

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

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June 8, 2023

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

Dear Chair Khan:

On September 2, 2021, we wrote to you to conduct oversight about the Federal Trade Commission's (FTC) unusual approach to the merger of Illumina and GRAIL.¹ The FTC refused to cooperate with our oversight, responding without explanation that it "cannot provide any nonpublic information concerning this subject."² Due to your earlier refusal to comply with our oversight, and in light of troubling facts we have since learned that the FTC worked with foreign regulators to deny U.S. companies due process, we write to renew our requests for material about the FTC's review of the Illumina-GRAIL merger.

Illumina and GRAIL are two American health care companies focused, in part, on developing cancer screening tests.³ Recent news and court filings show that the FTC shared sensitive information with European regulators shortly before the European Commission (EC) took unprecedented action to challenge the Illumina-GRAIL merger.⁴ The FTC then used the EC's action to withdraw from federal court and instead challenge the merger in the FTC's in-house administrative court, where the Commissioners act as both prosecutors and judges.⁵ These facts raise serious concerns about the FTC's commitment to due process in adjudicative and enforcement matters.

¹ See Letter from Hon. Jim Jordan, Chairman, H. Comm. on the Judic. & Hon. Darrell Issa, Chairman, Subcomm. on Courts, Intellectual Property, and the Internet to Lina Khan, Chair, Fed. Trade Comm'n (Sept. 2, 2021).

² See Letter from April J. Tabor, Secretary, Fed. Trade Comm'n to Hon. Jim Jordan, Chairman, H. Comm. on the Judic. (Sept. 22, 2021).

³ Press Release, Illumina Forms New Company to Enable Early Cancer Detection via Blood-Based Screening, GRAIL (Jan. 10, 2016).

⁴ Editorial Board, *The FTC's Antitrust Collusion*, WALL ST. J., Feb. 23, 2023; 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, (S.D. Cal., May 26, 2021).

⁵ 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).

The FTC's approach to the Illumina-GRAIL merger departs from the FTC's normal processes and raises questions about the Commission's reliance on foreign jurisdictions to enforce U.S. laws. In March 2021, the FTC filed a complaint in federal district court to obtain an order preventing the parties from merging during the FTC's administrative litigation.⁶ Simultaneously, the FTC contacted the EC about the merger,⁷ after which the EC opened an investigation that effectively prevented the parties from merging.⁸ While the EC effectively held off the merger, the FTC withdrew its complaint from federal court and proceeded with its own administrative hearing.⁹ The FTC took this step even though the companies were challenging the EC's jurisdiction to prevent the merger.¹⁰

Illumina and GRAIL opposed the FTC's motion to withdraw, seeking the opportunity to defend the merger in federal court and claiming that "there is reason to believe that the FTC engineered the EC investigation" as part of its opposition to the merger.¹¹ Some commentators also speculated that the FTC may have withdrawn its complaint from federal court to prevent the court from ruling against the FTC.¹² Although the FTC initially lost its challenge to the merger at trial in its own administrative court in September 2022, the Commission, acting as judge and prosecutor, reversed its Chief Administrative Law Judge and ordered Illumina to divest GRAIL on March 31, 2023.¹³

In our September 2021 letter, we noted our concern that the FTC was in extensive contact with the EC about the merger and requested information related to the FTC's communications with the EC, among other requests.¹⁴ Despite the FTC's failure to produce any documents responsive to our request, federal court documents confirmed this concern. For example, court filings revealed that FTC officials were "in frequent contact with the EC," which included providing the EC with information relating to a third-party complainant and sensitive timing information.¹⁵ In addition, a Freedom of Information Act (FOIA) request uncovered additional

⁶ 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).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 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, at n. 5 (S.D. Cal., May 26, 2021).

¹² See, e.g., Editorial Board, *Government Race Against a Cure*, WALL ST. J. (June 2, 2021).

¹³ Press Release, Fed. Trade Comm'n, Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Sept. 12, 2022); Press Release, Fed. Trade Comm'n, FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023).

¹⁴ Letter from Hon. Jim Jordan, Chairman, H. Comm. on the Judic. & Hon. Darrell Issa, Chairman, Subcomm. on Courts, Intellectual Property, and the Internet to Lina Khan, Chair, Fed. Trade Comm'n (Sept. 2, 2021).

¹⁵ 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, n. 5 & 10-11 (S.D. Cal., May 26, 2021).

evidence of improper coordination between the FTC and EC.¹⁶ The heavily redacted documents between FTC employees and European regulators revealed considerable communications leading up to the EC's unprecedented action to review the merger.¹⁷ Shortly thereafter, the FTC moved to dismiss its case from federal court in favor of its in-house administrative process because EC review was preventing the merger from closing.¹⁸ The timing and topics of the discussions between the FTC and European regulators suggests a coordinated effort to attack the Illumina-Grail merger and avoid a U.S. federal court.

Denying the parties due process in a federal court while working with European regulators to delay the merger is improper and an abuse of the FTC's authority. The FTC's in-house administrative process undoubtedly favors the FTC as Commissioners sit as judges in the very case they decide to prosecute.¹⁹ The FTC's advantage is highlighted by its perfect win rate on appeal to itself.²⁰ Former FTC Chair Paul Rand Dixon explained this prejudgment concern, stating:

[B]y the very nature of the administrative process, the administrator, unlike a judge in a constitutional court, can never come to his adjudicative task with a mind wholly devoid of factual information about the subject before him. The statutory scheme . . . requires him to entertain a provisional conviction on the subject before the charges are even lodged.²¹

Relying on European enforcers to prevent a merger from closing and leveraging an in-house administrative process in a way that stacks the deck against private parties demands Congressional oversight. This need for oversight is especially true considering the agency's recent unanimous loss at the Supreme Court in *Axon Enterprise, Inc. v. FTC*, which opens the FTC's in-house administrative process to constitutional attacks in federal court.²²

As the Committee continues oversight and considers legislation relating to the FTC's authority and operations, we ask that you please provide the following material for the period January 1, 2021, to the present:

1. All documents, in unredacted form, provided in response to any FOIA requests related to the merger of Illumina and GRAIL;

¹⁶ See Letter from Hon. Jim Jordan, Chairman, H. Comm. on the Judic. & Hon. Darrell Issa, Chairman, Subcomm. on Courts, Intellectual Property, and the Internet to Lina Khan, Chair, Fed. Trade Comm'n (Sept. 2, 2021); Letter from April J. Tabor, Secretary, Fed. Trade Comm'n to Hon. Jim Jordan, Chairman, H. Comm. on the Judic. (Sept. 22, 2021); Editorial Board, *The FTC's Antitrust Collusion*, WALL ST. J., Feb. 23, 2023.

¹⁷ *Id.*

¹⁸ 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).

¹⁹ See, e.g., *Axon Takes On the Feds*, WALL ST. J. (Feb. 21, 2020).

²⁰ 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).

²¹ *The Pure Oil Company, et al.*, 66 FTC 1552, 1557 (1964).

²² 143 S.Ct. 890 (2023).


2. All documents and communications between the FTC and any foreign regulators or enforcers referring or relating to the merger between Illumina and GRAIL, including but not limited to call logs, meeting schedules, emails, instant messages, and text messages;
3. All documents and communications between or among employees or officials of the FTC referring or relating to the review or enforcement of the merger between Illumina and GRAIL by foreign enforcers or regulators;
4. All recommendation memoranda provided to the FTC's Bureau of Competition and Bureau of Economics front offices or to the Commission, including drafts and final versions, relating to the merger of Illumina and GRAIL;
5. All documents and communications between or among employees or officials of the FTC referring or relating to the FTC's motion to dismiss its challenge to the merger of Illumina and GRAIL in federal court;
6. All documents and communications referring or relating to *Axon Enterprise, Inc. v. FTC*, including any plans or analysis the FTC is considering in light of the Supreme Court's unanimous decision; and
7. All documents and communications referring or relating to prejudgment or other constitutional concerns in the FTC's in-house administrative process.

Please produce this information as soon as possible but no later than 5:00 p.m. on June 22, 2023. The Committee on the Judiciary is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of and legislate on matters relating to the “[p]rotection of trade and commerce against unlawful restraints and monopolies,” as well as “federal courts and judges, and local courts in the Territories and possessions.”²³ If you have any questions about this matter, please ask your staff to contact Committee staff at (202) 225-6906. Thank you for your attention to this matter.

Sincerely,



Jim Jordan
Chairman



Darrell Issa
Chairman
Subcommittee on Courts, Intellectual
Property, and the Internet

²³ Rules of the U.S. House of Representatives, R. X (2023).

The Honorable Lina Khan

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Thomas Massie

Chairman

Subcommittee on the Administrative State,
Regulatory Reform, and Antitrust

cc: The Honorable Jerrold Nadler, Ranking Member
The Honorable Henry C. Johnson, Ranking Member, Subcommittee on Courts,
Intellectual Property, and the Internet