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## FTC's Drop Of Illumina-Grail Merger Case Raises Uncertainty

By **Zarema Jaramillo and Leiv Blad** (June 9, 2021, 5:05 PM EDT)

A federal judge recently dismissed the Federal Trade Commission's challenge of Illumina Inc.'s acquisition of Grail Inc., a cancer-screening firm started and spun off years earlier by Illumina itself.

A victory for the defendants? Not so much.

After many months of trying to convince the FTC their merger will speed up approval for Grail's potentially life-saving technology, **the move** by the U.S. District Court for the Southern District of California under Judge Cathy Ann Bencivengo has left the defendants with even more uncertainty about the future of their deal.

By way of background, Illumina founded Grail in 2016 and subsequently spun it out as an independent company, though it retained a minority stake.

Illumina, a public company, also remained a key supplier of DNA sequencing and analysis inputs that Grail and its competitors use in order to develop their cancer screening tests.

In 2020, Illumina announced its intention to reacquire the remaining interest in Grail, bring its test in-house, create supply chain efficiencies and help Grail bring its test to market.

According to the parties, goal is to have a working, commercially viable test capable of screening for and detecting 50 different cancers early enough to improve patient outcomes and save lives.

But on March 31, the FTC filed a complaint for preliminary injunction and temporary restraining order to "maintain the status quo" while the commission proceeded with its administrative challenge of the Illumina-Grail merger.

It was the first time since the U.S. Department of Justice's 2017 challenge of the AT&T-Time Warner merger, which the government lost, that a U.S. antitrust agency was challenging a vertical merger in federal court.

The stage was set for an epic legal battle that would have broad repercussions for U.S. antitrust law.

However, Judge Bencivengo granted the FTC's motion to dismiss its own complaint for preliminary injunction and temporary restraining order.[1]

Importantly, the FTC sought, and the judge granted, dismissal without prejudice, leaving open the possibility of a second bite at the apple for the FTC if the General Court of the European Union agrees with Illumina's argument that it has no jurisdiction or if the European Commission clears the merger.

At the core of the FTC's argument for dismissal without prejudice: new developments that followed



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its filing of the complaint to block the deal have made a federal preliminary injunction unnecessary.

Specifically, the FTC argued that "[s]ince filing the PI, the FTC has learned that the EC has opened an investigation and as a result [Illumina/Grail] are currently prohibited from closing" the acquisition.[2]

As antitrust practitioners know, and the FTC admitted during the hearing on its motion, the FTC and European antitrust authorities have a long-standing relationship and routinely cooperate with each other.[3]

In fact, just two weeks before filing for the preliminary injunction, the FTC talked about its cooperation with foreign counterparts, including the European Commission, on pharmaceutical mergers.[4]

Sure, it is conceivable that while the FTC actively cooperates with the EC on most cases, it did not know about this specific case.

But lawyers for Illumina and Grail claimed that FTC's privilege logs, produced by the FTC during the litigation, indicate that the FTC staff have been in contact with their European counterparts about this proposed deal well before March — as early as November 2020 — and were apparently prepared to produce these documents to the court.[5]

Notably, Illumina and Grail asserted that "[t]here is reason to believe that the FTC engineered the EC investigation." [6] In response, the FTC relied on a bilateral treaty of cooperation to not disclose its contracts with European authorities.[7]

Based on the timeline in this case and the extensive bilateral relationship between U.S. and European antitrust authorities, Illumina and Grail's assertion seems plausible.

The merging parties also argued that the FTC wanted dismissal without prejudice, so that it could revive the case again closer to the Sept. 20 expiration date in the merger agreement, potentially stopping the deal "simply by running out the clock." [8]

The judge was not persuaded. She granted the FTC's motion in full and dismissed the case without prejudice. Ruling from the bench, she reasoned that the dismissal did not in any way prejudice Illumina or Grail's legal positions.

Judge Bencivengo also was not moved by the parties' argument that they had to incur substantial transaction costs.

U.S. antitrust enforcers have said that their merger control processes facilitated business planning and set reasonable expectations among firms in the business community.[9] Unfortunately, the FTC's procedural posturing in this case has undermined both goals.

The FTC's conduct here has created maximum uncertainty for companies focused on creating life-saving technologies.

The FTC may believe that the proposed merger is anti-competitive. If so, it should proceed to litigation and, ultimately, a decision on the merits. If not, it should dismiss the complaint with prejudice.

Using the procedural rules to delay the commission's decision and leveraging the decision-making processes of antitrust agencies in other countries for procedural advantage in what may be a later-filed litigation undermines confidence in the FTC's processes and the reasonable expectations U.S. antitrust agencies have been trying to build in the business community for almost 50 years.

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[1] See ECF 120, Plaintiff's Ex Parte Application Dismiss the Complaint Without Prejudice, FTC v. Illumina, Inc., Case No. 3:21-cv-800-CAB-BGS (S.D. Cal. May 21, 2021).

[2] Id. at 10.

[3] See e.g., Press Release, Officials from U.S. and European Commission Participate in Bilateral Discussions in Washington D.C. to Discuss Antitrust Enforcement, Federal Trade Commission (Sept. 27, 2018), <https://www.ftc.gov/news-events/press-releases/2018/09/officials-us-european-commission-participate-bilateral>.

[4] Press Release, FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers, Federal Trade Commission (March 16, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach>.

[5] ECF 124, Opposition to FTC's Motion to Dismiss the Complaint Without Prejudice 9-11, FTC v. Illumina, Inc., Case No. 3:21-cv-800-CAB-BGS (S.D. Cal. May 26, 2021).

[6] Id. at fn.5.

[7] Id.

[8] Opp'n to FTC's Motion to Dismiss at 17.

[9] See e.g., W. Baer, Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act (Oct. 31, 1996), <https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act>.