IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION Plaintiff, v. **ILLUMINA, INC.,** and **GRAIL, INC.,** Defendants.	Civil Action No. 1:21-cv-00873-RC

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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Plaintiff Federal Trade Commission (the "FTC" or "Commission") respectfully submits this opposition to the motion filed by Defendants Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") (collectively, "Defendants") to transfer venue in this action to the U.S. District Court for the Southern District of California.

I. INTRODUCTION

There is no doubt that venue is proper in the District of Columbia. Defendants do not argue otherwise. Plaintiff chose to file its complaint in this District and, under established case law, that choice is accorded substantial deference. Contrary to Defendants' arguments, a plaintiff's choice of forum is entitled to more, not less, deference in an antitrust case—like this one—that alleges nationwide harm and has a meaningful connection to the District.

Defendants cannot meet their "heavy burden" to overcome the deference given to Plaintiff nor can it even show that the Southern District of California is a more convenient forum. *United States v. H&R Block, Inc.*, 789 F. Supp. 2d 74, 85 (D.D.C. 2011) (citations omitted). Instead, Defendants want to transfer this matter from the District—which currently provides for remote proceedings—to the Southern District of California, because that district currently permits in-person proceedings.[1] Defendants' preference for an in-person hearing is insufficient to tip the scales in favor of transfer and their claim that the Southern District of California is "more convenient" is patently false.

[1] Defendants state that the Defendants and the Commission "anticipate holding an in person preliminary injunction hearing." (ECF No. 41-1 ("Defs' Mem.") at 1.) This is wrong. The Commission has not stated it anticipates holding an in-person hearing to the Defendants. The Commission's position is that an in-person hearing is only appropriate if, and when, it can be safely done. As the Defendants note, this Court is not holding in-person civil proceedings (Defs' Mem. at 2), and is indeed encouraging remote civil proceedings through August 31, 2021.

First, courts throughout the country have rejected Defendants' arguments that in-person hearings are necessary for credibility determinations. Second, even assuming that Defendants are correct that there is some benefit to having witnesses testify in person, that benefit will only inure to Illumina's own San Diego-based employees. All other witnesses will be faced with the choice of whether to testify remotely or face potential exposure to the COVID-19 virus in order to testify in person. Facing that Faustian dilemma, many third-party witnesses will, understandably, be loath to risk their health and safety to testify live in the Southern District of California. Third, given continuing concerns regarding a recent surge of infections in the pandemic,[2] there is no guarantee that the Southern District of California will continue to have in-person proceedings. (*See* ECF No. 41-1 ("Defs' Mem.") at 1.) Finally, even if the Southern District of California does proceed with in-person hearings, Defendants' preferred forum inconveniences nearly every witness and lawyer associated with this case. As Defendants point out, even if the individual is willing and able to assume such risk, current travel restrictions may make it "challenging, if not impossible, for out of state witnesses to appear in person before this Court at all" and witnesses would face "an array of logistical challenges, including potentially needing to take COVID-19 tests and to quarantine for up to 10 days before and after traveling to the hearing." (Defs' Mem. at 2, 7.) It is worth noting that Defendants' party witnesses will also be forced to travel with a venue transfer. In this District, these witnesses currently would not have to travel at all and could appear remotely.

On balance, Defendants move to transfer venue to essentially allow for an in-person hearing. This is not required by law or supported by the facts in this case. As discussed below,

[2] *See* Reis Thebault, *Are We Entering a 'Fourth Wave' of the Pandemic? Experts Disagree.*, WASHINGTON POST (APR. 4, 2021), https://www.washingtonpost.com/health/2021/04/04/covid-fourth-wave/.

transferring the case would contradict the antitrust venue statutes and well-established case law in this District and Circuit, as the private-and-public interest factors weigh strongly against transfer. The Court should deny Defendants' motion to transfer venue.

II. FACTUAL AND PROCEDURAL BACKGROUND

Illumina is the dominant provider of next generation sequencing ("NGS") instruments and consumables, responsible for more than 90 percent of the world's sequencing data. Illumina is headquartered in San Diego, California, with offices or facilities in California, Maryland, Wisconsin, and on five continents.[3] GRAIL is a private diagnostics company, headquartered in Menlo Park, California, with offices or facilities in Washington, D.C., North Carolina, and the United Kingdom.[4]

GRAIL and its rivals are racing to develop multi-cancer early detection ("MCED") tests that seek to shift the cancer paradigm by screening for multiple cancers in asymptomatic patients using only blood samples. GRAIL's Galleri test, along with its rivals' MCED tests in development, are designed to run on Illumina's NGS platforms. Third-party witnesses confirm that Illumina's NGS platforms are an essential input for the development and commercialization of MCED tests, and Illumina is the only viable option for MCED developers. On September 20, 2020, Illumina entered into an agreement to purchase GRAIL. The Commission subsequently opened an investigation into the proposed acquisition and, on March 30, 2021, voted 4-0 to issue an administrative complaint alleging that the proposed merger of Illumina and GRAIL is

[3] *See Office Locations*, ILLUMINA, https://is.gd/LOOMFn (last visited Apr. 8, 2021).
[4] *See Multi-Cancer Early Detection Company GRAIL Now Hiring For State-Of-The-Art Laboratory Facility in Research Triangle Park*, GRAIL (Feb. 25, 2021), https://is.gd/wwKUn5.

anticompetitive in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.[5]

That complaint alleges that Illumina's acquisition of GRAIL would substantially lessen competition in the U.S. MCED test market by diminishing innovation, potentially increasing prices, and reducing the choice and quality of MCED tests. The administrative case is set to proceed to a full merits hearing on August 24, 2021. During the administrative hearing, the parties collectively can present up to 210 hours of testimony, present opening statements and closing arguments (each can be up to two hours long) and introduce evidence into the record. 16 C.F.R. § 3.41. The administrative judge will then issue an initial decision, after which the Commission will decide the merits of the case without deferring to the administrative judge's factual or legal findings exercising "all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a). 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).

On March 30, 2021, Plaintiff filed in this Court a Complaint for a temporary restraining order and preliminary injunction pursuant to Section 13(b) of the FTC Act. (ECF No. 3 (the "Complaint")). The purpose of this proceeding is to obtain preliminary injunctive relief to preserve the *status quo*. Such relief is necessary to prevent interim harm to consumers and preserve the Commission's ability to conduct its administrative proceeding, and, if necessary, to order meaningful relief. As explained below, this District is the proper venue for adjudicating

[5] *See In re Illumina, Inc.*, Dkt. No. 9401 (F.T.C.), https://is.gd/V5d1Sc (last visited Apr. 8, 2021).

this preliminary injunction proceeding, and Defendants fail to meet the heavy burden of demonstrating that transfer is appropriate.

III. THE COURT SHOULD DENY DEFENDANTS' MOTION TO TRANSFER VENUE

A. Standard of Review

The federal change of venue statute, 28 U.S.C. § 1404, gives a district court discretion to transfer a case to another district where, unlike here, doing so would be "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). This District has a well-established standard for whether a court should grant a motion to transfer venue, under which the court weighs a series of public and private interest factors. *See Thayer/Patricof Educ. Funding, LLC v. Pryor Res., Inc.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002). "The moving party has the burden of establishing that a transfer is proper." *Miller v. Insulation Contractors, Inc.*, 608 F. Supp. 2d 97, 101 (D.D.C. 2009). Moreover, "[c]ourts have imposed a heavy burden on those who seek transfer and a court will not order transfer unless the balance is strongly in favor of the defendant." *See H&R Block, Inc.*, 789 F. Supp. 2d at 78 (citation omitted); *see also Gross v. Owen*, 221 F.2d 94, 95 (D.C. Cir. 1955) ("It is almost a truism that a plaintiff's choice of a forum will rarely be disturbed. . ."). Courts in this District routinely deny transfer motions when movants have failed to meet this heavy burden. *See, e.g.*, *Bederson v. United States*, 756 F. Supp. 2d 38, 55 (D.D.C. 2010) (denying motion). "When venue is properly laid in this district, '[t]ransfer elsewhere under Section 1404(a) must . . . be justified by particular circumstances that render [this] forum inappropriate by reference to the considerations specified in that statute. Absent such circumstances, transfer in derogation of properly laid venue is unwarranted.'" *Oceana v. Bureau of Ocean Energy Mgmt.*, 962 F. Supp. 2d 70 (D.D.C. 2013) (denying transfer) (quoting *Starnes v. McGuire*, 512 F.2d 918 (D.C. Cir. 1974) (en banc)).

B. The Unique Challenges Posed by COVID-19 Do Not Favor Transfer

Defendants, in essence, seek to transfer in order to have an in-person trial. Remote trials, however, have become *status quo* for civil bench trials as courts across the nation have grappled with the effects of the continuing COVID-19 pandemic. Courts have looked to Fed. R. Civ. P. 43(a), which authorizes a court to permit remote testimony for "good cause." As one court explained: "In terms of good cause, plaintiffs argue that 'COVID-19 creates perhaps the most compelling circumstances in history in favor of conducting this trial remotely.' . . . Given the unprecedented nature of the circumstances faced by our society at present, it is difficult to characterize this statement as hyperbole." *Flores v. Town of Islip*, No. 18-CV-3549 (GRB)(ST), 2020 WL 5211052, at *2 (E.D.N.Y. Sept. 1, 2020). Importantly, in endorsing remote bench trials, the courts have rejected the same concerns about videoconference trial testimony that Defendants raise here. (*See* Defs' Mem. at 1.) Judges are confident that they can evaluate the credibility of remote witnesses. *See, e.g.*, *Flores*, 2020 WL 5211052, at *2 ("[T]he issues of prejudice that could arise in the jury context are simply absent [in a bench trial]."); *Raffel Sys., LLC v. Man Wah Holdings Ltd., Inc.*, No. 18-CV-1765, 2020 WL 8771481, at *3 (E.D. Wis. Nov. 13, 2020) ("[T]his is a bench trial where there is a single fact-finder as opposed to a jury trial with multiple fact-finders needing to hear and view the testimony.") In a remote bench trial, the court "will be able to get an even closer look at . . . witnesses' faces via videoconference than [it] could during an in-person hearing." *Raffel*, 2020 WL 8771481 at *3.

In addition to the legal authority discussed in this memorandum that weighs against transfer, the Commission respectfully requests that, in the interest of the health and safety of all individuals involved in this case and their families and close contacts, the Court deny

Defendants' motion to transfer venue. The nation remains under a state of national emergency.[6] So too is the District of Columbia,[7] which recently extended its state of emergency and public health emergency through May 20, 2021.[8] Just this week, public health officials again cautioned that the spread of new variants, including in California and New York, may prolong the pandemic.[9] Yet, Defendants have requested this Court transfer this matter to the Southern District of California, which, as of March 8, 2021, is allowing in-person civil proceedings despite knowing that an in-person hearing would require many lawyers and witnesses to travel. (*See* Defs' Mem. at 1–2.)

Defendants claim that a California hearing will "dramatically reduce air travel and hotel occupancy." (Defs' Mem. at 1.) This is not the case. In this District, no one involved in this case is using air travel or staying in any hotels because the proceedings will be remote. Even if this District allows for an in-person preliminary injunction hearing, (i) Illumina's attorneys

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[6] *See Letter on the Continuation of the National Emergency Concerning the Coronavirus Diseases 2019 (COVID-19) Pandemic*, WHITE HOUSE (Feb. 24, 2021), https://is.gd/zeUY50 (stating that under the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.*, "[t]here remains a need to continue this national emergency. The COVID-19 pandemic continues to cause significant risk to the public health and safety of the Nation. More than 500,000 people in this Nation have perished from the disease, and it is essential to continue to combat and respond to COVID-19 with the full capacity and capability of the Federal Government.").

[7] OFFICE OF THE MAYOR, Mayor's Order 2021-038, Extension of the Public Emergency and Public Health Emergency and Modified Measures in Phase Two of Washington, DC Reopening (Mar. 17, 2021), available at https://is.gd/PPdamX.

[8] The New York Times reports that "Washington, D.C. is at a very high risk of exposure to Covid-19." *Tracking Coronavirus in Washington, D.C.*, N.Y. TIMES, available at https://is.gd/kLwd4W (last visited Apr. 8, 2021).

[9] Apoorva Mandavilli & Benjamin Mueller, *Virus Variants Threaten to Draw Out the Pandemic, Scientists Say*, N.Y. TIMES (Apr. 5, 2021), https://is.gd/UkSZap ("[I]t is increasingly clear that the next few months will be painful. So-called variants are spreading, carrying mutations that make the coronavirus both more contagious and in some cases more deadly. Even as vaccines were authorized late last year, illuminating a path to the pandemic's end, variants were trouncing Britain, South Africa and Brazil. New variants have continued to pop up—in California one week, in New York and Oregon the next. As they take root, these new versions of the coronavirus threaten to postpone an end to the pandemic.").

working on this matter, Cravath, Swaine & Moore LLP, are based in New York City, NY; (ii) GRAIL's attorneys working on this matter, Latham & Watkins LLP, are predominantly based in Washington, D.C.[10]; (iii) each FTC economist and all but one attorney working on this matter for the FTC are based in Washington, D.C.[11]; and (iv) the vast majority of attorneys representing potential third-party witnesses in this case are based in Washington, D.C. Moreover, many of the witnesses—both third party and party—would need to travel regardless of the forum to attend an in-person hearing.

The Commission's choice of this District as its venue ensures the safety of all courthouse employees, witnesses, and representatives. The continued use of remote proceedings protects the health of every person involved in this case and does not require any challenging travel. Indeed, transferring this case to the Southern District of California poses greater health and travel risks, and is far more likely to prevent witnesses and representatives from appearing in this case. As the Defendants' memorandum points out, "[t]he FTC's Complaint focuses extensively on [third-party] companies." (Defs' Mem. at 8). Unlike the remote proceedings of this District, Defendants' preferred venue creates a higher risk of the absence of multiple key third-party witnesses than venue in this District. This fact alone should weigh significantly against transfer. The Court should deny Defendants' motion to transfer venue.

[10] *See* Defs' Mem. at 16 (five of six Latham & Watkins attorneys are based in Washington, D.C.).

[11] The one exception is based in San Francisco, CA. Though Defendants correctly state that the Commission has offices around the country, Defendants' counsel knows that the FTC lawyers and economists working on this case are based in Washington, D.C., not a California regional office.

C. Venue Is Proper in the District of Columbia

As a threshold matter, neither Defendant contests personal jurisdiction in the District of Columbia, and venue is proper in this Court. (*See generally* Defs' Mem.) Thus, Section 13(b) of the FTC Act authorizes the Commission to bring suit here. *See* 15 U.S.C. § 53(b) (authorizing the Commission to bring suit in any district "where such person, partnership, or corporation resides or transacts business").[12]

D. The Private Interest Factors Weigh Against Transfer

In determining whether to transfer a case under Section 1404(a), courts typically analyze the following private interest factors: "(1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to the sources of proof." *Bederson*, 756 F. Supp. 2d at 46. Here, those factors militate strongly against transferring this action to the Southern District of California.

1. Plaintiff's Choice of Forum Deserves Substantial Deference

"The plaintiff's choice of a forum is 'a paramount consideration' in any determination of a transfer request." *Thayer/Patricof*, 196 F. Supp. 2d at 31 (quoting *Sheraton Operating Corp. v. Just Corporate Travel*, 984 F. Supp. 22, 25 (D.D.C. 1997)). As such, the "moving party bears a heavy burden of establishing that plaintiff's choice of forum is inappropriate." *Malveaux v. Christian Bros. Servs.*, 753 F. Supp. 2d 35, 40 (D.D.C. 2010) (internal quotations omitted). This maxim is not changed simply because the Plaintiff in this case is the FTC. Indeed, district courts have acknowledged "that the government's choice of venue in an antitrust case is entitled to

[12] Likewise, Plaintiff does not dispute that the Southern District of California would also be a proper venue for this action.

heightened respect." *H&R Block*, 789 F. Supp. 2d at 79 (internal quotations omitted) (citing *United States v. Brown Univ.*, 772 F. Supp. 241, 242 (E.D. Pa. 1991)). The "more liberal antitrust venue provision" bestowed by Congress when passing Section 13(b) of the FTC Act and Section 12 of the Clayton Act, 15 U.S.C. § 22, provided the Commission and the U.S. Department of Justice, respectively, with broad powers to choose the venue when they bring actions to enforce the antitrust laws, and courts have found that the government's choice of forum is "entitled to substantial weight." *See United States v. Microsemi Corp.*, No. 1:08cv1311, 2009 WL 577491, at *7 (E.D. Va. Mar. 4, 2009) ("Where venue is proper, a plaintiff's 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."); *see also Brown Univ.*, 772 F. Supp. at 242 (collecting cases).[13]

Despite this precedent, Defendants argue that the FTC's choice of forum should be given "little deference" because the "plaintiff's choice of forum lacks any meaningful ties to the particular controversy." (Defs' Mem. at 12.) This is not true. Here, the Complaint alleges that nationwide harm—which implicitly includes harm to any Federal Government purchaser or Washington, D.C.-located purchaser—will result from this merger. (Compl. ¶ 42.) Defendants' Answer and Affirmative Defenses repeatedly point to the notably outsized role that GRAIL's government and regulatory efforts, which are run out of its D.C. office, will play in a review of

[13] This District and its Circuit have recognized that other special venue provisions—such as the Employee Retirement Income Security Act of 1974 and the Securities Exchange Act of 1934—like that in Section 13(b) of the FTC Act give the plaintiff's choice of forum heightened deference. *Mazzarino v. Prudential Ins. Co. of Am.*, 955 F. Supp. 2d. 24, 28 (D.D.C. 2013) (citing 29 U.S.C. § 1132(e)(2); *Int'l Painters & Allied Trades Indus. Pension Fund v. Painting Co.*, 569 F. Supp. 2d 113, 117–18 (D.D.C. 2008)); *Fanning v. Capco Contractors, Inc.*, 711 F. Supp. 2d 65, 69 (D.D.C. 2010); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1155 (D.C. Cir. 1978) (citing *Zorn v. Anderson*, 263 F. Supp. 745, 749 (S.D.N.Y. 1966)).

this merger. (*See* ECF No. 49 (Defs' Answer), at 2, 11–14, 19, 23, 25 ("Moreover, because it is unlikely that Galleri will be able to obtain Medicare coverage without FDA approval, accelerating FDA approval will accelerate Medicare coverage, which is critical for Galleri to achieve widespread adoption in the U.S.")).

Moreover, the FTC's administrative adjudication is being conducted here in the District of Columbia, not in the Southern District of California. The purpose of this case is to obtain interim, injunctive relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to preserve the *status quo pendente lite*, so as to protect the Commission's ability to conduct its administrative adjudicatory proceeding on the ultimate merits of whether the Defendants' transaction violates the antitrust laws. *See, e.g.*, *FTC v. Whole Foods Mkt., 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)). There is a strong and meaningful local interest in an efficient and effective administrative adjudicatory hearing in the District of Columbia.

Despite the clear connection between Washington, D.C. and this case, Defendants argue that this case should be transferred because the claims did not "arise from D.C." and California has a local interest in hearing this case. It is true that courts considering a motion to transfer venue in merger cases have occasionally considered the place where the merger agreement was negotiated "as a proxy for where the witnesses, parties, and evidence are likely to be located in a typical case." *H&R Block*, 789 F. Supp. 2d at 80. Yet, ultimately, the merger agreement between Defendants is not a material issue in this case nor for deciding this motion. *See id.* ("The Court does not find [the fact of where the merger agreement was negotiated] sufficient to

override the substantial deference to which the plaintiff's choice of venue is entitled"). This is not a contract case and there is no dispute about whether, how, or on what terms the merger was negotiated. The Commission's Complaint reveals as much. As with most Clayton Act cases, the issues here will involve, among other things, relevant market definition and the likely impact of the proposed transaction on competition between MCED developers. As detailed in the Complaint, these are nationwide considerations and the locus of the negotiations and execution of the merger agreement is, for purposes of this motion, a non-factor. In *H&R Block*, now-Chief Judge Beryl A. Howell denied the merging defendants' motion to transfer because "any anticompetitive effects of the proposed transaction would be felt by consumers across the country." *Id.* at 80. Like *H&R Block,* this is not a case where "the market affected by alleged anticompetitive activity [is] located in a specific geographic area," which would make it appropriate to conclude that the Plaintiff's claims arose from that area. *Id.* Rather, as in *H&R Block*, "[g]iven the national market implicated by this case, no [local-market-related] factor here weighs in favor of transfer to any particular district." *Id*.

Even assuming that the location of merger agreement negotiations is relevant to the Court, Defendants have failed to establish a record that the Southern District of California was the locus of those negotiations. Neither Defendants' memorandum nor the declarations submitted in support of Defendants' motion to transfer venue claim that the merger agreement was negotiated in the Southern District of California. In addition, GRAIL is not located in the Southern District of California and does not claim that its witnesses and evidence are located there. Thus, even if the place where a party negotiated the merger had any factual relevance to Plaintiff's antitrust claims—which it does not—Defendants' record on this issue does not confirm that most of those negotiations took place in their preferred forum for this litigation. *See*

United States v. Energy Solutions, Inc., No. 1:16-cv-01056-GMS, 2016 WL 7387069, at *4 (D. Del. Dec. 21, 2016)) (denying motion to transfer where "the record d[id] not indicate where a majority of the negotiations took place").

In the face of these facts and the great weight of authority against them, Defendants rely heavily on two entirely irrelevant cases: *Cephalon* and *Graco*. In both cases, the courts found specific circumstances—absent in this case—that made it appropriate to depart from the general and well-established rule that a plaintiff's choice of forum is "ordinarily a 'paramount consideration' that is entitled to 'great deference.'" *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 26 (D.D.C. 2008) (quoting *Thayer/Patricof*, 196 F. Supp. 2d at 31). In *Cephalon*, the plaintiff "[did] not seriously contest that the District of Columbia ha[d] no meaningful connection to this action." 551 F. Supp. 2d at 27. The "most compelling point" in the *Cephalon* court's analysis was the presence of pre-existing private antitrust litigation in the transferee forum (the Eastern District of Pennsylvania) challenging the same conduct that the *Cephalon* plaintiff sought to challenge in the District of Columbia. *Id.* at 28–29. The court determined that transfer was appropriate so that the defendant would not "be forced to simultaneously litigate two cases in two different courts arising out of precisely the same conduct." *Id.* at 29. In contrast, here, there are no private antitrust suits relating to the merger in the Southern District of California (or anywhere else). The only other litigation related to the merger is in the FTC's administrative tribunal in Washington, D.C.

In *Graco*, the acquiring defendant had no contacts with the District of Columbia whatsoever, raising questions about whether the court even had personal jurisdiction over it. *FTC v. Graco Inc.*, No. 11–cv–02239 (RLW), 2012 WL 3584683, at *2–*4 (D.D.C. Jan. 26, 2012). By contrast, Illumina earns significant revenues in this District, both companies are

actively pursuing customers in this District, GRAIL has one of its three U.S. offices here, and it is undisputed that this Court has personal jurisdiction over both Defendants.

2. Defendants' Choice of Forum Does Not Weigh in Favor of Transfer

As explained above, it is Plaintiff's, not Defendants', choice of forum that receives a "strong presumption." *Int'l Painters & Allied Trades Indus. Pension Fund*, 569 F. Supp. 2d at 117 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)). Defendants do not claim otherwise. Indeed, although Defendants include "Defendants' Choice of Forum" in a heading, they do not offer any argument or case law to state that defendants' choice of forum is given any deference. (Defs' Mem. at 9.)

3. The Convenience of the Parties Does Not Weigh in Favor of Transfer

As explained above, the most convenient venue for the parties is the present one, with its current remote civil proceedings. Every relevant person involved in this case may participate from their homes or any safe location of their choosing. Because of the unique circumstances due to the COVID-19 pandemic, transfer would create inconvenience for all parties.[14] Given the stay-at-home nature of 2020-2021, courts have found the location of a defendant's home district even less persuasive as a basis to transfer venue. *See Sanders v. Western Express, Inc.*, No. 1:20-CV-03137-SAB, 2021 U.S. Dist. LEXIS 25841, at *11 (E.D. Wash. Feb. 9, 2021) ("[A]s demonstrated by the restrictions imposed by the ongoing COVID-19 pandemic, things like

[14] The distinction between an in-person (S.D. Cal.) and remote hearing (D.D.C.) is relevant to this Court's analysis. Nevertheless, as the FTC's discussion of each private and public interest factor shows, even if this District were to hold in-person hearings, Defendants have not met their heavy burden to show that transfer is warranted, and this District would still be convenient for all parties.

witness depositions and testimony can now be done digitally, weighing against a finding of convenience on the basis of the location of witnesses.").

There are limited circumstances under which the convenience of the defendants can be a significant factor for a transfer motion, and none of those circumstances are present here. In particular, transfer is appropriate only where "litigating in the transferee district [does] not merely shift inconvenience to [another party], but rather . . . lead[s] to an overall increase in convenience for the parties." *H&R Block*, 789 F. Supp. 2d at 80–81 (quoting *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 771 F. Supp. 2d 42, 48 (D.D.C. 2011) (internal quotation marks omitted) (second alteration in original). That means *all* of the parties, not just the defendants. *See, e.g.*, *Energy Solutions*, 2016 WL 7387069, at *4 ("[T]he court does not find 'convenience of the parties' to be synonymous with 'convenient for [defendant]'"). When the defendants' preferred venue would be no more convenient, overall, than the venue the plaintiff has chosen, "the tie is awarded to the plaintiff," and transfer should be denied. *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 665 (7th Cir. 2003). Defendants' convenience argument focuses on Illumina's headquarters being in the Southern District of California, which is in the "same state wherein GRAIL's principal place of business is located." (Defs' Mem. at 9.) Yet, GRAIL's principal place of business is located in the Northern District of California not the Southern District of California. Accordingly, GRAIL employees would likely need to travel regardless of whether the hearing was held in Washington, D.C. or the Southern District of California.[15] For

[15] Menlo Park, CA—where GRAIL is headquartered—is over 450 miles away from the federal courthouse in San Diego, California. *See* GoogleMaps Directions from GRAIL, 1525 O'Brien Dr, Menlo Park, CA 94025, to U.S. District Court Southern District of California, 333 W Broadway #420, San Diego, CA 92101, available at https://is.gd/NU0te9. While theoretically each GRAIL witness could make the over seven-hour drive, it is also likely that they would choose to fly and stay in a hotel.

the Commission, the existence of an FTC field office in Los Angeles "has little relevance to the Section 1404(a) analysis in this case" because "[t]he investigation in this case was conducted from the Washington office," not the field office. *SEC v. Ernst & Young*, 775 F. Supp. 411 (D.D.C. 1991); *cf. SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1155–56 (D.C. Cir. 1978).

Defendants also do not argue that litigating in this District will cause them "significant expense," or cause "hardship." *H&R Block*, 789 F. Supp. 2d at 81 (citing *Kotam v. Pizza Outlet, Inc.*, 400 F. Supp. 2d 44, 50 (D.D.C. 2005)). Nor could they, for their own actions belie any such claims. In the merger agreement, Illumina and GRAIL agreed that any litigation between them related to the merger would be litigated outside of California and in the Delaware courts, which are relatively close to this District.[16] As the court noted under similar circumstances in *H&R Block*, "the fact that the defendants negotiated and agreed to such a [forum selection] clause indicates their ability to avail themselves of legal protections offered by different fora around the country—including fora remote from their home districts." 789 F. Supp. 2d at 81. As the court recognized in *H&R Block*—which, like this case, featured defendants that were headquartered in neither D.C. nor Delaware—if Delaware is a convenient foreign forum for Defendants then so is Washington, D.C. After all, Delaware "is relatively close to this district." *Id.* at 81. Not to mention, because of the remote nature of this District's proceedings, denying transfer will likely save Defendants time and finances incurred from travel—likewise for the American taxpayer. Regardless of whether this District conducts an in-person or remote hearing, this factor does not weigh in favor of transfer.

[16] Agreement and Plan of Merger among Illumina, Inc., SDG OPS, Inc., SDG OPS, LLC and GRAIL, Inc. dated as of September 20, 2020, at § 11.07(a), https://is.gd/nVardR.

4. The Convenience of the Witnesses Does Not Weigh in Favor of Transfer

Courts consider the convenience of witnesses "only to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Cephalon*, 551 F. Supp. 2d at 25. An appeal to witness convenience should fail if the movant cannot show that witnesses will refuse to testify absent the transfer. *See, e.g.*, *Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr. Ltd. P'shp.*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998) (denying transfer motion because, *inter alia*, defendants "[d]id not suggest that . . . witnesses will refuse to appear if the trial is held in the District of Columbia"). As this District has noted before, "[t]he convenience of party witnesses is accorded less weight in the transfer analysis." *H&R Block*, 789 F. Supp. 2d at 82 (citing *Microsemi*, 2009 WL 577491, at *8). Defendants have not shown—and cannot show—that any witness will be unavailable to testify if the hearing is held in this District regardless of whether the hearing is remote or in person. *See H&R Block*, 789 F. Supp. 2d at 82 (citing *Brown Univ.*, 772 F. Supp. at 243 ("This [convenience of the witnesses] factor does not warrant transfer when witnesses are employees of a party and their presence can be obtained by that party.")) In this case, this factor weighs against transfer.

a. Party Witnesses Will Be Available in This Forum

Defendants do not claim that they will not make available any of their employees as witnesses in this District. At this time, any California-based witnesses would appear remotely in this District and, therefore, the relevance of witness convenience is negated as a practical matter. Moreover, Defendants do not argue that their witnesses would be unavailable to testify in a Washington, D.C. in-person hearing. That leaves Defendants' argument that the time difference between California and this District will "likely cause scheduling challenges." (Defs' Mem. at 8.) Defendants do not cite case law in support of this argument. More relevant though is that

many employees of either Illumina or GRAIL have already overcome the time difference and demonstrated their willingness to appear remotely before the Commission for investigational hearings and, in some cases, before FTC Commissioners.

b. Transfer Would Not Increase Convenience for Third-Party Witnesses

Courts consider the location of true third-party witnesses—that is, witnesses whose presence cannot be secured by the parties—when evaluating transfer motions. In this case, witness availability would be the same in either forum because, under 15 U.S.C. § 23, this Court is permitted to authorize trial subpoenas to be issued nationwide. In any event, transferring this case would actually increase the *inconvenience* to third-party witnesses.

Defendants claim that "the majority of third party witnesses" are located in California. (Defs' Mem. at 1.) This statement is false and entirely unsubstantiated. Neither Defendants nor Plaintiff have identified any third-party witnesses, so there is simply no basis for this claim. Defendants' Memorandum focuses on Complaint ¶ 46, (Defs' Mem. at 8), which identifies certain potential rivals for MCED technology. As the Defendants admit only three of the companies listed in Complaint ¶ 46 are based in the State of California, and only one is based in the Southern District of California.[17] So even within this limited sample size, Defendants claim is still wrong, and they fail to meet their burden to show that transfer is justified based on convenience of third parties.

Unlike the remote proceedings of this District, Defendants' preferred venue risks the absence of multiple key third-party witnesses. Even if the District decides to conduct an in-

[17] Defendants argue that the Court may not be able to compel any third-party witnesses who are not within 100 miles. (Defs' Mem. at 8–9.) Defendants omit, however, that the Southern District of California would also be hindered in their hypothetical scenario. For instance, only one company listed in Complaint ¶ 46 is within 100 miles of the Southern District of California.

person hearing, Defendants point to only one potential third-party witness that is within the Southern District of California. Therefore, the majority of third-party witnesses will be from outside the Southern District of California such that traveling to San Diego is not markedly more convenient than traveling to Washington, D.C. This fact alone should weigh significantly against transfer. The facts simply do not support Defendants' claims that this District is less convenient for potential third-party witnesses than the Southern District of California.

5. Access to Sources of Proof Does Not Weigh in Favor of Transfer.

Courts in this District have noted that "the location of documents is increasingly irrelevant in the age of electronic discovery, when thousands of pages of documents can be easily digitized and transported to any appropriate forum." *Fanning v. Capco Contractors, Inc.*, 711 F. Supp. 2d 65, 70 (D.D.C. 2010); *see Nat'l R.R. Passenger Corp. v. R & R Visual, Inc.*, No. 05-822, 2007 WL 2071652, at *6 (D.D.C. July 19, 2007) ("[T]echnological advances have significantly reduced the weight of the ease-of-access-to-proof factor."); *Brown Univ.*, 772 F. Supp. at 243 (holding that the location of documents "is entitled to little weight" when the documents have been and can be easily transported). During the course of the merger investigation, Defendants and third parties produced all documents electronically to the FTC. Even if there were a need for physical evidence in this case, that evidence would inevitably have to be routed through New York City and Washington, D.C. where the vast majority of the lawyers working on this case are located. *See Air Line Pilots Ass'n v. Eastern Air Lines*, 672 F. Supp. 525 (D.D.C. 1987) ("No matter where the litigation proceeds, these materials will have to be photocopied and shipped to Eastern's lawyers who live and work in the District area and to ALPA's lawyers who likewise live and work in D.C. . . ").

Further, during discovery, Defendants undoubtedly will seek Plaintiff's documents, which are located in Washington, D.C.[18] Accordingly, the location of documentary evidence does not weigh in favor of a transfer. To pretend, as Defendants do, that the location or origination point of these documents has any practical impact on the access to sources of proof ignores the reality of modern electronic data storage and e-discovery practices. This factor does not weigh in favor of transfer.

E. The Public Interest Factors Weigh Strongly Against Transfer

In addition to private factors, when analyzing a venue-transfer motion, courts examine whether transferring the case to another venue would serve the public interest. Public interest factors include: "(1) the local interest in making local decisions regarding local controversies; (2) the relative congestion of the transferee and transferor courts; and (3) the potential transferee court's familiarity with the governing law." *Bederson*, 756 F. Supp. 2d at 46.

1. The Interest in Resolving Local Controversies Does Not Weigh in Favor of a Transfer

In cases that involve "an essentially local matter," courts consider the localized nature of the dispute to be a factor in favor of transfer. *H&R Block*, 789 F. Supp. 2d at 83. This factor is neutral, however, in cases that are national in character. *Id.* ("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.") Although Defendants cite to *Cephalon* throughout their memorandum, they omit the part of that factually specific ruling that found that the local interest factor was inapplicable to a case of "nationwide significance, the resolution of which will have the same effect if rendered by this

[18] Indeed, Plaintiff FTC has already produced portions of its investigative materials to Defendants via electronic means.

Court or the [transferee court]." *Cephalon*, 551 F. Supp. 2d at 31. Like *H&R Block* and *Cephalon*, this case involves allegations of harm in a national—not a local—market. (Compl. ¶ 42). Defendants claim that "all relevant events and persons affected are concentrated in California." (Defs' Mem. at 10.) The Commission strongly disagrees. The harm alleged—increasing prices, loss of innovation, and reducing the choice and quality of MCED tests—in the Complaint will directly impact competitors, customers, and likely millions of patients who will receive MCED tests across the United States.

The FTC respectfully submits that the interests of the Commission are an important public interest factor that the Court should consider. The Commission brings this action on behalf of the public whose interests it represents and has chosen its home forum, which shares the same location as the ongoing administrative adjudication. That interest is served, by design, by the liberal venue provision established by Congress in Section 13(b) of the FTC Act, and an efficient and effective adjudicatory hearing in the District of Columbia.

2. Concerns about Court Congestion Weigh Against Transfer

Defendants attest that the "relative congestion of the transferor court and the potential transferee court is neutral." (Defs' Mem. at 11.) The Commission submits that transfer does not come without the creation of some uncertainty and delays as the new court familiarizes itself with the case and formulates a compatible schedule. It is also not presently known whether the transferee court would be able to adjudicate this case on a similar timeline as this Court. Considering this uncertainty, this factor also weighs against transfer.

3. Familiarity with Applicable Law Weighs Against Transfer

Defendants and courts generally view this factor as neutral on the presumption that all federal courts have equal familiarity with federal law. *See, e.g.*, *H&R Block*, 789 F. Supp. 2d at

84. It is worth noting, however, that this District adjudicates far more antitrust merger challenges than any other district in the country and, as a result, has developed a robust body of case law from which to draw in deciding such cases. *See, e.g.*, *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020); *FTC v. Wilhelm Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27 (D.D.C. 2018); *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018); *United States v. Anthem, Inc.*, No. CV 16-1493, 2017 WL 685563 (D.D.C. Feb. 21, 2017), *aff'd,* 855 F.3d 345, (D.C. Cir. 2017); *United States v. Aetna Inc.*, No. CV 16-1494, 2017 WL 325189 (D.D.C. Jan. 23, 2017); *FTC v. Staples, Inc*., 190 F. Supp. 3d 100 (D.D.C. 2016); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd,* 548 F.3d 1028 (D.C. Cir. 2008). This is in contrast to the non-merger antitrust cases reviewed by the Southern District of California cited by Defendants. (Defs' Mem. at 12 n.5.) This factor also weighs against transfer.

IV. CONCLUSION

The unique circumstances surrounding COVID-19 impute undeniable risk posed by Defendants' motion to transfer venue. The dichotomy of in-person and remote proceedings is relevant to this Court's review, and the FTC submits it weighs significantly against transfer across virtually every factor that the Court will consider. Moreover, even if this District decides to hold an in-person hearing, the facts of this case and the legal precedent decisively favors Plaintiff. Defendants have not come close to meeting the "heavy burden" of demonstrating that the balance of transfer factors weighs in their favor. The Court should deny Defendants' motion.

Dated: April 8, 2021

Respectfully submitted,

__/s/ Susan A. Musser_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th of April, 2021, I served the forgoing on all attorneys of record via the Court's CM/ECF system.

Susan Musser

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