

Illumina Defends Grail Deal To FTC Commissioners After Win

By **Matthew Perlman**

Law360 (November 10, 2022, 7:45 PM EST) -- Biotechnology company Illumina Inc. told members of the Federal Trade Commission in a brief that the agency's in-house judge was right to reject the commission's challenge of its Grail Inc. acquisition, contending that the "lifesaving transaction" will revolutionize cancer screening.

The companies made their assertion in an answering brief dated Nov. 3 but published this week, arguing that FTC Chief Administrative Law Judge D. Michael Chappell correctly found that agency staffers failed to prove that the completed deal would lessen competition.

"Even though this lifesaving transaction will accelerate the adoption of Grail's groundbreaking cancer-screening test, Galleri, complaint counsel seeks to unwind it based on speculation that Illumina may (theoretically) disadvantage putative rival tests many years in the future if and when they launch," the brief said.

Grail makes multicancer early detection tests that screen for multiple types of cancer at very early stages using Illumina's DNA sequencing technology. Enforcers contend that Illumina's \$8 billion reacquisition of Grail, which it founded and later spun off as a stand-alone company, will allow it to hinder potential rival cancer tests.

The companies finalized the transaction in August 2021 despite the pending FTC challenge and an ongoing review by European enforcers, prompting the European Commission to impose interim measures requiring Illumina and Grail to keep their operations separate or risk fines while that merger review continues.

The European Commission later moved to unwind the deal after concluding that it would hinder competition in the emerging market for blood-based early cancer detection tests in that jurisdiction.

FTC staffers are appealing to the full commission for review after Judge Chappell issued an initial decision in September finding that there was a lack of evidence showing that Grail has any actual rivals and that potential future rivals would be far behind.

Judge Chappell oversaw a six-week in-house trial last year, followed by closing arguments in June where he questioned whether getting the case wrong could cost lives.

The companies have insisted that the tie-up is the best way to accelerate widespread adoption of Grail's

test, the only test of its kind currently on the market. To help assuage concerns about its ability to hinder potential Grail rivals, Illumina said it also made an "open offer," a binding 12-year supply commitment, that guarantees to its current sequencing customers the same access to Illumina's sequencing products that Grail has at the same or lower prices that the customer paid before the transaction.

Illumina's answering brief for the appeal argued that the judge was right to find that it had no incentive to block future Grail competitors, contending that Illumina benefits when third parties develop products that use its sequencing platform. The brief also said Illumina's executives testified at trial that the majority of the company's revenue over the next decade is expected to come from sequencing services and that it does not yet profit from Grail.

"This finding further underscores that [opposing counsel's] theory makes no economic sense: Illumina cannot rely on losses from an unprofitable downstream business to make up losses from alleged foreclosure upstream," the brief said.

The brief also contended that the open offer ensures that Illumina's sequencing customers will have access to the same products and prices they did before the transaction. It also criticized the market staked out by FTC staffers, arguing that the judge was right to conclude that Grail has no substitutes.

Illumina also repeated arguments from its post-trial brief that the FTC's administrative process was unconstitutional.

These include contentions that the agency wasn't given clear direction from Congress about which cases to bring through its in-house proceedings rather than federal court. The company also argued that the FTC's proceedings violate due process rights because the commissioners who vote to bring a case ultimately adjudicate it, as well as equal protection rights because of the difference between the in-house process and the federal courts.

The brief also contends that the FTC's administrative law judges are unconstitutionally protected from removal.

These constitutional arguments are similar to those being made by Axon Enterprise in a lawsuit against the FTC that the U.S. Supreme Court heard oral arguments for on Monday. The justices are considering a question about when Axon should be able to bring its constitutional claims to federal court, either before or after the lengthy administrative process.

A representative for Illumina declined to comment Thursday. Representatives for the FTC did not immediately respond to a request for comment.

The FTC is represented in-house by Susan A. Musser, Stephanie C. Bovee, Peter T. Colwell, Eric D. Edmondson, Paul Frangie, Samuel C. Fulliton, Lauren Gaskin, David Gonen, James Wells Harrell, Matthew Joseph, Wade D. Lippard, Sebastian Lorigo, Dylan P. Naegele, Joseph Neely, Brian O'Dea, Nicolas Stebinger and Nicholas Widnell.

Illumina is represented by Preston Burton of Buckley LLP; Christine A. Varney, David R. Marriott, Sharonmoyee Goswami, Jesse M. Weiss and Michael J. Zaken of Cravath Swaine & Moore LLP; and Karen P. Hewitt and Shireen Matthews of Jones Day.

Grail is represented by Michael G. Egge, Marguerite M. Sullivan, Anna M. Rathbun, David L. Johnson and Alfred C. Pfeiffer of Latham & Watkins LLP.

The FTC case is In the Matter of Illumina Inc. and Grail Inc., docket number 9401, before the Federal Trade Commission.

--Additional reporting by Jimmy Hoover, Piper Hudspeth Blackburn, Bryan Koenig and Lauren Berg. Editing by Karin Roberts.

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