**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| 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.

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