UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **Illumina, Inc.,** **a corporation;** **and** **GRAIL, Inc.,** **a corporation.**	**Docket No. 9401** **PUBLIC**

CONCURRING OPINION OF COMMISSIONER CHRISTINE S. WILSON

I agree with the conclusion of the Commission Opinion that the acquisition of GRAIL, Inc. by Illumina, Inc. is likely to lessen competition substantially in the market for the research, development, and commercialization of MCED tests, and that the transaction consequently violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. I join all but two sections of the Commission Opinion: Sections VII.D.2 (analyzing competitive effects under *Brown Shoe*) and VII.D.5 (treatment of the Open Offer). Even with respect to those sections of the Opinion that I do not join, I do rely on and adopt the factual analysis contained therein.

I. *Brown Shoe* Standard to Establish a *Prima Facie* Case

I do not join Section VII.D.2, in which the Commission Opinion assesses the competitive effects of the acquisition under the so-called *Brown Shoe* standard. I do not join this part of the Opinion because there is no "*Brown Shoe* standard" in modern antitrust analysis. I find that Complaint Counsel established a *prima facie* case based only on the ability and incentive approach to analyzing foreclosure. *See* Sec. VII.D.3. The *Brown Shoe* analysis is unnecessary for finding liability in this case.

The Commission Opinion asserts that case law provides two different but overlapping standards to evaluate the likely competitive effects of a vertical transaction. The Opinion first asserts a *Brown Shoe* standard and then states that "more recently," courts and enforcers have focused on whether a transaction is likely to increase the ability and/or incentive of the merged

firm to foreclose rivals from sources of supply or from distribution outlets. In fact, although *Brown Shoe* has not been overturned, the most recent application of the *Brown Shoe* standard identified in the Commission Opinion is *Fruehauf Corp. v. F.T.C.*, decided in 1979. The Vertical Merger Guidelines, which were jointly issued by the Commission and the Department of Justice in 2020, and which remain in place at the Department of Justice, describe only the ability and incentive approach to analyzing foreclosure. Similarly, all recent litigated vertical merger cases employ only the ability and incentive analysis. *See United States v. UnitedHealth Group Inc.*, 2022 WL 4365867 (D.D.C. 2022); *United States v. AT&T Inc.*, 310 F. Supp.3d 161, 242-46 (D.D.C. 2018). As the Commission Opinion citations demonstrate, even FTC complaints accompanying consent agreements allege the ability and incentive framework, rather than relying on *Brown Shoe*. *See* Lockheed Martin Corp. and Aerojet Rocketdyne Holdings, Inc., Docket 9405 (FTC Jan. 25, 2022), https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf; UnitedHealth Group Inc., Collaborative Care Holdings, LLC, DaVita Inc., and DaVita Medical Holdings, LLC, Docket No. C-4677 (FTC Aug. 22, 2019), https://www.ftc.gov/system/files/documents/cases/181_0057_c4677_united_davita_complaint.pdf; Northrop Grumman Corp. and Orbital ADK, Inc., Docket No. C-4652 (FTC June 5, 2018), https://www.ftc.gov/system/files/documents/cases/1810005_c_4652_northrop_grumman_orbital_complaint_6-5-18_0.pdf; General Electric Co., Docket No. C-4411 (FTC Aug. 30, 2018), https://www.ftc.gov/sites/default/files/documents/cases/2013/08/130830generalelectriccmpt.pdf; CMS Energy Corp., Docket No. C-3877 (FTC March 19, 1999), https://www.ftc.gov/sites/default/files/documents/cases/1999/06/ftc.gov-cmsenergycmp.htm.

There is good reason that the *Brown Shoe* standard for vertical mergers, which elevates the role of market share, has been abandoned by the courts and the enforcement agencies. *Brown Shoe* was based on the Structure-Conduct-Performance economic paradigm,[1] which has been discredited. "The economic writing since the 1980s has largely repudiated . . . the *Brown Shoe* view . . . of vertical mergers." Herbert J. Hovenkamp, *Competitive Harm from Vertical Mergers* 5 (2020) Faculty Scholarship at Penn Law 2218, https://scholarship.law.upenn.edu/faculty_scholarship/2218 (also, "both Harvard and Chicago School thinking pushed back at the aggressive attitudes about industrial concentration, as well as the idea that merger-induced efficiency was an affirmative harm." (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, Chs. 9 & 10 (1978); 4 & 5 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW, Ch. 9 (1980))); Michael H. Riordan, *Competitive Effects of Vertical Integration* in HANDBOOK OF ANTITRUST ECONOMICS 145 (Paolo Buccirossi ed. 2008) ("A general presumption that vertical integration is pro-competitive is warranted by a substantial economics literature identifying efficiency benefits of vertical integration, including empirical studies demonstrating positive effects of vertical integration in various industries. . . . Thus, a task for legal and economic analysis [is] to identify those particular (and perhaps relatively few) circumstances in which vertical mergers reduce, or regulatory restraints on vertically integrated firms increase, consumer welfare."). Moreover, repudiation of the Structure-Conduct-Performance paradigm is now reflected in Supreme Court precedent in other areas of antitrust law. *See GTE Sylvania, Inc. v. Continental T.V., Inc.*, 433 U.S. 36 (1977); *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Kimble v. Marvel Ent., LLC*, 576

[1] The Structure-Conduct-Performance presumes anticompetitive outcomes from even modest levels of industry concentration.

U.S. 446, 461-62 (2015). ("Congress . . . intended [the Sherman Act's] reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences. . . . [B]ecause the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics.").

In particular, the first *Brown Shoe* factor that the Commission Opinion discusses, "the share of the market foreclosed," paints a simplistic view of the role of market share for vertical mergers that is inconsistent with modern economics and precedent. As the Department of Justice told the court in *United States v. AT&T*, for vertical mergers "there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers." *United States v. AT&T*, 310 F.Supp.3d at 192 (quoting Joint Statement on the Burden of Proof at Trial at 3 and citing 4A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 1000a ("The basic economic reason for limiting horizontal mergers is well-founded and rather generally accepted: horizontal mergers increase market concentration, and high market concentration can substantially lessen competition among rivals, particularly with respect to price. Unfortunately, there is no comparable theoretical basis for dealing with vertical mergers.").

While I do not join the legal analysis and conclusions in the Opinion's *Brown Shoe* discussion, I do join the Opinion's discussion of the factual analysis that describes the multiple ways that Illumina would be able to foreclose or disadvantage rivals based on its position as the only viable supplier of NGS platforms for MCED tests, which is relevant to the ability and incentive approach to analyzing foreclosure. I similarly join the Opinion for the factual discussions of the nature and purpose of the transaction and entry barriers. The factual analyses of these issues are relevant for, and are cross-referenced in, the discussion of anticompetitive effects that applies the incentive and ability approach to foreclosure.

II. Treatment of the Open Offer

I do not join Section VII.D.5, in which the Commission Opinion concludes that the Open Offer would be appropriately addressed at the remedy stage *after* a finding of liability. I agree that Illumina presented the Open Offer to GRAIL's rivals to address the Commission's concerns with the transaction, and that, consequently, the Open Offer is a remedy. I also agree with the Commission Opinion that it is not Complaint Counsel's burden, as part of its *prima facie* case, to show that the Open Offer does not ameliorate the anticompetitive effects of the transaction. Because Respondents can repeatedly change the terms of an offer (or, in other instances, present an evolving package of assets to be divested), even after trial has begun, addressing the impact of the proposed remedy should not fall on the government as part of the *prima facie* case. When the Respondents can change the terms of a remedy, even at a late date, the burden of production on the issue should fall on them.

As the Commission Opinion describes, under the burden-shifting framework for the analysis of cases under Section 7 of the Clayton, *see United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), the government must establish the *prima facie* case showing

that the merger is likely to be anticompetitive. If the government establishes the *prima facie* case, the defendant has the burden to show that the *prima facie* case inaccurately predicts the probable effect on future competition or to discredit the evidence supporting the *prima facie* case. If the defendant rebuts the *prima facie* case, the burden of producing additional evidence of anticompetitive effects shifts to the government, but the ultimate burden of persuasion always remains with the government. *Id.*

In circumstances like the present case, the effects of the proposed remedy – here, the Open Offer – should be treated as part of the defendant's rebuttal of the *prima facie* case. In a typical horizontal merger, the rebuttal evidence presented by a defendant would attempt to show that the presumption created by market shares does not accurately predict the competitive effects of the merger. *See General Dynamics Corp.*, 415 U.S. 486 (1974). Analogously, in this case, Respondents present the Open Offer to show that the incentive and ability of the merged firm to foreclose or disadvantage does not accurately predict the probable effect on future competition. Treating the remedy proposed by the Respondents as rebuttal evidence is consistent with treatment by the courts.[2] *See United States v. Aetna Inc.*, 240 F. Supp.3d 1, 59-60 (D.D.C 2017); *FTC v. Sysco Corp.*, 113 F. Supp.3d 1, 9 (D.D.C. 2015) (explaining that treating a proposed divestiture only as a remedy would allow the Government to rely on a description of the market that has "no connection to the post-acquisition world").

As rebuttal, the burden of showing the competitive effects of the Open Offer falls on Respondent. My analysis disagrees with the Commission Opinion to the extent that I believe that the competitive impact of the Open Offer should be considered as part of the analysis of competitive effects; the approach of the Commission Opinion addresses the Open Offer only after a finding of liability. The Commission Opinion cites to cases in which divestitures were conditional on closing the proposed transaction, but here, the Open Offer has already been incorporated into some contracts with MCED competitors. Thus, the Open Offer is a market fact rather than a conditional outcome.

Setting aside the appropriate characterization of the Open Offer, it remains true that Respondents offer little evidence regarding the Open Offer; instead, they assert that Complaint Counsel have the burden to address the remedy as part of their *prima facie* case. More important, the factual analysis of adequacy of the Open Offer, which is described in the Commission Opinion in Section VII.D.5.b (p. 69-77), demonstrates that the Open Offer does not prevent Illumina from advantaging GRAIL relative to GRAIL's rivals. Instead, the evidence reveals that after treating the evidence of the Open Offer as part of the competitive effects analysis, the Open Offer does not eliminate the predicted anticompetitive effects of the transaction. Ultimately, as

[2] When courts have addressed a remedy proposed by defendants in a merger challenge, they appropriately require a showing that the proposed remedy (often a divestiture that would be implemented essentially simultaneously with closing the proposed transaction) would restore competition. *See United States v. Aetna Inc.*, 240 F. Supp.3d 1, 60 (D.D.C 2017) ("In rebuttal, a defendant may introduce evidence that a proposed divestiture would 'restore [the] competition lost by the merger counteracting the anticompetitive effects of the merger.") (citing U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (2011)); *FTC v. Sysco Corp.*, 113 F. Supp.3d 1, 72 (D.D.C. 2015) (when considering proposed divestiture as rebuttal, "both sides cite to the 2004 U.S. Department of Justice's 'Policy Guide to Merger Remedies,' which provides the following guidance: 'Restoring competition requires replacing the *competitive intensity* lost as a result of the merger . . .").

described in the Commission Opinion, even after considering the effects of the Open Offer, anticompetitive effects are likely and the transaction is likely to lessen competition substantially.

III. Efficiencies

At times, the Commission Opinion makes sweeping statement that denigrate the role of efficiencies in merger analysis. I do not join those statements, which are gratuitous and unjustified. Efficiencies and procompetitive benefits have a role to play in merger analysis and can be particularly important for vertical merger analysis. *See* U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (Aug. 19, 2010); U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES § 6 (June 30, 2020) (withdrawn by Federal Trade Commission on Sept. 15, 2021, but still in place at Department of Justice); Roger D. Blair, Christine S. Wilson, et. al., *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*, 27 Geo. Mason L. Rev. 761 (2020); Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/. Indeed, courts have acknowledged efficiencies when analyzing challenged transactions. *See, e.g., United States v. AT&T*, 310 F. Supp. 3d 161 at 194, 215; *see also* Comments of TechFreedom, In the Matter of Request for Information on Merger Enforcement 16-19, Docket FTC-2022-0003 (Apr. 21, 2022). And, in particular circumstances, U.S. antitrust enforcement agencies consider out-of-market efficiencies. Horizontal Merger Guidelines § 10 n.14. Nonetheless, the broader debate about efficiencies and other procompetitive benefits of mergers is unnecessary in this case. As discussed in detail in the Commission Opinion, Respondents failed adequately to substantiate their claims.

IV. Due Process

Respondents moved on January 31, 2023 to reopen the record to admit additional exhibits, including correspondence between Commission staff and their counterparts in other jurisdictions. I agree with footnote 74 of the Commission Opinion when it asserts that cross-border coordination is specifically contemplated by international agreements and authorized by Congress. *See, e.g.*, Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, Memorandum of Understanding (Sept. 2, 2020); Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws (June 1998); 15 U.S.C. § 46(l)(2); 15 U.S.C. § 6201 *et seq*. Moreover, coordination among antitrust enforcers across jurisdictional boundaries is beneficial for consumers, merging parties, and the development of sound antitrust law. *See*, *e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf (international coordination through organizations such as ICN, OECD, and UNCTAD have "resulted in the development and implementation of standards of international best practice and consensus guidance on substantive antitrust and procedural fairness. Consistent approaches to competition law, policy, and procedures across jurisdictions facilitate cooperation among competition agencies, and increase the effectiveness and predictability of enforcement, which benefits the Agencies, consumers, and the business community.") And I agree with footnote 74

of the Commission Opinion that due process does not require Commissioner Slaughter to recuse herself from serving in an adjudicative capacity in this matter, despite the existence of correspondence between Commissioner Slaughter and competition enforcers in the U.K.

That said, I would be concerned about cross-border communications specifically designed to facilitate forum shopping on the part of the U.S. government. I have not concluded that this situation crossed the line from constructive cooperation to procedural unfairness, but I do believe that line exists, and that agencies should endeavor to steer clear of it. If the competition agencies are to maintain credibility in the eyes of their stakeholders, including legislatures, courts, consumers, and businesses, they must guarantee procedural fairness. *Cf.* U.S.-Mexico-Canada Trade Agreement Chapter 21 21_Competition_Policy.pdf (ustr.gov).