

ONE HUNDRED SEVENTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
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September 2, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

We are concerned about the Federal Trade Commission's (FTC) unusual approach to the merger of Illumina and GRAIL. The FTC's actions in this matter—and its apparent gamesmanship in coordination with European regulators—require congressional oversight.

Illumina and GRAIL are two American health care companies. Illumina's business focuses in part on DNA sequencing.¹ In 2016, Illumina founded GRAIL to focus on cancer screening, and then spun GRAIL off while keeping a minority stake.² In 2020, the companies announced the intent to merge to accelerate product development and help GRAIL's cancer detection tests get to market.³ The merger portends to offer a “test capable of screening for and detecting 50 different cancers early enough to improve patient outcomes and save lives.”⁴ The companies expected that Illumina's expertise in compliance and distribution would help accelerate the availability of GRAIL's detection tests.⁵ On August 18, 2021, Illumina and GRAIL announced they had completed their merger despite the ongoing legal challenges by the FTC and European enforcers, in an effort “to prevent regulatory proceedings from killing the deal by running out the clock.”⁶

¹ See Zarema Jaramillo & Leiv Blad, *FTC's Drop of Illumina-Grail Merger Case Raises Uncertainty*, LAW360 (June 9, 2021), <https://www.law360.com/articles/1392063>.

² *Id.*; see also Press Release, Illumina Forms New Company to Enable Early Cancer Detection via Blood-Based Screening, GRAIL (Jan. 10, 2016), <https://grail.com/press-releases/illumina-forms-new-company-to-enable-early-cancer-detection-via-blood-based-screening>.

³ *Id.*

⁴ *Id.*

⁵ See generally Christopher Cole, *FTC's Illumina-Grail Court Case Dropped Despite Cos.' Protest*, LAW360 (June 1, 2021), <https://www.law360.com/articles/1389876/ftc-s-illumina-grail-court-case-dropped-despite-cos-protest>; Thom Lambert, *Bad Blood at the FTC*, TRUTH ON THE MARKET (June 9, 2021), <https://truthonthemarket.com/2021/06/09/bad-blood-at-the-ftc>.

⁶ Brent Kendall, *Illumina Completes Deal for Life-Sciences Firm Grail Despite FTC Antitrust Challenge*, WALL ST. J. (Aug. 19, 2021), <https://www.wsj.com/articles/illumina-completes-deal-for-life-sciences-firm-grail-despite-ftc-antitrust-challenge-11629320260>.

The FTC’s approach to the Illumina-GRAIL merger departs from its typical enforcement process and raises questions about the Commission’s interference in the case. In March 2021, as it commonly does when appropriate in merger reviews, the FTC filed for an injunction in federal district court to allow the agency time to litigate the case before the FTC’s own internal administrative court.⁷ The district court’s ruling functionally makes or breaks these types of cases—companies generally abandon a merger if the court enjoins the merger and, conversely, the FTC generally declines to pursue a case in its administrative court when the district court refuses to grant an injunction.⁸ In this way, seeking an injunction in district court provides clarity to all parties and helps to more speedily resolve merger challenges.

The FTC, however, never allowed the district court to rule on the Illumina-GRAIL merger, abruptly withdrawing its complaint for preliminary injunctive relief.⁹ The FTC took this unusual step only after the European Commission (EC) began reviewing the merger and after the FTC had conducted extensive discovery.¹⁰ There is also a suggestion that the FTC may have withdrawn its complaint from federal court to avoid a direct loss, which would have effectively ended the FTC’s review.¹¹ Even still, the companies allege that “the transaction did not meet . . . thresholds for” the EC’s review, and Illumina is challenging the EC’s jurisdiction.¹²

Illumina and GRAIL also suggest the FTC may have even “engineered the EC investigation” as part of the FTC’s strategy in opposing the merger.¹³ They cite documents showing that FTC officials were “in frequent contact with the EC,” including providing the EC with what appears to be nonpublic information relating to a third-party complainant.¹⁴ The FTC appears to have colluded with the EC on litigation strategy as well.¹⁵

While the FTC has a duty to challenge a proposed merger if the agency does not believe it complies with the law, if these allegations are accurate, the FTC’s approach before the court suggests that the FTC took significant steps to avoid speedily resolving novel legal issues under U.S. law in a forum—federal district court—where the FTC was more likely to lose. Denying the court the opportunity to make such a determination while working with European bureaucrats to attempt to delay the merger while the FTC makes its case before an administrative law judge likely benefits the FTC due to the agency’s remarkable win rate when litigating before its in-

⁷ See ECF 120-1, Memorandum in Support of Plaintiff’s *Ex Parte* Application to Dismiss the Complaint Without Prejudice, *FTC v. Illumina, Inc.*, Case No. 3:21-cv-800-CAB-BGS, 5 (S.D. Cal., May 21, 2021).

⁸ See Bryan Koenig, *Illumina, Grail Say FTC Just Wants to Run Out Merger Clock*, LAW360 (May 27, 2021), <https://www.law360.com/articles/1388871/illumina-grail-say-ftc-just-wants-to-run-out-merger-clock>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., *Government Race Against a Cure*, WALL ST. J. (June 2, 2021), <https://www.wsj.com/articles/government-race-against-a-cure-11622669124> (“But the FTC late last month . . . ask[ed] a federal judge to dismiss its lawsuit. Why would it do that? Because the agency doesn’t want a judge to rule in favor of Illumina.”).

¹² Koenig, *supra* note 8.

¹³ See ECF 124, Opposition to FTC’s Motion to Dismiss the Complaint Without Prejudice, *FTC v. Illumina, Inc.*, Case No. 3:21-cv-800-CAB-BGS, 11 n. 5 (S.D. Cal., May 26, 2021).

¹⁴ *Id.* at 10-11.

¹⁵ *Id.*

house tribunal.¹⁶ The FTC's administrative process is so favorable to the agency that even if the administrative law judge deems the merger to be legal, the FTC Commissioners can override that decision.¹⁷

Concerns related to the FTC's approach to this matter are not relegated to one political party, rather they are an issue of great bipartisan concern.¹⁸ Relying on European enforcers, and leveraging a suspect in-house administrative process¹⁹ that stacks the deck against private parties, demands additional Congressional oversight.²⁰ As the Committee continues oversight and considers legislation relating to the FTC's scope and authority, please provide the following material:

1. All documents and communications referring or relating to the European Commission's examination of the merger between Illumina and GRAIL, including but not limited to all documents and communications sent to or received from employees or officials of Belgium, France, Greece, Iceland, the Netherlands, or Norway;
2. All documents and communications between or among employees or officials of the Federal Trade Commission and employees or officials of the European Commission referring or relating to Illumina or GRAIL, including but not limited to all call logs, meeting schedules, emails, and text messages;
3. All documents and communications between or among employees or officials of the Federal Trade Commission and employees or officials of Belgium, France, Greece, Iceland, the Netherlands, or Norway, referring or relating to Illumina or GRAIL, including but not limited to call logs, meeting schedules, emails, and text messages; and
4. All documents and communications between or among employees or officials of the Federal Trade Commission referring or relating to the merger between Illumina and GRAIL.

¹⁶ See, e.g., *Axon Takes On the Feds*, WALL ST. J. (Feb. 21, 2020), <https://www.wsj.com/articles/axon-takes-on-the-feds-11582329250> ("The FTC always wins . . . FTC attorneys create the trial record. Administrative law judges appointed by FTC commissioners adjudicate cases with appeals decided by the same commissioners.").

¹⁷ *Id.* ("Even when a company has been *exonerated* by an administrative judge, the commission has reversed the ruling." (emphasis added)); see generally Petition for Writ of Certiorari, *Axon v. Federal Trade Commission*, No. 21-86, at 9 (July 20, 2021) ("As one might expect of a forum in which the investigator, prosecutor, trial-level judge, and appellate-level judge all work for the same agency, the FTC fares shockingly well in proceedings before its own ALJ: *The FTC has not lost a case on its home turf in a quarter century.*" (emphasis added)).

¹⁸ See, e.g., Letter from Congressman Scott H. Peters to Chair Khan *et al.*, 2 (July 1, 2021) (requesting that the FTC account for "America's continued global competitiveness" in its approach, and expressing concern that the "United States . . . not lose any ground to its international competitors" such as China).

¹⁹ See, e.g., Eleanor Tyler, *Axon's SCOTUS Attack May Pose a Threat to the FTC*, BLOOMBERG LAW (July 29, 2021), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-axons-scotus-attack-may-pose-a-threat-to-the-ftc>; see generally Petition for Writ of Certiorari, *Axon v. Federal Trade Commission*, No. 21-86 (July 20, 2021).

²⁰ See generally *Government Race Against a Cure*, *supra* note 11; Lambert, *supra* note 5.

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Please produce this information as soon as possible but no later than 5:00 p.m. on September 16, 2021. If you have any questions about this request, please contact Committee staff at (202) 225-6906. Thank you for your prompt attention to this matter.



Jim Jordan
Ranking Member
Committee on the Judiciary

Sincerely,



Darrell Issa
Ranking Member
Subcommittee on Courts, Intellectual Property, &
the Internet

cc: The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary