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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ILLUMINA, INC. and GRAIL, INC.,

Defendants.

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

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

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

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

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

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

Dated: May 21, 2021

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

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

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

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TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Other Authorities

Rules

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

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

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

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

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

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

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

BACKGROUND

Illumina, Inc., the dominant provider of next-generation genome sequencers, announced that it entered into a definitive agreement to acquire GRAIL, Inc., a healthcare company racing to develop multi-cancer early detection tests, for cash and stock consideration of $8 billion (hereinafter, "Proposed Transaction").[7] After an investigation, the Commission found reason to believe that, if consummated, Defendants' merger would be anticompetitive and violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, and voted 4-0 to issue an Administrative Complaint to permanently enjoin Defendants from consummating the Proposed Transaction and set an administrative hearing for August 24, 2021 to decide the merits of this case. (Complaint, *In the Matter of Illumina, Inc. v. GRAIL, Inc.*, FTC Docket No. 9401, p. 1. (hereinafter "Administrative Complaint").

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

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

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

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

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

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

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

[10] *Id.*

[11] *Id.*

[12] *Id.*

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

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

STANDARD OF REVIEW

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Compressed Case Schedule Necessitates Expedited Relief

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

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

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

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

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

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

CONCLUSION

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

Dated: May 21, 2021

Respectfully submitted,

/s/ Susan A. Musser

Susan Musser

Counsel for Federal Trade Commission

CERTIFICATE OF SERVICE

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

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

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v.

ILLUMINA Inc. and GRAIL, Inc.,

Defendants.

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

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

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

I, Susan A. Musser, declare as follows:

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

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

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

DATED: May 21, 2021

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

Exhibit 1

European Commission - Competition

In this section:

Mergers

Merger Cases

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

Decisions, press releases and other communications from the Commission are published as soon as they are official. The Commission cannot respond to inquiries about the exact timing of publication.

M.10188 ILLUMINA / GRAIL

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

New Search

Help on how to use the case search tool

Exhibit 1

Exhibit 2

Illumina v Commission
Case T-227/21

Reports of Cases
Information not available

Subject-matter
Information not available

Systematic classification scheme
Information not available

Citations of case-law or legislation

References in grounds of judgment
Information not available

Operative part
Information not available

Opinion
Information not available

Dates

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

Date of the Opinion
Information not available

Date of the hearing
Information not available

Date of delivery
Information not available

References

Publication in the Official Journal
Information not available

Name of the parties
Illumina v Commission

Notes on Academic Writings
Information not available

Procedural Analysis Information

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

Subject-matter

Information not available

Provisions of national law referred to
Information not available

Provisions of international law referred to
Information not available

Procedure and result
Actions for annulment

Formation of the Court
Information not available

Judge-Rapporteur
Information not available

Advocate General
Information not available

Language(s) of the Case
English

Language(s) of the Opinion
Information not available

Exhibit 3

Musser, Susan

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

Sharon:

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

Best,

Susan

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

Susan:

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

Best,

Sharon

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

Exhibit 3

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

Sharon:

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

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

Best,

Susan

Exhibit 3

Exhibit 4

Musser, Susan

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

Susan:

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

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

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

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

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

Best,

Sharon

Exhibit 4

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

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

Sharon,

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

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

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

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

Best,

Susan

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

Exhibit 4

Susan:

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

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

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

Best,

Sharon

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

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

Sharon:

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

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

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

Thanks,

Exhibit 4

Susan

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

Susan:

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

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

Best,

Sharon

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

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

Sharon:

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

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

Exhibit 4

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

Many thanks,

Susan

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

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

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

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

Hi Susan:

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

Best,

Sharon

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

Exhibit 4

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

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

Best,

Susan

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

Susan:

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

Best,

Sharon

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

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

Sharon:

Exhibit 4

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

We can use the below dial-in.

888-273-3658
326 2850
Pin 2174

Thanks,

Susan

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

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

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

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

Exhibit 5

In the Matter of:

Tronox Limited/Cristal USA

December 20, 2017
Pretrial

Condensed Transcript with Word Index

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

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

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

Reported by: Susanne Bergling, RMR-CRR-CLR

APPEARANCES:

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

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

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

ALSO PRESENT:
Steven Kaye, Tronox Deputy General Counsel

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

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

5

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

6

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

7

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

8

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

Exhibit 6

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

BY HAND
Encl.

April 20, 2021

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

Dear Chief Judge Sabraw and Mr. Morrill:

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

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

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

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

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE

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

Dated: April 20, 2021

RUDOLPH CONTRERAS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION

GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE

I. INTRODUCTION

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

II. BACKGROUND

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

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

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

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

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

III. LEGAL STANDARD

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

IV. ANALYSIS

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

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

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

A. The Effect of the COVID-19 Pandemic

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

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

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

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

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

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

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

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

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

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

B. The Private Interest Factors Support Transfer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 6

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

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

C. The Public Interest Factors Are Essentially Neutral

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

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

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

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

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

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

* * *

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

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

V. CONCLUSION

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

Dated: April 20, 2021

RUDOLPH CONTRERAS
United States District Judge

Exhibit 7

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

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

SCHEDULING ORDER

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

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

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

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

August 23, 2021 - Final prehearing conference to begin at 2:00 p.m. Eastern Time.

The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits.

To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.

August 24, 2021 - Commencement of Hearing, to begin at 10:00 a.m. Eastern Time.

ADDITIONAL PROVISIONS

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

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

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

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

5. Rule 3.22(c) states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: April 26, 2021