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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ILLUMINA, INC, and GRAIL, INC.,

Defendants.

Case No. 3:21-cv-00800-CAB-BGS
OPPOSITION TO FTC'S MOTION TO DISMISS THE COMPLAINT WITHOUT PREJUDICE
Complaint Filed: March 30, 2021
Judge: Hon. Cathy Ann Bencivengo
Magistrate: Hon. Bernard G. Skomal
Trial Date: August 9, 2021

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1
STATEMENT OF FACTS 5
STANDARD OF DECISION 8
ARGUMENT 9
I. THE FTC'S REQUEST FOR DISMISSAL WITHOUT PREJUDICE IS UNJUSTIFIED. 9
II. THE FTC'S REQUEST FOR DISMISSAL WITHOUT PREJUDICE IS INEQUITABLE AND WILL IMPOSE UNDUE PREJUDICE ON DEFENDANTS. 16
III. DISMISSAL WITHOUT PREJUDICE WOULD BE INEFFICIENT AND IMPRACTICAL. 19
CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Blue Spike, LLC v. Adobe Sys., Inc.,
2015 WL 13655824 (N.D. Cal. May 4, 2015) ..... passim

Burnette v. Godshall,
828 F. Supp. 1439 (N.D. Cal. 1993) 8, 9, 16, 19

Cent. Montana Rail, Inc. v. BNSF Ry. Co.,
No. CV-05-116-GF-RKS, 2010 WL 11534149
(D. Mont. Apr. 13, 2010) 23

Diamond State Ins. Co. v. Genesis Ins. Co.,
379 F. App'x 671 (9th Cir. 2010) 19

Evenflo Co., Inc. v. Augustine,
No. 14-CV-1630-AJB-JLB 2015 WL 7568663 (S.D. Cal. Nov. 24,
2015) 16, 19

FTC v. Affordable Media,
179 F.3d 1228 (9th Cir. 1999) 13

FTC v. Agora Financial, LLC,
447 F. Supp. 3d 350 (D. Md. 2020) 13

FTC v. Sage Seminars, Inc.,
No. C 95-2854 SBA, 1995 WL 798938 (N.D. Cal. 1995) 13

FTC v. Triangle Media Corp.,
No. 18CV1388-LAB (LL), 2018 WL 6305675
(S.D. Cal. Dec. 3, 2018) 13

FTC v. Tronox Limited,
332 F. Supp. 3d 187 (D.D.C. 2018) 14

Hanginout, Inc. v. Google,
No. 13CV2811 AJB (NLS), 2015 WL 11254688
(S.D. Cal. April 22, 2015) 19, 23

IXIA v. Mitchell,
No. CV 08–07076 RGK, 2009 WL 10674095
(C.D. Cal. July 8, 2009) 23

Lee v. Van Boening,
1996 WL 145303 (9th Cir. 1996) 15

Nassau Boulevard Shell Serv. Station, Inc. v. Shell Oil Co.,
869 F.2d 23 (2d Cir. 1989) 17

Neville v. Dill,
No. 19CV321-CAB-MDD, 2019 WL 4242502 (S.D. Cal. Sept. 6,
2019) 8, 19

Oakland Tribune, Inc. v. Chronicle Publ'g Co.,
762 F.2d 1374 (9th Cir. 1985) 17

Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Servs.,
90 F. App'x 499 (9th Cir. 2003) 15

Peck Ormsby Const. Co. v. City of Rigby,
No. CIV. 1:10-00545 WBS, 2013 WL 5274221
(D. Idaho Sept. 17, 2013) 23

Sequa Corp. v. Gelmin,
No. 91 CIV. 8675 (DAB), 1995 WL 404726
(S.D.N.Y. July 7, 1995) 17

Stone v. Fisher,
No. 20-CV-1818 (JMF) (BCM), 2020 WL 2765107
(S.D.N.Y. May 28, 2020) 15

Thompson v. Janssen Pharms., Inc.,
No. CV162628PSGAGRX, 2017 WL 5135548
(C.D. Cal. Oct. 23, 2017) 9, 15

White v. Donley,
No. CV05-7728ABCFMOX, 2008 WL 4184651
(C.D. Cal. Sept. 4, 2008) 9, 16, 19, 24

Statutes & Rules

15 U.S.C. § 53(b) 12

Federal Rule of Civil Procedure 41 ..... 8, 18

Defendants Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") respectfully submit this memorandum in opposition to the Federal Trade Commission's (the "FTC's") motion to dismiss this case *without prejudice*.

PRELIMINARY STATEMENT

Defendants Illumina and GRAIL do not oppose the dismissal of this case ***with*** *prejudice*, because it should never have been brought in the first place. The FTC's motion to dismiss *without prejudice* is a different matter. The FTC purports to seek a routine dismissal *without prejudice* for the sake of efficiency. However, there is nothing routine or efficient about the FTC's request. In the guise of a non-substantive motion, the FTC seeks to scuttle a pro-competitive transaction that will save thousands of lives. The FTC seeks to achieve by procedural gamesmanship what it cannot achieve on the merits. The FTC's motion should be denied.

The FTC chose to invoke the jurisdiction of this Court in an attempt to enjoin Illumina's reacquisition of GRAIL, in a purely-vertical combination that, if consummated, will save thousands of lives. While Illumina and GRAIL dispute the FTC's allegations, they consented to a temporary restraining order (the "TRO") to afford this Court a full and fair opportunity to consider the merits of the FTC's claims before the transaction is set to expire on its terms on September 20, 2021 (absent extension). The FTC received the benefits of that deal, with the TRO preventing closing for two months now. Defendants have been working diligently to prepare the case for a hearing beginning on August 9. Defendants have produced more than 34 million pages of documents; made more than 20 witnesses available for investigatory hearings or deposition; obtained discovery from at least 25 third parties; retained more than 15 experts; and gathered considerable evidence that we believe debunks the FTC's case.

Now, having gotten the benefit of the stipulated TRO, just as fact discovery is about to close, and with the evidence mounting that the FTC could never prove what is necessary to obtain a preliminary injunction to preclude Illumina and GRAIL from reuniting, the FTC seeks to renege on its deal and dismiss its case *without prejudice*, insisting on the right to file a new case seeking exactly the same relief in a few months—when there will be insufficient time for a full hearing on the merits before the transaction expires.

While voluntary dismissal is frequently allowed, it is not justified, and should not be permitted, where, as here, (1) the plaintiff fails to provide a sufficient explanation of the need for a dismissal, (2) dismissal *without prejudice* would be inequitable and result in legal prejudice to the defendants, or (3) dismissal *without prejudice* would be wasteful, inefficient and impractical.

First, the FTC's rationale for dismissing its case *without prejudice* is baseless. The FTC contends that it learned from an April 20, 2021, press release that the European Commission ("EC") is investigating the transaction and that the EC investigation bars Defendants from closing, making a preliminary injunction unnecessary. That, of course, was a full month before it filed this motion, during which time the FTC took full advantage of this proceeding. In any event the FTC knew about the EC investigation long before April 20; it knew about the investigation by, if not before, March 9, 2021, which was three weeks ***before*** the FTC filed its Complaint in this action. Thus, its suggestion that a *recent* development in the EU necessitates its motion is without merit.

Moreover, the EC investigation does not necessarily bar closing the transaction. Illumina has challenged the EC's decision to review Illumina's merger in the European courts, because the transaction (i) does not qualify for review by any member state, (ii) the EC's decision to investigate is time-barred and (iii) the process by which the investigation was initiated is unlawful. Even assuming the

EC's investigation could be an obstacle to closing at this time, Illumina and GRAIL are working diligently to resolve any EC concerns, such that the EC could approve the transaction at or about the time the TRO is set to expire on September 20. Furthermore, as a legal matter, the existence of a foreign investigation does not moot an action for a preliminary injunction. (*See* Section I below.)

Second, dismissal *without prejudice* would be inequitable and result in legal prejudice to the Defendants and the public interest. The FTC seeks to dismiss the case *without prejudice*, so that it can file a new case seeking exactly the same relief whenever the FTC unilaterally concludes the EC is closer to clearing the transaction. That gambit is disrespectful to the Court and to the Defendants. The parties agreed to, and the Court entered, a case management order permitting the FTC's request for a preliminary injunction to be tried, and the Court to rule, on or before September 20, when the consented-to-TRO expires. The parties recognized that the agreed-upon schedule was the only practical way to put the Court in a position to make an informed judgment about the merits of the transaction before it expires by its terms. Nothing has changed.

Allowing the FTC to remake the parties' agreement would have real, prejudicial consequences. Any material deviation from the schedule to which the parties agreed would make it nearly impossible for any court to make an informed decision regarding the fate of what Defendants believe is a pro-competitive life-saving transaction. Permitting the FTC to withdraw its case now and refile later would thus make it impossible (as a practical matter) for a court to properly address the merits of a subject matter that is not uncomplicated. Indeed, dismissal *without prejudice* would put the FTC in a position to effectively block a pro-competitive, life-saving combination irrespective of its merits, simply by running out the clock. That tactic has no place in an equitable proceeding. (*See* Section II below.)

Third, even if the agreed TRO and CMSO did not exist, dismissal of this case *without prejudice* would be wasteful and inefficient, so long as the FTC seeks to enjoin the closing of the transaction. Contrary to the FTC's contention, dismissing this case would not conserve any resources. The vast majority of fact discovery, which closes on June 4, is done. The first wave of expert reports is due on June 8 and trial is just 11 weeks away. Illumina and GRAIL (and probably also the FTC) have made substantial progress in preparing for trial. Moreover, all of the discovery taken (and to be taken) in this matter will be available to the parties in the separate administrative proceeding before the FTC, that is scheduled to commence on August 24, 2021, which the FTC has said it will pursue irrespective of whether the Court dismisses the present case (with or without prejudice). So, nothing done here will be wasted no matter the outcome of the present motion.

By contrast, dismissing this case *without prejudice* would require duplicative efforts when the FTC seeks to restart the case in a few months. Defendants would have to answer anew; the parties would have to negotiate and the Court would have to enter a new CMSO; discovery would have to be completed on any new allegations; experts would have to restart work on their reports, submit the reports and undergo depositions; and pretrial disclosures would have to be made—all on a much shorter schedule than the already-aggressive schedule to which all parties agreed. In fact, it would be a practical impossibility for the parties to have a trial on the merits of the FTC's preliminary injunction request and for the Court to issue a decision on the merits following that trial, unless the trial happens on August 9, as planned. (*See* Section III below.)

If the FTC wanted to dismiss this case *with prejudice*, then Defendants would join the motion. But as the FTC seeks a dismissal *without prejudice* that would allow it to bring a new case several months from now seeking exactly the same relief but on a schedule that would preclude review by an Article III court

before the deal expires on its own terms, the motion should be denied. Dismissal *without prejudice* would increase the likelihood of chaos on a decision on a matter of enormous importance to the parties and the public.

STATEMENT OF FACTS

Defendant Illumina is a leading provider of sequencing products for genetic and genomic analyses. (Answer of Defendants Illumina, Inc. and GRAIL, Inc. (Dkt. 49) (the "Answer") at 2.) Illumina was founded in 1998 in San Diego. (*Id.* at ¶ 23.) Its mission is to improve human health by unlocking the power of the genome. (*Id.* at 2.)

Defendant GRAIL is a developer of a multi-cancer screening test, Galleri. (*Id.*) Illumina founded GRAIL in 2016 with the goal of developing an early screening test for multiple cancers to detect cancer at an early stage, when they can be more easily cured. (*Id.*) In 2017, GRAIL was spun out as a standalone company to invest in the extensive, population-scale clinical trials needed to develop Galleri. (*Id.*) Illumina retained a 14.5% equity interest, and the right to receive a percentage royalty from GRAIL's future revenues. (*Id.*) GRAIL is also continuing to develop other tests for different patient populations. (*Id.*)

On September 20, 2020, Illumina and GRAIL announced that they had reached an agreement to reunite. (*Id.* at ¶ 26.) This reunification will produce numerous pro-competitive efficiencies that will help GRAIL bring its cancer screening test to more patients, sooner, including: (1) accelerating FDA approval and Medicare reimbursement; (2) accelerating private insurance reimbursement; (3) accelerating the commercialization of GRAIL's test at scale; (4) elimination of double marginalization; (5) accelerating international expansion of GRAIL's test; and (6) R&D efficiencies. (*Id.* at 11-13.)

In fact, the merging parties believe the reunification of Illumina and GRAIL will revolutionize cancer care, saving tens of thousands of lives. (*Id.* at 1.)

It will do that by accelerating the commercialization of GRAIL's Galleri test and leading to the development of new innovative products in the future. (*Id.*) Illumina is uniquely situated to use its experience and substantial resources to accelerate the widespread adoption of Galleri and reach more patients faster. (*Id.* at 3.) GRAIL projects that, if it can get the help this transaction will provide, the test can save many thousands of lives annually. Acceleration by one year will avert between 18,037 and 25,349 deaths over a 10-year period.

Despite these benefits, the FTC has alleged that the transaction could have anticompetitive effects in what the FTC calls the "multi cancer early detection" or "MCED" test market, which does not exist. (Complaint (Dkt. 14) at ¶ 1.) The FTC contends, for example, that a reunited Illumina and GRAIL would be able to raise prices and otherwise disadvantage GRAIL's *potential* rivals. (*Id.* at ¶¶ 11, 54.)

The FTC's claim that the transaction will harm competition in a future MCED testing market would be purely speculative at best. (Answer at 3.) GRAIL's Galleri test, which was provided one month ago to a limited number of concierge medicine practices, is currently the only multi-cancer screening test close to commercial launch. (*Id.* at 3); Press Release, *GRAIL Announces First Health System to Offer Galleri, Novel Multi-Cancer Early Detection Blood Test* (Mar. 2, 2021), https://grail.com/press-releases/grail-announces-first-health-system-to-offer-galleri-novel-multi-cancer-early-detection-blood-test/. Neither GRAIL nor its potential rivals will obtain FDA approval and reimbursement, a prerequisite to wide-scale adoption and access of multi-cancer screening tests, before 2025 at the earliest. In any case, the reunification of Illumina and GRAIL will not harm competition; it will bring down prices, foster efficiency, facilitate competition on the merits, and stimulate further innovation in an expanded marketplace. (Answer at 11-13.)

Although Illumina disputes the FTC's allegation that the transaction will have an anticompetitive effect in any actual market, Illumina offered current and prospective oncology customers contract terms (an "open offer") to resolve any concern the FTC might have.[1] (*Id.* at 3.) Specifically, Illumina made a binding 12-year commitment to enter into a supply agreement that guarantees oncology customers the same access to Illumina's sequencing products that they enjoy today, at the same prices. (*Id.* at 3-4.) Under that commitment, Illumina has committed not only *not* to raise prices, but also to lower them by at least 43% by 2025, to provide uninterrupted supply to all oncology test developers, and not to withhold any technical or regulatory assistance requested by GRAIL's potential rivals. (*Id.* at 3-4.) Illumina's compliance with the open offer will be subject to regular audits by an independent, third-party auditor and a binding arbitration provision. (*Id.* at 4.)

The FTC has refused to seriously engage with the open offer and, instead, on March 30, 2021, filed this lawsuit seeking a preliminary injunction against the transaction. (*Id.* at 4, ¶ 27.) The merger agreement provides for termination rights if the transaction has not been consummated by September 20, 2021 (subject to an extension of three months under certain circumstances). (*Id.* at 14.) Accordingly, the parties agreed to a TRO that would expire on September 20, 2021 on the express understanding that the parties would work together to allow a federal court to consider and decide the FTC's preliminary injunction motion by September 20, 2021. (Temporary Restraining Order (Dkt. 8) ("TRO") at 1.)

Since entry of the TRO, the parties have been engaged in expedited fact discovery, which is set to close on June 4. Illumina and GRAIL have produced

[1] These terms are available on Illumina's website: *Oncology Contract Terms*, Illumina, https://www.illumina.com/areas-of-interest/cancer/test-terms.html?SCID=2021-270ECL5522 (last visited May 26, 2021).

over 34 million pages from over 250 custodians and provided responses to 49 investigative inquiries and 21 interrogatories in this litigation and the preceding investigation. Illumina and GRAIL have also engaged more than 15 experts to address the flaws in the FTC's challenge to the transaction.

In the face of mounting evidence against it, on May 20 the FTC issued a press release announcing that it was dismissing this case, even before any motion had been filed and before the FTC had completed the meet and confer process with Defendants.[2]

As is further discussed below, the case should not be dismissed *without prejudice*.

STANDARD OF DECISION

The FTC's motion to dismiss *without prejudice* is governed by Federal Rule of Civil Procedure 41. The decision whether to grant a motion to dismiss *without prejudice* under Rule 41, or order that any dismissal be *with prejudice*, is "discretionary with the court." *Burnette v. Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993), *aff'd sub nom. Burnette v. Lockheed Missiles & Space Co.*, 72 F.3d 766 (9th Cir. 1995); *Neville v. Dill*, 19CV321-CAB-MDD, 2019 WL 4242502, at *2 (S.D. Cal. Sept. 6, 2019) (Bencivengo, J.) ("[A]n action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." (internal citation and quotation marks omitted)).

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[2] Press Release, FTC, *Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case* (May 20, 2021), https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth; *FTC v. Illumina*, Plaintiff's *Ex Parte* Application to Dismiss the Complaint Without Prejudice, No. 3:21-cv-00800-CAB-BGS, Dkt. No 120 (May 21, 2021); *FTC v. Illumina*, Ex. 4 to Declaration of Susan A. Musser in Support of Plaintiff's *Ex Parte* Application to Dismiss the Complaint Without Prejudice, No. 3:21-cv-00800-CAB-BGS, Dkt. No 120-3, at 10 (May 21, 2021).

Courts have found that dismissal *with prejudice* is appropriate where (1) the plaintiff provides insufficient explanation of the need to take a dismissal; (2) where it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action; and (3) where it would result in waste, great delay and duplication. *Burnette*, 828 F.Supp. at 1443-44 (citing "defendant's effort and expense involved in preparing for trial", "delay and lack of diligence on the part of plaintiff" and "insufficient explanation of the need to take a dismissal" as factors favoring dismissal with prejudice); *Blue Spike, LLC v. Adobe Sys., Inc.*, No. 14-CV-01647-YGR, 2015 WL 13655824, at *3 (N.D. Cal. May 4, 2015) (citing fact that plaintiff "failed to provide a sufficient explanation for the basis for its request" and that "it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action" as relevant factors favoring dismissal with prejudice).

ARGUMENT

Defendants do not oppose the dismissal of this case ***with*** *prejudice*. But the FTC seeks to dismiss this case *without prejudice*, so that it can refile its action in a few months. As explained below, the FTC's request for dismissal *without prejudice* should be denied because (1) the FTC fails to provide a sufficient explanation of the need to take a dismissal, (2) dismissal *without prejudice* would be inequitable and result in legal prejudice to the Defendants and the public interest, and (3) dismissal *without prejudice* would be wasteful, inefficient and impractical.

I. The FTC's Request for Dismissal Without Prejudice is Unjustified.

Dismissal *without prejudice* is only appropriate when the plaintiff has provided a sufficient explanation of the need to take a dismissal. *See Thompson v. Janssen Pharms., Inc.*, No. CV162628PSGAGRX, 2017 WL 5135548, at *6 (C.D. Cal. Oct. 23, 2017); *Blue Spike*, No. 14-CV-01647-YGR, 2015 WL 13655824, at *3; *White v. Donley*, No. CV05-7728ABCFMOX, 2008 WL 4184651, at *3 (C.D. Cal. Sept. 4, 2008). The FTC seeks to justify its motion to dismiss based on a

supposed "recent development": that the EC is investigating the transaction and that the merging parties cannot close the transaction while that investigation is pending. This claim is baseless and therefore insufficient to justify dismissal with prejudice.

No recent development. To begin, there is no recent development, and the FTC did not *just* learn about the EC investigation or the alleged standstill. By its own telling, the FTC knew about the investigation no later than April 20, 2021, and yet did not bring the present motion until a month later. In fact, the FTC knew about the investigation much earlier. The fact of the investigation was a matter of public record no later than March 9, 2021.[3] Thus, at a minimum, the FTC was on notice of the investigation at least three weeks before the FTC filed its Complaint in this action on March 30 and over six weeks before it moved this Court to enter the CMSO on April 26.

In truth, the FTC knew about the specifics of the EC investigation before all of the details were public. The privilege log produced by the FTC shows that the FTC was in frequent contact with the EC throughout the month of March ***prior*** to filing the Complaint and TRO.[4] Specifically, the privilege log shows

[3] The EC's purported stay pending review of the merger has been in place since March 11, 2021, when the EC accepted France's referral under Article 22. That referral was public since March 9, 2021. *Referral: The French Competition Authority Refers to the European Commission the Acquisition of a US Biotechnology Company by a Company Specialised in Integrated Systems for the Analysis of Genetic Variation and Biological Function (Illumina/GRAIL),* Concurrences: Antitrust Publications & Events (Mar. 9, 2021), https://www.concurrences.com/en/review/issues/no-2-2021/alerts/referral-the-french-competition-authority-refers-to-the-european-commission-the. The FTC is of course aware of the relevant rules and penalties related to the EC (MTD 5 n.4, 7 n.13); its motion touts "past cases" in which it deferred to the investigations of foreign regulators, including the EC (MTD 11).

[4] The FTC marked its privilege log confidential under the protective order entered in this action. While Defendants do not believe the information in the log is

communications between the FTC and the EC in early to mid-March.[5] That privilege log also shows communications with Member States as early as mid-November. In a recent European court filing challenging Illumina's motion to expedite its appeal, the EC indicated that it is actively speaking to the FTC about the timing of the FTC's actions.[6] Thus, the FTC's contention that a *recent* development in the EU necessitates its motion is untenable.

No legal bar. Irrespective of when the FTC learned of the EC investigation, it is not a legitimate bar to closing the transaction.[7] The EC initiated its investigation of the transaction under an untested interpretation of Article 22 of the EU Merger Regulations prior to issuing any guidelines on the use of that

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confidential they have not filed it with this brief. However, upon request, Defendants will provide the brief to this Court under seal or in person at the hearing for this motion.

[5] While Defendants cannot say for sure, there is reason to believe that the FTC engineered the EC investigation they now claim moots the need for a preliminary injunction. In mid-March, the FTC sent the EC contact information for a third party complainant with whom they met on numerous occasions. When Defendants sought full information regarding these communications, the FTC refused on the basis of a claimed privilege under the Agreement Between United States and European Communities On The Application of Positive Comity Principles In The Enforcement Of Antitrust Laws, which governs requests from one antitrust enforcement authority to another to investigate conduct.

[6] Observations on the Application for Expedited Procedure, Case T-227/21 (May 21, 2021). The EC's brief is not public and Defendants cannot file it on the public docket at this time. However, upon request, Defendants will provide the brief to this Court under seal or in person at the hearing.

[7] The question of the legal effect of the EC proceedings is a question of EU law, and one not implicated by the FTC's complaint in this Court. To the extent that the FTC's motion seeks an advisory opinion from this Court about such legal effects, Defendants respectfully object.

process.[8] Moreover, the EC's initiation of an investigation was made outside the proper time period and is procedurally flawed. Illumina has challenged the EC's decision to review Illumina's merger under Article 22 in the European courts on an expedited basis and believes that the European courts will find that the investigation was unlawful and that the EC lacks jurisdiction.

Even if the EC's investigation were legitimate, Illumina and GRAIL believe that it will not bar them from closing should this Court issue a decision denying the FTC's request for a preliminary injunction. While Defendants are challenging the EC's investigation, they are also cooperating with EC authorities and believe that the EC will ultimately clear the transaction on the merits. The EC process runs in parallel to these proceedings and Illumina and GRAIL are optimistic it can be completed at or about the time the TRO is set to expire on September 20.

No investigatory mootness/unripeness. Contrary to the FTC's suggestion (MTD 10), the existence of a foreign investigation does not simultaneously moot and make unripe the action for a preliminary injunction under Section 13(b) of the FTC Act. Section 13(b) of the FTC Act authorizes the FTC to seek a preliminary injunction "[w]henever [it] has reason to believe" that defendants are "about to violate" the laws that it enforces. 15 U.S.C. § 53(b).

[8] The EC's action is unprecedented and highly controversial because under the EC's own rules and those of every one of its Member States, the transaction did not trigger jurisdiction for review at the EC or any Member State, and the EC used Article 22 to invite Member States who did not have jurisdiction in the first place to request referral of the transaction for centralized review by the EC in Brussels. Natalie McNelis & Nicholas Hirst, *Comment: Illumina-Grail Case Exposes Controversy Behind EU Grab for Non-notifiable Mergers*, MLex Market Insight (April 7, 2021), https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/mergers-and-acquisitions/illumina-grail-case-exposes-controversy-behind-eu-grab-for-non-notifiable-mergers.

Courts have approved the FTC's use of that authority to enjoin allegedly illegal conduct even where the conduct at issue has been deferred because of potential legal penalties, as the FTC has alleged with regard to the EC investigation. *See FTC v. Agora Financial, LLC*, 447 F. Supp. 3d 350, 358-59, 369-70 (D. Md. 2020) (rejecting a mootness challenge to the FTC's ability to enjoin an allegedly misleading promotion that was stopped in light of "an inquiry . . . about consumer confusion"); *see also FTC v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (explaining that the party asserting mootness must make it "absolutely clear" that the "allegedly wrongful behavior cannot reasonably be expected to recur"). In fact, courts in this Circuit have specifically held that the FTC can enjoin conduct that would happen *but for* governmental investigation, regardless of the conduct's likelihood while the investigation is ongoing. *See FTC v. Triangle Media Corp.*, No. 18CV1388-LAB (LL), 2018 WL 6305675, at *1 (S.D. Cal. Dec. 3, 2018) ("Absent the [government's] enforcement action, there would be little doubt [defendant] would still be 'violating' or 'about to violate' the law . . . ."); *FTC v. Sage Seminars, Inc.*, No. C 95-2854 SBA, 1995 WL 798938, at *6 (N.D. Cal. 1995) (rejecting the argument that the FTC's claim to enjoin conduct was mooted, including because the conduct was only stopped "*after* defendants learned that the [government] had commenced an investigation into [defendant's] practices").

The FTC's claim that its Complaint is moot and unripe ignores its own pleading and its prior practice. In its complaint, the FTC alleges that a preliminary injunction is required to prevent the transaction from closing "while the Commission adjudicates whether the Acquisition is unlawful". (Complaint at 2.) The EC investigation does nothing to change that because Defendants expect any EC concerns will be resolved before or about the time the TRO will expire and the administrative proceeding will not run its course until early 2022. In addition, the FTC has brought challenges to transactions while an EC investigation is pending.

For example in connection with the Staples/Office Depot merger, the FTC brought an action for a preliminary injunction after the EC had initiated an investigation of the transaction.[9]

The FTC contends that "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". (MTD 11.) However, that is not the process the FTC took here. It chose to bring an action in this Court. The FTC's reliance on *FTC v. Tronox Limited* (MTD 11-12) is misplaced. In that case, the FTC waited to bring a request for a preliminary injunction against a merger until after the conclusion of a European investigation and an administrative trial. 332 F. Supp. 3d 187, 218 (D.D.C. 2018). The Court assessed whether the FTC's delay in bringing a request for a preliminary injunction tipped the equities in favor of the defendants. It did not assess the question presented here – whether it would be proper for the FTC to withdraw a request for a preliminary injunction that was already pending, having obtained an agreement to a TRO in exchange for an accelerated CMSO. The Court's passing reference to ripeness was *dicta* and has no bearing on actual

[9] *See FTC v. Staples, Inc.*, Pls.' Mot. and Statement of Points and Authorities in Support of Request for Preliminary Inj., No. 15CV02115, 2015 WL 10682935 (D.D.C. Dec. 7, 2015); Press Release, European Commission, Mergers: Commission Opens In-Depth Investigation into Staples' Proposed Takeover of Office Depot (Sept. 25, 2015), *available at* https://ec.europa.eu/commission/presscorner/detail/en/ IP_16_278; Case M.7555—Staples/Office Depot, Merger Procedure Regulation (EC) 139/2004, at 3 (2016) ("On 25 November 2015 . . . the Phase II proceedings were extended . . . . On 10 December 2015 the Parties submitted revised commitments."), https://ec.europa.eu/competition/mergers/cases/decisions/m7555_5720_3.pdf.

ripeness in applying Section 13(b) here.[10] Nothing in *Tronox* justifies the FTC's seeking to abdicate to the EU its responsibility to decide a transaction between two U.S. companies or to use that policy decision to short-circuit a federal court's ability to review the FTC's effort to bar the closing of the transaction by procedural gamesmanship.[11]

Because its rationale for dismissal *without prejudice* lacks merit, the FTC's motion to dismiss *without prejudice* should be denied. *See, e.g.*, *Stone v. Fisher*, No. 20-CV-1818 (JMF) (BCM), 2020 WL 2765107, at *3 (S.D.N.Y. May 28, 2020) ("The Court further concludes that plaintiff's 'explanation for the need to dismiss' is inadequate, particularly given his announced intention to resume the litigation of his federal claims at such time as he can do so unburdened by the TRO."); *Thompson*, 2017 WL 5135548, at * 6 (denying motion for voluntary dismissal where plaintiff "g[a]ve no explanation as to why they waited until this relatively late date" to seek dismissal); *Blue Spike*, 2015 WL 13655824, at *3 (dismissing *with prejudice* where plaintiff "failed to provide a sufficient

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[10] The FTC also cites two cases (MTD 10-11) in which district courts refused to grant injunctions duplicating their prior orders in suits brought by private plaintiffs under statutes other than Section 13(b). *See Ocean Conservancy, Inc. v. Nat'l Marine Fisheries Servs.*, 90 F. App'x 499, 500-01 (9th Cir. 2003) (refusing to enjoin an office from conducting marine research because doing so was already prohibited by the court's prior orders); *Lee v. Van Boening*, No. 94-35909, 1996 WL 145303, at *1 (9th Cir. 1996) (refusing to enjoin prison officials from opening the plaintiff's mail because doing so was already prohibited by the court's prior order). But in this action, of course, the FTC acts under Section 13(b) and does not ask this Court to duplicate a prior order.

[11] The FTC contends that the EC's investigation "accomplishes the same relief sought in the PI complaint". (MTD at 10). That is plainly untrue. The preliminary injunction complaint seeks to prevent the transaction from closing during the pendency of the administrative proceeding, the resolution of which is not expected until 2022. By contrast, we anticipate resolving any concerns raised by the EC at or about the time the TRO expires in September 2021.

explanation for the basis for its request" in "an obvious effort by the plaintiff to escape the inevitable consequences of its own failures").

II. The FTC's Request for Dismissal Without Prejudice Is Inequitable and Will Impose Undue Prejudice on Defendants.

A dismissal *without prejudice* is inappropriate where it would be prejudicial or inequitable to allow the plaintiff to bring the same action again in the future. *See Burnette*, 828 F. Supp. at 1443 (explaining that the court should "order the dismissal to be with prejudice where it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action"); *Evenflo Co., Inc. v. Augustine*, No. 14-CV-1630-AJB-JLB, 2015 WL 7568663, at *5 (S.D. Cal. Nov. 24, 2015); *Blue Spike*, 2015 WL 13655824, at *3; *White*, 2008 WL 4184651, at *3. Here, the FTC seeks to dismiss the case *without prejudice*, precisely so that it can file a new case seeking exactly the same relief as soon as the FTC feels the EC is closer to clearing the transaction. Allowing the FTC to do that would put the FTC in a position to terminate the transaction without adequate review by an Article III Court because it is unlikely a court could determine the merits on the timeline provided for in the merger agreement.

While Defendants believe the FTC's case and request for a preliminary injunction are meritless, they consented to a TRO and agreed to a schedule that would put the Court in a position to decide the motion before the transaction expires on September 20. All parties agreed that a decision on the FTC's motion would require substantial fact discovery, a period of expert discovery, and a substantial hearing on the merits. In an April 20, 2021 joint letter to Chief Judge Sabraw, the parties advised the Court that they expected the hearing in this matter

would require at least two weeks. (FTC's Exhibit 6.) In oral communications, the FTC has advised Defendants that they would like two weeks to present their case.[12]

Permitting the FTC to withdraw its case now and refile later would make it impossible (as a practical matter) for the Court to address the issues on the kind of schedule that the parties already agreed is appropriate. If the FTC were to withdraw and refile perhaps in August/September, there would be insufficient time for the parties to complete fact discovery on any new claims, conduct expert discovery, exchange trial exhibits and other pretrial submissions, and otherwise ready the case for a hearing before the transaction would expire on its terms. There is a significant chance a court would be unable to devote adequate time to the issues if a new motion for a preliminary injunction were thrust upon it at the eleventh hour. Thus, dismissal *without prejudice* would give the FTC the unchecked power to block this pro-competitive, life-saving combination without regard to its merits, simply by running out the clock.[13]

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[12] Defendants believe they can put on their case in approximately five to six trial days and intend to ask the Court to establish a chess clock allocating time evenly between the parties in a trial to last approximately 10-12 trial days.

[13] To obtain a preliminary injunction, a plaintiff must act equitably and with dispatch. *See Sequa Corp. v. Gelmin*, No. 91 CIV. 8675 (DAB), 1995 WL 404726, at *9 n.7 (S.D.N.Y. July 7, 1995) ("[D]elay may reflect tactical maneuvering by the movant with the goal of maximizing the burden on his adversary. . . this delay would be relevant to an assessment of the relative harms to be endured by the parties if a proposed preliminary injunction were either granted or denied." (citing *Nassau Boulevard Shell Serv. Station, Inc. v. Shell Oil Co.*, 869 F.2d 23, 24 (2d Cir. 1989)); *see also Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."). The FTC's claim that it should be allowed to start the process of seeking a preliminary injunction, withdraw its application, and then start again later at its convenience is incompatible with the conduct expected of a party seeking equitable relief. A later-filed application for a preliminary injunction could nonetheless occasion the

A recent court filing by the EC further supports Defendants' view that the FTC is working to run out the clock on this transaction. In its observations to Illumina's motion to expedite its challenge to the EC investigation, although the EC did not formally oppose expedition it noted to the European General Court that U.S. proceedings were ongoing, and that they were a relevant factor for the General Court's decision on expedition. In particular, the EC stated that it is in contact with the FTC which has told it that the administrative process would last at least until March 2022. Essentially, the EC is arguing to the European General Court that the case need not be decided because there is a U.S. proceeding. Meanwhile, the FTC is arguing in the U.S. that the case need not be decided because there is an EC proceeding. This ploy has broad implications. If the Court allows the FTC to withdraw its request for preliminary injunction *without prejudice*, then any transaction that is subject to investigations in both the U.S. and EC would never qualify for review by a federal district court.

Ordinarily, no plaintiff wants its case dismissed unless there is some clear advantage in dismissal, and no defendant opposes dismissal of a case against it unless there is some real disadvantage. So it is here. The FTC seeks to obtain by dismissal what it cannot achieve by litigating the case on the merits: preventing the transaction from closing. Defendants oppose dismissal without prejudice to avoid a re-filed suit that will run the clock and by that means alone preclude closing of the transaction. That Defendants oppose the dismissal of claims against them speaks volumes about where the prejudice lies in the event the FTC is allowed to drop this case only to start another case months down the road.

The FTC contends that Defendants would not suffer legal prejudice because they intend still to pursue an administrative trial on the merits. As the FTC

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expense, delay, and uncertainty associated with litigation, allowing the FTC to scuttle the transaction using tactics unrelated to the merits.

knows, however, the FTC's continued prosecution of the administrative proceeding will do nothing to avoid prejudice to Defendants, the transaction and the public, because no decision will be taken in the administrative proceeding until 2022.

Courts have rejected motions for dismissal *without prejudice* in similar circumstances where dismissal would be prejudicial to defendants. *See Diamond State Ins. Co. v. Genesis Ins. Co.,* 379 F. App'x 671, 673 (9th Cir. 2010) (affirming Rule 41(a)(2) dismissal *with* prejudice where dismissal *without* prejudice would "essentially allow [plaintiff] to 'revoke its promise'" with respect to a settlement agreement with defendant); *Neville*, 2019 WL 4242502, at *2 (Bencivengo, J.) (dismissing the case with prejudice where "[p]laintiff ha[d] engaged in forum-shopping" and dismissal *without prejudice* would, in fact, prejudice defendants); *Burnette*, 828 F. Supp. at 1443 (explaining that the court should "order the dismissal to be with prejudice where it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action"); *Blue Spike*, 2015 WL 13655824, at *3 (denying request for dismissal with prejudice where dismissal was "a transparent attempt to circumvent the impact of [the judge's] ruling"); *Evenflo*, 2015 WL 7568663, at *5 ("The timing of this motion, filed on the heels of the close of fact discovery, is suspicious.").

III. Dismissal Without Prejudice Would Be Inefficient and Impractical.

Finally, while dismissal is favored when it secures the "just, speedy, and inexpensive determination" of an action (MTD 8), that would not be the result of the FTC's motion to dismiss *without prejudice*. *See Hanginout, Inc. v. Google*, No.13cv2811 AJB (NLS), 2015 WL 11254668, at *2 (S.D. Cal. April 22, 2015) ("[R]ules of civil procedure 'should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.'"); *White*, 2008 WL 4184651, at *3 (denying request for dismissal *without prejudice* where there was a pending claim dispositive motion so dismissal would be wasteful

and inefficient). Contrary to the FTC's contention (MTD 12), requiring the FTC to go forward with the preliminary injunction action would not "waste the resources of the court, third parties, and taxpayers". The opposite is true.

Inefficiency. The parties have already engaged in extensive fact discovery. As explained above, Defendants have produced more than 34 million pages in response to the FTC's requests[14]; made more than 20 witnesses available for investigatory hearings or deposition; and obtained discovery from at least 25 third parties, including, for example, Exact Sciences Corporation, Foundation Medicine, Inc., Freenome Holdings, Inc., Guardant Health, Morgan Stanley, Natera, Inc., Omniome, Inc., Quest Diagnostics, Singlera Genomics, Inc., Singular, StageZero Life Sciences, Inc., and Ultima Genomics.[15] Fact discovery is set to end on June 4, and the first wave of expert reports is due on June 8. Illumina and GRAIL (and presumably also the FTC) have made substantial progress in preparing for trial, and witnesses have blocked their calendars and are ready to go. If the preliminary injunction hearing goes forward, all of the discovery taken (and to be taken) in this matter will be available to the parties in the separate administrative proceeding before the FTC, which the FTC has said it will pursue irrespective of whether the Court dismisses the present case (with or without prejudice). The scheduling order in the administrative proceeding specifically contemplates that the

[14] The FTC has had access to the vast majority of this discovery prior to March 1, 2021, when the Defendants substantially complied with the FTC's second request in connection with its investigation of the transaction.

[15] Additional third parties that have been subpoenaed include: Ariosa Diagnostics, Inc., Caris Life Sciences, Inc., Element Biosciences, Inc., Emory Healthcare, Genapsys, Inc., Labcorp, Luminex Corporation, Pacific Biosciences of California, Personal Genome Diagnostics, Inc., PreventionGenetics, LLC, Progenity, Inc., Roche Sequencing Solutions, Inc., Thermo Fisher Scientific, Inc., ThirdRock Ventures, LLC, and Thrive Earlier Detection Corp.

discovery taken in this action may be used in that case. So, nothing done here will be wasted no matter the outcome of the present motion.

By contrast, allowing the FTC to withdraw and refile this case would waste significant resources and impose unneeded burden and expense on the parties and the Court. When the FTC files a new (and with the benefit of months of discovery, possibly revised) complaint, the litigation will start over—in many ways from square one. The case would be assigned to a new judge or return to this Court. Defendants would need to prepare and file a new answer. A new CMSO would need to be negotiated and entered. Fact discovery would be required as to any new allegations and updated discovery would be required as to old allegations. New subpoenas would need to issue. The parties would need also to prepare and exchange expert reports (revised and updated for the new preliminary injunction case) and take expert depositions. The parties would need to exchange deposition designations, proposed exhibits, and other pre-trial submissions. And there is no guarantee that there will be time for all of this or that the Court would be able to accommodate a trial of at least two weeks prior to the termination date for the transaction.[16] Proceeding according to the current agreed-upon and so-ordered schedule avoids all of this duplicative waste and averts the likely self-inflicted chaos that would follow from allowing the FTC the option of a belated redo.[17]

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[16] In footnote 20 of its Brief, the FTC states that it is willing to "stipulate to the use of evidence gathered post-dismissal in a subsequent filing for a temporary restraining order of preliminary injunction." But the FTC could bring the TRO long after discovery is closed in the administrative action (June 24), and so there would likely be a need for interim discovery.

[17] Defendants do not believe the FTC's present theories of anticompetitive harm have any merit. Nor do Defendants believe any later-filed claims of harm would have any more merit. But the FTC will no doubt seek to shroud itself in the trappings of government authority and argue it should be given deference in matters of antitrust enforcement. Defendants expect no court would want to address the

That the FTC is pursuing an administrative proceeding in parallel does not make this case duplicative. The FTC concedes in its brief that different standards apply across the two proceedings. (MTD at 11.) As the FTC knows, it cannot obtain a preliminary injunction barring closing of the transaction in the administrative proceeding; the ALJ is not empowered to do that. Only a district court can issue a preliminary injunction to determine whether the transaction can close. If the FTC seeks to prevent Defendants from closing, it will come right back to this Court to seek a preliminary injunction.[18]

Delay and expense. The FTC argues that the case should be dismissed *without prejudice* and without the imposition of any conditions because, it says, it "acted quickly and the explanation for dismissing the PI Complaint is clear." (MTD 14.) Not so, for all the reasons discussed above. The FTC suggests that it would have acted more quickly but for Defendants refusing to provide a clear answer regarding the impact of the EC proceedings on this case. That is false. Defendants promptly and repeatedly advised the FTC that "[t]he 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". (MTD Ex. 4.) In any case, as shown above, the FTC not only knew about the EC proceedings long before it acknowledges in its opening brief, but also there is reason to believe the FTC played a role in the initiation of the investigation.

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issues presented by this transaction, which all agree have life-saving consequences, on a rushed schedule, especially when the parties have already agreed to a process that will allow for an orderly resolution.

[18] While injunctive relief is available to the FTC, such relief can only be obtained after a final decision is issued—something that will only occur many months after the expiration of the transaction.

The FTC contends that "Defendants have incurred minimal expense that they would have otherwise not incurred in the administrative process" which they claim will be the more expansive proceeding. (MTD 15.) This too is incorrect. Defending against the FTC's request for a preliminary injunction and preparing for a trial beginning on August 9 has resulted in significant expense to Defendants that they would not have otherwise incurred, including the preparation of expert reports, discovery responses and other filings specifically focused on the legal standard applicable in the district court proceedings. Moreover, it is this case, not the administrative proceeding, that will determine the outcome of this transaction. If this Court issues a preliminary injunction, then Defendants will abandon the transaction. If the Court denies the preliminary injunction, then Defendants will close and the FTC will have to decide whether to proceed with the administrative case. If history is any guide, the FTC will not proceed. But in any case it will not be able to stop the closing. The administrative proceeding will not resolve until long after the termination date of the transaction.

Courts routinely deny motions to dismiss *without prejudice* where, as here, doing so would be wasteful, inefficient and impractical. *Hanginout*, 2015 WL 11254688, at *2 (noting upon denying dismissal *without prejudice* that the "rules of civil procedure 'should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding'"); *Peck Ormsby Const. Co. v. City of Rigby*, No. 1:10–00545 WBS, 2013 WL 5274221, at *2 (D. Idaho Sept. 17, 2013) (declining to dismiss claim without prejudice where there would be "further delay and the duplication of costs and efforts already expended"); *Cent. Montana Ry. Co. v. BNSF Ry. Co.*, No. CV-05-116-GF-RKS, 2010 WL 11534149, at *3 (D. Mont. Apr. 13, 2010) (denying Rule 41(a)(2) motion to dismiss where "[i]f voluntary dismissal were granted, the result would be great delay and duplication"); *IXIA v. Mitchell*, No. CV 08–07076 RGK (AJWx), 2009 WL

10674095, at *2 (C.D. Cal. July 8, 2009) (denying Rule 41(a)(2) motion to dismiss where, *inter alia*, the case was "only two and one-half months from trial"); *White*, 2008 WL 4184651, at *3 (denying request for dismissal *without prejudice* where it would impair "the timely final adjudication" of plaintiff's claims).

In seeking dismissal *without prejudice*, the FTC seeks to have its cake and eat it too. It seeks to put a pin in its obligation to show that there is any basis for a preliminary injunction, while continuing to deploy the threat of one to influence the European process and dissuade the parties from closing. In a proceeding about equity, the FTC should have to pick. The FTC chose to sue and to pursue injunctive relief. It negotiated a TRO and a schedule to determine its entitlement to injunctive relief. If the FTC still wants to hold open the possibility of such relief, then this case should proceed according to the agreed-upon schedule. If not, then the Court should dismiss this case *with prejudice* so that the transaction can close and Defendants can get about the business of saving lives.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should deny FTC's motion to dismiss *without prejudice*.

Dated: May 26, 2021

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