation and as a result Defendants are currently prohibited from closing the Proposed Transaction.[16] Given this recent development, a preliminary injunction pursuant to Section 13(b) is rendered moot as the EC's current investigation preserves the *status quo* and accomplishes the same relief sought in the PI Complaint. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 352 (3d Cir. 2016) ("The purpose of Section 13(b) is to preserve the status quo and allow the FTC to adjudicate the anticompetitive effects of the proposed merger in the first instance.").

In an analogous context, courts have found applications for preliminary injunction similarly unnecessary when another authority or case has obviated the need for judicial relief.[17] As in this case, the courts found plaintiffs' claims moot because there was no pending harm and, therefore, no further relief which could be granted. *See, Ocean*

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[16] *Article 22 EU Merger Referrals: Analysis of Commissioner Vestager's announcement to accept referrals from NCAs for non-reportable concentrations*, Latham Watkins (September 18, 2020), https://www.lw.com/thoughtLeadership/article-22-eu-merger-referrals.

[17] While the requirements for obtaining a preliminary injunction under Section 13(b) are different than the requirements under the traditional four-part equity standard, important analogies can be drawn from these cases. Section 13(b), "allows a district court to grant preliminary relief "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *FTC v. Whole Foods Market, Inc.*, 548 F.3d at 1034. "Congress recognized the traditional four-part equity standard for obtaining an injunction was not appropriate for the implementation of a Federal statute by an independent regulatory agency. Therefore, to obtain a § 53(b) preliminary injunction, the FTC need not show any irreparable harm, and the 'private equities' alone cannot override the FTC's showing of likelihood of success. *Id*. (internal citations omitted).

Conservancy, Inc. v. National Marine Fisheries Services, 90 Fed. Appx. 499, 501 (9th Cir. 2003) (holding that the appeal of the district court's preliminary injunction denial is moot because "under no circumstances may [Defendant] engage in the conduct Plaintiffs seek to enjoin."); *Lee v. Van Boening*, 81 F.3d 168, 1996 WL 145303 , at *1 (9th Cir. 1996) (affirming the district court's denial for preliminary injunction "as moot on the basis that in another case, the district court had permanently enjoined the [same conduct]"). The same principles apply here: now that the EC has opened an investigation there is no additional relief that this Court can provide, accordingly there is no live case or controversy and this case is moot.

Proceeding straight to an administrative hearing and bypassing the federal proceeding when the EC has an open investigation into the same merger is consistent with the Commission's practices in past cases. For example, *In the Matter of Tronox Limited/Cristal USA* the Commission declined to file a complaint seeking a preliminary injunction and instead proceeded straight to the administrative hearing. (Complaint, *In the Matter of Tronox Limited/Cristal USA*, Dkt. 9377 (December 5, 2017)); *see also* Complaint, *In the Matter of Illumina Inc./Pacific Biosciences of California, Inc.*, Dkt. 9387 (December 17, 2019)). The Commission's reasoning in those cases was consistent with our reasoning here, namely, that a TRO or a PI is only necessary to "protect [the administrative] proceeding, which we consider to be the merits proceedings and the proceeding where we actually determine the legality of the merger." (Exhibit 5 at 6:18, Transcript, Complaint, *In the Matter of Tronox Limited/Cristal USA*, Dkt. 9377 (December 5, 2017)). In *Tronox*, foreign regulators later cleared the transaction at issue, allowing the parties to close. At that time – after the conclusion of the administrative trial but before the ruling on the merits – the FTC moved the District Court of D.C. to seek a preliminary injunction. *Federal Trade Commission v. Tronox, Ltd.*, 332 F.Supp.3d 187, 194 (D.D.C. 2018). The court in that case explained that the FTC was correct in seeking a preliminary injunction only after the foreign regulators had cleared the merger and noted that "[u]ntil foreign regulators approved the proposed merger, there was no

imminent threat to competition, so a request for injunctive relief would have likely been unripe." *Id.* at 218-19. Given that Defendants here are likewise blocked from closing by the EC, the current case should also be dismissed as unripe and be filed only if and when the *status quo* changes.

(b) ***Continuing to Litigate an Unnecessary PI Complaint is Inefficient and a Waste of Resources***

Continuing to litigate an unnecessary PI Complaint in federal court is against the public interest and would waste the resources of the court, third-parties, and taxpayers. First, calendaring this case, of course, is not cost neutral and necessarily comes at the expense of other litigants' cases that have been pushed back to accommodate this case's schedule. Beyond the substantial time this court would be asked to devote to conducting the PI hearing and reaching a decision on the (now unnecessary) PI Complaint, to the extent that disputes arise—as they often do in complex, civil litigation—the Magistrate Court and this Court will be asked to set aside time to address those disputes. Second, Plaintiffs and Defendants anticipate that the PI hearing would last at least two weeks and involve testimony from numerous third-party and party witnesses. (Exhibit 6). This PI hearing will unnecessarily burden both witnesses who will need to devote time and resources to travel and testify at this hearing as well as this Court that will need to dedicate finite resources to conduct a hearing and render a decision that will have no impact on the *status quo*.

Finally, continuing to litigate the PI Complaint while simultaneously preparing for the administrative trial also imposes substantial unnecessary expenses on the parties and taxpayers. While fact discovery conducted in the federal court proceeding can be used in the administrative proceeding (and thus, federal discovery completed to date is by no means wasted), the two proceedings have fundamentally different purposes and are on different timelines. To obtain a preliminary injunction pursuant to section 13(b), the FTC merely must raise "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and

determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Warner Communications, Inc.*, 742 F.2d at 1162. In contrast, at the administrative trial, the FTC must show by a preponderance of the evidence that "the effect of the merger 'may be to substantially lessen competition.'" *United States v. Philadelphia Nat.* Bank, 374 U.S. 321, 362 (1963). The different standards across the two proceedings can create differences across, among other things, expert reports, pre-trial briefing, and post-trial conclusions of law and findings of fact. Requiring the FTC to pay for and submit different briefing and reports is inefficient and expensive to the government and ultimately taxpayers.

(c) Dismissal of the Complaint will not Legally Prejudice Defendants

A Court should exercise its discretion to dismiss a case under Fed. R. Civ. P. 41(A)(2) as long as the dismissal will not result in legal prejudice to the defendants. To show legal prejudice, the defendant must show "prejudice to some legal interest, some legal claim, some legal argument." *Bader v. Elecs. For Imaging, Inc.*, 195 F.R.D. 659, 661–62 (N.D. Cal. 2000); *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996) ("We conclude that legal prejudice is just that—prejudice to some legal interest, some legal claim, some legal argument."). Defendants will suffer no such legal prejudice.

"The only purpose of a proceeding under § 13 is to preserve the status quo until [the] FTC can perform its function." *Food Town*, 539 F.2d at 1342. That function is the administrative trial on the merits which will determine whether the Proposed Transaction is permanently enjoined. The PI complaint merely seeks to preserve the FTC's ability to obtain meaningful relief if Complaint Counsel proves the Proposed Transaction violates Section 7 of the Clayton Act or Section 5 of the FTC Act. Since preserving the *status quo* is the only purpose of this proceeding, Defendants have no separate legal interest or claim that can be prejudiced by dismissing the PI Complaint. Nor does dismissing the PI Complaint prejudice Defendants from raising any legal argument in the administrative trial.

II. This Case Should be Dismissed Without Prejudice and Without the Imposition of Any Conditions

To determine whether a case should be dismissed with or without prejudice the Court should consider whether it would be "inequitable or prejudicial to defendant to allow plaintiff to refile the action." *Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993). To make that determination, courts consider "(1) the defendant's effort and expense involved in preparing for trial, (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, [and] (3) insufficient explanation of the need to take a dismissal." *Id.*

Plaintiff has acted quickly and the explanation for dismissing the PI Complaint is clear. At the time of filing its PI Complaint, FTC had a good faith basis to believe that a preliminary injunction was needed. That changed when twenty days after the FTC filed the PI Complaint, the EC announced that it opened an investigation that prohibits Defendants from consummating the Proposed Transaction.

Shortly after learning of the EC announcement, the FTC emailed Defendants asking whether the EC's investigation prevented them from closing and when Defendants intended to initiate EC's proceedings by filing a Form CO. (Exhibit 3). Defendants refused to provide a clear answer regarding the impact of the EC's proceedings and provided no answer as to when they were filing their Form CO or whether they would be fined in the event they were to close. (Exhibit 3). The FTC then sent an interrogatory asking Defendants to identify all "events, conditions, investigations, proceedings or barriers" to closing the transaction and RFPs asking for communications and documents sent to regulators. (Musser Decl., ¶ 2). In Defendants' May 3, 2021 responses and objections to the FTC's interrogatory and subsequent conversations regarding the same, Defendants again refused to answer directly whether the EC investigation prohibited it from closing and refused to produce responsive documents. (Musser Decl., ¶ 3). The FTC notified Defendants that it may seek to dismiss this case on May 18, 2021. (Musser

Decl., ¶ 4). Clearly there has been no excessive delay and the FTC has been diligent in prosecuting this action.

The efforts Defendants have made to date to prepare for the PI hearing are useful for the administrative trial on the merits. Federal court fact discovery may be used in the administrative proceeding. (Exhibit 7, ¶ 7). Thus, Defendants have incurred minimal expense that they would have otherwise not incurred in the administrative process.[18] If the Court dismisses the PI Complaint, the Parties will continue to conduct fact and expert discovery for the more-expansive administrative proceeding. While the FTC does not anticipate needing to re-file a Complaint for Preliminary Injunction or Temporary Restraining Order, if it does, Defendants would not suffer any prejudice or inequity.[19] If the EC clears the Proposed Transaction during the pendency of the administrative trial, or if the Defendants attempt to close in violation of EC law, both Parties would be able to use the evidence gathered to date in this proceeding as well as evidence gathered in the administrative proceeding in any future proceeding for a preliminary injunction.[20]

III. The Compressed Case Schedule Necessitates Expedited Relief

The FTC contacted Defendants on May 18, 2021, telling them that the FTC intended to file this application and asked them to meet and confer that day. (Musser

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[18] The FTC has also offered to honor all negotiations and agreements reached with either parties or third parties regarding discovery sent in this case to corresponding discovery requests sent in the administrative process. (Exhibit 4, p 4-5).

[19] The FTC also stipulates that, while not anticipated, in the event that it later needs to file a temporary restraining order or preliminary injunction it will file its complaint in the Southern District of California.

[20] The Case Management and Scheduling Order ("CMSO") (Dkt. 88) notes that "[o]nly discovery obtained by a party in the Part 3 administrative proceeding before the close of fact discovery in this proceeding may be used as part of this litigation, except by agreement of the parties or by leave of the Court for good cause shown," (CMSO, ¶ 10). In the event that this case is dismissed, the FTC is willing to stipulate to the use of evidence gather post-dismissal in a subsequent filing for a temporary restraining order of preliminary injunction.

Decl. at ¶ 4). The FTC and Defendants met and conferred the next day. (Musser Decl. at ¶ 5). In a follow-up email, the FTC proposed an expedited briefing schedule and again offered to meet and confer on the proposed schedule. (Musser Decl. at ¶ 5). Defendants responded the next day that they opposed the application but agreed to meet and confer on a briefing schedule. (Musser Decl. at ¶ 6-7). Pursuant to this Courts' "Civil Case Procedures" the FTC has served on Defendants a copy of this application with return receipt requested. ("Honorable Cathy Ann Bencivengo U.S. District Judge Civil Case Procedures", "IV. Ex Parte Motions.").

The FTC respectfully requests expedited relief in this application and for all deadlines under the CMSO to be stayed while a decision is pending. As this Court is aware, fact discovery closes on June 4, 2021 and numerous other deadlines are due shortly thereafter. (CMSO, Dkt. 88, p. 17). In the event that the Court dismisses this action, both parties would have incurred unnecessary expense proceeding under extremely compressed deadlines while a decision is pending.

CONCLUSION

Under Rule 13(b) preliminary injunctive relief in federal court should only be sought if and when it is necessary to preserve the *status quo* during the pendency of the administrative adjudicative proceedings, not as a prophylactic measure. Forcing the FTC to litigate a case when there is no live case or controversy to address the mere hypothetical that preliminary relief may later be necessary is inconsistent with case law and a waste of judicial resources. As such, the FTC moves this court to dismiss the PI Complaint without prejudice.

Dated: May 21, 2021

Respectfully submitted,

/s/ Susan A. Musser
Susan Musser
Counsel for Federal Trade Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 21, 2021, I served the foregoing on the following counsel via electronic mail and the Court's CM/ECF system:

Sharonmoyee Goswami
Jesse Weiss
Michael Zaken
Illumina Trial Team (list serv)
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
sgoswami@cravath.com
jweiss@cravath.com
mzaken@cravath.com
IlluminaTrialTeam@cravath.com

Counsel for Illumina, Inc.

Marguerite Sullivan
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LWVALORANTITRUST.LWTEAM@lw.com

Counsel for GRAIL, Inc.

/s/ Susan A. Musser
Susan Musser
Counsel for Federal Trade Commission

Susan A. Musser (D.C. Bar No. 1531486)
Daniel K. Zach (N.Y. Bar No. 4332698)
Stephen Mohr (D.C. Bar 982570)
Sarah Wohl (D.C. Bar No. 1016357)
Nicolas Stebinger (N.Y. Bar No. 4941464)
FEDERAL TRADE COMMISSION
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Telephone: 202-326-2122
smusser@ftc.gov

Counsel for Plaintiff Federal Trade Commission

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ILLUMINA Inc. and GRAIL, Inc.,

Defendants.

Case No.: 3:21-cv-00800-CAB-BGS

DECLARATION OF SUSAN A. MUSSER IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION TO DISMISS THE COMPLAINT WITHOUT PREJUDICE

Judge: Hon. Cathy Ann Bencivengo
Magistrate: Hon. Bernard G. Skomal
Courtroom: 15A
Hearing Date:

I, Susan A. Musser, declare as follows:

1. I am an attorney for Plaintiff Federal Trade Commission ("FTC") in the above-captioned matter. Pursuant to this Court's Rule IV in its Civil Case Procedures, I submit this declaration in support of the FTC's *Ex Parte* Application to Voluntarily Dismiss the Complaint Without Prejudice.
2. The FTC sent Defendants an interrogatory asking Defendants to identify all "events, conditions, investigations, proceedings or barriers" to closing the transaction.
3. The Defendants responded to the interrogatory on May 3, 2021 providing an incomplete response. In the meet and confer conducted days later, Defendants again refused to answer directly what impact, if any, the EC's investigation had on their ability to close the transaction.
4. FTC contacted Defendants on May 18, 2021 providing notice of its intent to potentially seek to dismiss the complaint and asking Defendants to meet and confer. Defendants responded that they were able to meet and confer a day later.
5. On May 19, 2021, I conferred with counsel for Defendants by telephone in a good-faith effort to resolve the FTC's *Ex Parte* Application to Dismiss the Complaint Without Prejudice. During that call, I detailed the FTC's position and answered Defendants' questions. Defendants did not provide their position on the phone call, explaining that they needed to confer with their clients. I followed up by emailing to ask whether Defendants agree to an expedited briefing schedule. In that same email, I offered consider any joint motion to extend the deadlines for fact discovery in the administrative hearing and told the defendants that the FTC would not object to service of discovery in the following week.
6. On May 20, 2021 at 9:01 PM EST, Defendants sent an email saying they "oppose" this motion without providing any additional information. I responded by asking Defendants to provide additional detail regarding their clients' position so we could attempt to narrow the issues before the Court.

7. On May 21, 2021 at 12:17 AM, I emailed the Defendants to explain that the FTC did not intend to file a motion for expedited briefing schedule. Nevertheless, I offered to meet and confer with them in case they were interested in proposing a jointly-agreed upon briefing schedule for the FTC's *Ex Parte Application*. The FTC and Defendants met and conferred later that day. Defendants proposed that they have two weeks to respond to the FTC's motion followed by one week for the FTC to reply to the Defendants' opposition brief. The FTC rejected that proposal given its need for expedited relief.

8. The Defendants' position is as follows: "FTC has provided no factual or legal basis to Defendants for their motion to dismiss the case without prejudice. Defendants would not oppose a motion by the FTC to dismiss the case with prejudice. Defendants oppose the FTC's application to dismiss this case without prejudice, including the FTC's application to do so by *Ex Parte* Application. The FTC's *Ex Parte* Application is prejudicial to Defendants, given that the parties are in the midst of fact discovery under the stipulated CMSO, as ordered by the Court. Given that the FTC is seeking to make a case dispositive motion, Defendants believe that the FTC should proceed under the ordinary briefing schedule for a noticed motion under the Court's rules, under which noticed motions are heard on a 35-day schedule. Such a schedule would provide Defendants 21 days to respond to FTC's motion. As a compromise, Defendants have proposed an accelerated schedule under which Defendants would have less time to respond, but the FTC rejected that proposal."

DATED: May 21, 2021

/s/ Susan A. Musser
Susan A. Musser
Counsel for Federal Trade Commission

Exhibit 1

European Commission - Competition

In this section:

- Overview
- What's new?
- Official Journal
- Legislat on
- Cases
- Statistics
- Publications
- Practical information

Mergers

Merger Cases

On this page you can search for all merger cases.
For currently open merger cases follow this link open merger cases.
For latest updates of cases follow this link updates of cases.
For JV and ECSC cases (old cases not available via the search page) follow this link: JV and ECSC cases.

Decis ons, press releases and other commun cat ons from the Commission are published as soon as they are official. The Commiss on cannot respond to inquiries about the exact timing of publication.

M.10188 ILLUMINA / GRAIL

Concerns economic activity (NACE):	C.21 - Manufacture of basic pharmaceutical products and pharmaceutical preparat ons
Regulation:	Council Regulation 139/2004
Decision(s):	19.04.2021: Art. 22 Full referral Press Release: MEX/21/1846
Relation with other case(s):	(none)
Other case related information(s):	(none)
Related link(s):	(none)

New Search

Help on how to use the case search tool

Exhibit 2

Illumina v Commission
Case T-227/21

Reports of Cases
Information not available

Subject-matter
Information not available

Systematic classification scheme
Information not available

Citations of case-law or legislation

References in grounds of judgment
Information not available

Operative part
Information not available

Opinion
Information not available

Dates

Date of the lodging of the application initiating proceedings
28/04/2021

Date of the Opinion
Information not available

Date of the hearing
Information not available

Date of delivery
Information not available

References

Publication in the Official Journal
Information not available

Name of the parties
Illumina v Commission

Notes on Academic Writings
Information not available

Procedural Analysis Information

Source of the question referred for a preliminary ruling
Information not available

Subject-matter

Information not available

Provisions of national law referred to
Information not available

Provisions of international law referred to
Information not available

Procedure and result
Actions for annulment

Formation of the Court
Information not available

Judge-Rapporteur
Information not available

Advocate General
Information not available

Language(s) of the Case
English

Language(s) of the Opinion
Information not available

Exhibit 3

Musser, Susan

From: Musser, Susan
Sent: Thursday, April 22, 2021 3:35 PM
To: Sharonmoyee Goswami; LWVALORANTITRUST.LWTEAM@lw.com; Illumina Trial Team; Anna.Rathbun@lw.com; 'Marguerite.Sullivan@lw.com'
Cc: Wohl, Sarah; Widnell, Nicholas; Mohr, Stephen A.; Zach, Daniel; Andrew, Jordan S.
Subject: RE: Illumina/GRAIL | European Commission's Investigation

Sharon:

Thanks for the response. To make sure I understand, the Defendants' position is that should they consummate their transaction today, they would face no penalties from the European Commission? On the second point we raised in our initial email, can you provide an estimate as to when and if Defendants are going to submit their Form CO filling?

Best,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Thursday, April 22, 2021 3:16 PM
To: Musser, Susan <smusser@ftc.gov>; LWVALORANTITRUST.LWTEAM@lw.com; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Anna.Rathbun@lw.com; 'Marguerite.Sullivan@lw.com' <Marguerite.Sullivan@lw.com>
Cc: Wohl, Sarah <swohl@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>
Subject: RE: Illumina/GRAIL | European Commission's Investigation

Susan:

Defendants do not confirm and do not agree they are currently barred from consummating their proposed merger as related to the European Commission. The European Commission's assertion of jurisdiction is unprecedented and unlawful and you should make no assumptions regarding what the parties can or cannot do in closing the transaction, either in whole or in part. Moreover, as you know, Defendants stipulated to a TRO in this action with the agreement that the FTC would promptly seek a PI on an expedited basis in a federal district court. To the extent the FTC changes its position on the PI motion from the agreement between all parties, the terms of the TRO would no longer apply.

Best,

Sharon

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

Exhibit 3

From: Musser, Susan <smusser@ftc.gov>
Sent: Thursday, April 22, 2021 10:01 AM
To: LWVALORANTITRUST.LWTEAM@lw.com; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; Anna.Rathbun@lw.com; 'Marguerite.Sullivan@lw.com' <Marguerite.Sullivan@lw.com>; Sharonmoyee Goswami <sgoswami@cravath.com>
Cc: Wohl, Sarah <swohl@ftc.gov>; Widnell, Nicholas <nwidnell@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Andrew, Jordan S. <jandrew@ftc.gov>
Subject: Illumina/GRAIL | European Commission's Investigation

Sharon:

It has recently come to our attention that the European Commission has accepted requests submitted by "Belgium, France, Greece, Iceland, the Netherlands, and Norway to access the proposed acquisition of GRAIL by Illumina under the EU Merger Regulation." According to the European Commission, "Illumina cannot implement the transaction before notifying and obtaining clearance from the Commission."

Our understanding is that the European Commission's investigation currently bars Illumina and GRAIL from consummating their proposed merger. Please confirm that Defendants agree that they are currently barred from consummating their proposed merger due to their status before the European Commission. Moreover, it is our understanding that Illumina and Grail will continue to be prohibited from consummating their proposed merger until the European Commission's investigation is completed. Please let us know whether Defendants agree that they are barred from consummating their proposed merger until the European Commission's investigation is completed and when the Defendants plan to submit their Form CO to initiate proceedings before the European Commission. As you know, the answer to these questions impact the need for and timing of any preliminary injunction hearing in this case.

Best,

Susan

Exhibit 4

Musser, Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Friday, May 21, 2021 7:52 PM
To: Musser, Susan; Illumina Trial Team; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S.; Mohr, Stephen A.; Zach, Daniel; Milici, Jennifer; kphewitt@jonesday.com; Kahn, Lin W.
Subject: RE: Illumina/GRAIL | M&C

Susan:

Thank you for your email. As we've told you now several times, your seeking to proceed by *Ex Parte* procedure is entirely inappropriate.

I have confirmed that Defendants cannot agree to a stay of the deadlines in the parties' stipulated Case Management and Scheduling Order, which the parties jointly moved for, and the Court entered. This would effectively allow the FTC to achieve the same result as the motion to dismiss without prejudice.

While the rules may not require FTC to share a copy of your affidavit with Defendants, they do require the FTC to represent our position accurately. Please include the below recitation of Defendants' position in FTC's affidavit to the Court:

> FTC has provided no factual or legal basis to Defendants for their motion to dismiss the case without prejudice. Defendants would not oppose a motion by the FTC to dismiss the case with prejudice. Defendants oppose the FTC's application to dismiss this case without prejudice, including the FTC's application to do so by *Ex Parte* Application. The FTC's *Ex Parte* Application is prejudicial to Defendants, given that the parties are in the midst of fact discovery under the stipulated CMSO, as ordered by the Court. Given that the FTC is seeking to make a case dispositive motion, Defendants believe that the FTC should proceed under the ordinary briefing schedule for a noticed motion under the Court's rules, under which noticed motions are heard on a 35 day schedule. Such a schedule would provide Defendants 21 days to respond to FTC's motion. As a compromise, Defendants have proposed an accelerated schedule under which Defendants would have less time to respond, but the FTC rejected that proposal.

Your email also misstates what I stated about the closing of the transaction. I stated that the TRO currently prevents Defendants from closing. Under the terms of the stipulated TRO that the parties negotiated, Illumina and GRAIL may close this transaction "immediately upon dismissal of this action by the Commission." (D.I. 8.) Therefore, if the FTC's motion to dismiss without prejudice were granted, the TRO would be immediately lifted, and there would be no impediment to closing the transaction in the United States. Defendants do not confirm and do not agree they are currently barred from consummating their proposed merger as related to the European Commission. The European Commission's assertion of jurisdiction is unprecedented and unlawful and you should make no assumptions regarding what the parties can or cannot do in closing the transaction, either in whole or in part. Given the FTC's actions, it is Defendants' position that if the FTC moves to dismiss this case then the FTC has waived its right to seek either a temporary restraining order or a preliminary injunction seeking to block the parties from consummating their merger in the United States at any time in the future.

Best,

Sharon

Exhibit 4

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Friday, May 21, 2021 6:43 PM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Sharon,

Thank you for meeting and conferring with us. As noted in my email this morning and as I reiterated on the phone call, the FTC does not intend to file a motion for expedited briefing in connection with its Ex Parte Application to Dismiss the Complaint. We participated in the call to see if Defendants were interested in proposing a briefing schedule that we had previously discussed. We considered your counter proposal and do not agree that Defendants have two weeks to respond to our application, and accordingly, will defer to the local rules, chamber rules, and preference of the Court with respect to any briefing schedule.

We also asked if Defendants would agree to stay all deadlines related to the federal complaint for a preliminary injunction during the pendency of the FTC's application. You indicated that you did not think that was something you could agree to but you would confirm. Please let us know by 8:00 PM whether you agree to such a stay. We will assume you do not agree to stay the deadlines if we have not received your position by that time.

Finally, our understanding of local and chamber rules is that they do not require us to share a copy of any declaration I may submit in advance of our filing. It is clear from your email yesterday that Defendants "oppose the motion" that we are at an impasse with respect to the application. As such our representation of Defendants position is that you "oppose our application" and "do not think that there is any factual or legal basis for dismissal of the case without prejudice."

We also asked for additional detail regarding your position as to why you do not think there is any factual or legal basis for dismissal of the case and you explained that your position was set out in your 9:25 AM 5/21/2021 email. I asked whether you would close the transaction if this case were dismissed, and you noted that the TRO prevents Defendants from closing.

Best,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Friday, May 21, 2021 9:25 AM
To: Musser, Susan <smusser@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Exhibit 4

Susan:

Thanks for your email. We don't think that there is any factual or legal basis for dismissal of the case without prejudice.

As we have previously stated, defendants do not confirm and do not agree they are currently barred from consummating their proposed merger as related to the European Commission. The European Commission's assertion of jurisdiction is unprecedented and unlawful and you should make no assumptions regarding what the parties can or cannot do in closing the transaction, either in whole or in part.

Defendants do not believe that there is any basis for proceeding on an *Ex Parte* basis. Defendants do not believe that there is any reason for expedition on this motion. That said, we are willing to meet and confer with the FTC about a briefing schedule that both sides can agree on. I am not available before the deposition, but I can try to be available on a lunch break. Does that time work for you?

Best,

Sharon

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Friday, May 21, 2021 12:17 AM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Sharon:

Thank you for your response. Can you please explain the basis for the disagreement between the parties? Specifically, we still don't know whether the disagreement is based on a different understanding of the facts or whether your position is that dismissal is somehow legally inappropriate. Moreover, please tell us whether Defendants agrees that the EC prevents them from closing prior to either obtaining clearance from the EC or dismissal by the Court. This information will assist the FTC in narrowing the issues before the district court.

Now that we know Defendants are planning to oppose this motion, our understanding is that this will be filed as an *Ex Parte* Application per the local rules and Chamber rules. As such, a separate motion to expedite is not necessary at this time. That being said, if Defendants agree to the below briefing schedule we will let the Court know in our filing that the parties jointly propose such a briefing schedule.

Finally, our understanding is that Ms. Perettie's deposition does not start until 10:00 EST. We are available to meet and confer prior to the start of that deposition. Please let us know if that works for you.

Thanks,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Thursday, May 20, 2021 9:01 PM
To: Musser, Susan <smusser@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Susan:

Defendants have conferred with their clients about the FTC's motion to dismiss without prejudice. Defendants will oppose any such motion.

We are available to meet and confer regarding the FTC's proposed motion to seek an expedited briefing schedule. We are available for a call tomorrow immediately following the Cindy Perettie deposition.

Best,

Sharon

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Thursday, May 20, 2021 1:59 PM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Sharon:

Thank you for the update. We reiterate our request to let us know as soon as practicable your clients' position on this. Under the assumption that a Motion to Dismiss is filed and Defendants choose to oppose said motion, the FTC would request the court for an expedited briefing schedule as follows: (a) Defendants file opposition motion five days after the initial filing; (b) Plaintiffs' reply brief is filed two days after Defendants' opposition motion. Please let us know if you will oppose any motion to expedite or if you agree with the schedule (or would like to propose an alternative). In the event that you do not agree with this proposal, please provide some times today to meet and confer.

As we explained yesterday, we will be sending out administrative subpoenas today and tomorrow to the third parties in this action that follow the subpoenas issued in the federal case in advance of Friday's deadline in the Part 3 CMSO. As we made clear to you yesterday, the FTC position will be that compliance with any federal subpoenas issued by the FTC

(including any agreements to modify the subpoena) will similarly satisfy compliance with the administrative subpoenas. Moreover, the FTC will not object on the basis of time to any Part 3 interrogatories, requests for documents, subpoenas duces tecum that Defendants may issue next week. To the extent Defendants would like to propose an extension of the time to issue Part 3 subpoenas duces tecum to third parties (including a modification to the Part 3 CMSO), please let us know and we would be happy to consider such a proposal.

Many thanks,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Wednesday, May 19, 2021 8:09 PM
To: Musser, Susan <smusser@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Susan, as promised we have followed up with our clients about the FTC's proposed motion. We have scheduled a call for tomorrow afternoon PT. We will circle back either late tomorrow or early Friday.

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sgoswami@cravath.com

From: Sharonmoyee Goswami
Sent: Tuesday, May 18, 2021 7:12 PM
To: Musser, Susan <smusser@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Hi Susan:

We are available at 3pm ET tomorrow. We can use the dial-in that you circulated.

Best,

Sharon

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Tuesday, May 18, 2021 5:14 PM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Thank you, Sharon. Can you please propose some times to discuss today.

Best,

Susan

From: Sharonmoyee Goswami <sgoswami@cravath.com>
Sent: Tuesday, May 18, 2021 3:52 PM
To: Musser, Susan <smusser@ftc.gov>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>; kphewitt@jonesday.com; Kahn, Lin W. <lkahn@jonesday.com>
Subject: RE: Illumina/GRAIL | M&C

Susan:

We are not available at 4:00pm today. We will circle back with some proposed times.

Best,

Sharon

Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue, New York, NY 10019
T +1-212-474-1928
sgoswami@cravath.com

From: Musser, Susan <smusser@ftc.gov>
Sent: Tuesday, May 18, 2021 3:10 PM
To: Sharonmoyee Goswami <sgoswami@cravath.com>; Illumina Trial Team <IlluminaTrialTeam@cravath.com>; LWVALORANTITRUST.LWTEAM@lw.com
Cc: Andrew, Jordan S. <jandrew@ftc.gov>; Mohr, Stephen A. <smohr@ftc.gov>; Zach, Daniel <dzach@ftc.gov>; Milici, Jennifer <jmilici@ftc.gov>
Subject: Illumina/GRAIL | M&C

Sharon:

I wanted to circle up with you to see if you have time to meet and confer today at 4:00 regarding a potential Motion to Dismiss the Complaint for Preliminary Injunction and TRO. Let me know if that time works for you.

We can use the below dial-in.

888-273-3658
326 2850
Pin 2174

Thanks,

Susan

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it.

Exhibit 5

In the Matter of:

Tronox Limited/Cristal USA

December 20, 2017
Pretrial

Condensed Transcript with Word Index

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)
TRONOX LIMITED,)
a corporation,)
NATIONAL INDUSTRIALIZATION)
COMPANY (TASNEE),) Docket No. 9377
a corporation,)
NATIONAL TITANIUM DIOXIDE)
COMPANY LIMITED (CRISTAL),)
a corporation,)
and)
CRISTAL USA, INC.,)
a corporation.)
)

PRETRIAL CONFERENCE
Wednesday, December 20, 2017
PUBLIC SESSION
BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Administrative Law Judge

Reported by: Susanne Bergling, RMR-CRR-CLR

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:
DOMINIC E. VOTE, ESQ.
ROBERT S. TOVSKY, ESQ.
CEM AKLEMAN, ESQ.
MEREDITH LEVERT, ESQ.
Federal Trade Commission
400-7th Street, S.W.
Washington, D.C. 20024
(202) 326-3505

ON BEHALF OF THE RESPONDENT TRONOX:
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MATTHEW J. REILLY, ESQ.
KAREN M. DESANTIS, ESQ.
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655-15th Street, N.W.
Washington, D.C. 20005
(202) 879-5123
michael.williams@kirkland.com

ON BEHALF OF THE RESPONDENT CRISTAL:
JAMES L. COOPER, ESQ.
PETER J. LEVITAS, ESQ.
Arnold & Porter Kaye Scholer
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 942-5014
james.cooper@apks.com

ALSO PRESENT:
Steven Kaye, Tronox Deputy General Counsel

P R O C E E D I N G S
- - - - -

JUDGE CHAPPELL: All right. Call to order Docket 9377, In Re: Tronox Limited, et al.
Is it Tronox? Tronox? How is it pronounced?
MR. WILLIAMS: Tronox, Your Honor.
JUDGE CHAPPELL: All right. Thank you.
I am going to start with the appearances of the parties, the Government first. Go ahead.
MR. VOTE: Good afternoon, Your Honor. Dominic Vote on behalf of Complaint Counsel. With me at counsel table we have Robert Tovsky, Cem Akleman, and Meredith Levert.
JUDGE CHAPPELL: All right, thank you.
For Respondents?
MR. WILLIAMS: Good afternoon, Your Honor. Mike Williams from Kirkland & Ellis for Tronox. With me at counsel table, I have my partner Matt Reilly.
MR. REILLY: Good afternoon, Your Honor.
JUDGE CHAPPELL: How are you doing?
MR. REILLY: Nice to see you again, Your Honor.
JUDGE CHAPPELL: Aren't you supposed to be over here?
MR. REILLY: The last time they kicked me out, and I can't get back on that side, Your Honor.

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JUDGE CHAPPELL: Those old jokes never get old.
MR. REILLY: I know. You keep laughing. I keep doing them, Your Honor.
MR. WILLIAMS: And with me, Your Honor, I have my partner Karen DeSantis and also the Deputy General Counsel of Tronox, Steven Kaye.
JUDGE CHAPPELL: Okay.
MR. COOPER: Good afternoon, Your Honor. James Cooper from Arnold & Porter Kaye Scholer on behalf of Cristal, and with me is --
JUDGE CHAPPELL: When you say Cristal, you mean both entities have been sued?
MR. COOPER: Yes, the Cristal entities. There are three of them.
JUDGE CHAPPELL: Have the Respondents worked out who is going to do your summary? Are you going to split it or is one of you going to handle it or --
MR. WILLIAMS: It will be all me, Your Honor.
JUDGE CHAPPELL: Okay, all right.
I wasn't sure from what I'd read if an ancillary federal action has been filed. I would like to hear the nature and status of that at this time.
MR. VOTE: Yes, Your Honor. We have not filed a federal court action in this case, and the reason for that is the parties are not in a position to close the

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case. As Your Honor is aware --
JUDGE CHAPPELL: Close the merger?
MR. VOTE: Correct. Excuse me. Close the merger.
JUDGE CHAPPELL: You are always in a position to close the case.
MR. VOTE: That's exactly right.
The parties are not currently in a position to close the merger, and the reason for that is because they have ongoing regulatory reviews in multiple other jurisdictions.
The European Commission this morning issued a press release that said that they are initiating a second phase investigation, which they have until May 15th to make a decision on.
JUDGE CHAPPELL: And you think what Europe does is relevant to us?
MR. VOTE: No, Your Honor. I think our position is that when we go and ask the federal court for emergency relief, such as a TRO or a PI, we are doing that because we need to protect this proceeding, which we consider to be the merits proceeding and the proceeding where we actually determine the legality of the merger. We are not aware that the parties are going to close, and so we don't see that there's any

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threat to this proceeding or any need to start a parallel proceeding.
JUDGE CHAPPELL: All right. Is that it?
MR. VOTE: That's it.
JUDGE CHAPPELL: Anything you want to add to that?
MR. WILLIAMS: From our side, Your Honor, I would say that this does raise some issues --
JUDGE CHAPPELL: What's "this"? "This"?
MR. WILLIAMS: This, the fact that there is no ancillary federal proceeding right now.
JUDGE CHAPPELL: Right.
MR. WILLIAMS: We have advised Complaint Counsel and we had advised the FTC early on in this process that there is an expiration date for this deal of May 21st, and I understand that Your Honor moves these things along, but we also have an opening trial date of May 8, with de novo review to the entire Commission.
JUDGE CHAPPELL: It's not Your Honor that moves these things along. It's a ridiculous Commission rule that pushes nonconsummated mergers along much sooner than they should be. It's based on history that's incorrect, but go ahead.
MR. WILLIAMS: I'm sure Your Honor will enforce

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that, and we will all abide by it, but I don't know that it's going to move fast enough in this case. So we are waiting for these ancillary proceedings, and I didn't know that they would be held up pending Europe, that's a new concept to me, but in all events, we are going forward in full force in front of Your Honor, of course.
JUDGE CHAPPELL: Do you have your tickets to Brussels just in case?
MR. WILLIAMS: I always have tickets to Brussels, Your Honor.
JUDGE CHAPPELL: All right. Here is my take on this. I have been doing this way too many years. I have never seen a merger case go to trial, when it's nonconsummated, once we get a ruling on an injunction, and what that means is it's a tremendous waste of resources for the taxpayers of America and for Respondents, for attorneys' fees, to try to get this case to completion when, number one, at this time, I'm finding out we don't even know if they can merge based on regulatory action.
Number two -- and this is my experience -- if an injunction is granted -- and this goes back to my days of actually being on your side of the table and working on mergers -- you generally walk away when any

Exhibit 6

Honorable Dana M. Sabraw
John P. Morrill, Clerk of Court
United States District Court for the Southern District of California
James M. Carter and Judith N. Keep U.S. Courthouse
333 West Broadway
San Diego, CA 92101

BY HAND
Encl.

April 20, 2021

Re: *F.T.C. v. Illumina Inc. et al.*, No. 1:21-cv-00873-RC

Dear Chief Judge Sabraw and Mr. Morrill:

We write on behalf of Defendants Illumina, Inc. ("Illumina") and GRAIL, Inc, ("GRAIL") (the "Defendants") and Plaintiff the Federal Trade Commission ("Plaintiff" or "FTC"), to bring to the Court's attention the above-captioned matter, which was transferred from the District Court for the District of Columbia ("D.D.C.") to the District Court for the Southern District of California ("S.D. Cal.") earlier today. (*See* D.D.C. Dkt. 57.)

On March 30, the FTC filed a complaint in the D.D.C. seeking a preliminary injunction to prevent Illumina and GRAIL from consummating their proposed merger. To allow the relevant district court time to determine whether a preliminary injunction is warranted, the parties stipulated to a temporary restraining order providing that Defendants may not close until the earliest of (a) 12:01 AM Eastern Time on September 20, 2021; (b) 11:59 PM Eastern Time on the second (2nd) business day after the Court rules on Plaintiff's motion for a preliminary injunction or (c) immediately upon dismissal of this action by the FTC. Today, Judge Contreras, the presiding judge in the D.D.C. action, entered the attached order and opinion transferring this action to S.D. Cal. (D.D.C. Dkt. Nos. 57–58.)

Subject to approval of the assigned judge, the parties have tentatively agreed to propose an expedited schedule, with a preliminary injunction hearing to begin on July 26, 2021 and to last at least two weeks.

Accordingly, the parties respectfully request that, to the extent possible, this case be assigned to a judge who will have the availability to accommodate the expedited schedule in this case.

Respectfully submitted,

/s/ David R. Marriott
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(212) 474-1430
dmarriott@cravath.com

Karen P. Hewitt
Jones Day
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(858) 314-1119
kphewitt@jonesday.com

Counsel for Defendant, Illumina Inc.

/s/ Marguerite M. Sullivan
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Latham & Watkins LLP
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Washington, D.C. 20004
(202) 637-1027
Marguerite.Sullivan@lw.com

Counsel for Defendant, GRAIL, Inc.

/s/ Susan Musser
Susan Musser
Federal Trade Commission
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smusser@ftc.gov

Counsel for Plaintiff, Federal Trade Commission

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400 7th St., SW
Washington, DC 20024

Counsel for Plaintiff, Federal Trade Commission

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	:		
	:		
Plaintiff,	:	Civil Action No.:	21-873 (RC)
	:		
v.	:	Re Document No.:	41
	:		
ILLUMINA, INC., *et al.*,	:		
	:		
Defendants.	:		

ORDER

GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE

For the reasons stated in the Court's Memorandum Opinion separately and contemporaneously issued, Defendants' Motion to Transfer (ECF No. 41) is **GRANTED**. The Clerk of the Court is directed to transfer this case to the Southern District of California.

Dated: April 20, 2021

RUDOLPH CONTRERAS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	:		
	:		
Plaintiff,	:	Civil Action No.:	21-873 (RC)
	:		
v.	:	Re Document No.:	41
	:		
ILLUMINA, INC., *et al.*,	:		
	:		
Defendants.	:		

MEMORANDUM OPINION

GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE

I. INTRODUCTION

Two biotechnology firms agreed that one would acquire the other. The federal government then filed suit to stop the merger, arguing that the deal would stifle innovation and harm consumers. But before any court can decide whether the merger can go forward, this Court must determine where the litigation should take place. Between this district and a district that would be easier for the most witnesses to get to, the latter is more appropriate.

II. BACKGROUND

Illumina, Inc. is a market leader in genetic sequencing products. Redacted Compl. ¶¶ 5–6, ECF No. 14. Its sequencing platforms are a key component in multi-cancer early detection tests, which promise to revolutionize cancer treatment. *Id.* ¶¶ 2, 6. These tests will allow healthcare providers to screen for a wide variety of cancers and detect cancer early on in a tumor's development. *Id.* ¶¶ 2–3. Several biotechnology firms are racing to develop the technology and bring it to market. *Id.* ¶ 4.

In 2015, Illumina formed GRAIL, Inc. to compete in that race. *Id.* ¶ 7. Two years later, however, Illumina reduced its share in GRAIL to below 20%. *Id.* ¶ 8. It currently owns just 14.5% of GRAIL's voting shares, with well-known investors like Jeff Bezos, Bill Gates, and Johnson & Johnson owning the rest. *Id.* GRAIL has now developed a multi-cancer early detection test called "Galleri." *Id.* ¶¶ 4, 9. It plans to seek approval to commercialize Galleri from the U.S. Food and Drug Administration ("FDA"). *Id.* ¶ 9. Last year, Illumina and GRAIL (collectively, "Defendants") entered into a merger agreement whereby Illumina would acquire the remaining 85.5% of GRAIL's shares it does not already own. *Id.* ¶ 26.

Concerned that the merger would have serious anticompetitive effects on the U.S. multi-cancer early detection test market, *see id.* ¶¶ 1, 11–14, the Federal Trade Commission decided to conduct an administrative adjudication to determine if the deal would violate federal antitrust laws, *id.* ¶ 27. That adjudication is scheduled to begin in the District of Columbia on August 24, 2021. *See id.*; Pl.'s Mem. Opp'n Defs.' Mot. Transfer Venue ("Pl.'s Opp'n") at 11, ECF No. 55. To prevent Defendants from executing the merger while the adjudication is pending, the Commission filed this action. *See* Pl.'s Mot. TRO, ECF No. 4. The parties have stipulated to a temporary restraining order that prevents the merger until the earliest of (1) September 20, 2021; (2) the end of the second business day after a court rules on the Commission's motion for a preliminary injunction; or (3) the Commission's dismissal of the action. TRO at 2, ECF No. 8.

The dispute at issue now is which court should decide the Commission's preliminary injunction motion. Defendants ask that the case be transferred to the Southern District of California. *See* Mem. P & A Supp. Defs.' Mot. Transfer Venue ("Defs.' Mot."), ECF No. 41-1. Both companies are headquartered in California—Illumina in the Southern District, Schwillinksi Decl. ¶ 4, ECF No. 41-3, and GRAIL in the Northern District, Song Decl. ¶ 3, ECF No. 41-2.

California was also the site of the merger negotiations. Schwillinksi Decl. ¶ 5; Song Decl. ¶ 6. And Defendants say that, if an in-person hearing on the motion is possible, more witnesses would have an easier time getting to the Southern District than this one. Defs.' Mot. at 1–2. The Commission opposes transfer. *See* Pl.'s Opp'n. It stresses that its choice of forum deserves considerable deference. *Id.* at 1. And it disputes Defendants' claim that the Southern District would be more convenient. *Id.* at 2. Ultimately, Defendants have the better argument.

III. LEGAL STANDARD

Even when venue is already proper, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Assessing a transfer request requires an "individualized, case-by-case consideration of convenience and fairness." *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). The party who asks for a transfer bears the burden of showing it is warranted. *Chauhan v. Napolitano*, 746 F. Supp. 2d 99, 102 (D.D.C. 2010). First, the movant must demonstrate that venue would be proper in the proposed transferee district. *Wolfram Alpha LLC v. Cuccinelli*, 490 F. Supp. 3d 324, 330 (D.D.C. 2020). Second, the movant must show that the balance of private and public interests weighs in favor of transfer. *Id.*

IV. ANALYSIS

The Commission does not disagree that venue would be proper in the Southern District of California. Nor could it, seeing as Illumina is headquartered there and GRAIL is headquartered elsewhere in California. *See* 28 U.S.C. § 1391(b)(1) (stating that venue is proper in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located"); *see also* 15 U.S.C. § 53(b) (permitting the Commission to bring suit, *inter*

alia, wherever venue is proper under section 1391). As a result, this dispute centers on whether private and public interests warrant transfer.

Almost all those factors are neutral or favor transfer. But the one factor weighing in favor of keeping the case is ordinarily entitled to a great deal of deference. Although the question is a close call, the Court agrees with Defendants that transfer is appropriate.

A. The Effect of the COVID-19 Pandemic

Before delving into an assessment of the private and public interest factors, the Court addresses how the ongoing COVID-19 pandemic affects its analysis. For over a year, courts across the country—including this one and the District Court for the Southern District of California—have held limited in-person hearings to slow the spread of the COVID-19 virus. *See, e.g.*, Standing Order 20-9 (D.D.C. Mar. 16, 2020); Standing Order 18-A (S.D. Cal. Mar. 23, 2020). In the meantime, courts have mostly resorted to holding hearings over the telephone and videoconferencing software. But the proliferation of vaccines raises the possibility of returning to regular in-person proceedings soon. *See COVID-19 Vaccinations in the United States*, Ctr. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#vaccinations (showing that, as of April 18, 2021, 25.4% of the U.S. population was fully vaccinated).

The parties spar over how the possibility of an in-person preliminary injunction hearing impacts the appropriateness of transfer. Defendants want the hearing—which they say "will function as a trial on the merits"—to be in person. Defs.' Mot. at 1. And if the hearing is in person, they say, then it would be much easier for witnesses and parties who largely reside in California and the Western United States to travel to the Southern District than it would be for them to travel to the District of Columbia. *Id.* at 1, 7. Defendants assert that the risk of contracting COVID-19 may dissuade West Coast witnesses' attendance at a hearing on the other

side of the country, and they point out that local D.C. travel restrictions (such as testing and isolation requirements) would raise logistical hurdles. *See id.* at 7–8; *see also, e.g.*, D.C. Health, *Coronavirus 2019 (COVID-19): Guidance for Travel* (Mar. 3, 2021), https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/Travel_Guidance_DCHealth_COVID-19_Updated%203.3.21.pdf. According to Defendants, relocating the case to the Southern District would minimize these burdens.

The Commission responds that an in-person proceeding is unnecessary, so none of Defendants' claimed burdens should hold weight. *See* Pl.'s Opp'n at 6–8. It points to cases where other district courts found that videoconference platforms permitted adequate assessment of remote witnesses' credibility. *Id.* at 6 (citing *Flores v. Town of Islip*, No. 18-cv-3549, 2020 WL 5211052, at *2 (E.D.N.Y. Sept. 1, 2020); *Raffel Sys., LLC v. Man Wah Holdings Ltd., Inc.*, No. 18-cv-1765, 2020 WL 8771481, at *3 (E.D. Wis. Nov. 13, 2020)). Given the effectiveness of remote proceedings, the Commission argues, there is no point in risking participants' health with an in-person hearing—especially in light of concerns that a fourth surge in COVID-19 cases may be coming or that variants of the virus may stall recent progress. *See* Pl.'s Opp'n at 7–8.[1] If the hearing will be remote anyway, the Commission concludes, then transferring the case would do little for the convenience of the parties or witnesses. *See id.* at 7.

Yet significantly, "[l]ive testimony is . . . markedly preferable" to remote testimony. *Beall v. Edwards Lifesciences LLC*, 310 F. Supp. 3d 97, 106 (D.D.C. 2018) (quoting *Pyrocap Int'l Corp. v. Ford Motor Co.*, 259 F. Supp. 2d 92, 98 (D.D.C. 2003)); *see also United States v.*

[1] *See also* Reis Thebault, *Are We Entering a 'Fourth Wave' of the Pandemic? Experts Disagree.*, Wash. Post (Apr. 4, 2021), https://www.washingtonpost.com/health/2021/04/04/covid-fourth-wave/; Apoorva Mandavilli & Benjamin Mueller, *Virus Variants Threaten to Draw Out the Pandemic, Scientists Say*, N.Y. Times (Apr. 5, 2021), https://www.nytimes.com/2021/04/03/health/coronavirus-variants-vaccines.html.

Lattimore, No. 20-cv-123, 2021 WL 860234, at *7 (D.D.C. Mar. 8, 2021) ("The Court would greatly prefer to hold all pre-trial hearings in person. . . . Unfortunately, the COVID-19 pandemic simply prevents the Court from holding in-person hearings safely at this time."). The utility of live proceedings is not limited to aiding in the evaluation of witness credibility—though that is one important benefit, *see Beall*, 310 F. Supp. 3d at 106; *Pyrocap*, 259 F. Supp. 2d at 98. Among other advantages, live proceedings permit more natural dialogue among hearing participants, allow participants to handle any physical evidence, and avoid the technical difficulties that can sometimes trip up virtual proceedings. The Court will therefore seek to maximize the chances that the preliminary injunction hearing can occur in person or, in the event of a hybrid proceeding, that as many people as possible can safely provide live testimony.

Due to the continued rollout of vaccines, an in-person or hybrid proceeding may be possible by July or August, which is when the parties anticipate the hearing taking place. *See* Sheryl Gay Stolberg, *Biden Moves Up Vaccine Eligibility Deadline for All Adults to April 19*, N.Y. Times (Apr. 6, 2021), https://www.nytimes.com/2021/04/06/us/politics/biden-vaccine-all-adults-eligible.html. But between the spread of virus variants, the possibility of another surge, and regional differences in vaccination rates, there is no way to predict whether a live hearing is more likely in one district versus the other. As a result, the relative likelihood of an in-person hearing between the two districts will not factor into the Court's analysis.

Nevertheless, the Court will assume in its assessment that the hearing will occur, at least in part, in person. *Cf. Montgomery v. Barr*, No. 20-cv-03214, 2020 WL 6939808, at *9 (D.D.C. Nov. 25, 2020) ("[T]his factor, as well as some others geared towards convenience, seems less relevant today because of the frequency of telephone and video conferences due to the COVID-19 pandemic. Even so, the Court must apply the legal framework, which envisions in-person

hearings and trials, as it exists. To do otherwise would eviscerate the idea that local courts should hear local matters." (citation omitted)). If that assumption turns out to be wrong, then—as the Commission points out—it matters little for convenience's sake which court hears the case. Either way, witnesses, lawyers, and the parties will be able to join the videoconference proceedings from the safety of their homes and offices. But if the hearing will be in person, then pandemic-related risks and restrictions could significantly impact participants' ability and willingness to attend. It is safer to plan for an in-person hearing so that, in case one does occur, as many participants as possible can safely appear.

B. The Private Interest Factors Support Transfer

When weighing a motion to transfer, a court takes into account the following private interest considerations: (1) the plaintiff's choice of forum; (2) the defendant's preferred forum; (3) the location where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) ease of access to sources of proof. *Vasser v. McDonald*, 72 F. Supp. 3d 269, 282 (D.D.C. 2014). Only one private interest factor—the plaintiff's choice of forum—favors this Court retaining the case. The remaining factors range from having a neutral effect on the venue analysis to strongly favoring transfer. Those factors win out.

Because the last four factors help assess the weight the first two are entitled to, the Court begins with them. For starters, the location where the claim arose benefits Defendants. A claim originates "in the location where the corporate decisions underlying those claims were made or where most of the significant events giving rise to the claims occurred." *Beall*, 310 F. Supp. 3d at 104 (citation omitted). Defendants emphasize that their officers negotiated the acquisition agreement in California. Song Decl. ¶ 6; Schwillinski Decl. ¶ 5. Although they do not specify that the negotiations took place in the Southern District, they are adamant that the negotiations

did not touch the District of Columbia at all. Song Decl. ¶ 6; Schwillinksi Decl. ¶ 5. At a minimum, then, the location where the claim arose is a neutral factor. *Cf. United States v. Energy Sols., Inc.*, No. 16-cv-1056, 2016 WL 7387069, at *4 (D. Del. Dec. 21, 2016) (explaining that the factor was "largely neutral" when the record was unclear and did not "definitively indicate" that merger negotiations took place in the proposed transferee district). But even if the negotiations occurred, say, in the Northern District of California, that district is much closer to the Southern District than this one. So to the extent that the factor is "a proxy for where the witnesses, parties, and evidence are likely to be located," *United States v. H & R Block, Inc.*, 789 F. Supp. 2d 74, 80 (D.D.C. 2011), the Southern District would likely provide a more convenient forum for this dispute than one across the country. *Cf. FTC v. Graco Inc.*, No. 11-cv-2239, 2012 WL 3584683, at *5 (D.D.C. Jan. 26, 2012) (determining that the factor favored transfer when the merger agreement "was negotiated, drafted, and executed" in the proposed transferee district). Indeed, the Court's analysis of the other factors bears that hypothesis out.

The convenience-of-the-parties factor is neutral. For a "burden suffered by a party from litigating in a particular forum to weigh in favor of transfer, litigating in the transferee district must not merely shift inconvenience to the non-moving party; instead, it should lead to increased convenience overall." *Mazzarino v. Prudential Ins. Co. of Am.*, 955 F. Supp. 2d 24, 31 (D.D.C. 2013). Defendants' potential benefit from transfer is obvious. Illumina is headquartered in the Southern District. *See* Schwillinski Decl. ¶ 4; *see also Virts v. Prudential Life Ins. Co. of Am.*, 950 F. Supp. 2d 101, 107 (D.D.C. 2013) (explaining that a company's headquarters in a district made that forum a more convenient one). And GRAIL is headquartered in the Northern District of California, which is much closer to the Southern District than the District of Columbia. *See* Song Decl. ¶ 3. But because transfer would take the case away from where the Commission is

headquartered, it would merely shift inconvenience to the Commission. As a result, the factor favors neither party. *See Graco*, 2012 WL 3584683, at *6 (finding that convenience of the parties did "not weigh in favor of either party" because "Minnesota is more convenient for the defendants and the District of Columbia is more convenient for the FTC").[2]

Weighing heavily toward transfer is the convenience of witnesses. This factor is the most important one. *Beall*, 310 F. Supp. 3d at 105 ("The most critical factor to examine under 28 U.S.C. § 1404(a) is the convenience of the witnesses." (citation omitted)). Significantly, the inquiry is "not whether certain witnesses may be located outside the chosen forum, but instead whether those witnesses would be unwilling to testify in the District of Columbia." *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 28 (D.D.C. 2008) (internal quotation marks and citation omitted). And because parties can typically compel their employees to appear regardless of the forum, the convenience of nonparty witnesses matters more than the convenience of party witnesses. *See H & R Block*, 789 F. Supp. 2d at 82; *see also Cephalon*, 551 F. Supp. 2d at 28 ("The employee witnesses located at Cephalon's headquarters are under the control of Cephalon and could most likely be compelled to testify here.").

Defendants' argument on this factor is strong. By their count, eleven of the nineteen third-party witnesses that the Commission has deposed or examined via investigational hearings "appear to be based in California." Mot. Hr'g Tr. at 13:14–15. And of the fourteen Illumina and GRAIL employees the Commission examined, thirteen live in California. *Id.* at 13:11–12. In addition, Defendants' competitors—which, both parties agree, will supply some witnesses—are

[2] The Commission mentions that the Southern District would require more lawyers to travel. *See, e.g.*, Pl.'s Opp'n at 7–8. But "[t]he location of counsel 'carries little, if any, weight in an analysis under § 1404(a).'" *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 52 n.7 (D.D.C. 2000) (citation omitted).

largely based in California and the Western United States. Of the competitors the Commission lists in its sealed complaint, more are headquartered in California than any other state or the East Coast as a whole, others have offices in California, and another has offices in nearby Arizona. *See* Sealed Compl. ¶ 46, ECF No. 3; *see also* Pl's. Opp'n at 18; Mot. Hr'g Tr. at 26:4–6 (Commission attorney stating that "potential witnesses" live in California, Arizona, Maryland, Massachusetts, and the District of Columbia). The Commission points out that the third-party witnesses' geographic distribution remains to be seen because the parties have not yet identified them for the hearing. Pl.'s Opp'n at 18. It also suggests that, while some potential witnesses' employers are in California, the witnesses live elsewhere. Mot. Hr'g Tr. at 25:23–25. Ultimately, however, the Commission does not offer any hard figures to dispute the general point that likely witnesses would have an easier time getting to the Southern District than this district.

Travel that would ordinarily pose a mere inconvenience may well, under the current circumstances, deter witnesses from attending proceedings in the case. "[T]he pandemic has highlighted that there can be risks associated with travel," so "[s]ome people who would not have been worried about travel before the pandemic are now reluctant to travel." *Express Mobile, Inc. v. Web.com Grp., Inc.*, No. 19-cv-1936, 2020 WL 3971776, at *4 (D. Del. July 14, 2020). Furthermore, witnesses may be less willing to attend proceedings if it means elongating their stay to account for local COVID-19 travel protocols such as testing and quarantining.

Given that more potential witnesses appear to be located in or near California than anywhere else, transferring proceedings in the Southern District would minimize the burdens and risks of travel for the greatest number of witnesses. *Cf. id.* at *3 (finding that the convenience of the witnesses "favor[ed] transfer" in part because "the bulk of non-expert witnesses are more likely to reside in the Middle District of Florida than anywhere else"). Even if many of the

witnesses live in other districts in the Western United States, holding proceedings in the Southern District would still reduce the need for potentially hazardous long-haul airplane trips. *See Safer Travel Ideas*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-risk.html (warning travelers to avoid long flights with layovers). Indeed, "[c]ourts have consistently transferred actions when the majority of witnesses live *near* the transferee forum." *Beall*, 310 F. Supp. 3d at 105 (alteration in original) (emphasis added) (quoting *Mathis v. Geo Grp., Inc.*, 535 F. Supp. 2d 83, 87 (D.D.C. 2008)). In sum, the critical convenience-of-the-witnesses factor strongly favors transfer.

The Southern District also provides easier access to some sources of proof, though the factor carries limited weight. Between housing Illumina's headquarters and its relatively close proximity to GRAIL's headquarters in the Bay Area, the Southern District has a geographic advantage over this district when it comes to obtaining corporate records about the merger. That said, modern technology permitting the instantaneous transfer of those kinds of records nearly eliminates that advantage. *See H & R Block*, 789 F. Supp. 2d at 83. *But see Beall*, 310 F. Supp. 3d at 106 ("While the records may be in electronic form, this factor weighs nonetheless in favor of transfer because 'all of the . . . documents' are located in the transferee forum." (citation omitted)). More important is the Southern District's proximity to physical exhibits such as company equipment and products, which Defendants remarked in oral argument would help a court decide the case. *See* Mot. Hr'g Tr. at 20:3–9. Because Defendants failed to raise that argument in their brief, *see* Defs.' Mot. at 11, the Court is hesitant to put too much stock in it, *see Walker v. Pharm. Rsch. & Mfrs. of Am.*, 461 F. Supp. 2d 52, 58 n.9 (D.D.C. 2006) (explaining that a party forfeits an argument not raised in its opening brief). Nevertheless, the Southern District appears marginally better poised to access relevant evidence than this Court.

What remains to be considered are the parties' preferences. Usually, a plaintiff's choice of forum is "a 'paramount consideration' that is entitled to 'great deference' in the transfer inquiry." *Cephalon*, 551 F. Supp. 2d at 26 (quoting *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res., Inc.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002)). Indeed, "some courts have found that the government's choice of venue in an antitrust case is 'entitled to heightened respect.'" *Id.* (quoting *United States v. Brown Univ.*, 772 F. Supp. 241, 242 (E.D. Pa. 1991)); *see also United States v. Microsemi Corp.*, No. 08-cv-1311, 2009 WL 577491, at *7 (E.D. Va. Mar. 4, 2009) ("Where venue is proper, a plaintiffs [sic] choice of forum is entitled to substantial weight, particularly where the plaintiff's choice of forum is authorized by the more liberal antitrust venue provision."). But the deference owed to a plaintiff diminishes if "there is an insubstantial factual nexus between the case and the plaintiff's chosen forum." *Fed. Hous. Fin. Agency v. First Tenn. Bank Nat. Ass'n*, 856 F. Supp. 2d 186, 192 (D.D.C. 2012) (quoting *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 724 F. Supp. 2d 90, 95 (D.D.C. 2010)). And "when the weight of the plaintiff's choice is comparatively weak," the defendant's choice deserves greater consideration. *Mazzarino*, 955 F. Supp. 2d at 31 (quoting *Virts*, 950 F. Supp. 2d at 106).

This case has little connection to the District of Columbia. After all, it originated out of a merger that two California-based companies negotiated in California. *Cf. Cephalon, Inc.*, 551 F. Supp. 2d at 26 ("None of the negotiations that led to the settlement agreements at the heart of this controversy took place in, or were in any other way related to, the District."); *cf. also Bergmann v. U.S. Dep't of Transp.*, 710 F. Supp. 2d 65, 72 (D.D.C. 2010) ("Plaintiff's choice of forum is also entitled to less deference where, as here, the majority of operative facts took place outside the District of Columbia."). The Commission nevertheless insists that this case is tied to the District in several ways. It first asserts that the merger will cause nationwide harm that will

affect consumers in the District of Columbia. Pl.'s Opp'n at 10. It then infers that, because Defendants claim in their answer that the merger will help GRAIL obtain FDA approval for Galleri, that GRAIL's small, D.C.-based government-relations office will play a "notably outsized role . . . in a review of this merger." *Id.* at 10–11; *see also, e.g.*, Redacted Answer at 12, ECF No. 49. And finally, it says that the parallel administrative adjudication pending in the District of Columbia warrants keeping the cases in the same locale. Pl.'s Opp'n at 11.

Each of those attempts to demonstrate a meaningful connection to this forum falls flat. While D.C. residents may feel the anticompetitive effects of the merger, the nationwide impact makes this forum no different than any other. *Cf. FTC v. Acquinity Interactive, LLC*, No. 13-cv-5380, 2014 WL 37808, at *2 (N.D. Ill. Jan. 6, 2014) (concluding that the Commission's choice of forum was entitled to "less weight" than usual because "the only real connection between the lawsuit and this district is that some of the alleged consumer injury occurred here," but that "d[id] not differentiate this district from any other district in the country"); *cf. also Graco*, 2012 WL 3584683, at *5 (similar); *Cephalon*, 551 F. Supp. 2d at 27–28 (similar). Likewise, GRAIL's D.C. office is not as relevant as the Commission claims it is. The office has fewer than ten employees, Song Decl. ¶ 5, and it is focused on lobbying rather than securing regulatory approvals (which is handled out of the company's California headquarters), Mot. Hr'g Tr. at 7:14–22. *Cf. Cephalon*, 551 F. Supp. 2d at 26 (finding that a corporation's "very small public affairs office in the District of Columbia" did not create a meaningful connection to the District). The yet-to-begin administrative adjudication does not help the Commission either. Its claim that the proceeding connects this case to the District was unsupported by any legal authority. *See* Pl.'s Opp'n at 11; *cf. Graco*, 2012 WL 3584683, at *5 ("The FTC argues that because this case is [a] preliminary injunction proceeding in aid of an administrative proceeding currently pending in

the District of Columbia, this case, in a procedural sense, arises out of that administrative action. There is, however, no legal support provided for the plaintiff's proposition."). And "this Court has long recognized that mere involvement on the part of federal agencies, or some federal officials who are located in Washington, D.C. is not determinative of whether the plaintiffs' choice of forum in the District of Columbia receives deference." *First Tenn. Bank*, 856 F. Supp. 2d at 192 (cleaned up) (quoting *New Hope Power*, 724 F. Supp. 2d at 95–96).

To the extent the Commission suggests that the FDA approval process ties this case to this district because the agency is headquartered nearby in Maryland, it is wrong. *See* Mot. Hr'g Tr. at 27:18 to 28:1. Of course, one of the many reasons Defendants agreed to the merger is that they believe it will allow Illumina to help secure FDA approval for GRAIL's Galleri product. *See* Redacted Answer at 12. But a federal agency's general oversight of an industry does not link its home forum to every controversy that somehow relates to its regulatory processes. *See Bergmann*, 710 F. Supp. 2d at 73 ("While plaintiff argues that his claims 'arose principally at the headquarters offices of the Defendants in Washington, D.C.,' defendants persuasively counter that 'the only real connection [the] lawsuit has to the District of Columbia is that a federal agency headquartered here . . . is charged with generally regulating and overseeing the [administrative] process.'" (alterations and omissions in original) (citations omitted)). The FDA has not taken any specific action toward Defendants. Its regulatory regime was merely part of the backdrop that motivated the deal.

The *H & R Block* case that the Commission relies on dealt with an agency that played a much more direct role in prompting the challenged merger. There, the government alleged that a do-it-yourself tax preparation company negotiated the acquisition of a competitor to stop it from disrupting the industry. *See* 789 F. Supp. 2d at 77. One of the competitor's prominent moves

involved a public-private partnership between tax preparation companies and the D.C.-based Internal Revenue Service that let qualified taxpayers prepare and file their taxes for free. *Id.* The competitor introduced an offer through the partnership that was free to all U.S. taxpayers, forcing major players in the industry to follow suit. *Id.* The industry then lobbied for restricting the type and number of taxpayers that could receive the partnership's free services, which the IRS eventually did. *Id.* Because "facts underlying the complaint took place" in the District and IRS employees would likely be witnesses, the government asserted that its choice of forum was entitled to deference. *Id.* at 79. The court agreed. *Id.* at 79–80. But the factors that drove that decision are not present here. In *H & R Block*, the IRS had a direct hand in the events that led to the challenged transaction. It partnered with tax preparation companies and, in response to lobbying, reduced industry participants' ability to compete through that partnership. By contrast, the FDA's sole involvement in this case is that GRAIL will one day ask it to approve Galleri for sale. The agency plays just the passive, background role of industry regulator. Indeed, it is telling that no party has indicated that FDA employees will serve as witnesses. The FDA's approval process thus does not connect the case with this forum.

Having determined that this case lacks a meaningful connection to the District other than the fact that the Commission is located here, the Court will not defer to the Commission's choice of forum. *See First Tenn. Bank*, 856 F. Supp. 2d at 192. That means the Defendants' choice deserves greater weight. *See Mazzarino*, 955 F. Supp. 2d at 31. And because the only contrary factor is diminished, the private interest factors collectively weigh toward transfer.

C. The Public Interest Factors Are Essentially Neutral

There are three public interest factors that courts typically consider when deciding a motion to transfer: (1) whether there is a local interest in making a local decision about a local

controversy; (2) the proposed transferee court's familiarity with the applicable law; and (3) the relative congestion of the transferor and transferee courts. *H & R Block*, 789 F. Supp. 2d at 83. Because these factors are basically neutral with only the local interest factor possibly favoring transfer, the Court will keep its discussion brief.

First, if there is any local interest in this lawsuit, it would support transferring the case to the Southern District. The Court has already explained how the case's origins in California favor transfer. *Cf. Graco*, 2012 WL 3584683, at *6 (finding that the local interest factor favored transfer because the challenged transaction was negotiated in the proposed district and one of the defendants was headquartered there). In addition, Illumina is headquartered in the Southern District, and a decision blocking or permitting the merger could affect the company's employees who live there. *Cf. Bader v. Air Line Pilots Ass'n, Int'l*, 63 F. Supp. 3d 29, 36 (D.D.C. 2014) (noting that there was "some local interest" in the proposed transferee district because a related organization was headquartered there and the case "could have some impact on its employees"); That said, no district has a peculiarly local interest in hosting a suit that alleges nationwide anticompetitive effects. *See H & R Block*, 789 F. Supp. 2d at 83 ("The local interest in making decisions regarding local controversies is a neutral factor here because, as defendants concede, this case has national economic significance and does not present an essentially local matter."); *Cephalon*, 551 F. Supp. 2d at 31 (explaining that the public interest factor had "little application" because the "use of reverse-payment settlements" was "not a local issue at all" but instead "a question that has nationwide significance"). Consequently, this factor gives little reason to transfer the case beyond those already discussed—if any.

Second, because "all federal courts are presumed to be equally familiar with the law governing federal statutory claims," neither district court enjoys an expertise-based advantage

over the other. *See Mazzarino*, 955 F. Supp. 2d at 32 (quoting *Intrepid Potash–N.M., LLC v. U.S. Dep't of Interior*, 669 F. Supp. 2d 88, 98 (D.D.C. 2009)). This factor is therefore neutral.

Third, caseload statistics do not indicate that one forum would be able to dispose of the case more efficiently than the other. While district judges in the Southern District have more cases (503 cases per judge) than those in the District of Columbia (373 cases per judge), the median time between the filing of a civil case and the case's disposition is nearly equal across the two districts (6.0 months in the Southern District versus 5.8 months in the District of Columbia). Admin. Off. of U.S. Courts, *United States District Courts—National Judicial Caseload Profile* 2, 69 (Sept. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2020.pdf. None of the parties try to tell a different story from those statistics. *See* Defs.' Mot. at 11–12; Pl.'s Opp'n at 21. Instead, the Commission suggests that, if the case is transferred, there could be delays as the new court gets up to speed. Pl.'s Opp'n at 21. But seeing no evidence that the Southern District courts are more backlogged than courts in this district, the Court doubts that any delay will be material. Moreover, accepting the Commission's argument would give the initial court an automatic advantage in any transfer dispute. As Defendants point out, a transferee court will always have to play catch-up when it receives a new case. Mot. Hr'g Tr. at 18:17–22. This factor is neutral too.

* * *

In the final calculation, only one factor favors this Court retaining the case: the Commission's choice of forum. But because the case lacks a meaningful connection to the District of Columbia, that ordinarily important factor carries little weight. The remaining factors are either neutral or support transfer. Most significantly, transferring the case to the Southern District of California would be much more convenient for the bulk of the witnesses. That

already substantial factor holds even greater force during the ongoing COVID-19 pandemic. The Court will therefore transfer the case.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Transfer (ECF No. 41) is **GRANTED**. An order consistent with this Memorandum Opinion is separately and contemporaneously issued.

Dated: April 20, 2021

RUDOLPH CONTRERAS
United States District Judge

Exhibit 7

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

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

SCHEDULING ORDER

May 11, 2021	-	Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
May 14, 2021	-	Complaint Counsel provides expert witness list.
May 18, 2021	-	Respondents' Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
May 21, 2021	-	Respondents' Counsel provides expert witness list.
May 21, 2021	-	Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
June 11, 2021	-	Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.

June 25, 2021	-	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
July 2, 2021	-	Deadline for Complaint Counsel to provide expert witness reports.
July 16, 2021	-	Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel provides courtesy copies to ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
July 16, 2021	-	Deadline for Respondents' Counsel to provide expert witness reports. Respondents' expert report(s) shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
July 23, 2021	-	Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents' basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents' Counsel provides courtesy copies to ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
July 26, 2021	-	Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek

		appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondents).
July 26, 2021	-	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[1]
August 3, 2021	-	Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
August 5, 2021	-	Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 13.
August 5, 2021	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits. *See* Additional Provision 12.
August 12, 2021	-	Deadline for filing responses to motions *in limine* to preclude admission of evidence.
August 12, 2021	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
August 13, 2021	-	Exchange and provide a courtesy copy to ALJ of objections to final proposed witness lists and exhibit lists. The parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits.
August 13, 2021	-	Complaint Counsel files pretrial brief supported by legal authority.
August 17, 2021	-	Exchange proposed stipulations of law, facts, and authenticity.
August 18, 2021	-	Respondents' Counsel files pretrial brief supported by legal authority.

[1] Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

August 23, 2021	-	Final prehearing conference to begin at 2:00 p.m. Eastern Time. The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties. Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.
August 24, 2021	-	Commencement of Hearing, to begin at 10:00 a.m. Eastern Time.

ADDITIONAL PROVISIONS

1. For any correspondence to the Office of Administrative Law Judges that is required, the parties shall use electronic mail to the following email address: OALJ@FTC.GOV.

2. The parties shall serve each other by electronic mail and shall include "Docket 9401" in the re: line and all attached documents in .pdf format. In the event that service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits. Citations to filings or orders in the docket of this case shall set forth the title and the date of the cited document. Citation to FTC's internal numbering system ("OSCAR") shall not be used.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within seven days of service of a document request, the parties shall confer about the format for the production of electronically stored information. All discovery taken in the federal court litigation can be used in this administrative proceeding.

8. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, the deadline for the motion to compel shall be within 5 days of reaching an impasse.

9. The deposition of any person may be recorded by video, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by video at least five days in advance of the deposition. The parties shall work in good faith, in light of the public-health emergency, to develop appropriate protocols for remote depositions. No deposition, whether recorded by video or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

10. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. The parties need not separately notice the deposition of a non-party noticed by an opposing party. If both sides notice any non-party fact deposition, the time and allocation for the deposition shall be divided evenly between them. For any non-party deposition noticed by only one side, the non-noticing side shall be allocated one and a half hours of deposition time for cross or re-cross testimony. Unused time in any side's allocation of deposition time may be used by the other side.

11. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within 3 business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 business days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

12. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018); and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017); *In re North*

Texas Specialty Physicians, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

13. Motions *in limine* are strongly discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. Id. (citing *Hawthorne Partners v. AT&T Technologies, Inc*., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental, Inc*., 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

14. The final witness lists shall represent counsel's good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness lists may not include additional witnesses who were either not listed in the preliminary or supplemental witness lists previously exchanged, or whose depositions were not taken during the federal court litigation, unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

15. If any party wishes to offer a rebuttal witness other than a rebuttal expert, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

16. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

17. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

18. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications

of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g), except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied on by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

(i) a list of all commercially-available computer programs used by the expert in the preparation of the report;
(ii) a copy of all data sets used by the expert, in native file format and processed data file format; and
(iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

(g) Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) any form of communication or work product shared between any of the parties' counsel and their expert(s), or between any of the experts themselves;
(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

(iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;

(iv) drafts of expert reports, analyses, or other work product; or

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

19. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with 16 C.F.R. § 3.45(e).

20. Due to ongoing public health concerns related to COVID-19, it is probable that the evidentiary hearing in this matter will be conducted remotely by video conference. The parties are encouraged, in advance of the hearing, to take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and to submit such trial testimony as an exhibit in lieu of presenting the expert's testimony via live video at trial. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although the parties are encouraged to submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, you may choose to do trial depositions for all or fewer than all experts.

21. An expert witness' testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness is only allowed to provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

22. The final exhibit lists shall represent counsel's good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

23. Properly admitted deposition testimony, including discovery depositions or trial depositions, whether or not recorded by video, and properly admitted investigational hearing transcripts, are part of the record. Unless permitted by the Administrative Law Judge with three days' prior approval, such depositions or excerpts of depositions shall not be read or played during the evidentiary hearing in order to provide that testimony, but may be read or played when used in the examination of live witnesses.

24. Due to ongoing public health concerns related to COVID-19, it is probable that the evidentiary hearing in this matter will be conducted remotely by video conference. To accommodate safety or other concerns of witnesses and attorneys and staff, the parties may, in advance of the hearing, take trial depositions of fact witnesses

who had been deposed before the close of discovery and to submit such trial deposition testimony (as video and/or transcript of trial deposition testimony) as an exhibit in lieu of presenting the fact witness' testimony via live video at trial. Although the parties may submit trial depositions in lieu of live video testimony at trial for all fact witnesses in the case, you may choose to do trial depositions for fewer than all fact witnesses.

25. The parties shall provide to one another, and to the Administrative Law Judge and the court reporter, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or unforeseen circumstances.

26. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

27. Complaint Counsel's exhibits shall bear the designation PX and Respondents' exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation PXD and Respondents' demonstrative exhibits shall bear the designation RXD or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

28. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial and to provide the exhibits to the court reporter. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if PX100 and RX200 are different copies of the same document, only one of those documents shall be offered into evidence. The parties shall agree in advance as to which exhibit number they intend to use. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: April 26, 2021

EXHIBIT B

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Federal Trade Commission

Plaintiff,

V.

Illumina Inc.; GRAIL, INC.

Defendant.

Civil Action No. 21-cv-00800-CAB-BGS

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

Motion Hearing held on 5/28/2021 re 120 Ex Parte MOTION to Dismiss the Complaint without prejudice filed by Federal Trade Commission. Hearing argument and for reasons stated on the record, the Court grants the motion to dismiss. Case closed.

Date: 6/1/21

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ A. Hazard

A. Hazard, Deputy

EXHIBIT C

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

PLAINTIFF,

V.

ILLUMINA, INC. AND GRAIL, INC.,

DEFENDANTS.

NO.21-CV-00800-CAB-BGS

MAY 28, 2021

SAN DIEGO, CALIFORNIA

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CATHY ANN BENCIVENGO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
FEDERAL TRADE COMMISSION
BY: SUSAN MUSSER, DANIEL ZACH
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REPORTED BY STENOTYPE, TRANSCRIBED BY COMPUTER

15:04:51 SAN DIEGO, CALIFORNIA; MAY 28, 2021; 3:04 P.M.

-OOO-

THE CLERK: BACK ON THE RECORD THIS AFTERNOON. CALLING MATTER NUMBER 21 FROM OUR CALENDAR, THIS IS 21CV0800-CAB-BGS, FEDERAL TRADE COMMISSION VS. ILLUMINA INC. ET AL, ON CALENDAR FOR A MOTION HEARING. COUNSEL, PLEASE STATE YOUR APPEARANCES.

MS. MUSSER: GOOD MORNING, YOUR HONOR. THIS IS SUSAN MUSSER FOR THE FEDERAL TRADE COMMISSION. I'M JOINED BY MY COLLEAGUES DAN ZACH AND STEPHEN MOHR.

THE COURT: THANK YOU.

MR. MARRIOTT: GOOD MORNING -- GOOD AFTERNOON I GUESS SHOULD SAY, YOUR HONOR. DAVID MARRIOTT FROM CRAVATH, SWAINE AND MOORE, AND WITH ME IS MIKE ZAKEN AND SHIREEN MATTHEWS. AND

15:05:29 THEN WITH US FROM ILLUMINA, YOUR HONOR, IS CHARLES DADSWELL WHO IS GENERAL COUNSEL AND SCOTT DAVIES.

THE COURT: ALL RIGHT. THANK YOU. THERE ARE --

MR. PFEIFFER: YOUR HONOR, MY APOLOGIES --

THE COURT: I'M SORRY. I'M AL PFEIFFER FROM LATHAM AND WATKINS ON BEHALF OF GRAIL. I ALSO HAVE WITH ME MY COLLEAGUES COLLEEN SMITH AND MARCUS CURTIS.

THE COURT: ALL RIGHT. THANK YOU. I KNOW THAT TRADITIONALLY I ASK PEOPLE TO RISE WHEN THEY'RE SPEAKING IN FEDERAL COURT BUT BECAUSE WE DO HAVE A LOT OF PEOPLE ON THE TELEPHONE LINE, YOU CAN STAY IN YOUR SEATS AND JUST MAKE SURE

15:06:05 THE MICROPHONE IS PULLED UP VERY CLOSE SO PEOPLE CAN HEAR YOU WHEN YOU'RE SPEAKING.

SO WE ARE HERE TODAY ON THE QUESTION OF THE FTC'S MOTION TO DISMISS THE COMPLAINT IN THIS CASE WITHOUT PREJUDICE. I'M HAVING THE HEARING IN PART BECAUSE THERE WAS NO OPPORTUNITY FOR A REPLY BRIEF; AND SINCE IT IS THE FTC'S MOTION, YOU MAY PROCEED.

MS. MUSSER: THANK YOU VERY MUCH, YOUR HONOR, AND GOOD AFTERNOON. YOUR HONOR, IT'S THE FTC'S POSITION THAT THIS HERE IS ACTUALLY QUITE A SIMPLE MOTION. AT THE TIME OF FILING THE COMPLAINT, THE PLAINTIFFS HAD REASON TO BELIEVE THAT IT NEEDED A PRELIMINARY INJUNCTION IN ORDER TO MAINTAIN THE STATUS QUO AND GIVE IT AN OPPORTUNITY TO CONDUCT A FULL PROCEEDING ON THE MERITS IN THE PART 3 CASE. QUITE SIMPLY, YOUR HONOR, THAT
15:07:00 CHANGED. ON APRIL 20TH, THE E.C. ANNOUNCED THAT ILLUMINA MUST NULLIFY THE TRANSACTION AND THAT ILLUMINA CANNOT IMPLEMENT OR CLOSE THE TRANSACTION BEFORE NOTIFYING AND OBTAINING CLEARANCE BEFORE THE E.C.

SO IN OTHER WORDS, YOUR HONOR, THE E.C. BLOCKS, NOW BLOCKS THE CONSUMMATION OF THIS TRANSACTION WHICH IS THE EXACT RELIEF THAT THE PLAINTIFFS ARE SEEKING IN ITS COMPLAINT FOR PRELIMINARY INJUNCTION. AS SUCH, THE PLAINTIFFS AT THIS TIME NO LONGER HAS REASON TO BELIEVE THAT IT NEEDS THE RELIEF THAT IT SOUGHT, AND IT'S THE PLAINTIFF'S POSITION THAT PROCEEDING WITH THIS CASE WOULD BE UNNECESSARY AND A WASTE OF THIS COURT'S

15:07:43 TIME AND TAXPAYER RESOURCES. AS SUCH, THAT IS WHY WE ARE HERE TODAY TO MOVE THIS COURT TO DISMISS THIS CASE WITHOUT PREJUDICE.

WELL, YOUR HONOR, OUR BRIEFING SPEAKS FOR ITSELF, BUT WITH THE COURT'S INDULGENCE, I WANTED TO HIGHLIGHT A FEW REASONS WHY RELIEF IS APPROPRIATE IN RESPONSE TO THE ALLEGATIONS DEFENDANTS RAISE IN THEIR MOTION.

THE COURT: GO AHEAD.

MS. MUSSER: FIRST, IN THEIR BRIEFING, DEFENDANTS ALLEGE SOMEHOW THAT THE MERE FACT THAT THE FTC COMMUNICATED WITH FOREIGN ENFORCEMENT AGENCIES SOMEHOW SHOWS THAT WE INSTIGATED THE E.C.'S INVESTIGATION. FIRST, WHILE COMMUNICATIONS WITH THE E.C. AND FTC ARE PRIVILEGED, AS SISTER ANTITRUST ENFORCEMENT AGENCIES, THE AGENCIES ROUTINELY

15:08:23 COMMUNICATE TO FOSTER STATUTORILY-ENCOURAGED INTERNATIONAL COOPERATION. THIS IS NOT SURPRISING. THIS IS NOT UNTOWARD.

SECOND, IT'S HELPFUL TO GIVE A BRIEF OVERVIEW OF THE ARTICLE 22 PROCESS. IT'S THIS ARTICLE 22 PROCESS THAT THE E.C. IS USING TO REVIEW THIS TRANSACTION IN EUROPE. SO FIRST, MEMBER STATES MUST SUBMIT WHAT'S CALLED A REFERRAL REQUEST TO THE E.C. THE E.C. LOOKS AT THAT REFERRAL REQUEST AND DECIDES WHETHER TO ACCEPT THE MEMBER STATES' REQUEST FOR IT TO EXERCISE JURISDICTION AND REVIEW THE MERGER. ARTICLE 22 REQUIRES MEMBER STATES TO DETERMINE WHETHER A MERGER HAS SIGNIFICANTLY AFFECTED COMPETITION. SECOND THE E.C., IN ORDER TO ACCEPT THOSE

15:09:17 REFERRAL REQUESTS, MUST FIND THAT THE SAME CRITERIA HAS BEEN MET. HERE, SIX E.C. MEMBER STATES -- FRANCE, GREECE, BELGIUM, ICELAND, THE NETHERLANDS AND NORWAY -- ALL FOUND THAT THE MERGER HAD MET THAT CRITERIA, THE CRITERIA THAT THIS MERGER COULD SIGNIFICANTLY AFFECT COMPETITION. ON APRIL 20TH, THE E.C. ANNOUNCED THAT THEY TOO FOUND THAT THE SAME CRITERIA HAD BEEN MET. THERE'S ABSOLUTELY NO REASON TO THINK THAT THE SIX MEMBER STATES, PLUS THE E.C., DID ANYTHING OTHER THAN TO CONDUCT THEIR OWN INDEPENDENT ASSESSMENT, AND THE MERE FACT THAT THE FTC COMMUNICATED WITH THE E.C. AS PART OF THE ORDINARY COURSE OF BUSINESS DOES NOT OTHERWISE INDICATE.

SECOND, THE PARTIES ALSO ARGUE THAT THE FTC SHOULD HAVE KNOWN SOMEHOW THAT THE PARTIES COULD CLOSE AT THE TIME IT INITIALLY FILED THE COMPLAINT. YOUR HONOR, I THINK IT'S 15:10:08 HELPFUL TO REVIEW WHAT THE FTC DID KNOW. WE KNEW THAT, ONE, FRANCE HAD SUBMITTED A REFERRAL REQUEST. WE ALSO KNEW THAT THE DEFENDANTS WERE CHALLENGING THAT REQUEST IN THE EUROPEAN COURTS. AND THIRD, WHAT WE KNEW IS THAT THE E.C. HAD NOT YET ACCEPTED THAT REFERRAL REQUEST. SO IN OTHER WORDS, THERE WAS A REFERRAL THAT WAS BEING CHALLENGED AND HAD NOT YET BEEN ACCEPTED.

FINALLY, BEFORE FILING THE COMPLAINT, WE ASKED ILLUMINA'S COUNSEL WHETHER OR NOT THERE'S ANYTHING ABOUT THE E.C. POSTURE THAT WOULD PREVENT IT FROM CLOSING. WE WERE TOLD NO. SO BASED ON OUR UNDERSTANDING AND THE PROCEDURE AND OUR

15:10:49 COMMUNICATIONS WITH THE DEFENDANTS, IT WAS OUR BELIEF AT THAT TIME THAT WE NEEDED A PRELIMINARY INJUNCTION IN ORDER TO PREVENT THIS CASE FROM BEING CLOSED.

THE THIRD POINT I WANTED TO ADDRESS IS THAT I JUST WANT TO LEVEL SET A BIT HERE ON TIMING. SO FIRST, THE DEFENDANT SEEMS TO ASSUME THAT WE COULD BE BACK HERE AT ANY MINUTE. YOUR HONOR, THE END RESULT OF THE E.C. INVESTIGATION COULD BE THAT THIS TRANSACTION IS BLOCKED COMPLETELY AND WE'RE NEVER BACK HERE. MOREOVER, IN THE EVENT THAT THE E.C. INVESTIGATION ENDS, WE HAVE NO REASON TO BELIEVE THAT IT'S GOING TO BE ANYTIME SOON, AND OUR REASON STEMS FROM THREE MAIN RATIONALE. FIRST, WE CONSULTED WITH OUR OFFICE OF INTERNATIONAL AFFAIRS AND IT'S BASED ON THEIR UNDERSTANDING OF THE PROCESS IN THE E.C. SECOND, AS I JUST MENTIONED, SIX

15:11:42 MEMBER STATES AND THE E.C. FOUND REASON THROUGH THE REFERRAL PROCESS TO BELIEVE THIS WOULD HAVE A SIGNIFICANT EFFECT ON COMPETITION. AND THIRD, WE ARE A WEEK FROM CLOSING FACT DISCOVERY, AND THROUGHOUT THE COURSE OF FACT DISCOVERY, THE FTC'S CONCERN ABOUT THE POTENTIAL COMPETITIVE EFFECTS OF THIS TRANSACTION HAVE NOT BE ASSUAGED. THEY'VE BEEN HEIGHTENED. AND BASED ON ALL OF THAT, WE HAVE NO REASON TO BELIEVE THIS WILL BE AN ABBREVIATED OR TRUNCATED REVIEW IN THE E.C.

MOREOVER, THERE'S A COUPLE POINTS TO PRESENT FROM AN EFFICIENCY PERSPECTIVE. AS I JUST MENTIONED, WE DON'T THINK WE'LL BE BACK HERE ANYTIME SOON; BUT IF WE ARE, THERE WILL BE

NO LOSS OF EFFICIENCY. FIRST, AS I JUST MENTIONED, ALL THE PARTIES IN THIS CASE HAVE DONE A LOT OF WORK IN FACT DISCOVERY ALREADY. THAT FACT DISCOVERY, THAT WORK DONE, WILL SEAMLESSLY TRANSITION TO THE PART 3 PROCESS. AS NOTED IN THE FTC'S OPENING BRIEFING, THAT FEDERAL COURT DISCOVERY UNDER THE CMSO IN PART 3 WILL BE PART OF THAT RECORD SO NO WORK HAS BEEN LOST.

SECOND, IN THE EVENT WE DO END UP BACK BEFORE YOUR HONOR, THIS CASE WILL BENEFIT FROM THE CONTINUED DISCOVERY THAT WILL AUTOMATICALLY HAPPEN IF THIS CASE IS DISMISSED. SO IF YOUR HONOR GRANTS THE PLAINTIFF'S MOTION TO DISMISS THIS CASE WITHOUT PREJUDICE, WHAT WILL HAPPEN IS WE'LL SEAMLESSLY TRANSITION TO PART 3, AND THAT PART 3, AS YOU CAN SEE FROM THE SCHEDULING ORDER SUBMITTED AS PART OF OUR BRIEFING, WILL HAVE EXPERT REPORTS, BRIEFING AND WILL CULMINATE IN A FULL ADJUDICATION ON THE MERITS.

THAT PROCESS WILL DO TWO THINGS. FIRST, IT WILL NARROW THE SCOPE OF THE ISSUES IN DISPUTE IN THIS CASE; SO IN THE EVENT WE HAVE TO COME BACK, WE CAN DO SO IN AN ABBREVIATED AND TRUNCATED FASHION. SECOND, THE DEFENDANTS IN THEIR BRIEFING TALKED A LOT ABOUT POTENTIAL CHANGES TO THE COMPLAINT. I WANT TO SHARE WITH YOUR HONOR THAT'S NOT PRACTICABLE IN THIS SITUATION. SO WHAT HAPPENS IN THE PART 3 ADMINISTRATIVE PROCESS IS THAT THE COMMISSION VOTES OUT A COMPLAINT. ONCE THAT COMPLAINT IS VOTED OUT, IT CANNOT BE CHANGED. AND THE PI COMPLAINT LOOKS AT WHETHER THERE'S A SUBSTANTIAL LIKELIHOOD OF

15:13:58 SUCCESS ON THAT PART 3 COMPLAINT, AND IT EFFECTIVELY MIRRORS THAT COMPLAINT AND BECAUSE THAT PART 3 COMPLAINT WILL NOT CHANGE, ANY SUBSEQUENT COMPLAINT FOR PI OR TRO THAT WE WOULD HAVE TO FILE IN THE UNLIKELY EVENT WE'RE BEFORE THIS COURT WON'T HAVE ANY EXPANDED SCOPE OR ANY EXPANDED ISSUES BECAUSE THOSE ISSUES ARE ALREADY SET, YOUR HONOR.

AND FINALLY, THE DEFENDANTS WILL SUFFER NO LEGAL PREJUDICE SHOULD WE HAVE TO, IF WE EITHER HAVE TO PROCEED TO PART 3 OR IF WE HAVE TO COME BACK AGAIN FOR A TRO OR PI. ON THE FIRST PART, AS I JUST MENTIONED, DEFENDANTS WILL BE ABLE TO SEAMLESSLY CONTINUE TO DEVELOP THEIR THEORIES, THEIR LEGAL ARGUMENTS THROUGH THE PART 3 PROCESS. SECOND, IF WE COME BACK HERE, THE DEFENDANTS WILL BE ABLE TO USE THAT SCOPE OF DISCOVERY WHICH IS INHERENTLY BROADER THAN ANY SCOPE OF 15:14:53 DISCOVERY IN THE PI AND BE ABLE TO DEVELOP THE SAME ARGUMENTS AND TO PRESENT THOSE IN A SUBSEQUENT FEDERAL COMPLAINT, IN FEDERAL PI HEARING. SO AS SUCH, THERE'S NO LEGAL RIGHT, THERE'S NO LEGAL INTEREST THAT THEY'RE LOSING EITHER BY PROCEEDING IN PART 3 OR IN THE EVENT THAT WE WOULD HAVE TO BE BACK BEFORE THIS COURT.

GIVEN THAT THERE'S TWO THINGS WE KNOW RIGHT NOW -- ONE, THAT WE NO LONGER NEED A PI, AND TWO, THAT PROCEEDING DOWN THIS TRACK WILL BE AN INHERENT WASTE OF THIS COURT'S TIME, LITIGANT RESOURCES AND TAXPAYER'S MONEY -- IT'S THE FTC'S POSITION THAT THIS CASE SHOULD BE DISMISSED WITHOUT

PREJUDICE.

THE COURT: ALL RIGHT. THANK YOU. WE'LL HEAR FROM ILLUMINA FIRST.

MR. MARRIOTT: THANK YOU. MAY I USE THE LECTERN?

THE COURT: THAT'S FINE.

MR. MARRIOTT: I'M SO USED TO THAT. IT WILL BE HARD TO DO SITTING DOWN.

THE COURT: THAT'S FINE.

MR. MARRIOTT: THANK YOU, YOUR HONOR. AGAIN, DAVID MARRIOTT FOR ILLUMINA. YOUR HONOR, AS WE SAID IN OUR PAPERS, ILLUMINA AND GRAIL HAVE NO OBJECTION TO THE DISMISSAL OF THIS CASE WITH PREJUDICE. OUR PROBLEM IS WITH THE PROPOSED DISMISSAL WITHOUT PREJUDICE. AND WE ACKNOWLEDGE, YOUR HONOR, THAT DISMISSAL WITHOUT PREJUDICE IS NOT INAPPROPRIATE SIMPLY BECAUSE WE MAY FACE AN ADDITIONAL SUIT AND IT'S NOT INAPPROPRIATE SIMPLY BECAUSE THE FTC MAY GAIN SOME TACTICAL ADVANTAGE. WE THINK, HOWEVER, IT IS INAPPROPRIATE FOR THE THREE REASONS WE DESCRIBE IN OUR PAPERS. ONE, YOUR HONOR, THE RATIONALE OFFERED BY THE FTC HERE WE SUBMIT DOESN'T SURVIVE SCRUTINY. THE CASE IS NEITHER MOOT NOR IS IT UNRIPE. DISMISSAL WITHOUT PREJUDICE WILL, WE THINK, RESULT AN UNDUE PREJUDICE TO THE DEFENDANTS. WE THINK IT WOULD BE INEQUITABLE. WE THINK IT WOULD BE UNDULY PREJUDICIAL TO THE PUBLIC. AND WE THINK CONTRARY -- WITH RESPECT TO OUR FRIENDS AT THE FTC, WE DO THINK IT WOULD BE WASTEFUL. WE THINK IT WOULD BE INEFFICIENT,

15:16:46 AND WE THINK IT WOULD BE IMPRACTICABLE.

WITH YOUR HONOR'S PERMISSION, WHAT I'D LIKE TO DO, IF I MAY, IS TO TAKE YOU THROUGH EACH OF THOSE, MINDFUL THAT YOUR HONOR NO DOUBT HAS READ THE PAPERS, TAKE YOU THROUGH EACH OF THEM IN JUST A LITTLE BIT OF ADDITIONAL DETAIL. BEFORE I DO THAT, YOUR HONOR, I THOUGHT IT MIGHT BE HELPFUL TO UNDERSCORE WHAT I GUESS WOULD BE CALLED FIVE BACKGROUND OBSERVATIONS OR FACT THAT I THINK MAY BE HELPFUL IN UNDERSTANDING THE DISPUTE HERE AND CLARIFYING SOME OF THE ISSUES. THE FIRST OF THOSE, YOUR HONOR, IS THIS TRANSACTION IS IN OUR VIEW NO ORDINARY MERGER. IT IS -- ILLUMINA FOUNDED GRAIL IN 2016. THE SCIENTISTS THERE IDENTIFIED WHAT THEY THOUGHT WAS A GENETIC ABNORMALITY IN FETUSES DURING PRENATAL TESTING. TURNS OUT WHAT THEY FOUND WAS THAT THE MOTHERS THEMSELVES ACTUALLY HAD CANCER,
15:17:38 YOUR HONOR. IT WAS THAT DEVELOPMENT, THAT DISCOVERY THAT LED TO THE CREATION OF GRAIL. ILLUMINA SPUN GRAIL OUT IN ORDER TO ENCOURAGE FUNDING, TO ALLOW FOCUS, TO DEEMPHASIZE RISK. BUT IT RETAINED, YOUR HONOR, AND IT HAS ALWAYS HAD AN OWNERSHIP INTEREST IN GRAIL.

SO NOW ILLUMINA AND GRAIL HAVE CONCLUDED THAT THE BEST WAY FOR GRAIL TO SUCCEED IS TO, IN EFFECT, COME BACK HOME SO TO SPEAK. SO THIS TRANSACTION REQUIRES ILLUMINA ACQUIRING THOSE SHARES AND THOSE PORTIONS OF GRAIL THAT IT SOLD SEVERAL YEARS AGO. IT IS A PURELY VERTICAL TRANSACTION, AND THAT'S IMPORTANT TO THE ANALYSIS THAT THIS COURT I THINK WOULD NEED TO

15:18:16 DO IN A TRIAL OF THIS MATTER. THAT'S KIND OF THE BACKGROUND FACT ONE, YOUR HONOR. IT'S NOT AN ORDINARY MERGER. BACKGROUND FACT TWO IS THAT THE STAKES HERE I THINK ARE UNUSUALLY HIGH. SO MOST TRANSACTIONS ARE ABOUT MONEY, AND WE'RE NOT SUGGESTING FOR A MOMENT THAT THERE ISN'T MONEY AND FINANCE AND ECONOMICS INVOLVED IN THIS TRANSACTION, BUT THERE'S A LOT MORE I THINK INVOLVED HERE, YOUR HONOR, THAN IN YOUR ORDINARY TRANSACTION.

THE GRAIL TEST IS CALLED GALLERI. THE GALLERI TEST IS A TEST TO ALLOW SCREENING FOR ASYMPTOMATIC PEOPLE FOR UP TO 50 DIFFERENT TYPES OF CANCER. AND IT'S UNDISPUTED THAT SCREENING PEOPLE, ASYMPTOMATIC PEOPLE IN PARTICULAR, ALLOWS FOR DETECTION OF CANCER AT A TIME WHEN THEY CAN ACTUALLY BE TREATED AND REMEDIED AND CURED IN WAYS THEY OTHERWISE CANNOT. AND THERE'S NOT ANY DISPUTE HERE, I DON'T THINK, YOUR HONOR, THAT

15:19:06 EARLY DETECTION HAS THE PROSPECT OF SAVING LIVES, AND WE THINK, WE BELIEVE WE INTEND TO SHOW THIS COURT, IF WE'RE ALLOWED TO PRESENT OUR CASE AT A TRIAL, THAT ILLUMINA AND GRAIL REUNITING WILL ALLOW THE TWO COMPANIES TO ACCELERATE THE PROCESS OF ALLOWING THIS EARLY DETECTION OF CANCER, AND WE INTEND TO SHOW YOUR HONOR THAT THAT HAS THE PROSPECT OF SAVING TENS OF THOUSANDS OF LIVES, AND THAT'S WHAT WE THINK IS AT STAKE HERE.

NOW, THE THIRD OBSERVATION I WOULD MAKE, YOUR HONOR, BY WAY OF BACKGROUND IS THAT WE BELIEVE, CONTRARY TO WHAT COUNSEL FOR THE FTC SUGGESTS, IS THAT THIS CASE IS WHAT WILL ACTUALLY DECIDE THE FATE OF THIS TRANSACTION. WHAT COUNSEL HAS

15:19:45 SUGGESTED IS THAT IT'S REALLY THE PART 3 PROCEEDING BEFORE THE FTC IS THE REAL SHOW AND THIS CASE IS SORT OF AN AID TO WHAT'S GOING ON IN THE ADMINISTRATIVE PROCESS. WE RESPECTFULLY, YOUR HONOR, SUBMIT THAT THAT'S NOT CORRECT. THE FTC COMMENCED AT THE SAME TIME THIS CASE AN ADMINISTRATIVE PROCEEDING. IT'S THEIR RIGHT TO DO THAT. BUT THE ALJ IS NOT EMPOWERED TO ENTER INJUNCTIONS TO PREVENT THE CLOSING OF TRANSACTIONS OF THIS KIND. AND THAT'S WHAT THE ISSUE IN THIS CASE IS: SHOULD THE TRANSACTION BE ENJOINED BEFORE THE PARTIES CAN ACTUALLY CLOSE THE CASE? AND IF YOUR HONOR WERE FOLLOWING A HEARING TO ENJOIN THIS TRANSACTION, THEN IT WOULD ALMOST CERTAINLY, YOUR HONOR, BE ABANDONED BY THE PARTIES. WHEN THERE ARE INJUNCTIONS IN TRANSACTIONS OF THIS KIND, THAT BASICALLY IS THE DEATH NAIL, AS A GENERAL MATTER, TO TRANSACTIONS.

15:20:31 BY CONTRAST, IF YOUR HONOR ELECTS NOT TO ENTER A PRELIMINARY INJUNCTION IN THIS CASE, THEN WHAT WOULD HAPPEN IS THAT THE FTC WOULD HAVE TO MAKE THE DECISION AS TO WHETHER IT WISHES STILL TO PURSUE ITS PART 3 PROCEEDING. PART 3 PROCEEDING COULDN'T STOP THE CLOSING OF THE TRANSACTION. THAT WOULDN'T HAPPEN. THE ONLY THING THE PART 3 PROCEEDING COULD DO IS POTENTIALLY LEAD SEVERAL YEARS DOWN THE ROAD TO ILLUMINA BEING REQUIRED TO SELL GRAIL, YOUR HONOR. AND HISTORICALLY WHAT HAPPENS IS WHEN DISTRICT COURTS DECLINE TO ENTER PRELIMINARY INJUNCTIONS STOPPING THE CLOSINGS OF TRANSACTIONS IS THAT THE FTC SIMPLY DOESN'T PROCEED ANY FURTHER WITH ITS

15:21:08 PART 3 PROCEEDING. SO WE THINK, YOUR HONOR, RESPECTFULLY, THAT THIS CASE AS A PRACTICAL MATTER WILL DETERMINE THE FATE OF THIS TRANSACTION.

THE FOURTH BACKGROUND OBSERVATION, YOUR HONOR, IS THAT THE DEFENDANTS HERE CONSENTED TO A TRO IN ORDER TO ALLOW FOR AN ORDERLY PROCESS. THE FTC CAME TO US. THEY SAID THEY WERE INTERESTED IN A TRO. DEFENDANTS, OF COURSE, WERE NOT REQUIRED TO AGREE TO A TRO. WE COULD HAVE SIMPLY CALLED TO QUESTION AND HAD THE ISSUE PRESENTED ON AN ACCELERATED TRO SCHEDULE. BUT FRANKLY, YOUR HONOR, THE ISSUES WE ALL AGREE ARE IMPORTANT ISSUES. WE EXPECTED NO COURT WOULD WANT TO HEAR THESE ISSUES ON AN ACCELERATED BASIS AND HAVE TO MAKE A RUSH JUDGMENT.

SO WE CONSENTED TO THE TRO TO ALLOW THE PARTIES TO
15:21:56 PUT ON THEIR BEST POSSIBLE CASE, ALLOW THE FTC TO SAY WHATEVER IT WANTED TO SAY AND DEFENDANTS SAY WHATEVER THEY WANT TO SAY, SUBJECT TO THE COURT'S AGREEMENT, SO THAT A DECISION COULD BE MADE ON THE MERITS OF WHETHER OR NOT THE INJUNCTION SHOULD ISSUE THAT WOULD STOP CLOSING OF THE TRANSACTION. AND THE PARTIES CAME TO AN AGREEMENT THAT A TRO SHOULD BE ENTERED THAT WOULD STAY THE CLOSING OF THE TRANSACTION TO SEPTEMBER 20. THAT'S THE SO-CALLED OUTSIDE DATE OF DEAL, THE DATE OF THE CONTRACT BY WHICH THE TRANSACTION WOULD EXPIRE. AFTER WE AGREED TO THAT TRO, YOUR HONOR, THE PARTIES THEN UNDERTOOK A RELATIVELY LENGTHY NEGOTIATION OF WHAT THE CASE MANAGEMENT

15:22:26 ORDER SHOULD LOOK LIKE. WE CAME TO AN AGREEMENT AS TO WHAT I BELIEVE THE PARTIES GENERALLY THOUGHT WAS THE FASTEST POSSIBLE SCHEDULE TO GET THESE ISSUES TEED UP AND A RESOLUTION BY THE COURT. IT'S AN AGGRESSIVE SCHEDULE, YOUR HONOR, BUT I THINK THE PARTIES HAD A JOINT INTEREST IN CAUSING IT TO HAPPEN SO THE COURT COULD DECIDE THESE ISSUES ON THE MOST ACCELERATED POSSIBLE BASIS.

THE FINAL POINT, YOUR HONOR, I GUESS I WOULD MAKE HERE IS THAT THE KEY DATE FOR PURPOSES OF DECIDING WHETHER OR NOT THE TRANSACTION HERE WOULD BE JEOPARDIZED FATALLY BY THE FTC'S EFFORTS TO DISMISS WITHOUT PREJUDICE IS THIS; THE KEY DATE IS SEPTEMBER 20TH. THAT IS THE DATE BY WHICH THE TRANSACTION EXPIRES BY ITS OWN TERMS. THEY SEEK A PRELIMINARY INJUNCTION. THEY SEEK TO, THEY SAY, PRESERVE THE STATUS QUO
15:23:12 AND THAT IS THE STATUS QUO THAT THE TRANSACTION WOULD EXPIRE ON SEPTEMBER 20TH. IT CAN BE EXTENDED, YOUR HONOR, IN CERTAIN NARROW CIRCUMSTANCES WHICH I SUBMIT CERTAINLY ARE NOT TRIGGERED NOW; WE WOULDN'T KNOW IF THEY ARE TRIGGERED UNTIL SEPTEMBER 20, AND EXTENDING THE DATE EXTENDING BEYOND THAT HAS THE PROSPECT OF CREATING ALL KINDS OF UNCERTAINTY FOR THE PARTIES HERE AS TO WHETHER THE TRANSACTION CLOSING WOULD IMPOSE BURDEN ON ILLUMINA FOR EXAMPLE AND ON GRAIL FOR A VARIETY OF REASONS.

SO WITH THAT BACKGROUND, YOUR HONOR, LET ME BRIEFLY ADDRESS EACH OF THE THREE KEY FLAWS WE SUBMIT EXIST IN THE FTC'S APPLICATION FOR DISMISSAL WITHOUT PREJUDICE. THE FIRST

15:23:50 OF THOSE, YOUR HONOR, IS THAT WE SUBMIT THAT THEIR THEORY OF WHY THIS CASE IS NO LONGER APPROPRIATE FOR A PRELIMINARY INJUNCTION IS LEGALLY UNFOUNDED. IT IS NEITHER MOOT, YOUR HONOR, NOR IN OUR VIEW IS THE CASE UNRIPE. WITH RESPECT TO MOOTNESS, THE BASIC QUESTION IS WHETHER THERE'S A PRESENT CONTROVERSY AS TO WHICH THIS COURT COULD ENTER EFFECTIVE RELIEF. THE CASE ISN'T MOOT WHEN THE COURT CAN OFFER SOME FORM OF EFFECTIVE RELIEF. THE LAW IS CLEAR THEY HAVE THE BURDEN TO SHOW THE ABSENCE OF CONTROVERSY, THAT THE CASE IS IN FACT MOOT AND THE --

THE COURT: WELL, IT'S THEIR CASE. IF THEIR POSITION IS THEY WERE ASKING FOR AN INJUNCTION AND THEY DON'T THINK THEY WANT IT OR NEED IT ANYMORE, THEN ISN'T THAT THEIR CALL AND THEIR RISK?

15:24:43 MR. MARRIOTT: YOUR HONOR, IT IS THEIR CALL BUT SUBJECT TO THIS COURT'S APPROVAL ON APPROPRIATE CONDITIONS AND IN THE CIRCUMSTANCE HERE WHERE --

THE COURT: WELL, IT'S NOT REALLY MY POSITION TO DETERMINE WHETHER OR NOT THEY ARE MAKING A GOOD LEGAL CALL AS TO WHETHER OR NOT RELYING ON THE EU IS THE RIGHT THING TO DO. THAT'S THEIR CALL. I'M NOT GOING TO SECOND GUESS THEM ON WHETHER THAT'S APPROPRIATE.

MR. MARRIOTT: OUR POINT, YOUR HONOR, IS SIMPLY IS IF THERE'S GOING TO BE A DISMISSAL, IT OUGHT TO BE A DISMISSAL WITH PREJUDICE. THEY OUGHT NOT BE ALLOWED TO COME BACK AND

15:25:17 HAVE US NOW TWO MONTHS, THREE MONTHS, WHATEVER IT IS DOWN THE ROAD, SOME INDETERMINATE AMOUNT OF TIME, EFFECTIVELY DOING AGAIN WHAT WE'VE BEEN DOING NOW ALL TOWARDS RESOLUTION BY SEPTEMBER 20, THE DATE WHEN THE CONTRACT EFFECTIVELY EXPIRES ON ITS TERMS, THE DATE OF THE TRO, BUT THERE WON'T BE TIME TO DO THEN WHAT WE'VE BEEN ENDEAVORING TO DO NOW. THAT REALLY IS THE POINT, YOUR HONOR. SO MOOTNESS -- IF THEIR THEORY IS IN ORDER TO GET A DISMISSAL WITH PREJUDICE THEY'VE GOT TO SHOW THAT THEY'VE GOT AN EXPLANATION FOR WHAT THEY'RE TRYING TO DO, WHY THAT MAKES SENSE, AND THE ONLY EXPLANATIONS OFFERED, YOUR HONOR, IS THAT THE CASE IS NOT RIPE ANYMORE. IT'S NOT MOOT. AND MY POINT IS SIMPLY THAT THE CASE IS NOT MOOT. WHAT THE COMPLAINT ASKS FOR --

THE COURT: I'M NOT SURE I AGREE WITH THAT. THEY

15:25:57 SAID THEY DON'T NEED IT ANYMORE. THEY'RE MOVING FOR PRELIMINARY INJUNCTION, AND THEY DON'T NEED THE RELIEF ANYMORE. THEY DON'T WANT IT. I MEAN, THAT'S WHAT THE COURT UNDERSTANDS THEIR POSITION TO BE. THEY MAY BE WRONG. BUT THAT'S, THAT'S THEIR POSITION. SO LET'S MOVE ON FROM THAT POINT. YOU NEED TO DEMONSTRATE TO ME THAT THERE'S PLAIN LEGAL PREJUDICE HERE IF I GIVE THEM A DISMISSAL ON THE TERMS THEY REQUESTED.

MR. MARRIOTT: THANK YOU, YOUR HONOR. SO LET ME ILLUSTRATE WHY I THINK THERE'S PLAIN LEGAL PREJUDICE. SO REALLY THREE PRINCIPAL REASONS; THEY'RE DESCRIBED IN MY PAPERS. LET ME DESCRIBE A LITTLE MORE. ONE IS WE CONSENTED TO A TRO

15:26:41 WITH THE UNDERSTANDING THAT THE PARTIES WOULD BE PRESENTING TO THE COURT THE QUESTION OF WHETHER OR NOT THIS TRANSACTION COULD CLOSE. AND WE'VE BEEN ENDEAVORING TO DO THAT, ONLY TO NOW FIND OUT THAT THE FTC NO LONGER WISHES TO PURSUE THE TRO. SO THEN EFFECTIVELY WE'VE BEEN PURSUING AN INJUNCTION TO STOP THE CLOSING AT THIS TIME, RESERVING THE RIGHT TO DO IT LATER.

SO EFFECTIVELY, WE'VE CONSENTED TO SOMETHING ON THE UNDERSTANDING WE WOULD BE PRESENTING THESE ISSUES TO A COURT TO MAKE A DECISION ABOUT WHETHER OR NOT THE TRANSACTION COULD CLOSE, AND NOW EFFECTIVELY THE RUG HAS BEEN PULLED OUT FROM UNDERNEATH US. FAR MORE FUNDAMENTALLY, YOUR HONOR, I THINK THE PROBLEM HERE IS THAT UNDER THE FTC'S PROPOSAL IT WILL BE AS A PRACTICABLE MATTER IMPOSSIBLE TO GET THE KIND OF MEANINGFUL HEARING THAT WE THINK IS REQUIRED HERE GIVEN WHAT THEY'RE

15:27:23 PROPOSING BECAUSE UNDER THEIR PROPOSAL -- THE PARTIES, REMEMBER, WE ALREADY AGREED IN ORDER TO GET THIS DONE, NOW SEVERAL MONTHS AGO, WHAT WE NEEDED TO HAVE WAS THE SCHEDULE YOUR HONOR ULTIMATELY ENTERED. THAT'S WHAT EVERYBODY THOUGHT WAS NECESSARY IN TERMS TO ALLOW FOR THE REQUISITE DISCOVERY, TO GET THE EXPERT WORK DONE, TO GET THE DOCUMENTS EXCHANGED. WE CAME TO THAT UNDERSTANDING TO GET US TO SEPTEMBER 20TH. AND NOW WHAT THE FTC IS SAYING IS THEY DON'T FEEL THEY NEED IT NOW BECAUSE OF WHAT IS GOING ON IN EUROPE -- AGAIN, WE RESPECTFULLY DISAGREE WITH THEM ON THAT -- BUT PUT THAT ASIDE AND ASSUME THEY'RE RIGHT ABOUT THAT. WHAT THEY'RE PROPOSING NOW, YOUR

15:27:50 HONOR, EFFECTIVELY MAKES IT IMPOSSIBLE FOR US TO GET A HEARING OF THE KIND EVERYONE AGREED WAS NECESSARY IF LATER ON DOWN THE ROAD THEY DECIDED -- WHETHER IT BE AUGUST, SEPTEMBER, WHATEVER -- THAT THEY WANT TO COME BACK TO COURT AND HAVE THE KIND OF HEARING THAT EVERYBODY WAS PROPOSING WAS REQUIRED HERE TO ALLOW FOR A HEARING ON THE MERITS, AND I THINK IT'S FUNDAMENTALLY PREJUDICIAL.

IT MAKES IT IMPOSSIBLE FOR US TO GET A FULL AND FAIR HEARING WITH THE PRESENTATIONS THE PARTIES CONTEMPLATED BEING MADE WOULD BE MADE BECAUSE IT WOULD NECESSARILY BE THE CASE THAT WE WOULD BE DOING THIS ON A CONDENSED SCHEDULE. WE WOULD FIND, YOUR HONOR, THAT THE CASE IS BASICALLY BEING REDONE. SO IT'S TRUE THAT NOT EVERYTHING WOULD HAVE TO BE REDONE BECAUSE LOTS OF DOCUMENTS HAVE BEEN EXCHANGED; THE PART 3 PROCESS

15:28:36 CONTINUES. BUT WHAT UNDOUBTEDLY WOULD BE THE CASE IS WE WOULD END UP -- LET'S JUST CALL IT AUGUST, LATE AUGUST -- THEY WILL COME BACK, THEY WILL FILE IT, IT SOUNDS LIKE THE EXACT SAME CASE AGAIN; THE CASE WILL HAVE TO BE ASSIGNED TO A JUDGE. THE DEFENDANTS WILL HAVE TO ANSWER THE COMPLAINT. THE CASE MANAGEMENT ORDER WILL HAVE TO BE NEGOTIATED, ENTERED BY THE COURT, AND WE'LL HAVE TO DO ALL THE THINGS THAT NOW HAVE BEEN STOPPED SHORT WHEN BASICALLY WE'VE COMPLETED DOING. FACT DISCOVERY ENDS ON JUNE 4TH. THE FIRST WAVE OF EXPERT REPORTS GOES IN ON JUNE 8TH. AND UNDER THEIR APPROACH, ALL OF THAT WILL BE STOPPED SHORT IN ITS TRACKS, AND WE WOULD SIMPLY GO OFF

15:29:16 AND DOING WHAT WE'VE BEEN DOING IN PARALLEL ANYWAY WHICH IS THE PART 3 PROCEEDING, AND IT WOULD BE AS A PRACTICABLE MATTER, I SUBMIT, IMPOSSIBLE TO COME BACK AT THE END OF AUGUST, SEPTEMBER, AND TO TRY TO PICK UP WHERE WE LEFT OFF.

WE CAME TO THE AGREEMENT WITH THE SCHEDULE BECAUSE EVERYBODY THOUGHT IN GOOD FAITH THAT'S WHAT WAS NECESSARY. IT CAN'T POSSIBLY BE THE CASE THAT WHAT WAS NECESSARY A MONTH AGO, TWO MONTHS AGO, WHEN WE ALL NEGOTIATED THE SCHEDULE, SUDDENLY NOW IS NOT NECESSARY TO ALLOW FOR A FULL AND FAIR HEARING ON THE MERITS. AND THAT'S THE PROBLEM WITH WHAT THEIR PROPOSAL WOULD DO. IT WOULD MAKE IT IMPOSSIBLE BY THAT SEPTEMBER 20 DATE TO GET A DETERMINATION THAT DOESN'T AMOUNT TO BEING A RUSH JOB BY ANY PERSON TO WHOM THIS CASE GOT ASSIGNED.

AND I THINK THAT FUNDAMENTALLY PUTS US IN,

15:30:02 ADMITTEDLY, YOUR HONOR, AN ODD POSITION TO BE A DEFENDANT ARGUING "DON'T DISMISS THE CASE." I THINK THE CASE SHOULD BE THROWN OUT ON THE MERITS, YOUR HONOR. I THINK THE CASE SHOULD BE THROWN OUT WITH PREJUDICE. WHAT WE'RE ASKING IS SIMPLY IF THEY'RE GOING TO TRY TO GET A TRO IN A PROCEEDING THAT'S ABOUT EQUITY, THAT THEY HAVE TO DO THAT IN A WAY THAT DOESN'T ALLOW THE INTEGRITY OF THE PROCEEDING TO BE COMPROMISED BECAUSE IT HAS TO GO SO FAST AND BECAUSE THERE IS NOT A FULL AND FAIR OPPORTUNITY TO -- IT SEEMS LIKE THEY HAVE TO MAKE A REMEDY. IF THEY WANT A TRO, IF THEY WANT AN OPPORTUNITY TO STOP THE TRANSACTION, TO NOT ALLOW US TO CLOSE THE TRANSACTION, THEN

15:30:37 THEY OUGHT TO PROCEED ON THE SCHEDULE THE PARTIES AGREED IS APPROPRIATE. AND IF THEY DON'T WANT THAT, WE GOT TO SIMPLY ACKNOWLEDGE THAT THEY DON'T WANT TO PURSUE THAT AND WE OUGHT TO THEN LET THE TRANSACTION CLOSE AND THE PARTIES CAN PROCEED WITH THEIR BUSINESS.

AND IF THE FTC DECIDES THAT IT STILL WANTS TO PURSUE IN ITS ARTICLE 3, PART 3 PROCEEDING THE RELIEF THAT THE TRANSACTION SOMEHOW -- THEY'RE FREE TO DO THAT. THE ISSUE HERE IS JUST SHOULD WE ALLOW TO PERMIT A DECISION THAT WOULD ALLOW A CLOSING SO THAT THE TRANSACTION DOESN'T EXPIRE ON ITS TERMS ON SEPTEMBER 20TH AND WHEN THE TRO IS LIFTED; AND THAT'S WHAT, YOUR HONOR, WE THINK WOULD CREATE GREAT PREJUDICE HERE TO THE DEFENDANTS TO NOT HAVE THE RIGHT TO HAVE THAT PUT FORWARD. IT'S THE DELAY, YOUR HONOR, THAT IT WOULD, THAT WOULD FLOW FROM

15:31:30 IT THAT IS, WE THINK, ENORMOUSLY PREJUDICIAL.

IT'S NOT JUST THE DELAY THAT "CAN WE GET A TRIAL ON?" "CAN WE MAKE IT HAPPEN?" AND I SUBMIT THAT WOULD BE VERY HARD EVER TO DO, YOUR HONOR, IN ANY FULL AND FAIR WAY. BUT THE DELAY THEY'RE CONTEMPLATING IS ALSO DELAYING THE BENEFITS TO THE TRANSACTION. COUNSEL FOR THE FTC SUGGESTS THAT THEY'VE BECOME MORE EMBOLDENED DURING THE COURSE OF DISCOVERY ABOUT THE STRENGTH OF THEIR CASE. WELL, YOUR HONOR, I THINK THAT THE EXACT OPPOSITE FEELING EXISTS ON THE OTHER SIDE. THIS IS NOT OBVIOUSLY THE HEARING IN WHICH YOUR HONOR IS GOING TO COME TO THAT DETERMINATION. ALL WE'RE ASKING IS THAT WE BE GIVEN AN

15:32:01 OPPORTUNITY TO EXPLAIN TO THIS COURT WHY IT IS THE TRANSACTION IS A PRO-COMPETITIVE TRANSACTION, WHY IT IS THAT THE EFFORT TO SCUTTLE THIS BY A PROCEDURAL MANEUVER IS NOT ONE THAT SHOULD CARRY THE DAY.

THE COURT: ALL RIGHT.

MR. MARRIOTT: THANK YOU, YOUR HONOR.

THE COURT: GRAIL?

MR. PFEIFFER: YES, YOUR HONOR. THANK YOU. MAY I ALSO --

THE COURT: YES, YOU MAY.

MR. PFEIFFER: YOUR HONOR, I'LL TRY NOT TO REPEAT. I HOPE WHAT I HAVE TO SAY IS ADDITIVE. I WANT TO PICK UP ON SOMETHING YOU JUST SAID TO MR. MARRIOTT WHEN YOU SAID, ISN'T IT THEIR CALL, AND DON'T THEY TAKE THE RISK? AND THE PROBLEM WE 15:32:42 HAVE WITH THIS FROM THE GRAIL SIDE, YOUR HONOR, IS THAT THEY WANT TO TAKE THE CALL BUT NOT TAKE THE RISK. WHAT THEY WANT TO BE ABLE TO DO IS GET RID OF THIS FOR NOW BUT COME BACK AT ANY TIME WITH ANOTHER APPLICATION FOR A TRO AND A PRELIMINARY INJUNCTION AND THAT I THINK IS RELATIVELY, PERHAPS TRULY, UNPRECEDENTED. BECAUSE IN THE FTC'S PAPERS DEALING WITH WHETHER THIS IS SOMETHING THEY CAN DO OR NOT, THEY CITED TO THE *TRONOX* CASE AND SAID THEY'RE BEING CONSISTENT WITH WHAT HAPPENED IN THAT CASE. BUT *TRONOX* WAS VERY DIFFERENT. IN THAT CASE, THE FTC SIMPLY CHOSE NOT TO GO TO COURT. THEY DID TAKE THE RISK BECAUSE THEY DIDN'T GO AND SEEK AN INJUNCTION. THEY

15:33:21 RELIED ON THE EFFECT OF THE E.C. PROCEEDINGS.

HERE, THEY AFFIRMATIVELY CHOSE TO INVOKE THE JURISDICTION OF THE UNITED STATES COURTS, AND THEY DID THAT -- FRANKLY, WE BELIEVE AT THE TIME THEY HAD TO HAVE KNOWN ABOUT THE E.C. PROCEEDINGS, BUT THAT'S A SIDE ISSUE; THEY GOT REAL BENEFITS FROM THEIR DECISION, THEIR CHOICE TO INVOKE THE FEDERAL COURT JURISDICTION. THEY GOT A STIPULATED TRO WHEN WE COULD HAVE FOUGHT THAT. THEY GOT A WORKED OUT SCHEDULE THAT GAVE THEM VERY ACCELERATED DISCOVERY RIGHTS, AND WHAT WE GOT AS THE FLIP SIDE OF THAT BARGAIN, IT VERY MUCH WAS A BARGAIN, WAS THE RIGHT TO AN EARLY DETERMINATION OF THE PROCEEDING THAT THEY WERE BRINGING AND NOT HAVE IT BE SOMETHING THEY COULD DRAG OUT FOREVER.

THAT IS THE CONCERN, PARTICULARLY FOR GRAIL, THAT I 15:34:10 HAVE NOW, YOUR HONOR, IS THAT THEY'VE GOTTEN THE BENEFITS OF THEIR DEAL. NOW THEY THINK THEY DON'T NEED THOSE BENEFITS ANYMORE, BUT THEY'VE ALREADY GOT THEM. IT'S A DEAL THAT WAS DONE, AND THEY CAN'T SORT OF RESCIND ON THAT DEAL NOW. FOR GRAIL, STACKING DELAY UPON DELAY, WITH A VERY REAL SPECTOR OF SORT OF SITTING US OUT ON THE SIDELINES UNTIL THE DEAL, TERMINATION DATE COMES AND GOES AND THERE IS NO DEAL IS VERY PROBLEMATIC FOR GRAIL. I HAVE NO DOUBTS THAT IT'S PROBLEMATIC FOR ILLUMINA TOO; BUT FOR GRAIL, IT'S MOST SEVERE BECAUSE WE ARE SITTING THERE IN A POSITION, WE'RE DOING THIS DEAL PRECISELY BECAUSE IT WILL ACCELERATE US TO GETTING THIS

15:34:51 LIFE-SAVING TECHNOLOGY TO THE MARKETPLACE TO ACHIEVING COMMERCIAL SCALE AND FDA APPROVAL, PAYER ACCEPTANCE, THINGS THAT ARE NECESSARY FOR THIS TO ACTUALLY SAVE THOUSANDS OF LIVES, NOT JUST ONE-OFFS.

THE TIME WE SPENT ON THE SIDELINES, WE THOUGHT WE KNEW WHAT THAT WAS. WE THOUGHT THAT'S WHAT WE BARGAINED FOR WAS THAT WE HAD A TRIAL IN AUGUST THAT WOULD BRING THE U.S. SIDE OF THIS TO A CLOSE AND THAT THERE WOULD BE NO RISK OF AN INJUNCTION IF THEY DIDN'T GET ONE THEN BECAUSE THE PART 3 PROCEEDINGS DO NOT CARRY A BAR, DO NOT CARRY AN INJUNCTION. SO THE ONLY THING WE'D BE DEALING WITH THEN WOULD BE THE E.C., AND IF WE PREVAIL HERE, WE BELIEVE WE'D HAVE A VERY, VERY GOOD JOB OF CONVINCING THE E.C. THAT THERE WASN'T MUCH MORE FOR THEM TO DEAL WITH, THAT WE COULD RESOLVE THIS; WE COULD GET THIS ALL
15:35:42 DONE IN ADVANCE OF SEPTEMBER 20TH, AND WE'D BE ON OUR WAY TO THE COMMERCIALIZATION.

IF THIS ALL FALLS APART, WE'VE BEEN PARKED ON THE SIDELINES FOR HOWEVER LONG IT TAKES, PERHAPS THROUGH DECEMBER AS MR. MARRIOTT SAYS, AND AT THAT POINT -- THE FINANCIAL MARKET ALREADY IS NOT AS GOOD AS THEY WERE A FEW MONTHS AGO -- WE DON'T KNOW WHERE THEY'LL BE. IT'S NOT A GIVEN THAT WE'LL BE ABLE TO ACHIEVE THE SAME KIND OF FINANCIAL ALTERNATIVE TO THE ILLUMINA PURCHASE THAT WE COULD HAVE ACHIEVED A FEW MONTHS AGO OR A FEW MONTHS EARLIER IF THEY DRAG THIS OUT. SO WE REALLY DO ASK THAT THE UNFAIRNESS OF STACKING DELAY UPON DELAY BE WEIGHED

15:36:22 INTO THIS WHEN YOU LOOK AT WHAT'S ACTUALLY GOING TO HAPPEN AND DON'T ALLOW THE FTC TO GO BACK ON A DEAL THAT THEY ALREADY GOT THE BENEFITS OF.

THE COURT: ALL RIGHT.

MR. PFEIFFER: THANK YOU, YOUR HONOR.

THE COURT: ANY RESPONSE?

MS. MUSSER: YOUR HONOR, JUST A FEW POINTS, IF YOU WILL. FIRST, I THINK IT'S IMPORTANT TO GO BACK TO THE DIFFERENCES BETWEEN A PRELIMINARY INJUNCTION HEARING AND A FULL ADJUDICATION ON THE MERITS IN PART 3, THE ACTUAL TRIAL. AFTER THE FULL ADJUDICATION ON THE MERITS IN PART 3, AT THAT POINT THE COMMISSION CAN ISSUE A PERMANENT INJUNCTION AND THAT PERMANENT INJUNCTION WILL BLOCK THIS DEAL. SO I WANT TO MAKE THAT CLEAR. AND SECOND, DESPITE DEFENDANT'S CHARACTERIZATIONS
15:37:06 OTHERWISE, THE PRELIMINARY INJUNCTION HEARING IS JUST THAT. THE RELIEF THAT IS GRANTED AFTER THAT COULD ONLY BE TO PRESERVE THE STATUS QUO. THAT IS IT. AND AT THAT POINT THE COMMISSION, AS MR. MARRIOTT MENTIONED, COULD PROCEED TO GO FORWARD ON A FULL PART 3 HEARING SHOULD IT DECIDE TO DO SO.

MOREOVER, TO THE EXTENT THAT WE ARE BACK IN THIS COURT AND WE ARE HAVING TO SEEK A TRO AND PI, AS WE MENTIONED BEFORE, WE REALLY DON'T THINK THAT'S GOING TO HAPPEN, WE DON'T THINK THAT'S WHERE WE'LL BE, BUT IF WE ARE, IT'S GOING TO BE OUR RISK TO PROVE TO THE COURT THAT WE NEED A TRO AND WE NEED A PI AND THAT'S A RISK WE CONSIDERED AND ARE WILLING TO TAKE.

15:37:51 BUT WHAT THE DEFENDANTS MUST SHOW ISN'T, IS THAT THEY SUFFERED LEGAL PREJUDICE, AND YOUR HONOR, THAT IS A HIGH STANDARD; THAT IS THEY'VE GIVEN UP A LEGAL RIGHT; THEY'VE GIVEN UP A LEGAL INTEREST. AND SO SOME CASES THAT WHEN YOU LOOK AT THE NINTH CIRCUIT PRECEDENT ON THIS IS ARE THEY UNABLE TO ASSERT A PARTICULAR TYPE OF DEFENSE. SO FOR EXAMPLE, ARE THEY BARRED FROM ASSERTING A STATUTE OF LIMITATIONS CLAIM OR ARE THE PARTIES SOMEHOW UNABLE TO -- OR HAVE THE PARTIES BEEN PREJUDICED BY THE LACK OF INVESTMENT OF PROSECUTION IN CASES. AND THAT'S SIMPLY NOT HAPPENING HERE. WHAT'S HAPPENED HERE IS THE FTC HAS AGGRESSIVELY PURSUED BOTH CASES, PART 3 DISCOVERY AND THE PI DISCOVERY, AND THE DEFENDANTS WILL BE ABLE TO ASSERT ANY CLAIM, ANY LEGAL CLAIM, ANY LEGAL DEFENSE THAT THEY WANT IN EITHER PROCEEDING. SO THERE'S JUST NO LEGAL PRECEDENT UNDER 15:38:46 NINTH CIRCUIT PRECEDENT HERE.

THE COURT: ALL RIGHT. ALL RIGHT. THANK YOU.

FEDERAL RULE OF CIVIL PROCEDURE 41(A)(2), WHICH IS THE RULE THIS MOTION IS BROUGHT UNDER, ALLOWS THE PLAINTIFF PURSUANT BY ORDER OF THE COURT AND SUBJECT TO TERMS AND CONDITIONS THE COURT DEEMS PROPER TO DISMISS AN ACTION WITHOUT PREJUDICE AT ANY TIME. WHEN DETERMINING ON A RULING TO DISMISS WITHOUT PREJUDICE, THE COURT HAS TO CONSIDER WHETHER THE DEFENDANT WILL SUFFER SOME PLAIN LEGAL PREJUDICE AS A RESULT OF THE DISMISSAL.

MOST OF WHAT I HEARD TODAY IS ABOUT THE EQUITIES OF

15:39:23 THE POSITIONS OF THE PARTIES; IT'S ABOUT TACTICAL ADVANTAGES AND DISADVANTAGES; IT'S ABOUT EXPENSES THAT WERE INCURRED AND EFFORTS THAT WERE MADE; IT'S ABOUT DEALS THAT WERE STRUCK THAT MIGHT BECOME VOIDED BY THIS AGREEMENT. BUT I REALLY HAVE NOT HEARD ANY LEGAL PREJUDICE. THE THREAT OF FUTURE LITIGATION, THE UNCERTAINTY OF IT, IS INSUFFICIENT TO ESTABLISH PLAIN LEGAL ERROR ACCORDING TO THE, LEGAL PREJUDICE ACCORDING TO THE NINTH CIRCUIT. THE TACTICAL ADVANTAGE THAT THEY MAY BE GETTING WHICH HAS KIND OF BEEN THE CRUX OF GRAIL'S -- YOU KNOW, THE ECONOMIC IMPACT, THAT'S NOT LEGAL PREJUDICE. THEY'RE ENTITLED TO DISMISS THEIR CASE.

I DO NOT BELIEVE THAT THE DEFENDANTS HAVE MET A BURDEN TO SHOW THAT THEIR MOTION SHOULD BE DENIED TO DISMISS THE CASE WITHOUT PREJUDICE. THEY SAY THEY DON'T NEED THE
15:40:16 RELIEF THEY WERE SEEKING FROM THE COURT ANYMORE; RIGHT OR WRONG, THAT'S THEIR DECISION. THE COURT IS DISMISSING THIS CASE WITHOUT PREJUDICE AT THIS TIME. THANK YOU FOR YOUR TIME TODAY.

ALL COUNSEL: THANK YOU, YOUR HONOR.

(MATTER CONCLUDED.)

C-E-R-T-I-F-I-C-A-T-I-O-N

I HEREBY CERTIFY THAT I AM A DULY APPOINTED, QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL CONFERENCE.

DATED: JUNE 1, 2021, AT SAN DIEGO, CALIFORNIA.

/S/ JULIET Y. EICHENLAUB
JULIET Y. EICHENLAUB, RPR, CSR
OFFICIAL COURT REPORTER
CERTIFIED SHORTHAND REPORTER NO. 12084

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2023, 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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I also certify that I caused the foregoing document to be served via email to:

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