1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 OFFICE OF ADMINISTRATIVE LAW JUDGES
4
5 In the Matter of:)
6 ILLUMINA, INC.,)
7 a corporation,) Docket No.
8 and) 9104
9 GRAIL, INC.,)
10 a corporation,)
11 Respondents.)
12 --------------------------------)
13
14 Virtual Proceeding Via Zoom
15 December 13, 2022
16 1:00 p.m.
17 Oral Argument
18
19 BEFORE THE HONORABLE COMMISSION:
20 LINA M. KHAN, CHAIR
21 CHRISTINE S. WILSON, COMMISSIONER
22 REBECCA KELLY SLAUGHTER, COMMISSIONER
23 ALVARO BEDOYA, COMMISSIONER
24
25 Reported by: Sally Jo Quade, RPR, Court Reporter

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1 P R O C E E D I N G S
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3 MS. TABOR: Oyez, oyez, oyez. All persons having
4 business before the Federal Trade Commission are
5 admonished to draw near and give their attention. God
6 save the United States and this Honorable Commission.
7 CHAIR KHAN: Good afternoon, everyone. The
8 Commission is meeting today in open session to hear oral
9 argument in the matter of Illumina, Inc. and GRAIL,
10 Inc., Docket Number 9401, on complaint counsel's appeal
11 of the initial decision.
12 Counsel supporting the complaint is represented
13 by Ms. Susan Musser and the respondent is represented by
14 Mr. David Marriott and Ms. Shannon Goswami.
15 Each side will have 45 minutes to present their
16 arguments. Counsel supporting the complaint will make
17 the first presentation and may reserve time for
18 rebuttal. Counsel for the respondent will then make its
19 presentation. Neither side has requested to set aside
20 time for discussing confidential information, but
21 nevertheless, the Commission voted to close portions of
22 this meeting as needed to discuss such information
23 pursuant to 5 USC 552(B), (C), (4) and (10). If
24 necessary, each side is permitted to reserve up to 20
25 minutes of their total presentation time for discussion

1 of confidential information. You should each ensure
2 that any discussion of confidential information occurs
3 at the end of your presentation. When you are ready to
4 discuss confidential information, please let us know so
5 we can go into confidential session. During that time,
6 the argument will not be webcast to the public and we
7 will resume the webcast once any confidential
8 information has ended.
9 Ms. Musser, would you like to reserve any time
10 for rebuttal?
11 MS. MUSSER: Yes, Chair Khan, I would like to
12 reserve 15 minutes.
13 CHAIR KHAN: Great. We have noted that, and when
14 you are ready, you may begin.
15 MS. MUSSER: Good afternoon, Commissioners. This
16 is Susan Musser for complaint counsel. I am joined
17 today at counsel table by Steve Mohr, Jordan Andrew and
18 Sara Wohl. Devin Allen will be running the slides for
19 me today.
20 In 1950, Congress amended the Clayton Act to
21 explicitly extend the vertical mergers that deprive
22 rivals of a fair opportunity to compete. Over the
23 ensuing 60 years, courts have developed two main ways to
24 assess whether an acquisition poses just such a risk.
25 The ability and incentive framework as applied by AT&T

1 and the Brown Shoe framework. The market realities here
2 in this case show that this is not a close call under
3 either framework. Specifically, the initial decision
4 recognizes four key facts that when taken together with
5 the rest of the record evidence and applied in the
6 proper legal framework are sufficient to meet complaint
7 counsel's initial burden.
8 Namely that first MCED, or multicancer early
9 detection tests, have no functional alternatives to
10 Illumina in order to run their test. Second, that MCEDs
11 are completely dependent upon Illumina for every facet
12 of their business. Simply put, these tests cannot be
13 run without Illumina's sequencers or consumables.
14 Third, that there is current and robust
15 innovation competition happening today between GRAIL and
16 its competitors. And fourth, there are billions of
17 dollars of incentives at stake here.
18 Collectively, these facts show that this is no
19 ordinary vertical merger, and instead, this case
20 presents clear anticompetitive tendencies that are
21 precisely the type of harms Congress sought to arrest in
22 their incipiency by extending Section 7 of the Clayton
23 Act to vertical mergers.
24 First, let me highlight key facts -- yes,
25 Commissioner Wilson?

1 COMMISSIONER WILSON: Thank you, counsel. The
2 ALJ did not address possible entry into the NGS market,
3 but you mentioned Illumina is the only choice.
4 Respondents' expert, Professor Willig, may he rest in
5 peace, identified several likely entrants into NGS
6 sequencing, and I don't believe these names are
7 confidential, Ultima Genomics, Singular Genomics, La
8 Roche, Omniome and Element Biosciences.
9 Can you tell me why we should not consider these
10 possible potential entrants as eroding Illumina's
11 monopoly position in NGS?
12 MS. MUSSER: For these entrants to offset the
13 harm here, they must do so in a manner that is timely,
14 likely and sufficient. And these potential upstream
15 entrants simply do not have -- fail for one of many of
16 those reasons. I want to be careful here to not
17 disclose any in camera information, but if you look at
18 complaint counsel's findings of fact, you will see that
19 either entry is not likely for these tests, meaning that
20 there is no evidence in the record to show that they
21 will enter in time to constrain the harm that is going
22 to happen from this transaction.
23 Second, many of these tests lack key
24 commercialization and technical features that are
25 necessary for these MCED tests to run their test

1 effectively. If you look at the record evidence, these
2 MCEDs need something very specific. These are highly
3 complicated tests that need to be run with precision,
4 meaning they need a high throughput, they need high
5 accuracy, and they need cost effectiveness, and finally,
6 they need dependability. So these MCEDs need to know
7 not that there is a possibility that they may work some
8 day, but that they are sufficient to meet their
9 commercialization needs. And there is no evidence in
10 the record that any single one of these is sufficient to
11 meet the needs of these MCED tests.
12 I also want to highlight the evidence from BGI.
13 As this Commission took judicial notice, the
14 reputational constraints and the privacy concerns of
15 that potential upstream entrant alone, are, again,
16 another reason and another way that this possible entry
17 cannot offset the harm here.
18 Taking a step back from that, I think it's also
19 important to understand the switching costs. So even if
20 theoretically an upstream NGS entrant could enter in
21 two, five, ten years, which there is no evidence in the
22 record that such an entry could occur, it costs a lot of
23 money to switch these tests to be run on a particular
24 sequence. We've heard in the record that these tests
25 are designed to work like a lock and a key and would

1 need to start over in order to be even passable with
2 these tests.
3 COMMISSIONER WILSON: Counsel, Illumina presents
4 more sophisticated platforms, presumably there would be
5 switching costs as MCEDs move from one to the next
6 advanced platform even within Illumina, so what is the
7 incremental cost of switching away to a different NGS
8 provider, assuming that one were to come to market?
9 MS. MUSSER: So there's evidence in the record
10 that switching from Illumina sequencer to Illumina
11 sequencer won't require nearly as much redevelopment,
12 which kind of makes sense. If you're switching or
13 upgrading a MacBook or something that's going to require
14 a lot less technical adaptation than, say, switching
15 from a MacBook to a PC.
16 There's also evidence in the record that explains
17 that Illumina will have and has in the past offered
18 particular discounts or tools in order to offset any
19 costs of entry. So the costs of entry -- of switching
20 between Illumina sequencers is not nearly as high as the
21 cost of switching to whole other sequencers, but
22 regardless of the comparative costs, the record evidence
23 shows or has failed to show that there are any possible
24 upstream entrants that are even likely to meet the
25 technical or commercial capabilities such that this

1 theoretical problem is even something the market has to
2 consider.
3 COMMISSIONER WILSON: Thank you, counsel.
4 MS. MUSSER: So first, let me highlight a few key
5 facts about how complaint counsel has met its initial
6 burden under the ability and incentive framework.
7 Taking ability first. The unusual decision recognized
8 that the merged firm will have the ability to foreclose
9 post-merger as each and every MCED witness testified
10 during the administrative hearing.
11 For example, Mike Nolan, Freenome, one of GRAIL's
12 rivals, chief executive officer testified, "We just
13 don't have -- we don't see a suitable substitute to meet
14 our highest-level requirements." Dr. Darya Chudova,
15 Guardant, another rival senior vice president of
16 technology also explained that "Illumina sequencers are
17 the only game in town."
18 Simply put, MCED tested offers have no functional
19 substitutes now or in the near future for the reasons I
20 just mentioned in response to Commissioner Wilson's
21 questions.
22 And MCEDs need Illumina sequencers. Every single
23 one of GRAIL's rival MCED test developers explained that
24 they are completely dependent upon Illumina NGS
25 sequencers during research, development and

1 commercialization. Bill Getty explained, it relies on
2 Illumina for technical support, for supplies, as well as
3 access to technology.
4 And it's helpful here to take a step back,
5 Commissioners. MCEDs are a lab test. They take blood
6 and perform a sophisticated DNA analysis on that blood.
7 To do that, they have to use the DNA sequencer. That's
8 how these tests work. They cannot be run without a
9 sequencer. And Illumina and MCEDs are designed to run
10 on Illumina's sequencer in particular, like a key is
11 designed to work with a particular lock.
12 As such, no matter what Illumina does with regard
13 to pricing, supplies or support, GRAIL's rivals have
14 simply no functional alternatives. And, if Illumina
15 were to disadvantage them, GRAIL's rivals must simply
16 take the punch and the consequences that come with it or
17 get out of the ring.
18 As Mr. Getty testified, without Illumina's NGS
19 sequencers, it is kneecapped in its ability to run its
20 lab, which would, of course, flow through to ability to
21 compete.
22 COMMISSIONER WILSON: Counsel?
23 MS. MUSSER: Yes?
24 COMMISSIONER WILSON: So let me ask a couple of
25 questions. We're talking about ability and incentive.

1 There is different descriptions of the legal requirement
2 for anticompetitive effects, from disclosure arising
3 from the record complaint counsel has focused on
4 increasing either ability or incentive or both, and
5 respondent claims there must be both ability and
6 incentive plus I think something else.
7 What are the three cases, the three strongest
8 cases that you would point me to to illustrate your
9 description of the legal standard?
10 MS. MUSSER: I would point you to Brown Shoe.
11 Brown Shoe is a case from the Supreme Court that, of
12 course, we're all very familiar with. It is routinely
13 cited in antitrust decisions. That lays out one of the
14 frameworks that complaint counsel is relying on.
15 I would also point the Court to the PolyCore
16 case, which talks about the importance of the incipiency
17 standard and how the Clayton Act is designed to stop
18 these anticompetitive harms in their incipiency. And
19 finally, I would point you to the analysis -- pardon me,
20 the analysis in AT&T, which applied the ability and
21 incentive framework that we have used throughout the
22 course of our briefing.
23 COMMISSIONER WILSON: Thank you. And when we are
24 talking about foreclosure in anticompetitive effects,
25 obviously the open offer looms large in the discussions

1 in the trial before the ALJ and in the briefings.
2 Counsel has argued -- complaint counsel has argued that
3 Illumina's current 100 percent market share of the NGS
4 market provides the merged firm with the ability to
5 foreclose the market. Let's stipulate that the open
6 offer may not perfectly eliminate foreclosure.
7 To what extent does the open offer ameliorate the
8 ability of Illumina to foreclose downstream competitors
9 in some way? Could you perhaps gauge that for me on a
10 scale of zero to 100?
11 MS. MUSSER: I think it's helpful to look at what
12 the open offer needs to do under the case law, and under
13 the case law as this Court has analyzed in Otto Bock and
14 as the United States v. Aetna court analyzed, it needs
15 to offset the harm. So respectfully, ameliorating the
16 harm or alleviating the harm isn't the relevant
17 standard; however, in this case, any ability given the
18 utter dependency cannot substantially -- cannot offset
19 the substantial -- the reasonable probability of
20 lessening competition.
21 If there is any way that the open offer here
22 cannot completely eliminate the ability in this case
23 given the utter dependency of MCEDs on Illumina's
24 sequencers and how any ability to delay, to stall, to
25 provide an inferior product, stems that relationship to

1 its ability to compete, here what the evidence shows is
2 that even if it can offset some mechanisms for harm, it
3 cannot show that complaint counsel has not shown a
4 reasonable probability of substantially lessening
5 competition.
6 COMMISSIONER WILSON: So complaint counsel has
7 argued there are extensive holes in the open offer.
8 What do you see as the largest holes?
9 MS. MUSSER: I think the largest hole is the
10 flexibility. There has been a lot of briefing and a lot
11 of back and forth in this case, Commissioner Wilson, and
12 I think that here what we have seen throughout that
13 briefing is that complaint counsel and respondents argue
14 about how the open offer should be interpreted, which
15 holistically proves the point that here there is
16 incredible disagreement on what these terms even mean,
17 which is going to lead to enforceability problems as
18 well as problems in how this is implemented in a way to
19 protect MCEDs.
20 I think a big hole is the pricing provision.
21 Here, while this sets a price floor, as Illumina has
22 admitted extensively in its briefing, it projects the
23 price of sequencers to be going down, down, down, and
24 there's no evidence that they wouldn't decrease further
25 absent a hard official price floor.

1 Second, as Dr. Darya Chudova explained, there is
2 dispute in the record about whether or not the way that
3 the pricing provisions operate in the open offer is even
4 meaningful. Whether or not it should be priced per read
5 versus priced per gigabyte. So that's a concrete
6 example of one of many holes in the open offer.
7 COMMISSIONER WILSON: Thank you, counsel.
8 CHAIR KHAN: I appreciate your clarifying that in
9 your view having an open offer that is ameliorating the
10 harm would not be sufficient, we really need relief that
11 would fully offset or reverse the underlying harm. One
12 of the key issues posed to us is who carries the burden,
13 and where this inquiry fits in within the burden
14 shifting framework.
15 Could you share, you know, one way that we have
16 traditionally looked at these types of proposals is in
17 the remedy stage, respondents here suggest that we
18 should instead consider it as part of the prima facia
19 case. Can you share more as to whether you think that
20 intrinsically considering it as part of the prima facia
21 case opens the door to accepting relief that would
22 depart from the tradition of only accepting remedies
23 that are fully reversing or offsetting the harm as
24 opposed to accepting ones that would just ameliorate it?
25 MS. MUSSER: In either circumstance, either under

1 as part of the respondents' prima facia case, or pardon,
2 complaint counsel's prima facia case or respondents's
3 rebuttal case, it needs to offset the harm. However,
4 the better course of both policy and law that this
5 burden be shifted to respondents, I'm happy to explain
6 that further, Commissioner Khan, if you would like.
7 CHAIR KHAN: That's sufficient. Thank you. One
8 more question. I appreciated you at the beginning
9 noting that there are two kind of primary governing
10 frameworks here, we have Brown Shoe and we have
11 incentive and ability. Could you share more as to how
12 you see those interrelate or intersect. Some have
13 suggested that some of the Brown Shoe factors are, in
14 fact, a proxy for incentive and ability, some suggest
15 these are entirely separate inquiries. It would be
16 helpful to hear how you see these two frameworks
17 intersect or not.
18 MS. MUSSER: These are two separate frameworks.
19 Either one leads to the same result in this case that
20 complaint counsel has met its prima facia showing of a
21 substantially lessening of competition.
22 That being said, there is overlap to the extent
23 that ability and incentive are assessed in the Brown
24 Shoe framework. So if you look at the Brown Shoe
25 factors, they look at the ability to foreclose. That

1 ability to foreclose a share of the market is another
2 way of looking at ability under the ability and
3 incentive framework. Likewise, one of the factors is
4 the nature and purpose of the transaction. Encompassed
5 within that factor is also incentive.
6 So the ability and incentive framework is
7 analyzed in Brown Shoe, where Brown Shoe deviates a bit
8 is there are other factors that can also form part of
9 the analysis.
10 CHAIR KHAN: Okay. Thank you.
11 MS. MUSSER: Touching a little bit on incentive,
12 I want to highlight a few key reasons that in contrast
13 to Judge Chappell's initial decision, that complaint
14 counsel has met its burden to show an incentive to
15 disadvantage GRAIL's rivals. The first is that Illumina
16 is betting the future of its company on this
17 transaction, in that Illumina says that this transaction
18 serves two key functions, to transform them from a
19 clinical tool company to a clinical testing company, as
20 well as to provide a mechanism for participation in a
21 multi-billion dollar market.
22 On your screen is a statement from Francis
23 deSouza, Illumina's CEO, to investors, explaining that
24 this transaction will provide them access to this market
25 opportunity. Taking these two together, Illumina views

1 the future of its company not geared towards winning in
2 the NGS market, but rather in tapping the opportunity of
3 clinical testing markets like the MCED market.
4 Second, GRAIL isn't the only one racing towards
5 this pot of money. Other companies are also developing
6 tests which share key features with Galleri and are, in
7 fact, designed to compete with it and are competing with
8 it today. There are two parts of the record that
9 support this. The first is evidence that shows that
10 these companies are all blood-based tests that look for
11 and identify the location of cancer asymptomatic
12 patients.
13 Evidence also shows that these all have the
14 technical capability for a similar number of cancers as
15 GRAIL and are being developed to compete with GRAIL at
16 commercialization on the number of cancers detected, on
17 the location of those cancers, their sensitivity and
18 specificity.
19 Indeed, evidence in this case shows that Exact,
20 Freenome, Guardant, Singular, Helios, GRAIL, and others,
21 are both current innovation competitors and future
22 commercial competitors.
23 COMMISSIONER WILSON: Counsel?
24 MS. MUSSER: I want to take a moment -- yes,
25 Commissioner Wilson?

1 COMMISSIONER WILSON: So respondents' expert
2 Dennis Carlton claimed a procompetitive benefit of the
3 transaction is that GRAIL will be brought to market
4 sooner and as a consequence lives will be saved in
5 discussing the MCED rivals to GRAIL. Have you sought to
6 assess the cost of foreclosure in terms of lives just to
7 have equivalence with the respondents' expert?
8 In other words, have we gauged the foreclosure
9 impact in terms of the delay that it will cause to the
10 other MCED tests and therefore the cost in lives brought
11 about by the delay of bringing those other tests to
12 market?
13 MS. MUSSER: What GRAIL's MCED competitors have
14 explained, and as detailed in Fiona's report, that
15 delaying these competitors' ability to get to market
16 soon will have a meaningful impact on the ability of
17 this market to save lives. So that is an inherent part
18 of the assessment, and one of the harms that could flow
19 from this competition. So that is something that's been
20 assessed.
21 COMMISSIONER SLAUGHTER: Counsel, can I just ask,
22 I thought Commissioner Wilson asked a very, very good
23 question, do I understand your answer to be that there
24 is a meaningful impact, but it hasn't been or maybe
25 couldn't be quantified?

1 MS. MUSSER: Yes. I think that's right, that
2 while this has certainly been assessed as part of the
3 market characterizations of this test, it hasn't been
4 given a precise number as your question indicates.
5 COMMISSIONER SLAUGHTER: I think it's an
6 important point because part of respondents' advocacy
7 for this deal, not only in the papers in front of the
8 Commission today, but in the press, in an extensive
9 lobbying campaign, has been the only if you care about
10 saving lives, you must let this deal go through. And I
11 think it's important, Commissioner Wilson pointed to an
12 important other side of the argument, which is perhaps
13 one way to think about lives saved is one test to
14 market, but a different way to think about it might be
15 myriad tests to market and robust competition in
16 innovating multiple tests.
17 So I'm wondering if you could expand a little bit
18 on the harm on the side of competition or saving lives
19 in the absence -- or were the transaction to go through.
20 MS. MUSSER: Absolutely, Commissioner Slaughter.
21 So as I was -- I think it's helpful to look at what the
22 competition is that is occurring right now, and what the
23 impact of this foreclosure will be on this current
24 competition. What we see in the record evidence is we
25 see that both GRAIL and its rivals are looking at what

1 these other companies are doing, improving their tests
2 and developing a better product as a result of that.
3 That is in the record evidence.
4 If you look at pages 17 through 19 of our reply
5 brief, we detail all of the evidentiary findings. So
6 not only is -- that is a direct impact, which is there
7 is going to be not only -- the tests that do get to
8 market are not going to be as good because the path as a
9 whole will be moving slower as a result of this test.
10 Moreover, to the extent that some of these
11 competitors cannot make it to market and will never
12 commercialize, that also will have an impact on lives
13 saved. Put simply, it's helpful to think of this as an
14 innovation race, and together with competition, this
15 race moves quicker and gets to the market sooner and
16 with better choices for consumers. And that results
17 both in an impact to lives saved.
18 It's really helpful to think about this perhaps
19 in the context of Covid. Having multiple choices of
20 convenience and multiple competitive options was a
21 benefit to patients overall. If you think about it, for
22 some of us, J&J was a good alternative, while Moderna
23 was a good alternative for others, depending on our
24 needs. Likewise, having multiple choices and multiple
25 MCEDs that reach the market will not only make the tests

1 that do reach the market collectively better, but will
2 provide life-saving alternatives to patients.
3 In assessing innovation incentives, it's helpful
4 to also think about what is the cost of foreclosing.
5 And here the evidence in this case shows that Illumina
6 stands to benefit from any trip, stumble or fall from
7 GRAIL's rivals. First, to the extent that GRAIL's
8 rivals fall out of the race, a reduction in innovation
9 competition puts less pressure and less cost on GRAIL
10 itself to innovate and commercialize.
11 Second, to the extent that commercialization is
12 delayed, stalled or made more difficult, GRAIL's rivals
13 will benefit by entrenching its market share and beating
14 its rivals to full commercialization. Those are the
15 benefits that GRAIL stands to receive by foreclosing its
16 competition. Those will not be offset by any costs.
17 In the first instance, the record evidence shows
18 that Illumina doesn't have to stop supplying GRAIL
19 totally in order to disadvantage its rivals. Instead,
20 Illumina can simply hamper other MCEDs ability to
21 develop and commercialize without losing 100 percent of
22 its sales.
23 But taking a step back, even if it were to lose
24 100 percent of its NGS sales to GRAIL's rivals, that's
25 only 2 percent of its sales, a very, very small fraction

1 of its business.
2 And, finally, and perhaps most persuasively, and
3 as the initial decision recognized, on a test-by-test
4 basis, Illumina projects earning more from the sale of a
5 Galleri test than a sale of a consumable and sequencer
6 to Galleri's rivals, meaning that Illumina stands to
7 make much more profit from the sale of Galleri than a
8 sale to Galleri's rivals.
9 As such, any lost NGS sales are more than
10 compensated by winnings in the MCED market. As the
11 evidence stands, Illumina has much to gain and very
12 little to lose by disadvantaging GRAIL's rivals and
13 giving it an incentive to punch first through whatever
14 means necessary.
15 An analysis of the Brown Shoe framework provide
16 another route of reasonable probability of substantially
17 lessening competition. In the first instance, the
18 Supreme Court made clear that if the shares to market
19 foreclosed is so large that it approaches monopoly
20 proportions, the Clayton Act will, of course, have been
21 violated. Here, Illumina is a sole provider of NGS
22 sequencers, a critical input for the research,
23 development and commercialization of MCED tests. As
24 such, Illumina has the power to foreclose monopoly
25 portions of the MCED market.

1 The initial decision failed to properly consider
2 Illumina's ability to foreclose when assessing complaint
3 counsel's cause under Brown Shoe, but complaint counsel
4 does not just rely on foreclosure alone, but has also
5 shown additional Brown Shoe factors to support a finding
6 that the merger has a reasonable probability of
7 substantially lessening competition.
8 Now, despite complaint counsel's robust showing
9 under both AT&T and Brown Shoe, respondents argue that
10 complaint counsel has failed to meet its prima facia
11 case. While the initial decision's conclusions are
12 flawed for many reasons, as laid out fully in our
13 briefing, I want to highlight three key arguments
14 relating to Illumina's incentives to foreclose.
15 First, the initial decision argues that Galleri
16 is too differentiated from its rivals to be a diversion.
17 This finding is in error. MCED witnesses, those who are
18 best positioned to testify as to their test
19 capabilities, explained that Galleri and its rivals
20 share key features and are developing a test to compete
21 on the very features that respondents argue are
22 different. GRAIL's own documents support this robust
23 finding of current competition and projected future
24 commercial competition.
25 Second, respondents argue that because MCED tests

1 aren't yet for sale, Illumina cannot and does not have a
2 current incentive to foreclose. This argument, however,
3 ignores robust current innovation competition and
4 creates a safe harbor unrecognized by statute or case
5 law exempting developing markets from the reach of the
6 Clayton Act in violation of the incipiency standard laid
7 out in PolyCore.
8 This argument also falsely assumes that
9 respondents must know the precise details of GRAIL's
10 rivals at commercialization in order to have an
11 incentive to foreclose. Not true. Rather, there must
12 only be a sufficient risk of diversion to give rise to
13 foreclosed GRAIL's rivals, and here, GRAIL's ordinary
14 course documents have already identified companies that
15 pose just such a risk to diversion.
16 This argument also ignores evidence of a key
17 GRAIL rival, Exact. GRAIL has identified Exact as its
18 most significant competitor in MCED space. And the
19 record evidence shows that Exact and GRAIL share key
20 features and are on similar development timelines.
21 Third, the initial decision ignores the change in
22 incentives from shifting from a 12 percent owner of
23 GRAIL to 100 percent owner of GRAIL. But this argument
24 is both legally and factually flawed. The Clayton Act
25 is concerned with a lessening of competition, and as the

1 Court explained in United States v. General Dynamics,
2 the proper focus should be on the change resulting from
3 the merger.
4 Commissioners, I find that my time is up. I'm
5 happy to answer any additional questions if you have
6 any, or reserve the rest of my time.
7 CHAIR KHAN: I just have one question. As you
8 noted, the initial decision was quite skeptical as the
9 harm. What do you see as your strongest evidence of the
10 harm and that it would be probable and imminent?
11 MS. MUSSER: The robust evidence of the current
12 competition happening today. There is a slide in the
13 deck that we provided to the Commission in advance that
14 shows that document after document after document of
15 ordinary course testimony supported by those same MCED
16 companies' testimony in this proceeding that explains
17 that they are competing, that that competition matters,
18 and that competition is threatened.
19 CHAIR KHAN: Okay. Thank you, Ms. Musser.
20 We will now go to Mr. Marriott and Ms. Goswami.
21 When you are ready, you can begin.
22 MR. MARRIOTT: Thank you, Madam Chair,
23 Commissioners, we appreciate the opportunity to be heard
24 this afternoon.
25 There are five reasons or sets of reasons,

1 really, why we respectfully submit that the complaint
2 counsel's challenge to this transaction fails. Chief
3 Judge Chappell expressly adopted two of the five,
4 adopted another in part and found it unnecessary to
5 reach the remaining two. And we would like to focus our
6 remarks this afternoon, if we may, on the grounds
7 expressly adopted by Chief Judge Chappell.
8 With your permission, I will begin with the first
9 ground for affirmance, focusing on what we believe are
10 five flaws in complaint counsel's claim that fully
11 reuniting Illumina and GRAIL will harm competition. If
12 time allows, I will touch briefly upon alternative
13 grounds for affirmance, including efficiencies, but not
14 the open offer. Ms. Goswami will address the open offer
15 in our remaining ten or 15 minutes.
16 So before we do that, let me say just a few
17 words, if I may, about who Illumina is and why it seeks
18 to reunite with GRAIL and what from our perspective is
19 at stake in this transaction.
20 Illumina is a leader in NGS sequencing, to be
21 sure. It has not only introduced a series of unmatched
22 innovations, but also it has brought the cost of
23 sequencing the full human genome from $10 million in
24 2007 to less than $700 today.
25 COMMISSIONER WILSON: Counsel, if I may?

1 MR. MARRIOTT: Yes, Commissioner?
2 COMMISSIONER WILSON: So your expert, Professor
3 Carlton, claims that a procompetitive benefit of the
4 transaction is that GRAIL will be brought to market
5 sooner and as a consequence lives will be saved. He
6 accepted an estimate of one year sooner from Illumina's
7 executives. And I'm wondering, can you tell me the best
8 evidence that supports this one-year acceleration for
9 bringing the test to market and obtaining FDA approval?
10 MR. MARRIOTT: It's a great question,
11 Commissioner Wilson, and I think there is, frankly,
12 considerable evidence to that end. And what I would say
13 to the Commission is this: I think everybody in this
14 case agrees that cancer screening can save lives. And
15 you can find that at respondents' findings of fact 1117
16 through 19.
17 Everybody likewise agrees that accelerating the
18 adoption of an MCED test will save even more lives, and
19 you can find that at respondents' findings of fact 1122.
20 The only question, we think, is whether further
21 reuniting Illumina and GRAIL will further accelerate the
22 adoption of this test. And we think the evidence
23 showed, respectfully, that how could it have any other
24 effect?
25 Illumina is the world's foremost leader in NGS

1 sequencing technology, it has deep relationships and
2 credibility with regulators and with payers, and you'll
3 find that at respondents' findings of fact 1131.5 and
4 1131.7.
5 Illumina is a sophisticated global operator of
6 NGS testing at scale. It founded GRAIL. Its brand is
7 synonymous with innovation and low-cost sequencing. And
8 its innovations in NGS sequencing have allowed for the
9 development of entire industries.
10 That's kind of it at a high level, Commissioner,
11 but on top of that, we offered at trial, as you know,
12 collectively, evidence from some 50 plus fact witnesses
13 and experts. Unlike complaint counsel, we had medical
14 experts who testified with respect to what this test can
15 do and what it will mean to accelerate the test and the
16 effect that it will have upon lives and the prospect of
17 being able to save lives.
18 Dr. Cody addressed that, for example. Dr. Abrams
19 addressed that. And a number of fact witnesses, who
20 albeit employees of Illumina and GRAIL, are nonetheless
21 themselves experts, including M.D.s in the field who all
22 expressed that opinion. And I would say --
23 COMMISSIONER WILSON: So, Professor Carlton
24 described in his expert report testimony from Thrive,
25 Guardant and Karius that downstream rivals do not need

1 information and support from Illumina to obtain FDA
2 approval and presumably that was offered as evidence
3 that no foreclosure is likely. And so I'm wondering
4 what kinds of information and support from Illumina do
5 third parties need and what kinds of benefits could they
6 get from Illumina but for Illumina's acquisition of
7 GRAIL.
8 In other words, it seems to me to be a double
9 standard to say the MCED, the other MCED developers
10 don't need anything from Illumina, but, in fact, GRAIL
11 will be able to bring its product to market and obtain
12 FDA approval sooner if it is merged with Illumina.
13 MR. MARRIOTT: Thank you, Commissioner. I don't
14 think it's a double standard. I think Dr. Carlton was
15 talking in the testimony to which you refer really about
16 two different things. There's getting to market with an
17 LDT, a laboratory developed test, which is what GRAIL is
18 to market with, and then there's getting FDA approval
19 ultimately for a test of perhaps a different kind. And
20 I think Dr. Carlton was reviewing -- was speaking to the
21 different types of assistance that may be required for
22 those different types of tests.
23 Illumina has, to be sure, contracts of different
24 varieties and kinds with different customers, pursuant
25 to which it provides different levels of service. And

1 you get that service whether you're an MCED test
2 developer, whether you're not an MCED test developer,
3 and so that kind of service is provided, but it is not
4 in any way necessary for other than simply providing --
5 selling the instruments and selling the consumables for
6 Illumina to work closely with any of its customers for
7 them to be able to develop a downstream test.
8 And I think what, in fact, we've seen on this
9 very record is that the companies who are purportedly in
10 the process of developing rival tests for GRAIL are
11 companies that are developing those tests without any
12 meaningful input from Illumina as to what it is
13 precisely they're doing. And I think several of the
14 developer witnesses themselves expressly testified to
15 that effect on their cross examination and I think some
16 of our experts, including Dr. Cody, for example, also
17 spoke to the same issue.
18 So I hope that, Commissioner, answers your
19 question.
20 COMMISSIONER WILSON: Thank you.
21 CHAIR KHAN: Just one followup on this on the
22 regulatory acceleration point. So one of the pieces of
23 evidence that you all point to is Illumina's three
24 premarket approvals, but I understand that two of those
25 premarket approvals are for lab equipment, which is

1 already Illumina's core competency and don't relate to
2 the MCED test. So help me understand how it is that
3 this transaction would actually help in that regard. It
4 would seem that other partners would be better fits if
5 the goal was really to be able to help in that -- on
6 that dimension.
7 MR. MARRIOTT: Thank you, Madam Chair. Let me
8 say the following: There are a number of different
9 capabilities that come into play in trying to accelerate
10 the development of the Galleri test in a way that gets
11 it widely available so as many people as possible can be
12 screened. It includes experience with private payers.
13 It includes health system partnerships. It includes
14 derisking the reimbursement challenges. It includes
15 value assessment of various methods of development. It
16 includes regulatory experience with PMAs. You mentioned
17 that. Global presence and expertise.
18 And Illumina has in each of those categories what
19 GRAIL simply does not. And, frankly, it has in each of
20 those categories what nobody else on the planet actually
21 has. As the leader in NGS sequencing, it has developed
22 a set of skills and expertise to put it in a unique
23 position in order to assist Galleri in this regard.
24 We are not saying Illumina has a perfect track
25 record in its own regulatory approval process, it does

1 not. I don't think anybody does. But what it has
2 learned through that process is what is necessary and
3 effective in getting a test through this process to get
4 it ultimately approved by the greatest number of people
5 possible.
6 And witness after witness, including an expert in
7 this field, Ms. Deverka, Dr. Deverka spoke to this very
8 issue with effectively unrefuted, unrebutted testimony
9 and cross examination largely didn't touch the relevant
10 issue about whether Illumina had the ability here to do
11 for GRAIL what no other company could do for GRAIL. And
12 we respectfully submit it isn't terribly surprising at
13 the end of the day, Illumina founded GRAIL, after all,
14 and Illumina has always owned at least 12 percent on an
15 undiluted basis of the shares, the outstanding shares of
16 GRAIL.
17 COMMISSIONER BEDOYA: Please go ahead,
18 Commissioner.
19 COMMISSIONER WILSON: Just one quick followup,
20 Commission Bedoya. Counsel, is this the kind of
21 expertise that can be hired? In other words, can GRAIL
22 go out and find regulatory expertise that it could bring
23 in-house to smooth the FDA approval path?
24 MR. MARRIOTT: So, Commissioner Wilson, complaint
25 counsel has argued that it is. Respectfully, we submit

1 it is not. There is no question that one could go hire
2 a consultant in one field or another, right? We're not
3 suggesting that there aren't people out there in the
4 world who don't provide some regulatory assistance that
5 can be hired out. But what's necessary here in order to
6 accelerate the development of this test, the test never
7 before developed in the history so far as we know of
8 human kind, and get it out to the greatest number of
9 people, is not just a consultant here and there, it's
10 somebody who was able to touch upon all of the points
11 where expertise and assistance are required, along all
12 of the regulatory dimensions.
13 And if you look, Commissioners, for example, I
14 won't bother to bring it up, but at slides 44 and 45 of
15 the demonstratives that we present, you'll see those
16 different dimensions and what Illumina has there to
17 offer. There is not a single witness, Commissioner
18 Wilson, who said during the course of this lengthy trial
19 that you could simply go get a consultant to do the kind
20 of thing that will happen here if Illumina and GRAIL are
21 allowed to reunite. It's never been done. No witness
22 said it could ever been done. No fact witness. And no
23 expert said it could ever be done.
24 So respectfully, while you can get consulting
25 expertise and input here and there, the collection of

1 things that this transaction will put Illumina and GRAIL
2 in a position to do is something that we believe can
3 only be done by fully reuniting Illumina and GRAIL.
4 COMMISSIONER BEDOYA: Counsel, I have a
5 background fact question that would be helpful for you
6 to opine on.
7 MR. MARRIOTT: Sure.
8 COMMISSIONER BEDOYA: To what does Illumina
9 attribute its success as a testing platform vis-a-vis
10 the company's -- other companies? Is it the machine
11 learning algorithm? Is it something else? So that's
12 the first background question.
13 And then secondly, is that -- whatever that is,
14 is that protected by patent, and if so, for how long?
15 MR. MARRIOTT: So I mean, there are a lot of
16 things I think, Commission Bedoya, that go into
17 Illumina's success as an NGS provider. The algorithms I
18 think to which you refer are principally an issue with
19 respect to the GRAIL test kind of in the downstream.
20 But for Illumina, the sequencing steps, you know, they
21 involve kind of three principal dimensions. They
22 involve library preparation, where you're taking the
23 strand of DNA and you're preparing it, you're tagging it
24 and you're preparing it to be analyzed. They involve
25 the sequencing itself, right, which occurs on something

1 that this will diminish it, but it looks a little bit
2 like a copy machine, but it's far more complicated than
3 a copy machine. And then there's the data analysis that
4 goes into that.
5 Illumina has developed expertise along each of
6 those three dimensions. Some of that technology is, in
7 fact, covered by patents, and I don't think there's any
8 question about that, but we don't believe those patents
9 are an impediment to significant upstream competition
10 from other providers of NGS technology. And, in fact,
11 the key patents expired in August of 2022.
12 So there are patents in the picture, but those
13 patents certainly, Commissioner, are not impeding
14 companies from developing rival NGS platforms to be used
15 in both end test development and in other diagnostics.
16 COMMISSIONER BEDOYA: And do any patents remain,
17 other patents you've referenced in answering my
18 question, do any of them remain valid past 2034, or no?
19 MR. MARRIOTT: Well, I'm afraid I don't know,
20 Commissioner, that the record addresses that, except I
21 don't believe -- let me put it this way, I don't believe
22 there's anything in this record that suggests that
23 Illumina has a patent that is valid beyond 2030 that
24 would preclude entry into this market by a rival -- by a
25 rival developer of NGS technology.

1 COMMISSIONER BEDOYA: Thank you. And thank you
2 for the clarification on the algorithm. You're right.
3 Thank you. That's it.
4 MR. MARRIOTT: You're very welcome.
5 If I may, what I would say is this: There are,
6 in our view, five principal reasons why Chief Judge
7 Chappell was correct in his conclusion that this case
8 should be dismissed. As I said, he only addressed two
9 in particular. I want to focus attention, if I may, on
10 five reasons why we think he got it exactly right when
11 he said that this is not a transaction which will
12 substantially lessen competition, and then as I said,
13 I'll touch on some other alternative grounds if time
14 allows, and Ms. Goswami will talk about the open offer.
15 With respect to substantially lessening
16 competition, the overwhelming evidence, we believe,
17 supports the conclusion that foreclosing GRAIL's rivals
18 as alleged here would be inconsistent with Illumina's
19 past behavior, it would harm Illumina's primary present
20 and expected future business, and it would not benefit
21 Illumina certainly in the way that has been alleged by
22 complaint counsel.
23 Prior to closing this transaction, Illumina owned
24 12 percent of GRAIL and it was entitled to 7 percent of
25 its sales in perpetuity. And under that structure,

1 Commissioners, Illumina made five times more from GRAIL
2 than it would have made from any other test maker. And
3 yet, there is no evidence in this record of any actual
4 foreclosure by Illumina during the entire period of time
5 when Illumina was a 12 percent owner of GRAIL.
6 And to be sure, there is a difference between 12
7 percent and 100 percent, but nonetheless, 12 percent
8 difference, and under a structure in which Illumina
9 would make five times as much from the sale of any other
10 test, and yet not any evidence, none, of any foreclosure
11 by Illumina either as to actual products or as to R&D
12 development I think is a telling fact.
13 Foreclosing GRAIL's rivals here would harm
14 Illumina's primary business. It would do that by
15 reducing NGS sales. It would do it by causing
16 reputational damage. It would do it by discouraging NGS
17 applications on Illumina's systems. And, of course, it
18 would violate the open offer which, again, Ms. Goswami
19 will talk about.
20 COMMISSIONER SLAUGHTER: Counsel, can I interrupt
21 and ask, you started your argument by saying GRAIL's
22 test is really the only one that can come to market.
23 Illumina's acquisition will accelerate its path to
24 market and we should see that benefit as very material
25 and very important.

1 I'm having trouble reconciling that argument with
2 the one that you're making right now, which is that
3 Illumina has the incentive to consider -- to supply
4 other MCED manufacturers and help them develop products
5 and bring them to market.
6 Doesn't that tell us that there are other
7 products that could be coming to market, too, such that
8 we should not only see GRAIL as the viable MCED product
9 that could be available?
10 MR. MARRIOTT: Commissioner Slaughter, we see it
11 I think a little bit differently. To us, foreclosing
12 GRAIL rivals today, if there were rivals today, would
13 simply reduce NGS sales to Illumina. It would be
14 Illumina shooting itself in the foot, it would be
15 Illumina hurting its current customers, and it would
16 discourage development on the NGS platform that is
17 really the mainstay of Illumina's business.
18 Illumina has some 6,600 customers of which the
19 purported rivals of GRAIL are but a relatively small
20 number. And any acts of foreclosure here would not only
21 preclude -- would not only cause Illumina to lose those
22 NGS sales, but it would cause Illumina to lose sales by
23 those customers of non-NGS applications on the platform
24 and would damage the company's reputation, and I think
25 as a result disincent, as some of the experts found,

1 development on the platform of which Illumina derives
2 the principal part of its revenues and profits.
3 The evidence here, the undisputed evidence here,
4 shows that Illumina will not recoup losses from GRAIL
5 before '23. It won't even turn a profit with respect to
6 GRAIL until 2026. And so there just isn't the near-term
7 or even a reasonably distant term incentive to
8 disadvantage and damage its own customers.
9 What's more, foreclosure here would not, contrary
10 to what has been alleged, divert sales to Galleri from
11 other putative rivals of Galleri. And that's because,
12 among other things, Galleri is the only MCED test on the
13 market. There are no current alternatives.
14 And contrary to what has been suggested by
15 complaint counsel, Galleri really is very different, so
16 far as we can tell, from anything that is in
17 development. And whether or not there is an alternative
18 that will emerge is unknown and exactly what it will
19 look like when it emerges is unknown.
20 What we do know is that insofar as we can tell
21 anything about these tests, they are very different from
22 and not at all likely to be, as Chief Judge Chappell
23 expressly found, to be interchangeable with or
24 reasonably substitutable for the Galleri test.
25 COMMISSIONER SLAUGHTER: Can I just ask, why

1 can't -- I'm sorry, Madam Chair.
2 CHAIR KHAN: Go ahead, Commissioner Slaughter.
3 COMMISSIONER SLAUGHTER: Why can't Illumina have
4 it all? Why can't Illumina slow down deployment,
5 development or something short of full disclosure to
6 GRAIL rivals and still reap the benefit of those sales
7 while also preserving a monopoly position for GRAIL in
8 the market? Like why wouldn't that be Illumina's
9 incentive?
10 MR. MARRIOTT: Well, I think, Commissioner, I
11 think we can have it all, but not in the sense of which
12 you mean it. I think we can have it all in the sense
13 that we can build and develop, build out the NGS
14 platform still, so that we incent development of
15 diagnostic tests of all kinds on that platform. I think
16 we can achieve all of the objectives of this
17 transaction, including accelerating -- including a bunch
18 of R&D efficiencies and accelerating the market adoption
19 of the test and therefore saving lives.
20 We think we can do all of that without having to
21 damage or harm our customers. We just don't believe the
22 incentive lies there. And that, frankly, and I don't
23 mean to jump ahead and get to Ms. Goswami's piece, but
24 that's why doing the open offer was so easy because it
25 reflects exactly what Illumina intends to do anyway. We

1 don't think we benefit by foreclosing rivals in this
2 space. What we benefit from is turbocharging, if you
3 will, the downstream market by doing things that cause
4 other people to want to develop their programs, want to
5 develop their diagnostic tests on that platform. Not
6 just MCED tests, but heart tests and Alzheimer's tests
7 and tests of all kind. And a foreclosure strategy is
8 disastrous to trying to build out a platform in a way
9 that really expands and grows markets of all kinds.
10 CHAIR KHAN: And so just to be clear, there would
11 seem to be a tension between you're saying that the
12 incentives line up this way but you also need this open
13 offer in order for customers to believe that, you know,
14 there won't be the types of discrimination that
15 complaint counsel predict, you're saying instead the
16 open offer is necessary -- is just being put on the
17 table despite all the incentives already lining up that
18 way?
19 MR. MARRIOTT: That is correct. We do not, Chair
20 Khan, believe that we "need the open offer." I think
21 Chief Judge Chappell found on two independent grounds
22 that complaint counsel was unable to make out its prima
23 facie case. I understand Chief Judge Chappell to have
24 ruled, and I think correctly, that Illumina here does
25 not have an incentive here to foreclose, and I

1 understand him to further rule that even if you found
2 that Illumina had an incent to do it, he finds that the
3 open offer is sufficient to curtail any ability that
4 Illumina would have, or incentive for that matter, to do
5 so.
6 So I think those things existed, depending on we
7 don't think we need the open offer, if you will, in
8 order to demonstrate that complaint counsel has failed
9 to make out its prima facie case.
10 CHAIR KHAN: And in terms of the adequacy of the
11 open offer, I think one question to my mind separate
12 from that is this really going to fully reverse or
13 offset the harm in the way complaint counsel laid out is
14 the role of arbitration, and in a situation where you
15 have contracts between Illumina and testing companies
16 that are multi-dimensional, that are not just about
17 price, but a variety of other terms and conditions, it
18 just seems like there is a base level of complexity that
19 is not well suited for the type of arbitration model
20 that in other instances may, in fact, be successful.
21 You have generalist arbitrators, you have, you
22 know, these inquiries that are not, in fact, public.
23 Explain to me why we should have confidence that the
24 arbitration component here is actually a recipe for
25 success.

1 MR. MARRIOTT: Chair Khan, let me, if I may say
2 this, I will directly answer your question and then I
3 will -- so as not to fully steal her thunder, will defer
4 to my colleague Ms. Goswami when she comes up, but I
5 think the answer to the question is, and I think it's a
6 little paradoxical in a way because I think what
7 complaint counsel said she thought was the great
8 weakness of the open offer was its flexibility, and I
9 think, in fact, the flexibility, if I understand what
10 complaint counsel meant, is, in fact, one of its great
11 strengths.
12 The open offer is a real-world assessment of what
13 customers want. It was developed by taking into account
14 exactly what they want, exactly what they were asking
15 for in real-world conversations and it was taking into
16 account, frankly, what it is complaint counsel was
17 suggesting they thought they had issues with in the
18 transaction. It endeavors to satisfy customer demands
19 and it does so all while saying that there is an
20 arbitrator, independent third party arbitrator in place
21 who can deal with that complexity and fully empowered
22 beyond ways I think I've seen in any like arrangement to
23 be able to enter and allow any relief necessary to be
24 able to ensure that there is no harm done here, that
25 people are restored, and to the extent there is any

1 shifting of a position to their disadvantage to make
2 sure that is allowed.
3 The arbitrator is expressly instructed to do one
4 thing and that is to arbitrate to reflect that the
5 purpose of the open offer is to allay any concerns with
6 respect to this transaction. And it goes, again,
7 without stealing the thunder.
8 COMMISSIONER BEDOYA: Counsel, I apologize, but I
9 need to interrupt, and maybe this is a question for your
10 colleague. So you said that there would be reputational
11 harm flowing to Illumina from foreclosure, but at least
12 with respect to the four companies that have signed it,
13 I'm reading the open offer, and it is "confidential and
14 binding," and then there's a line on page 9 that says,
15 "Neither party may disclose the existence, content or
16 results of any arbitration without the prior written
17 consent of both parties unless required by law."
18 So how is there a reputational harm if you are
19 gagging the participants to the arbitration regarding
20 alleged foreclosure -- foreclosing conduct?
21 MR. MARRIOTT: Well, I think let me answer it
22 this way and then I'll have my colleague, if I may, say
23 a little bit more, but I don't believe, Commissioner,
24 that anyone is gagging anyone. I think the
25 confidentiality provision is all about ensuring that

1 people's information is protected. The mere fact, I
2 would say --
3 COMMISSIONER BEDOYA: But it's not limited to
4 trade secrets or other confidential information, it's
5 the entire existence of the proceeding is secret, unless
6 required by law. So this isn't an intellectual property
7 or trade secret question, is it?
8 MR. MARRIOTT: Well, I suppose it depends on what
9 comes up in the arbitration, but it isn't necessarily a
10 trade secret.
11 COMMISSIONER BEDOYA: And, in fact, the
12 intellectual property claims cannot be arbitrated by the
13 terms of arbitration.
14 MR. MARRIOTT: That is correct.
15 COMMISSIONER BEDOYA: So then -- sorry, please go
16 ahead.
17 MR. MARRIOTT: Yeah, I mean, what I would say is
18 that while the arbitration is itself something that is
19 to remain confidential, that doesn't preclude somebody
20 who is foreclosed from complaining to the marketplace,
21 as people are not shy about doing in the event that they
22 perceive some form of disadvantage being done, you know,
23 being foisted upon them by Illumina.
24 So the confidentiality clause doesn't prevent
25 customer A from telling customer B that they've been

1 foreclosed. It doesn't prevent customer A from saying
2 that they're hammered in the market because of Illumina.
3 And there's a lot of reputational risk associated with
4 that alone, even if the particulars of the arbitration
5 for which both sides benefit are there to protect what
6 goes on in that arbitration.
7 So it doesn't prevent somebody from, if you will,
8 blowing the whistle and I don't think it gags anybody
9 from saying Illumina is doing bad stuff to me and you
10 should pay attention to this and you shouldn't do
11 business with Illumina.
12 So what I would say, Commissioners, going back to
13 what we think are the kind of five principal flaws in --
14 COMMISSIONER WILSON: I'm sorry, counsel, if I
15 can just jump in again.
16 MR. MARRIOTT: Please.
17 COMMISSIONER WILSON: In Professor Carlton's
18 report, he identifies the reduction in GRAIL's effective
19 royalty rate and gauges the impact of that. He says the
20 total increase in U.S. consumer surplus from 2022 to
21 2030 is $136.9 million, and but I am curious, complaint
22 counsel has stated that before the transaction GRAIL was
23 exploring with Morgan Stanley ways to eliminate the
24 royalty between Illumina and GRAIL, and so I'm wondering
25 if the elimination of the royalty is merger-specific or

1 whether it could be achieved by contract.
2 MR. MARRIOTT: It is, Commissioner Wilson,
3 merger-specific. It is merger-specific because while
4 there was exploration of the kind to which you refer,
5 that exploration entirely utterly failed and that's what
6 the witnesses testified to. GRAIL had explored it and
7 GRAIL had determined that it did not work and that is
8 one of the reasons why GRAIL went along with the
9 proposed transaction.
10 So it was explored, it failed, and as a result, I
11 think that efficiency is highly merger-specific and, in
12 fact, it has actually already been realized because that
13 eliminated -- that royalty has been eliminated. It is
14 not a royalty that is being paid today.
15 COMMISSIONER WILSON: And engaging -- well, in
16 her report, Dr. Fiona Scott Morton assumed that there
17 was a royalty that gets imposed on the other MCED
18 rivals, and can you just give an overview for me of the
19 two or three biggest flaws that you see in Dr. Scott
20 Morton's expert report?
21 MR. MARRIOTT: Well, sure, Commissioner. I
22 think, with respect to Dr. Scott Morton, I believe
23 largely her testimony in this proceeding was sort of
24 beyond the scope of her expertise. I think Chief Judge
25 Chappell expressly found that, if you look at footnote

1 35 of the initial decision.

2 And with respect to efficiencies in particular,

3 Dr. Scott Morton's testimony effectively was that there

4 is in her view no reason why the parties couldn't simply

5 have entered into contracts to achieve much of the same.

6 That is the way I would net it out really across

7 efficiencies. I think that's the testimony she offered

8 with respect to supply chain, and EDM and reduced

9 royalty burden.

10 And I think, in fact, there was no fact testimony

11 to support that at all. There was simply the assertion

12 of an economist who, in our view, with respect, did not

13 take account of what the actual real-world trial facts

14 were. And the fact that --

15 COMMISSIONER SLAUGHTER: I'm sorry, counsel, can

16 you just elaborate on that point? Why should we not

17 take the economic analysis of an economist seriously?

18 MR. MARRIOTT: It's not the economic analysis,

19 Commissioner Slaughter, that shouldn't be taken

20 seriously necessarily, it's the facts that are the

21 predicate and the inputs to it. And Dr. Scott Morton in

22 her analysis simply observed the theoretical possibility

23 that people could have entered into contracts that would

24 eliminate, for example, EDM, or double marginalization

25 of it, or it would eliminate royalty burden. But, in

1 fact, and while it's certainly a theoretical possibility
2 in this case and in any other case, there is not any
3 historical evidence of such a thing ever happening with
4 respect to these companies, and there's not any fact
5 witness who supported the proposition that that was
6 something that was likely or even reasonably possible to
7 occur in this case.
8 So it's the difference between theory on the one
9 hand and then the facts as they were actually adduced in
10 the case on the other.
11 So with that, with respect to the first, we
12 think, principal flaw in Chief Judge Chappell's -- in
13 complaint counsel's case is really Chief Judge
14 Chappell's finding that the transaction will not
15 substantially lessen competition, and complaint
16 counsel --
17 CHAIR KHAN: Counsel, you were going back and
18 forth with Commissioner Wilson on efficiencies, I just
19 want to get a better understanding of your view of how
20 we should be considering this at all, right? So if we
21 determine that the transaction is, in fact,
22 substantially likely to harm competition in MCED tests,
23 are you then offering these efficiencies as an
24 efficiency defense or how are you suggesting that we
25 weigh these against the innovation harms that we might

1 find?

2 MR. MARRIOTT: So, Chair, if you find Chief Judge

3 Chappell got it wrong as to whether or not there will be

4 a substantial lessening of competition, if you find that

5 he got it wrong with respect to the open offer, then we

6 think, respectfully, that there are yet alternative

7 grounds by which and under which Chief Judge Chappell's

8 decision can and will be affirmed.

9 One of those is the efficiencies. We have, we

10 think, adduced considerable evidence of efficiencies

11 along a bunch of different dimensions, and we think

12 those efficiencies easily offset the alleged harm. We

13 don't think there is any harm here that's been

14 substantiated, but we think even if you accept it as

15 substantiated, we believe, respectfully, that it is

16 easily offset by the efficiencies as to which there has

17 been largely unrefuted evidence.

18 And when I say unrefuted, I don't mean that

19 complaint counsel doesn't disagree with us, I mean that

20 the actual evidence adduced at trial demonstrates these

21 efficiencies.

22 CHAIR KHAN: And what precisely gives you such

23 confidence that it was so clearly outweighed? We're

24 talking about the entire trajectory of innovation here

25 potentially, right?

1 MR. MARRIOTT: What gives me such confidence is
2 the following, Madam Chair: The evidence here
3 demonstrated, and I've alluded to it here a few minutes
4 ago, is that everybody agrees that MCED tests can save
5 lives. The undisputed evidence here was that the
6 acceleration of this test by a year has the potential to
7 save some 10,000 lives in the United States alone, and
8 18,000 to 25,000 lives worldwide.
9 And the evidence from the fact witnesses and from
10 the expert witnesses demonstrated that reuniting these
11 two companies will accelerate the adoption of that test
12 and by accelerating the adoption of the test will result
13 in lives saved. We could put numbers upon that. I
14 don't think that's the ideal way to think about saving
15 10,000 lives, but we can put numbers on that and those
16 numbers then are in excess of some 35 billion a year.
17 By contrast, there is absolutely no evidence, we
18 submit, presented by complaint counsel, of any harm
19 either to the current market, in which only Galleri is
20 the -- Galleri is the only test available, or to the --
21 or to the so-called R&D market. The harm hypothesized
22 by complaint counsel is that somehow there being damage
23 done to research and development, but you heard --
24 CHAIR KHAN: And just to be clear, you're
25 offering the efficiencies as then a defense. Is that

1 right?

2 MR. MARRIOTT: Well, I absolutely think they're a

3 defense in the event the Commission rejects the two

4 reasons on which Chief Judge Chappell opined and ruled.

5 CHAIR KHAN: And what do you see as the strongest

6 case suggesting that even if we find harm to competition

7 that we should be considering efficiencies defense here?

8 MR. MARRIOTT: Because the acceleration of this

9 test will save 10,000 lives.

10 CHAIR KHAN: As a matter of case law, what do you

11 see as the strongest case law?

12 MR. MARRIOTT: In support of the idea that the

13 efficiencies should be considered by the Commission?

14 CHAIR KHAN: If we find that there would be harm

15 to competition, that then efficiency is appropriate for

16 us to consider efficiencies as a defense here.

17 MR. MARRIOTT: I think that, you know, any number

18 of cases demonstrate that the -- that the efficiencies

19 are to be part of the calculus. AT&T comes to mind

20 as --

21 CHAIR KHAN: There's a difference between part of

22 the calculus and a defense, right?

23 MR. MARRIOTT: There is, I suppose, a difference

24 between the two. Yes.

25 CHAIR KHAN: And so you're saying you're

1 comfortable with either or there's one you're advocating
2 but not the other?
3 MR. MARRIOTT: When you say one or the other,
4 Commissioner, I'm not sure I understand the question.
5 CHAIR KHAN: You're saying it's part of any
6 initial analysis or if the Commission comes out in
7 finding that on net there is harm to competition, then
8 there is an opportunity for you all to say, yes, but
9 here are all these efficiencies that should serve as a
10 defense?
11 MR. MARRIOTT: Well, I think it's both. I think
12 that if you are undertaking the analysis of determining
13 whether there has been a substantial lessening of
14 competition, I think it is important in that context to
15 take into account all of the real-world facts, and I
16 think all of the real-world facts include some of the
17 consequences of this transaction. That includes things
18 like EDM.
19 And if you find there nonetheless is harm, I
20 think, you know, that I think there are nonetheless
21 cases in the event you find harm that indicate that the
22 efficiencies ought to be taken into account, can be
23 taken into account, and can be a so-called defense. And
24 I would include among them, I guess most recently, the
25 Deutsche Telecom case. I think the burden of persuasion

1 at the end of the day here, allays, I think, and
2 everybody agrees with this, on complaint counsel and it
3 relies -- it rests on them at all times.
4 And so it is both a defense and it is, I think,
5 in fact, a part of the overall analysis into figuring
6 out whether there has been a substantially lessening of
7 competition.
8 CHAIR KHAN: And what would you point to, just
9 real quick, what would you point to as the best
10 substantiation of all of these efficiency claims which,
11 candidly, I think at various points can read as quite
12 speculative?
13 MR. MARRIOTT: With respect --
14 CHAIR KHAN: Are there ordinary course documents
15 or other type of evidence that you would point us to?
16 MR. MARRIOTT: There is a lot I would point you
17 to, Commissioner, and let me give you some examples and
18 I would submit that they are not speculative. I would
19 point you to the testimony of several fact witnesses,
20 Frances deSouza, Alex Aravanis, Phil Febbo, Jay Flatley.
21 I would point you to the testimony of Dr. Carlton, who
22 undertook to quantify it. Dr. Cody, Dr. Abrams,
23 Dr. Deverka. And I would point you to the ordinary
24 course deal related documents which demonstrate a
25 genuine belief on the part of the company and on the

1 part of those developing the deal model as to what the
2 prospects of this transaction were.
3 This transaction was approved by the unanimous
4 board of both Illumina and GRAIL.
5 CHAIR KHAN: Just so I understand, when I ask
6 what is -- what would you point to as the best
7 substantiation of these efficiencies, the things that
8 you would point to are the testimony that was taken in
9 the course of this action, as well as deal documents
10 created in the course of putting together this proposal,
11 but there are no separate documents in the ordinary
12 course that you would point me to. Is that right?
13 MR. MARRIOTT: That's not right. I mean, I think
14 the ordinary course documents that describe the
15 operation of the business, right, make perfectly clear
16 that these are efficiencies that will happen. I mean,
17 again, some of the efficiencies have already happened.
18 There is not any question that the royalty burden has
19 been eliminated. And I think the documents that are --
20 millions of which, frankly, have been produced, are
21 supportive of the efficiencies as to which there has
22 been I think largely undisputed testimony.
23 I mean, the witnesses of Illumina and GRAIL who
24 spoke to the efficiencies, largely I would urge you to
25 read the cross examinations which largely didn't touch

1 whether or not these efficiencies exist or don't exist.
2 COMMISSIONER BEDOYA: Counsel, I know this is
3 counterintuitive, but if EDM is, in fact, large, isn't
4 that a strong economic argument that Illumina is, in
5 fact, a monopolist? Because if the upstream input
6 is competitive, there shouldn't be much of an
7 elimination of market power, whereas if Illumina is a
8 monopolist, there should be a substantial elimination of
9 that power with vertical integration.
10 So how would you answer that argument that a
11 large EDM -- asserted EDM -- would, in fact, weigh in
12 favor of Illumina having pretty extraordinary market
13 power?
14 MR. MARRIOTT: Well, Commissioner, I would say, I
15 guess, in this case, in the grand scheme of things, I
16 think the elimination of double marginalization is not
17 one of the more significant -- I think it's significant,
18 but it is not one of the more significant efficiencies,
19 but nonetheless, there is a margin, and it is declining
20 because of competitive restraints. But there is a
21 margin nonetheless.
22 COMMISSIONER BEDOYA: Thank you.
23 MR. MARRIOTT: I see that I have left my
24 colleague only six minutes, so with your permission, I
25 will pass the baton to Ms. Goswami. Thank you very

1 much, Commissioners.
2 MS. GOSWAMI: Thank you. I'll just focus on
3 one --
4 CHAIR KHAN: We can't hear you, counsel.
5 MS. GOSWAMI: Can you hear me now?
6 CHAIR KHAN: Yes.
7 MS. GOSWAMI: Thank you. Sorry about that. I
8 still don't know how to use Zoom apparently.
9 So it's undisputed that -- it's indisputable, in
10 fact, that premerger, no customer had access to terms
11 that were anywhere near as favorable as those in the
12 open offer, and customers are better off with the open
13 offer, and that's why all but two of the MCED test
14 developers that complaint counsel has identified have
15 signed it.
16 COMMISSIONER BEDOYA: Counsel, I apologize for
17 interrupting so quickly, but isn't the question not
18 whether they are better off but competition is better
19 off, and I find it hard that competition is better off
20 in a world where the testers are forced into arbitration
21 that is confidential, effectively secret, where the
22 adjudicator is not in Article 3 or a magistrate judge,
23 and where there is no representation of the government
24 or the public interest.
25 So even if this works out fine for them, isn't

1 there a broader question about how it's going to affect
2 competition, and isn't there an argument that all this
3 should be public if the whole purpose of this is to
4 protect competition and not just competitors?
5 MS. GOSWAMI: So I have a few answers to your
6 question, Commission Bedoya. So the first point is that
7 while the arbitration itself is confidential, obviously
8 as we've been talking about, you know, what is happening
9 with the audit, and the fact that there will be an audit
10 and that any violation under the audit will be made
11 available to any of the open offer customers within ten
12 days. You know, that part, again, it's not open to the
13 general public, but it's open to each of those
14 competitors. And, in fact --
15 COMMISSIONER BEDOYA: Is the government or a
16 public interest representative on that audit?
17 MS. GOSWAMI: The government and public interest
18 is not represented in that audit, but I think as the
19 Commissioners are well aware, you can take the approach
20 of the District Court in the Butterworth case and you
21 can decide to implement the open offer as a consent
22 decree. And so then there would -- the government would
23 have more of a role, but what we -- what has happened
24 here is, you know, all of these customers have
25 voluntarily entered into the open offer, and I want to

1 stress that point, because nobody is being forced into
2 arbitration.
3 So customers, they're able to enter into the open
4 offer until August 18th, 2027. What we've seen is that
5 ten people have already entered into the open offer.
6 They could have decided to keep the supply agreement
7 that they had premerger. They could have decided --
8 some people actually just buy off the website
9 essentially. They don't have any kind of supply
10 agreement at all. They could have continued to do that.
11 They voluntarily decided to enter into the open offer.
12 And that's because as the Chief Judge Chappell
13 found, the open offer provides additional benefits, and
14 those benefits are, to answer your question further,
15 Commission Bedoya, those are not just benefitting those
16 particular customers, but it's benefitting, you know,
17 competition as a whole because all of these competitors
18 are able to get access to sequencing and sequencing
19 services under the same terms that they did premerger,
20 if that's what they choose, or they can decide to use
21 what's known as the universal grid, where everyone gets
22 access to the same pricing.
23 And what's even more beneficial is there's
24 actually a 43 percent guaranteed price reduction by 2025
25 in the open offer, and where that 43 percent number

1 comes from is when Illumina made its deal model to
2 decide whether to buy GRAIL, it had a certain projection
3 of what GRAIL would pay for sequencing. And what
4 Illumina did in the open offer is take that number to
5 what GRAIL would pay for sequencing that built the
6 framework for why Illumina could buy GRAIL and plan to
7 make a profit, and gave that price to every single GRAIL
8 competitor.
9 And again, that's really protective of the
10 customers and it makes sure that not only can you keep
11 what is the premerger status quo as one option, you can
12 actually pick an option that guarantees that your prices
13 will go down.
14 And then the other thing that is key here is also
15 the access provision. So --
16 COMMISSIONER WILSON: I'm sorry, counsel, let me
17 just ask a question about pricing. There are two
18 different categories of pricing that customers can
19 choose, one is grandfathered and one is universal
20 pricing. Are they allowed to switch back and forth
21 between those two types of pricing during the course of
22 the agreement?
23 MS. GOSWAMI: They are allowed to switch from
24 grandfather pricing to universal pricing. They can't
25 switch back again then to grandfather pricing for the

1 simple reason that if people stop buying a particular
2 product it may be difficult to then bring it back once
3 no one is buying it anymore, but there is a guarantee
4 that they can switch to universal pricing at any time.
5 And otherwise they can keep using the same premerger
6 grandfather pricing for the entire 12 years under the
7 open offer.
8 COMMISSIONER WILSON: Thank you.
9 MS. GOSWAMI: And so the second important thing
10 that I want to draw everyone's attention to is the
11 access term. So, again, where the open offer came from
12 is that Illumina reached out to what were known as its
13 tier 1 customers, customers that had tens of millions of
14 dollars of spend on Illumina's platform, and asked them,
15 well, what are the terms that you want in this open
16 offer? And one of the things that they wanted is they
17 wanted to make sure that everyone gets access to the
18 same sequencing products, including, you know,
19 instruments and core consumables at the same time as
20 each other.
21 And so before there was -- there were some pilot
22 testing, there was some, you know, beta testing, that --
23 there's no kind of disparity in terms of when customers
24 get access to the products.
25 And then the flip side of that is what I just

1 alluded to with the grandfather pricing. You know,
2 premerger, there was always a chance that when there
3 would be upgrades on these instruments, and we've all
4 faced this, you know, when there are upgrades on these
5 instruments that you can no longer get the old
6 instrument that you are using, Illumina also got rid of
7 that under the open offer. You can decide that you
8 always have an option that you can keep buying the same
9 instrument that you bought before at the same price or
10 you can switch to a new instrument and you can also get
11 a 43 percent discount. And that is making customers
12 better off.
13 And the reason why we know that customers are
14 better off is because with they've signed it, and that's
15 one of the things that Chief Judge Chappell found. He
16 said, the fact that GRAIL's purported rivals have signed
17 the open offer is significant and undermines complaint
18 counsel's assertions --
19 CHAIR KHAN: Counselor, in addition to the
20 details of the open offer, one key issue here is really
21 who carries the burden and at what stage it's
22 appropriate for us to consider the open offer. Should
23 it be considered as part of the prima facia analysis or
24 should it be considered as a remedy? The initial
25 decision chose to consider it -- argued that it should

1 be considered as part of the prima facie case and you
2 all support that view. Could you share what in your
3 view is the strongest case in support of that approach
4 as opposed to considering it as part of the remedy given
5 that in Otto Bock and a whole bunch of other cases that
6 complaint counsel cites these types of offers are
7 instead considered at the remedy stage?
8 MS. GOSWAMI: So probably the two strongest cases
9 are U.S. v. AT&T and then a recent case which is a
10 United Healthcare Group case from the district of D.C.
11 CHAIR KHAN: And on AT&T, complaint counsel
12 distinguishes that in a whole range of ways, including
13 the fact that that was addressing a discrete type of
14 conduct, that there was a whole set of factors that they
15 identified. Do you have any response to the ways in
16 which they distinguish AT&T?
17 MS. GOSWAMI: So I think they're in our papers,
18 but just very briefly, it's not really distinguishable
19 in the way that complaint counsel tries to distinguish
20 it. What the court found in that case, and the D.C.
21 Circuit affirmed, is that the government failed to meet
22 its burden of proof because its lead economics expert
23 failed to consider AT&T's post-litigation offer of
24 arbitration agreements to distributors. And that's the
25 same thing that happened here. They didn't consider the

1 open offer in terms of deciding the prima facie burden.
2 But if I may, I want to spend a moment on the
3 United Healthcare case as well. In that case, and I'm
4 just going to read from it, in the government's view,
5 and there they talk about different remedy, but I'll
6 just say the contractual commitment must be ignored at
7 the prima facie stage, at least that the contractual
8 commitment was not part of the original transaction.
9 Then, in the government's view, a defendant must
10 prove that there is no lessening of competition, and
11 then the court went on to say, rejecting this exact
12 argument that complaint counsel is making here, this
13 would allow the government to rely on statistics that
14 bear no relationship to the post-acquisition world and
15 would shift the burden of persuasion to the defendant to
16 prove that there is no competitive harm, rather than to
17 require the government to prove that there is
18 substantial competitive harm. That approach cannot be
19 squared with the text of Section 7 or with Baker Hughes.
20 And that is --
21 CHAIR KHAN: Thank you, Ms. Goswami, I realize
22 that we are out of time, but I understand your position
23 that you think that that case is in strong support of
24 what you're arguing.
25 So thank you. We will now return back to

1 Ms. Musser.
2 MS. TABOR: Before we do that, Madam Chair, I
3 just wanted to note for the record that near the end of
4 complaint counsel's argument in chief, the clock was
5 prematurely paused at 14 minutes and 59 seconds. And
6 stoppage of the clock, however, was premature, as
7 complaint counsel continued to speak and, in fact,
8 responded to a question from the chair.
9 So our backup clock, which continued to run,
10 shows that complaint counsel actually stopped speaking
11 at 13 minutes and 21 seconds remaining in the total time
12 allotted for its argument. What I am doing is I am
13 noting that respondent also spoke for approximately 53
14 seconds over its allotment, which I am offsetting for
15 the time that respondents' counsel was muted, which
16 means that the total amount of time for complaint
17 counsel's rebuttal should be 14 minutes and two seconds,
18 and I would like the clock to be updated to reflect
19 that. Thank you.
20 Go ahead when you're ready, Ms. Musser.
21 MS. MUSSER: Thank you, Ms. Tabor.
22 I want to start where my colleague, Ms. Goswami,
23 left off. First I would like to address kind of a key
24 premise of hers and of respondents was that this open
25 offer made folks better off. Every single MCED who

1 testified at the hearing that signed the open offer said
2 that they, in fact, did not -- this did not make them
3 better off and instead that this -- that they still had
4 significant concerns. And let's talk a little bit about
5 that number.
6 There has actually only been two MCEDs who signed
7 the open offer, according to record evidence, and that
8 is -- there have only been two. I'm going to be careful
9 here, I don't know what's in camera, but there are two
10 who signed the open offer, there are two who signed
11 long-term supply agreements absent the open -- or
12 separate and apart from the open offer, and there are
13 the remaining MCED witnesses who testified who have not
14 signed any long-term supply agreement.
15 And I think there are a couple of key facts to
16 take away from this. If this open offer were that good,
17 the witnesses wouldn't be testifying that they still had
18 significant concerns. Couple that with testimony in the
19 record that explains several of these MCED witnesses
20 were, in fact, negotiating a separate supply agreement
21 separate and apart from this open offer when those
22 negotiations were abruptly cut off and the terms got
23 worse. That is the testimony from the witnesses that
24 were part of the record.
25 Separate, I want to discuss United/Change and the

1 policy implication regarding when the case should or
2 when a remedy should be considered as part of the Baker
3 Hughes analysis. In the first instance, to the extent
4 that United/Change considered it as part of the prima
5 facie case, that case involved a divestiture.
6 And so Ms. Goswami quoted a select part of the
7 United/Change provision that said that the numbers would
8 need to take into account the remedy. There, there was
9 a horizontal overlap and the court was referring to
10 market share that needed to account for this
11 divestiture. Here, the open offer is fundamentally
12 different from that in three key ways.
13 First, the open offer itself is a made for
14 litigation piece of paper. It was entered into days
15 before this complaint was issued and the preamble
16 explains that the purpose was to allay any concerns
17 relating to the transaction.
18 Second, this open offer has not been adopted
19 across the market. It is not a fundamental market
20 change. Rather, it has only been selectively adopted by
21 MCED customers, the same ones who are saying it's not
22 sufficient to alleviate the harms of this transaction.
23 And third, the open offer is only available until
24 final order by this Commission. It is not a fundamental
25 change in the market.

1 Setting that aside, and despite the United/Change
2 and AT&T opinion, the better policy choice is for
3 respondents to bear the burden of assessing -- of
4 proving that the open offer offsets harm. And that's
5 for four reasons.
6 First, from the institutional perspective,
7 requiring respondents to prove remedy is effective to
8 encourage them to propose adequate remedies instead of
9 only spatially plausible remedies such as what we have
10 here.
11 Second, when assessing who has the burden, the
12 courts look at who has access to the relevant facts.
13 The Supreme Court gave us this directive in Smith v.
14 United States. Here, respondents have unique access as
15 to how this open offer would work and therefore should
16 bear the burden of proof.
17 Third, requiring complaint counsel to prove
18 remedy will work in a way that artificially heightens
19 complaint counsel's burden to prove a negative in a way
20 that's inconsistent with the incipiency standards
21 intended by Congress in establishing the Clayton Act.
22 And fourth, shifting the burden as to inadequacy
23 of the remedy onto complaint counsel puts the
24 presumptions laid out in Baker Hughes and squarely
25 shifts the risk associated with the remedy onto

1 consumers instead of keeping it on respondents as part
2 of this rebuttal case.
3 Second, I would like to address a few of the
4 arguments that this Commission heard relating to
5 efficiencies. In the first instance, for many of the
6 same reasons as efficiencies -- as are laid out in
7 remedies, efficiencies should also be considered part of
8 respondents' burden. In the first instance, and
9 specifically in EDM, their own expert addressed these as
10 an efficiency, not as part of the prima facie case.
11 Second, a proper application of the Baker Hughes
12 framework also requires that this be shifted to
13 respondents in order to keep within a burden shifting
14 framework and not to relax that framework but that
15 complaint counsel has to prove everything in the first
16 instance.
17 And, finally, much like those remedies, and under
18 the Supreme Court precedent, respondents have unique
19 access to how these efficiencies would work and
20 therefore should meet the burden.
21 And now, courts are very clear about what it
22 takes to meet that burden. This Commission in Otto Bock
23 spelled that out, as well as the Third Circuit recently
24 in Hackensack. And it requires that respondents show
25 that their efficiencies are cognizable. And in doing

1 so, the court in Burtlesmann and H&R Block were very
2 specific that it cannot just rely on the testimony and
3 business judgment of company executives, because no
4 matter how well intentioned or how adept they are at
5 business matters, that is not sufficient to meet the
6 burden of proof in order to show cognizable
7 efficiencies.
8 And when this Commission asked my colleague from
9 respondents as to what evidence they should look at, he
10 answered, well, of course, how can it not? But how can
11 it not cannot be sufficient to offset the risk of this
12 merger and assure that consumers are not harmed.
13 A few specific efficiencies I would like to
14 address. The first is royalty. I would like to direct
15 this Commission to our proposed finding or our complaint
16 counsel's findings of fact at 5457 through 5775. What
17 the evidence actually showed was that testimony or that
18 testimony explains that the discussions regarding
19 elimination of royalty ended as the parties began
20 exploring a deal. Not that it couldn't happen, it's
21 just that they were prematurely stopped.
22 Second, there is testimony that this was never
23 raised with Illumina prior to this deal. And finally,
24 royalties can't be assessed in a vacuum, but instead
25 need to be analyzed in conjunction with the CVR or

1 contingent value rights, and in looking at those
2 together, any value of the remedy is offset by the CVR.
3 Second, I would like to talk for a minute about
4 acceleration. Going back to acceleration, and when you
5 look at the testimony and the evidence that my colleague
6 Mr. Marriott pointed to, it was again just the executive
7 and just the experts, but there are no ordinary course
8 documents that put a number on it and quantify it.
9 There are also sufficient -- extensive evidence
10 in this record that shows that this -- that there is
11 nothing unique that Illumina has. It has no secret
12 sauce that necessitates this merger to drive adoption
13 and acceleration of this test to market.
14 COMMISSIONER WILSON: Counsel?
15 MS. MUSSER: Yes, Commissioner Wilson?
16 COMMISSIONER WILSON: Thank you. Respondents'
17 expert, Dr. Carlton, describes testimony from Exact that
18 Exact's acquisition of Thrive increased the speed of FDA
19 approval, and I'm wondering what you see as the
20 similarities and differences between Illumina's
21 acquisition of GRAIL and Exact's acquisition of Thrive
22 and to what extent those acquisitions may be similar in
23 terms of facilitating more expedited FDA approval.
24 MS. MUSSER: Absolutely, Commissioner Wilson. So
25 Exact's acquisition of Thrive was an acquisition of two

1 companies who do the same thing, and that is in direct
2 contrast from an acquisition of a tool provider to an
3 MCED test. So Thrive and Exact had sales forces that
4 could be combined and synergized that were selling a
5 clinical tool and could use the same thing.
6 Likewise, Exact had specific success on bringing
7 a test to market from its Cologuard, which is a
8 stool-based cancer detection test for colon cancer. And
9 so those -- it had specific facts and specific expertise
10 that enabled it to have some synergies in perhaps
11 bringing Exact to marker.
12 In contrast, and as I mentioned earlier, Illumina
13 doesn't have that same expertise. It hasn't gotten a
14 clinical approval of its most similar test, an IPT test,
15 it still doesn't have FDA approval, and it, in fact, has
16 struggled with the few tests it has tried to bring to
17 the market and to get approved through the FDA.
18 So I think that comparison actually shows the
19 differences and why Illumina fails to meet its burden to
20 show merger-specific efficiencies such as acceleration.
21 Moreover, there is no number that they've been able to
22 provide. They haven't been able to specify how soon or
23 to provide any sort of specificity as to exactly what is
24 going to enable them to bring -- to have a unique secret
25 sauce to bring the GRAIL test to market sooner that they

1 couldn't get from somewhere else.
2 And, finally, I would like to end by going
3 back --
4 CHAIR KHAN: Counsel, I just want to make sure,
5 mindful of the time, I wanted to make sure that we had a
6 response from you on a point that Illumina raises in
7 response to the proposed remedy. So the proposed order
8 would require Illumina to return to GRAIL any proceeds
9 of the sale that exceed Illumina's investment amount,
10 and Illumina makes a host of claims on this. They say
11 that it's outside the bounds of contemplated relief,
12 that they didn't have an opportunity to have a hearing
13 on this relief and that this would constitute
14 impermissible disgorgement. Could you just share your
15 responses to those arguments?
16 MS. MUSSER: Absolutely. So taking a step back,
17 the remedy here is designed to do what all remedies are
18 designed to do at this Commission, which is to make
19 GRAIL whole. And for the most part, this remedy follows
20 the well-trod precedent from this Commission about how a
21 remedy can do that. It's a divestiture combined with a
22 hold separate, which is what we normally do or the
23 Commission normally does in consummated cases. It
24 differs in a few key respects, such as the cap on how
25 much profits Illumina can maintain.

1 I want to be clear, this is not disgorgement.
2 This was not intended to punish or penalize Illumina for
3 purchasing GRAIL. Rather, this cap on profits is
4 designed to make sure that the money returns to GRAIL
5 and that GRAIL is put in the best position to be as
6 competitive an MCED as possible. So it's designed to
7 return the precompetitive position that GRAIL would have
8 been in but for this merger.
9 CHAIR KHAN: And specifically, their claim that
10 they have not had a hearing on the specific relief
11 that's now being requested, how would you respond to
12 that? Was there anything else that would have informed
13 respondents of the relief being sought before the filing
14 of the proposed order?
15 MS. MUSSER: I think the general principles as
16 far as the -- what they're doing with GRAIL's purchase
17 price, off price, all of that is in the record, and so
18 there is nothing that would be gained from further
19 evidentiary analysis or development such that there
20 would necessitate a separate evidentiary hearing or a
21 hearing on the remedy.
22 CHAIR KHAN: Okay. Thank you.
23 MS. MUSSER: So again, I want to take a step back
24 and go back to 2016, because I think 2016 is informative
25 as to the change that will occur or once Illumina goes

1 from having a majority ownership or from a 12 percent
2 ownership to a majority ownership. And in 2016,
3 Illumina spun out GRAIL. And when it did, it went from
4 an owning a majority to being just near a 12 percent
5 institutional investor.
6 And in talking points to investors, Illumina's
7 CEO -- former CEO drafted talking points that explained
8 that this reduction from being a majority to 12 percent
9 ownership was what was going to level the playing field
10 and spur innovation.
11 That is exactly the innovation and the level
12 playing field that complaint counsel asks this
13 Commission to protect. As such, when the Commission
14 looks at the majority of the evidence, we ask that it
15 will adopt complaint counsel's proposed remedy to allow
16 just this competition to flourish in this life-saving
17 market under the Clayton Act incipiency standard.
18 Thank you for your time today.
19 CHAIR KHAN: Thank you, Ms. Musser.
20 Thank you, also, to Mr. Marriott and Ms. Goswami
21 for your presentations.
22 This marks the end of today's hearing, and so we
23 are adjourned.
24 (Whereupon, at 2:38 p.m., the argument was
25 adjourned.)

1 CERTIFICATE OF REPORTER
2
3 I, Sally Jo Quade, RPR, do hereby certify that
4 the foregoing proceedings were recorded by me via
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