PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro M. Bedoya

In the Matter of **Illumina, Inc.,** **a corporation,** **and** **Grail, Inc.,** **a corporation.**	**DOCKET NO. 9401**

COMPLAINT COUNSEL'S REPLY TO RESPONDENTS' ANSWERING BRIEF

John Newman
Deputy Director

Stephen A. Mohr
Assistant Director

Sarah E. Wohl
Deputy Assistant Director

Jordan S. Andrew
Deputy Assistant Director

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3455
Email: swohl@ftc.gov

Susan A. Musser
Stephanie C. Bovee
Paul Frangie
Samuel 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
Nicholas Widnell

Attorneys

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

PX – Complaint Counsel Exhibit

ID – Initial Decision Page

IDF – Initial Decision Finding

CCAB – Complaint Counsel's Opening Appeal Brief

RAB – Respondents' Answering Brief

CCB – Complaint Counsel's Post-Trial Brief

CCRB – Complaint Counsel's Post-Trial Reply Brief

CCFF – Complaint Counsel's Post-Trial Findings of Fact and Conclusions of Law

CCRFF – Complaint Counsel's Post-Trial Reply Findings of Fact and Conclusions of Law

RB – Respondents' Post-Trial Brief

RRB – Respondents' Post-Trial Reply Brief

Tr. – Citations to Trial Testimony: Witness (Party) Tr. 0000

PRELIMINARY STATEMENT

This case presents exactly the type of vertical acquisition that the Supreme Court has said would "of course" violate the Clayton Act. *Brown Shoe Co. v. United States*, 370 U.S. 294, 328 (1962). Illumina—an upstream monopolist supplier of a critical input for life-saving MCED tests—has acquired Grail, one of multiple companies competing to bring this novel technology to patients (the "Acquisition"). As record evidence shows, the Acquisition transforms Illumina from a supplier of a key input to a competitor, shifting Illumina's incentives from supporting the success of MCED tests generally to ensuring the success of Grail's Galleri test specifically. This fundamental change, coupled with voluminous evidence that Grail and its rivals are currently engaged in vigorous innovation competition (and ultimately will be close commercial substitutes), shows that post-Acquisition Illumina possesses the incentive to exercise its ability to disadvantage Grail's rivals.

In their Answering Brief, Respondents seek to obfuscate this straightforward case. First, Respondents ask the Commission to apply a hyper-technical standard to market definition and competitive effects which effectively disregards legal precedent and the impact of this Acquisition on current innovation competition. The Commission should decline Respondents' invitation to create a safe harbor from Clayton Act enforcement for mergers affecting innovation competition in dynamic markets. Respondents then turn precedent on its head and ask the Commission to require Complaint Counsel to show more than a reasonable probability that foreclosure may occur. The Clayton Act, however, was enacted "to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." *Brown Shoe*, 370 U.S. at 323 n.39 (quoting S. Rep. No. 81-1775, at 4298 (1950)). Respondents' proposed standard not only contravenes the statutory intent of the Clayton Act, but also impermissibly puts the risk of an anticompetitive merger on patients. Further, Respondents ask the Commission to ignore the

consistent testimony of MCED test developers. But it is the MCED test developers that are best positioned to testify about the capabilities and commercialization plans of *their* tests. And each of these witnesses explained: they are developing tests that compete with Galleri, CCRB 23-25; they rely on Illumina's NGS sequencers to research, develop, and commercialize their tests, CCB 67-68, 71-72; CCFF ¶¶ 1053-1200; and post-Acquisition Illumina will have the incentive to exercise its ability—with or without the Open Offer—to hamper their efforts to bring these life-saving tests to American patients. CCRB 176-78.

Respondents also seek to upend the longstanding burden-shifting framework, suggesting that Complaint Counsel must account for *Respondents'* proposed behavioral commitments in its *prima facie* case. Finally, Respondents rely on misstatements and misrepresentations to support their factual contentions. For example, Respondents inflate the differences between Galleri and rival MCED tests in contravention of their own clinical studies and misrepresent Complaint Counsel's statements to manufacture "concessions" that simply did not occur. A clear-eyed view of the record, coupled with an accurate reading of caselaw, illustrates that Complaint Counsel established a reasonable probability that the Acquisition is likely to substantially lessen competition.

STANDARD OF REVIEW

Although Respondents correctly acknowledge that the Commission reviews the ALJ's Initial Decision *de novo*, they incorrectly assert that the Commission must afford it "some deference" on factual findings and witness credibility. RAB 9. Respondents' invented standard contradicts the plain language of Commission Rule 3.54, 16 C.F.R. § 3.54, which allows the Commission to "exercise all the powers which it could have exercised if it had made the initial decision" and "adopt, modify, or set aside the findings, conclusions, and rule or order contained in

the initial decision."[1] These powers extend to determinations of witness credibility. *In re Realcomp II Ltd.*, 2007 WL 6936319 n.11 (F.T.C. Oct. 30, 2009) ("Consistently, the Supreme Court has confirmed that . . . an agency has plenary authority to reverse ALJ decisions on factual as well as legal issues, including factual findings 'based on the demeanor of a witness.'"). Particularly where the ALJ's credibility determinations are dubious—such as where the ALJ credited the self-serving testimony of Respondents' executives over extensive ordinary course documents—the Commission can (and should) correct these errors, as explained fully in Complaint Counsel's Opening Brief. CAB 36-39; *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395-96 (1948) (explaining that self-serving testimony is entitled to "little weight," where ordinary course documents directly contradict it).

ARGUMENT

I. Complaint Counsel Made a Fact-Specific Showing That the Acquisition Has a Reasonable Probability of Substantially Lessening Competition

Respondents misstate legal precedent and ignore evidence in arguing that Complaint Counsel has failed to meet its burden. First, Respondents misapply both the *Brown Shoe* and ability and incentive legal frameworks. Second, Respondents ignore key facts and misrepresent others in assessing whether Illumina has a post-Acquisition incentive to foreclose Grail's rivals. Third, Respondents err by disregarding Illumina's past conduct when vertically integrated.

A. Respondents Misstate *Brown Shoe* and Its Progeny

Much of Respondents' critique of Complaint Counsel's showing of competitive harm relies on a misapplication of the Supreme Court's decision in *Brown Shoe*. As a threshold matter, Respondents mistakenly contend that vertical merger challenges "require[] more of the

[1] Respondents only cite a single case for their supposed standard, *In re Trans Union Corp.*, in which the Commission only adopted the ALJ's witness credibility determination after conducting its own review of the record and concluding the witness was "persuasive." 2000 WL 257766, at *38 n.24 (F.T.C. Feb. 10, 2000).

government" than simply establishing the degree of the relevant market at risk of foreclosure. RAB 11. But *Brown Shoe* is clear. When analyzing vertical mergers, courts *first* look at the degree of potential foreclosure, and only if it is below "monopoly proportions" do courts consider other *Brown Shoe* vertical merger factors. CCB 119-22 (assembling cases). Ignoring this, Respondents make the puzzling claim that "[n]o court has adopted CC's *Brown Shoe* interpretation," despite proceeding to cite cases that interpret *Brown Shoe* in this very way. RAB 11 (citing *United States v. American Cyanamid Co.*, 719 F.2d 558, 566 (2d Cir. 1983) and *Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 (2d Cir. 1979)). The matter at hand—in which the only supplier of a critical input to the entire relevant market vertically integrates into that market—is precisely the unique set of facts that the Supreme Court held would "of course" violate the Clayton Act without further analysis. *Brown Shoe*, 370 U.S. at 328.

Moreover, even if the Commission proceeds to analyze the *Brown Shoe* factors, Respondents' application of each factor is flawed. For example, Respondents provide no citation for their argument—made for the first time on appeal—that Complaint Counsel must show "that the Transaction would remove [an] NGS product[] from the market" when analyzing the "likelihood and size of foreclosure" factor. RAB 12. Indeed, well-established caselaw explains that vertical mergers need not withhold complete access to a product to be anticompetitive but can also be anticompetitive by withholding "access on competitive terms." ID 168 (citing *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 673 (S.D.N.Y. 2002)). Respondents' arguments regarding the other *Brown Shoe* factors suffer from similar flaws. A proper application of the *Brown Shoe* factors illustrates that this Acquisition has a reasonable probability of substantially lessening competition. *See* CCB 119-25; CCAB 7-10.

B. Respondents' Application of the Ability and Incentive Framework Applies the Wrong Legal Standard and Misstates Key Facts

Respondents' criticisms of Complaint Counsel's application of the ability and incentive framework similarly rely on an inflated legal standard and a misapplication of record evidence. RAB 14-15.

1. Respondents' Purported Requirement of Actual Evidence of Anticompetitive Effects Lacks Legal Basis

In applying the ability and incentive framework, Respondents argue that "[a]ctual evidence of a probable anticompetitive effect" is required to show a violation of Section 7 of the Clayton Act, RAB 10, in contravention of well-established legal precedent requiring only that the Acquisition have a "reasonable probability" of substantially lessening competition. *See, e.g.*, *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019). One way Complaint Counsel has met its burden of showing that this Acquisition has a "reasonable probability" of substantially lessening competition by showing that Illumina possesses both the post-Acquisition ability and incentive to foreclose or disadvantage MCED test developers. *See* CCB 84-119.

2. Respondents Erroneously Claim That Complaint Counsel Failed To Show an Incentive To Foreclose

Respondents argue that Complaint Counsel failed to prove that post-Acquisition Illumina has the incentive to foreclose Grail's rivals because: (a) Complaint Counsel failed to show diversion from Galleri to rival MCED tests and to produce an "economic model"; (b) Complaint Counsel failed to account for alleged differentiation between Galleri and rival MCED tests; and (c) Illumina will have no incentive to foreclose until MCED tests are commercialized and profitable well into the future.[2] RAB 3, 15-20. Respondents' arguments are based on false and

[2] Respondents also argue that Complaint Counsel has failed to show an ability to foreclose, primarily because it has not considered the Open Offer. As explained *infra* § II, the Open Offer does not negate Illumina's ability to foreclose.

misleading claims, are unsupported by relevant legal precedent, and would create a safe harbor for anticompetitive acquisitions in contravention of the Clayton Act.

a) Respondents' Diversion Claims Are Unsupported by Law and Fact

Respondents' argument that Complaint Counsel failed to establish a *prima facie* case because it did not establish a certain degree of diversion between Galleri and rival MCED tests is legally and factually flawed. First, Respondents incorrectly suggest that Complaint Counsel is required as a matter of law to demonstrate a certain level of diversion under Section 7 of the Clayton Act. RAB 10, 18. Neither case Respondents cite, however, supports their purported standard, as explained in Complaint Counsel's post-trial briefing. CCRB 117-18. Likewise, Respondents' proposed, hyper-technical standard would essentially eliminate enforcement in dynamic, developing industries such as this one, creating a gaping hole in antitrust enforcement at odds with the Clayton Act. *See* CCRB § I.B.1.a; 15 U.S.C. § 18.

Second, Respondents incorrectly dismiss the diversion evidence presented by Complaint Counsel. For example, Respondents counter Complaint Counsel's economic expert's analysis that {[redacted]} PX6090 (Scott Morton Report) ¶ 268 (*in camera*), with the illogical assertion that "[i]f the diversion rates were lower than 100%, any attempt by Illumina to foreclose the identified 'rivals' would be economically irrational, as it would miss the opportunity to sell more NGS products and to expand demand in ways Galleri would not, resulting in a larger downstream pie into which Illumina could sell its profitable NGS products." RAB 18. But even Respondents' experts agree that {[redacted]} *See* RAB 24-25; RX3865 (Carlton Expert Report) ¶¶ 45-46 (*in camera*).

Similarly, Respondents allege that diversion is likely to be small because other MCED tests are "too dissimilar" from Galleri. RAB 15, 18. But Respondents' blanket assertion ignores the significant similarities between the features of Galleri and other MCED tests, *see, infra,* § I.B.2.b, as well as Respondents' own documents that identify other MCED tests as "competitors" or "threats" to Galleri. CCFF 3189-3569. MCED test developers uniformly testified that they view Galleri as their closest competitor—testimony corroborated by their ordinary course documents. {[redacted]} Reviewing this substantial record evidence, Complaint Counsel's economic expert concluded that {[redacted]} PX6090 (Scott Morton Report) ¶ 268.

Finally, Respondents argue that Complaint Counsel failed to meet its burden because it did not present an economic model assessing the competitive effects of the Acquisition. RAB 3, 24. Respondents' sole citation for its proposition actually rejects Respondents' claimed standard as contrary to Supreme Court precedent. *AT&T*, 916 F.3d at 1045-46 (D.C. Cir.) (citing *Ford Motor Co. v. United States*, 405 U.S. 562, 567-69, 578 (1972)); *see also* CCRB 109-11. Moreover, Respondents ignore that the Government has successfully litigated vertical merger cases, yet no court required the type of economic model Respondents seek to mandate here. *See, e.g.*, *Brown Shoe*, 370 U.S. 294; *Ford Motor*, 405 U.S. 562; *U.S. Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970); *In re Union Carbide Corp.*, 59 F.T.C. 614, 1961 WL 65409 (Sept. 25, 1961). Even if such a requirement did exist, Complaint Counsel satisfied it through Dr. Scott Morton's report and testimony, which presented an economic framework assessing the effects of the Acquisition in detail using {[redacted]}

b) Respondents' Differentiation Arguments Rely on False and Misleading Statements

Respondents argue that "Galleri is too different from its purported rivals" to spur an incentive to foreclose because no other MCED test in development competes with Galleri now or will do so in the foreseeable future. RAB 2-3, 15-16. To support this argument, Respondents rely (again) on its executives' exaggerated claim that "Grail has demonstrated that [Galleri] can detect more than 50 types of cancer in asymptomatic patients," and therefore no other MCED test competes with Galleri. RAB 2-3. But simply repeating that Galleri "can detect more than 50 types of cancers" *ad nauseum* does not make it true. Actual objective evidence—based on the admission of Respondents' own expert and on Grail's clinical data—shows that Galleri can test only for *seven* early-stage cancers in asymptomatic patients (the patients targeted by MCED tests)—fewer than the number that Exact's CancerSEEK test detects in an asymptomatic population (eight). CCB 61-62; CCRB 46; CCFF 6206-6394. Putting a comparison of clinical data aside, every MCED test developer provided similar testimony—that their MCED tests are technically capable of detecting a wide range of early-stage cancers in asymptomatic patients and that they intend to commercialize tests that detect a sufficient number of cancers to be competitive with Galleri. CCAB 20-21; CCFF 605-10.

Respondents' claims that only Galleri can "detect cancer signal of origin" ("CSO") suffer from similar evidentiary deficiencies. RAB 3. First, Respondents claim that Galleri's CSO capability is "96% accurate," but the sources Respondents cite do not even mention such a figure. RAB 16. Moreover, Grail's CSO "accuracy" measurement excludes false positives (which, by definition, involve inaccurate CSO predictions) and count predictions as "correct" even when Galleri does not accurately identify the location of the underlying cancer. *See* CCRFF 357, 841.1. Second, Respondents misleadingly claim that "*some* Galleri patients *may* undergo targeted

confirmatory follow-up" after receiving a blood test. RAB 16 (emphases added). But Galleri's own website expressly states that a positive Galleri result "*requires* confirmatory diagnostic evaluation by medically established procedures (e.g. imaging) to confirm cancer." PX0063 at 002 (emphasis added).

Finally, Respondents inaccurately state that "Galleri, unlike any other test in development, has also demonstrated a groundbreaking 99.5% specificity, which results in an extremely low false positive rate." RAB 16. Like Respondents' other exaggerated claims about Galleri, this is misleading because the study on which it is based included patients that had late-stage cancer or were already symptomatic. *See* CCFF 6259. Because the study was not limited to asymptomatic patients, even the study's authors and Grail's executives conceded that this figure is not indicative of how the test will perform in its intended use population. *See* CCRFF 357 (citing RX3409 at 10); CCFF 6259-61.

Respondents' overblown characterization of Galleri's capabilities also ignores the testimony of MCED test developers, who each explain that Galleri is a current competitor and will be a competitor in the future. This testimony—supported by Respondents' own ordinary course documents—is sufficient to establish that the differences between MCED tests that Respondents tout are evidence of vigorous competition rather than indicative of a lack thereof.[3] *See* CCFF 3189-3384.

c) Complaint Counsel Has Shown That Grail Has the Current Incentive To Foreclose Its Rivals

Respondents claim that the ALJ correctly found that Complaint Counsel cannot show a "current or near-term incentive to harm GRAIL's rivals." RAB 19. Complaint Counsel, however,

[3] Complaint Counsel presented voluminous evidence from market participants with real-world knowledge of the market and the tests at issue. Respondents, unable to refute that evidence, baselessly impose an invented requirement that Complaint Counsel call a "medical expert." RAB 16.

presented ample evidence showing that the ALJ's conclusions are mistaken and that this Acquisition gives Illumina the current incentive to foreclose Grail's rivals and stifle both current innovation competition and imminent future commercial competition, as explained in its Opening Brief. CCAB 12-26; CCB 104-119.

After failing to counter Complaint Counsel's evidentiary showing, Respondents proceed to misstate that Complaint Counsel "admit[ted]" during closing arguments that it "failed to prove" that Illumina has a present incentive to suppress innovation competition. RAB 19. This is a blatant mischaracterization. Complaint Counsel answered the ALJ's questions about whether Illumina's 12% ownership of Grail gave it "a 12 percent type of incentive to clog [competition] at this time if they want to clog," and whether acquiring 100% of Grail gave Illumina "88 percent more of an incentive to clog." Tr. 4613. Complaint Counsel responded that Illumina now has significantly more incentive to clog competition, and that there was no evidence "of clogging [Grail's competition during Illumina's] 12 percent ownership prior to this." *Id.* Simply because Illumina did not foreclose Grail's rivals as a minority owner does not mean it lacks the incentive to do so now that it has a 100% ownership interest. Indeed, Illumina's CEO explained how shifting from a majority owner in Grail to a minority owner "leveled the playing field" for Illumina's customers, as Illumina ceased providing Grail with preferential pricing and access to technology. CCFF 47-48. By Illumina's own reasoning, a reversion back to majority ownership will impact the pre-Acquisition level playing field, in part by changing Illumina's incentives vis-à-vis Grail.

Moreover, past anticompetitive conduct is not a requirement for a Clayton Act claim, which is inherently forward looking and was "adopted to arrest anticompetitive effects of market concentration in their incipiency." *Ash Grove Cement*, 577 F.2d at 1378. Indeed, past cases

explicitly rejected requirements to show harm before or during proceedings. *See Union Carbide*, 1961 WL 65409, at *18-19; *Ash Grove Cement*, 577 F.2d at 1378.

C. Respondents Mischaracterize Illumina's Past Conduct

While Complaint Counsel need not show that Illumina has foreclosed Grail's rivals in this market, that does not mean that Illumina's past conduct in *other* markets is wholly irrelevant. Respondents, however, disagree and argue that Illumina's past conduct when vertically integrated has no relevance to or bearing on its possible post-Acquisition actions. RAB 22. But, as detailed in Complaint Counsel's briefings, when vertically integrated, Illumina has assessed its degree of competition with downstream rivals in making business decisions and pursued whatever strategy will maximize Illumina's profits. CCB 99-104, 116-19; CCRB 134-53; CCAB 26-27. And here—when Illumina makes the same assessment in this market as it made in the therapy selection and non-invasive prenatal testing ("NIPT") markets—it will likewise have an incentive to foreclose Grail's rivals. Respondents' argument to the contrary is factually flawed.

First, Respondents argue that Illumina's prior actions toward its therapy selection customers do not offer insight into its likely actions post-Acquisition because "[t]he therapy selection market is thriving."[4] RAB 23. Respondents, however, miss the point. Complaint Counsel showed, through Illumina's *own documents*, that Illumina explicitly took into account {[redacted]} *See* CCFF 3749-4080. While not surprising,

[4] Respondents offer no support for their argument that the therapy selection market is "thriving," aside from testimony from a single Illumina executive. RFF 967. In fact, Illumina's actions hindered and delayed competing therapy selection tests from obtaining necessary FDA approvals. CCB §§ II.E.1.ii.g, II.E.1.b.iii; CCRB § III.F.2; CCFF 3749-4080.

as Illumina acted as any profit-maximizing firm would, this conduct reveals how vertical integration impacts a firm's economic incentives.

Second, Respondents falsely assert that Illumina did not disadvantage its NIPT rivals (who similarly rely on Illumina's NGS) after its vertical acquisition of Verinata, a provider of NIPT services. RAB 23-24. Specifically, Respondents state that post-acquisition "Verinata's share of NIPT sales *decreased* while rival sales *increased*." *Id*. These assertions are based on a highly flawed and misleading economic analysis, which not only omits data from the two years immediately following the acquisition, but also misattributes NIPT tests that Illumina performed *in its own lab* to Illumina's competitors. CCRB 141-43. Correcting for these errors reveals that Illumina's market share increased significantly post-acquisition and the number of independent NIPT competitors decreased. CCRB 140-42. Rather than address these arguments, which have been laid out in Complaint Counsel's briefing, Respondents falsely claim that Complaint Counsel cited only to a single witness, when Complaint Counsel actually cited to 22 of Illumina's own ordinary course documents, in addition to testimony from eight fact witnesses from six different third parties. CCRB 135-44.

II. Respondents' Open Offer Fails To Restore the Competitive Intensity Lost From the Acquisition

Respondents argue that Complaint Counsel failed to account for Respondents' proposed behavioral remedy in its *prima facie* case and that "the Open Offer prevents any possible anticompetitive harms" of the Acquisition. RAB 25. Longstanding caselaw, however, makes clear that behavioral remedies, especially those that are not fully in effect more than a year post-Acquisition, are properly considered in Respondents' rebuttal case. Moreover, the Open Offer cannot restore the competitive intensity lost from the Acquisition.

A. Respondents Bear the Burden of Showing That the Open Offer Will Replace the Acquisition's Competitive Harms

Respondents incorrectly assert that it is Complaint Counsel's burden to account for a proposed remedy in its *prima facie* case. RAB 27. This view contradicts the longstanding burden-shifting framework, which applies to both horizontal and vertical mergers. *See, e.g.*, *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *In re Otto Bock HealthCare N. Am., Inc.*, 2019 WL 5957363, at *11 (F.T.C. Nov. 1, 2019). Under this framework, once the government establishes its *prima facie* case that an acquisition is unlawful, the burden shifts to Respondents to rebut the *prima facie* case. *In re Polypore Int'l, Inc.*, 150 F.T.C. 586, 2010 WL 9549988, at *9 (F.T.C. Nov. 5, 2010); *Baker Hughes*, 908 F.2d at 982. During their rebuttal, Respondents must offer evidence that a proposed remedy (including a proposed behavioral remedy) would replace the competition lost from the Acquisition. *See United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017) ("In rebuttal, a defendant may introduce evidence that a proposed divestiture would 'restore [the] competition' lost by the merger counteracting the anticompetitive effects of the merger.") (emphasis added); *see also FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 56-59 (D.D.C. 2009) (analyzing as part of the merging parties' rebuttal their proposal to revise a licensing agreement to a competitor). There is no reason to break from this precedent here. *See* Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"* 22 (Oct. 2022) [hereinafter "Salop"] ("Behavioral remedies are necessarily part of the parties' rebuttal case. The proposed behavioral remedy amounts to a claim that the remedial restrictions will prevent the merged firm from acting on the anticompetitive incentives created by the merger.").

In their attempt to eschew this longstanding precedent, Respondents choose to classify their Open Offer as an "economic reality" or "real-world fact," rather than as a remedy. RAB 27-28. Specifically, Respondents argue that where "the merger and the fix would become operative

together, and where the fix was advanced at the same time as the complaint," the proposed "fix" should be analyzed as part of the *prima facie* case.[5] RAB 28. But courts analyze such real-world facts as part of the rebuttal case, *not* the government's *prima facie* case. *See United States v. Bertelsmann SE & Co. KGaA*, No. 21-2886-FYP, at *22, 62 (D.D.C. Oct. 31, 2022) ("The second step [of the burden-shifting framework] shifts the burden to the defendants, who must demonstrate in rebuttal that real-world conditions make market concentration alone an unreliable predictor of the merger's anticompetitive effects."); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 312 (D.D.C. 2020) (Defendants may rebut the government's *prima facie* case with any relevant "real-world evidence."). And even if the Commission accepts Respondents' incorrect legal framework, the Open Offer is far from an "economic reality" or "real-world fact" present at the time of the Acquisition. Rather, when the Acquisition was consummated, {[redacted]} CCAB 30 n.13. In other words, the Acquisition and the "fix" did not become operative together. While some MCED test developers signed the Open Offer *after* the Acquisition was consummated, the Open Offer only becomes fully operative if ordered by the Commission or a court, which will now take place, if at all, more than *one year* past consummation of the Acquisition. Adding to this, Respondents *revised* the terms of the Open Offer in the middle of trial, meaning the current Open Offer did not even exist when the Complaint was issued. CCFF 4483. Illumina's ability to unilaterally add or

[5] Respondents cite *Butterworth, Otto Bock*, and *AT&T* for the proposition that "contractual commitments proposed before or shortly after the filing of a complaint are analyzed as part of the government's *prima facie* case." RAB 29. However, the *Butterworth* court makes no mention of the timing of the parties' commitments relative to the complaint, and *Otto Bock* did not involve a behavioral remedy of any sort. *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996); *In re Otto Bock HealthCare N. Am., Inc.*, 2019 WL 5957363 (F.T.C. Nov. 1, 2019). Moreover, as discussed extensively in Complaint Counsel's Opening Brief, *AT&T* is readily distinguishable from the matter at hand. CCAB 31-32.

change terms in the Open Offer amplifies the shifting and uncertain nature of their proposed remedy.

B. The Open Offer Fails To Fully Address the Potential Competitive Harms of the Acquisition

Respondents further argue that the unilateral, non-negotiated terms of the Open Offer "provide[] customers all-encompassing protections against foreclosure." RAB 25. Respondents' argument is not based on any record evidence; rather, they simply regurgitate the Open Offer's self-drafted terms, hoping that repeating them enough will convince adjudicators of its efficacy. RAB 25. Accepting Respondents' argument, however, requires trusting them to act against their incentives and to avoid exploiting the many holes and ambiguities in the Open Offer by interpreting the contract in a way that disadvantages Grail's rivals and benefits itself and its shareholders. But every MCED test developer—who both know the industry and will actually be subject to the Open Offer's terms—testified that the Open Offer does not and cannot offset Illumina's ability and incentive to harm MCED test developers.[6] CCB 168 n.111, 180 n.119; *see also* CCFF 1105, 4335, 4468.

To counter this, Respondents argue that the Open Offer eliminates Illumina's ability and incentive to disadvantage Grail's rivals. RAB 30. In making their argument, Respondents primarily dispute Complaint Counsel's and MCED test developers' interpretations of the Open Offer's terms.[7] *Cf.* RAB 30 (claiming that no test developer "could do anything useful with

[6] Respondents repeatedly assert that Complaint Counsel refused to engage with Illumina on the terms of the Open Offer, but fail to offer any support for these accusations. RAB 25, 29. Both Complaint Counsel and Respondents asked party executives and third parties about the terms of the Open Offer during multi-hour depositions in which Respondents' counsel attended, *see, e.g.*, CCFF 4993-5000. Moreover, Complaint Counsel met and conferred with Respondents multiple times, both when the Open Offer was first proposed and later after it was amended. Respondents' suggestion that they were unaware of the flaws in Illumina's unilateral contract, despite having a front row seat to the plethora of concerns raised by market participants, is disingenuous.

[7] Respondents reduce concerns about the Open Offer to "nit-picky criticisms." RAB 29. Because Illumina seeks to impose its unilaterally drafted terms onto its customers, while also having "inherent incentives to evade the [Open

information about products in development") *with* CCFF 4559 (Dr. Vogelstein testifying that test developers could use information about NGS products in development "to begin developing tests that would be more accurate and, perhaps less expensive, to perform."); *cf.* RAB 31 (stating that "the price per read corresponds to the price per gigabase") *with* CCRB 181 (explaining that, {[redacted]}, "the price per gigabase does not necessarily correlate with the price per read"). Rather than continue to engage in a tit-for-tat battle of whose reading is correct,[8] it is precisely these differing interpretations that expose the fatal flaws of the Open Offer. Because Illumina drafted the Open Offer to cure its own anticompetitive Acquisition, it has "strong economic incentives to seek weak or ineffective remedies" and interpret contractual terms in a way that favors itself over competition. Brief of Proposed *Amici Curiae* The American Antitrust Institute and the Hon. William J. Baer at 7; *see also Bertelsmann*, No. 21-2886-FYP, at *68 (holding that proposed behavioral commitments "would not be profit-maximizing" and are "thus unreliable evidence of future conduct"); Salop 28 ("Behavioral remedies demand that the merged firm engage in conduct that it would prefer to avoid, so it has inherent incentives to evade the requirements."). This is why the Supreme Court has dictated that "all doubts as to the remedy are to be resolved in [the Government's] favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

Offer's] requirements," Salop 28, it is precisely these "nit-picky criticisms" that matter. *See Salop* 17 ("It is well accepted that behavioral remedies are generally less likely to succeed than divestitures because behavioral remedies invariably are unable to cover all the potential conduct of the merging firms and because they are difficult to enforce.").

[8] Respondents continue to misrepresent third-party testimony in support of their arguments. For example, Respondents quote former executive David Daly's testimony that {[redacted]} when Daly testified {[redacted]} And, Respondents once again repeat their claims that Exact's Conroy was unfamiliar with the terms of the Open Offer, despite Conroy's involvement in extensive negotiations directly with Illumina's CEO. CCRB 188-89; CCFF 4358, 4368-97.

Respondents also argue that the Open Offer provides better terms than MCED test developers would receive but for the Acquisition. RAB 26. But comparing the terms or availability of any pre-Acquisition contract to the Open Offer is meaningless. Pre-Acquisition, the incentives of MCED test developers and Illumina were aligned and MCED test developers did not need the protections of any remedy to offset potential competitive harm. Therefore, whether the Open Offer was available pre-Acquisition is irrelevant. Moreover, Respondents' argument is factually flawed: evidence shows that absent the Acquisition, MCED customers likely could have obtained better terms *for their specific businesses* than the Open Offer provides.[9] *See* CCAB 28 n.10. "Conduct remedies substitute central decision making for the free market." U.S. Dep't of Justice, Merger Remedies Manual (2020) § II. Here, evidence shows both that but-for this Acquisition, MCED test developers' need for protection would differ *and* a level, competitive playing field would enhance MCED test developers' ability to get better terms.

III. Respondents Have Failed To Meet Their Burden To Substantiate Efficiencies

Respondents wrongly argue that Complaint Counsel bears the burden of proving the absence of any efficiencies and simply assert that their efficiencies claims are unrebutted. Respondents' purported "legal standard," however, is unmoored by caselaw. Instead, a correct application of precedent shows that Respondents bear the burden to substantiate efficiencies to the extent efficiencies are a valid defense to Section 7 violations—a burden they have failed to meet.

[9] Respondents also repeat their argument that because several customers have already signed the Open Offer, those customers endorse the Open Offer's terms. RAB 27. Respondents fail to even address that these customers testified that they had no choice but to sign the Open Offer, given—as the ALJ found—Illumina is the only NGS option for their tests. IDF 795-805; CCAB 39.

A. Respondents Bear the Burden To Substantiate the Acquisition's Purported Efficiencies

Respondents argue that "[t]o establish its *prima facie* case, CC needed to show not only that the Transaction will likely result in competitive harm, but also that the alleged harm outweighs the Transaction's procompetitive benefits." RAB 33-34, 37. Even in jurisdictions that permit an efficiency defense, caselaw is clear that Respondents bear the burden of producing "clear evidence showing that the merger will result in efficiencies that will *offset* the anticompetitive effects and ultimately benefit consumers." *In re Otto Bock HealthCare N. Am., Inc.*, 2019 WL 2118886, at *50 (F.T.C. May 6, 2019) (Chappell, A.L.J.); *see also FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 175 (3d Cir. 2022). In assessing such efficiency claims, courts have applied strict standards in their review, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011), requiring Respondents to substantiate their efficiency claims "so that it is possible to 'verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.'" *Otto Bock*, 2019 WL 2118886, at *50 (Chappell, A.L.J.) (quoting U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) § 10).

Respondents fail to identify any justification to exempt vertical challenges from such well-established precedent.[10] Indeed, no court has adopted Respondents' position. In *Brown Shoe*, the Supreme Court did not even identify efficiencies as one of the factors to assess in evaluating the

[10] To the extent Respondents also are arguing that a distinction should be made between the elimination of double-marginalization ("EDM") and their other efficiency claims, there is no legal basis to treat EDM differently. Respondents' own economic expert describes EDM as an "efficiency," and no court has held that EDM should be analyzed any differently from other claimed efficiencies. CCB § II.F.2.b.

competitive effects of a vertical merger, and the Third Circuit recently rejected similar arguments in *Hackensack*. 30 F.4th at 172-75; *see also* CCB § II.F.B. Moreover, Respondents' approach is inconsistent with the *Baker Hughes* burden-shifting framework generally, in which it is well established that "where the facts with regard to an issue lie peculiarly in the knowledge of a party that party is best situated to bear the burden of proof." *Smith v. United States*, 568 U.S. 106, 112 (2013) (internal quotations and citations omitted); *accord* Initial Decision, *In re Altria Group, Inc.*, Docket No. 9393, at 5 (F.T.C. Feb. 15, 2022) ("[C]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.") (quoting 16 C.F.R. § 3.43(a)).

B. Respondents Have Failed To Meet Their Burden

Respondents repeatedly assert that their efficiency claims are supported by "unrefuted" and "uncontroverted" evidence. RAB 34, 35. As detailed in Complaint Counsel's Reply Brief, however, Complaint Counsel vigorously contested all of Respondents' claims through documentary and testimonial evidence, including depositions and cross-examinations of Respondents' executives and experts. *See* CCRB § V. For example, Respondents suggest that evidence related to their alleged R&D efficiency was uncontroverted. RAB 34-35. But even a cursory review of the record evidence shows that this claim was refuted through robust examination of Respondents' witnesses. Specifically, Respondents' economic expert and corporate designee on efficiencies conceded that "Illumina [had] not attempted to quantify these [claimed R&D efficiencies]," CCFF 5735, 5727, rendering them meaningless in assessing this Acquisition. *Bertelsmann*, No. 21-2886-FYP, at *77 (precluding unverified efficiencies claims in their entirety). Respondents' economic expert likewise did not attempt to estimate the scale of R&D efficiencies, CCFF 5728, or perform any independent calculation of costs associated with any R&D efficiencies. CCFF 5730. Indeed, Respondents' expert explained that because "it's hard

to make predictions as to exactly what R&D efficiencies would result," CCFF 5729, he did not attempt to assign a specific probability to the likelihood that new health products will be identified through the claimed R&D efficiencies, CCFF 5731, or attempt to identify what specific products may result from the claimed R&D efficiencies. CCFF 5732. Complaint Counsel similarly rebutted all of Respondents' other efficiency claims at trial. *See* CCRB § V.

IV. The ALJ's Findings on Relevant and Related Product Should Be Affirmed

Respondents failed to file *any* Notice of Appeal, as required by the FTC Rules of Practice. *See* 16 C.F.R., § 3.52(b)(1). Rather, Respondents attempt a workaround, asking this Commission to affirm parts of the Initial Decision but to reverse others for the first time in its Answering Brief. By failing to follow the procedures of this Commission, Respondents have waived their right to appeal the ALJ's decision on the relevant product market or related product.

Moreover, Respondents' arguments on the relevant and related products also fail substantively. First, as explained in detail in Complaint Counsel's briefing, the market for the research, development, and commercialization of MCED tests, which the ALJ supported, is not, as Respondents claim, "impermissibly speculative." *See* CCAB 6; CCB 49-63; CCRB 11-21. Respondents argue that to define a market, products within the market cannot be "in development" and instead must either be for sale currently or imminently. RAB 39. This contention, however, is contradicted by well-established precedent and would negate enforcement in a developing market such as this one, reading a safe harbor into the Clayton Act that does not exist. *See* 15 U.S.C. § 18 (prohibiting acquisitions of companies "engaged in commerce or in any activity affecting commerce"); CCRB 22-33. Second, contrary to Respondents' uncited claims, there is no legal requirement to define a related product market. Finally, even if proof of a related product market were required, the ALJ found that Illumina's NGS instruments and consumables are

"necessary for MCED tests and that there are presently no viable alternatives to Illumina NGS for MCED test development." ID 153, n.40.

V. Respondents' Constitutional Objections Lack Merit

Respondents present a potpourri of constitutional objections to this proceeding, RAB 41-44, all of which are either inapplicable or have been rejected in analogous circumstances.

A. Respondents' Article I and Seventh Amendment Challenges Are Procedurally Barred and Substantively Invalid

Respondents argue in their Answering Brief that the FTC's statutory scheme violates Article I and the Seventh Amendment of the Constitution. RAB 41-42; 44. Respondents waived these defenses by failing to plead them in their amended answer or to argue them in their pre-trial and initial post-trial briefs. Regardless, the defenses would fail.

In the first instance, a Commission decision whether to pursue an enforcement action in federal court or in Part III constitutes a "forum choice" that is a classic exercise of prosecutorial discretion, which is an executive function and not a legislative one and therefore does not implicate Article I. *See Hill v. SEC*, 114 F. Supp. 3d 1297, 1313 (N.D. Ga. 2015), *vacated on other grounds*, 825 F.3d 1236 (11th Cir. 2016). Moreover, even if the FTC's decision to proceed in its Part III forum is considered a legislative function, Congress provided sufficient guidance by instructing the FTC to seek Part III proceedings when it "would be to the interest of the public." 15 U.S.C. § 45(b); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require).

Respondents' argument that they would be denied their constitutional "right to a jury trial on the issue of disgorgement" similarly fails. RAB 44. Respondents gloss over their own cited Supreme Court cases for this point. *Granfinanciera, S.A. v. Nordberg* explicitly allows the

Government to adjudicate civil claims in administrative proceedings without a jury trial (i.e., "public rights"), even claims that would otherwise violate the Seventh Amendment if they were "[w]holly private . . . cases" that solely involved "private rights" or "the liability of one individual to another under the law." 492 U.S. 33, 51-54, 51 n.8 (1989) (quoting *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450, 458 (1977); *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

B. Respondents' Other Constitutional Challenges Are Either Inapplicable or Have Been Rejected in Analogous Circumstances

Respondents argue that the ALJ—whose initial decision they largely endorse—is unconstitutional because the ALJ's removal procedures violate Article II and the Due Process Clause. RAB 42-43. As explained previously, these arguments have already been rejected repeatedly by the Commission. CCRB 242-52.

Respondents argue, vaguely, that "parties to a merger challenged by the FTC are treated very differently from the parties to a merger challenged by DOJ," thus the FTC's adjudicative process violates the Equal Protection Clause of the Fifth Amendment. RAB 43-44. As explained in Complaint Counsel's post-trial briefing, Respondents have failed to provide any outcome-determinative differences between federal court litigation and the FTC's administrative adjudication. CCRB 249-52.

CONCLUSION

For the foregoing reasons, as well as the reasons provided in its Opening Brief, Complaint Counsel respectfully requests the Commission reverse the Initial Decision and issue the Proposed Order.

Dated: November 10, 2022

Respectfully submitted,

s/ Susan A. Musser
Susan A. Musser

Jordan S. Andrew
Wade D. Lippard
Stephen A. Mohr
Sarah E. Wohl
Dylan P. Naegele

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

David Marriott
Christine A. Varney
Sharonmoyee Goswami
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1140
dmarriott@cravath.com
cvarney@cravath.com
sgoswami@cravath.com

Counsel for Illumina, Inc.

Al Pfieffer
Michael G. Egge
Marguerite M. Sullivan
Anna M. Rathbun
Latham & Watkins LLP
555 Eleventh Street, NW
Washington, DC 20004
(202) 637-2285
al.pfeiffer@lw.com
michael.egge@lw.com
marguerite.sullivan@lw.com
anna.rathbun@lw.com

Counsel for GRAIL, Inc.

By: *s/ Susan A. Musser*
Susan A. Musser

Counsel Supporting the Complaint