No. 23-60167

# In the United States Court of Appeals for the Fifth Circuit

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ILLUMINA, INC. AND GRAIL, INC.,

*Petitioners*,

vs.

FEDERAL TRADE COMMISSION,

*Respondent*.

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# BRIEF OF *AMICUS CURIAE* TECHFREEDOM IN SUPPORT OF PETITIONERS

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On Petition for Review from the Federal Trade Commission, Docket No. 9401

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons and entities listed in the Petitioners' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification.

**Amicus Curiae:**

TechFreedom

**Counsel for Amicus Curiae:**

Bilal Sayyed

TechFreedom has no parent corporation. No publicly held company has any ownership interest in TechFreedom.

/s/ Bilal Sayyed
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June 12, 2023

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## INTEREST OF AMICUS CURIAE[1]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. TechFreedom's employees have extensive expertise in the laws and regulations enforced by the Federal Trade Commission.

Bilal Sayyed, Senior Competition Counsel for TechFreedom, served as Director of the Office of Policy Planning at the FTC from 2018-2021. "During his tenure, the Office of Policy Planning (OPP) initiated and managed the Chairman's Hearings on Competition and Consumer Protection in the 21st Century. After the Hearings, staff of the Bureaus of Competition and Economics and OPP (working with the Department of Justice) drafted the first joint Vertical Merger Guidelines, and prepared the Vertical Merger Commentary. In addition, under Sayyed's leadership, OPP initiated the Commission's inquiry into over 500 acquisitions by Google, Facebook, Amazon, Apple, and Microsoft." FTC, *FTC Chairman Simons Announces his Resignation and the Departure of*

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[1] No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief being filed.

*Senior Staff* (Jan. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/01/ftc-chairman-simons-announces-his-resignation-departure-senior-staff. Sayyed has continued to focus on mergers and the FTC as Senior Competition Counsel at TechFreedom. *See, e.g.,* Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022* (Dec. 20, 2022), https://ssrn.com/abstract=4308233.

## INTRODUCTION & SUMMARY OF ARGUMENT

In September 2020, Illumina, Inc., ("Illumina") and GRAIL Inc. (now Grail, LLC), (both "Grail") entered into an agreement to merge; they consummated their merger (the "transaction" or "merger") in August 2021. Prior to their merger, the firms were in a vertical relationship. Grail is the only firm that has commercialized—that is, brought to market—a multi-cancer early detection ("MCED") test. Illumina is an allegedly dominant supplier of next-generation sequencing ("NGS") platforms, a "key" or "critical" input into the development and use of MCED tests. NGS platforms are an upstream input into downstream MCED tests.

The Commission found that the merger has increased Illumina's incentive (combined with Illumina's pre-merger existing ability) to foreclose access to Illumina's NGS platform by those firms researching, attempting to develop, and attempting to commercialize MCED tests in competition with Grail, and that Illumina, in dealing with Grail's competitors, will have access to competitively sensitive information that it could use to affect existing and potential competition.

Anticipating such concerns, Illumina has already implemented a 12-year supply commitment (the "Open Offer") for firms engaged in the research, development, and intended commercialization of MCED tests. Initial Decision at 98, *In the Matter of Illumina, Inc. & GRAIL, Inc.*, No. 9401 (Sept. 9, 2022) ("IND"). Price and non-price commitments aim to address customers' (and Commission) concerns about access to Illumina's NGS platforms. Illumina has previously indicated a willingness to enter into a consent order consistent with the terms of the Open Offer but the Commission refused. *Id.* at 119; *see also* Opinion of the Commission at 62-63, *In the Matter of Illumina, Inc. & GRAIL, Inc.*, No. 9401 (Mar. 31, 2023) ("Comm.Opp.").

The Commission objects to the merger, because, in part, it *might* slow or prevent the future commercialization of MCED tests by firms that have not yet commercialized an MCED test—that is, all firms except Grail. The Commission believes the merger may also slow innovation competition in the market for MCED test. But the Commission has failed to show harm under either theory, because it has failed to show any firm other than Grail has a reasonable probability of commercializing an

MCED test, and because Illumina, even if it does foreclose access to its NGS platforms, has the strong incentive to continue to rapidly improve Grail's MCED test.

The Commission's Opinion takes a cramped view of the possible and likely efficiencies and benefits associated with the transaction. The Commission applies no such skepticism, nor the same exacting standard, to claims of possible future competition, or to its theoretical concerns about the transaction limiting innovation in MCED tests. This selective skepticism is inconsistent with the theoretical and empirical work showing vertical mergers may reasonably be expected to generate efficiencies and are less likely to have anticompetitive effects than horizontal mergers.

The Commission's dismissal of the Open Offer and rejection of Illumina's offer to enter into a consent order incorporating its terms is remarkable. The Commission routinely accepts such commitments to address concerns otherwise raised by a vertical merger; similarly, it has accepted such remedies requiring an alleged monopolist to deal with a rival.

To correct the Commission's failures to properly balance the potential harms from the transaction and the potential benefits of the transaction, the Commission's decision should be reversed and the order to divest Grail vacated. The court should direct the Commission to accept Illumina's previously expressed willingness to memorialize the Open Offer into an Order. The Court should allow the FTC to identify changes, consistent with past practice, to improve the scope, oversight, and enforcement of Illumina's open-offer commitments, including incorporation of a monitor to enforce, audit, and report on compliance with such an order.

## ARGUMENT

### I. The Commission Has Not Shown Cognizable Harm in the Relevant Product Market

The Commission identifies the relevant antitrust market as "the research, development, and commercialization of MCED tests" in the United States. Comm.Opp. at 2, 25. The Commission further distinguishes among these stages of activity and between harm to ongoing research and development activity and harm to future commercialization of an MCED test. For example:

- "[T]his case involves alleged harm to competition among firms currently engaged in research and development of MCED tests *for subsequent commercial sale*." *Id*. at 25 (emphasis added).

- "The record shows that MCED developers are engaged in current R&D competition with GRAIL and with each other *as they pursue commercialization* of their MCED tests . . . ." *Id.* at 30 (emphasis added).

- "Complaint Counsel have demonstrated the existence of *current competition in the research and development* of MCED tests. Cancer screening companies have spent hundreds of millions of dollars in the research and development of MCED tests with the same objective—to detect multiple cancers in asymptomatic patients by analyzing biomarkers in the blood. These companies are seeking to improve their tests by validating additional cancers and adding tissue of origin capabilities while improving sensitivity, specificity, and positive predictive value. . . . The ALJ correctly characterized this activity as 'present[] compet[ition].' . . . [I]f our relevant market definition failed to account for current R&D competition among

firms *seeking to commercialize* MCED tests, it would also fail to detect threats to that competition." *Id.* at 30-31 (emphasis added) (internal citations omitted).

- "[T]he harm to competition operates by foreclosing current, competing R&D efforts that are *pointed toward eventual commercialization*." *Id.* at 55 (emphasis added).

- "The harm to R&D competition is current and immediate, not speculative, although *the effects on commercialized sales may not be felt immediately*." *Id.* at 56 (emphasis added).

- "By thwarting rivals' *current R&D*, the challenged foreclosure deprives the market not just of 2-3 cancer tests that *might be commercialized* today but, more importantly, the more extensive screening tests that are under development. If today's foreclosure wipes a rival off the post R&D playing field, it fosters diversion from *what would have been the rivals' ultimate product* to Galleri [the Illumina-Grail product]." *Id.* at 55 (emphasis added).

In short, the Commission appears to distinguish between two types of harm that may occur in its relevant market: harm to current R&D efforts, sometimes equated with "innovation," and harm to the intended result of those R&D efforts: the introduction or improvement of commercial MCED tests to compete with Grail's commercial MCED test, Galleri.

### A. Commercialization of MCED Tests

Only Grail, through its Galleri product, has a commercial MCED test. "[O]nly Galleri has been released to the market while other products are in various stages of development and testing." *Id.* at 31. (Galleri has

been clinically shown to detect at least seven cancers; Grail and Illumina claim it can identify over fifty. *Id.* at 13, 54). The Commission identifies seven firms that Illumina allegedly has the incentive and ability to delay or otherwise hinder becoming future competitors to Grail for commercialized MCED tests. These are potential, not actual, competitors in the sale of commercialized MCED tests. Thus, any harm related to the commercialization of MCED tests—delays or worse—are harms to, or foreclosure of, potential competition.

Courts developed the potential competition doctrine in horizontal merger cases, but its required showing of likely entry by a potential competitor also applies here. To violate Section 7, elimination of a potential (future) entrant must result in the loss of future competition that is "sufficiently probable and imminent"; "remote possibilities [of lost competition] are not sufficient to satisfy the test set forth in [Section] 7." *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623, 628, 633, 642 (1974). In *Mercantile Texas Corp. v. Board of Governors*, this Court reviewed an order of the Federal Reserve Board to invalidate a proposed banking merger involving, arguably, a potential competitor; the Court

required a showing of reasonable probability that the firm would have entered the market absent the merger, *i.e.*, a likelihood greater than 50%. 638 F.2d 1255, 1268 (5th Cir. 1981).

Other appellate courts have adopted an even higher standard in interpreting *Marine Bancorp*. In *Tenneco, Inc. v. FTC*, the Second Circuit indicated that "to establish a violation . . . based upon the elimination of actual potential competition, . . . the Commission must show [among other things] that, absent its acquisition of Monroe [ ], Tenneco *would likely have entered* the market in the near future either de novo or through toehold acquisition." 689 F.2d 346, 352 (2d Cir. 1982) (emphasis added). *Yamaha Motor Co. v. FTC* defined the relevant burden differently: "would Yamaha, absent the joint venture, *probably have entered* the U.S. outboard-motor market independently…?" 657 F.2d 971, 977 (8th Cir. 1981) (emphasis added). *FTC v. Atlantic Richfield Co.* articulated a slightly different standard: "the proof . . . fails to show a *significant commitment* at the decisional level that Arco was *seriously considering* original entry . . . or entry by toehold acquisition." 549 F.2d. 289, 296-97 (4th Cir. 1977) (emphasis added). *In the Matter of B.A.T.*

*Industries, Ltd*., the Commission, in evaluating whether a merger removed a potential competitor from the relevant market, required the plaintiff to show *clear proof* that an acquiring firm would have entered the market but-for the merger. 104 F.T.C. 852, 917-18 (1984).

The most recent district court decision required "a likelihood noticeably greater than fifty percent." *See FTC v. Meta Platforms,* 2023 WL 2346238, at *22 (N.D. Cal. Feb. 3, 2023); *see also FTC v. Steris Corp*., 133 F. Supp. 3d. 962, 966 (N.D. Ohio 2015) (evidence must show that, absent the merger the potential entrant "'probably' would have entered" the relevant market).

In finding harm to potential or future competition here, the Commission ignored the requirement to show any firm but Grail had a reasonable probability of commercializing an MCED test. Grail's allegedly future competitors in a market for commercialized MCED tests meet neither the test for imminence nor reasonable probability; the Commission does not even try to show either. It assumes that, because they are engaged in research and or attempts to develop an MCED test that they will succeed in commercializing an MCED test.

The Commission identifies the status of the competitive efforts of seven firms: (i) Exact/Thrive ("developing an MCED test" and "preparing towards a registrational trial"); (ii) Guardant (describing R&D efforts for a single cancer test); (iii) Singlera ("working on developing four single-cancer screening tests and an MCED test"); (iv) Freenome (possibly relevant information redacted as confidential); (v) Natera (same); (vi) Helio Health (one single cancer test); and, (vii) a company whose name and other information is redacted and the likelihood of whose entry into the market is not publicly described and for whom we make no representations). Comm.Opp. at 14-19.

The Commission has neither established, nor made findings suggesting, a reasonable probability of commercialization of MCED tests by any firm other than Grail. Without showing that any firm would, pre-merger, have had a reasonable probability of commercializing an MCED test, the Commission cannot, as a matter of law, show any cognizable harm from delayed or foreclosed commercialization of an MCED test. No harm, no foul.

### B. Research and Development of MCED Tests

The Commission opinion articulates an alternative theory of harm that appears to be its primary theory of harm: Grail, and other firms, are engaged in innovation competition to improve on existing or future commercialized MCED tests, and the merger gives Illumina an ability and incentive to affect the pace and breadth of that competition. Even if no firm other than Grail commercializes a MCED test, the Commission alleges that Illumina's efforts to innovate, improve, or expand Grail's commercialized MCED tests may be slowed if Grails' competitors slow their efforts to develop an innovative test. If there is a race to innovate, the Commission appears to argue that Illumina can, by foreclosing competitors' access to NGS platforms, slow the pace of that race and that this is to its benefit.

We accept, arguendo, that Illumina can, by foreclosing access to its NGS platform, slow its competitors. But the Commission does not explain convincingly why this is to Illumina's benefit or why it will slow innovation. It may save some resources, either overall or may spread them over a longer period. But there is an opportunity cost to slowing

innovation. The primary benefit of Grail's MCED test is to identify persons who are "candidates" for cancer treatment, so they can address their likelihood of developing cancer symptoms, its severity, or the intensity of its treatment. But every day, Illumina loses potential customers, not to competitors but as individuals move from asymptomatic to symptomatic. This is the significant opportunity cost to Illumina slowing its innovation – a permanent decrease in the number of asymptomatic patients to test. Innovation will limit those loses.

An improved MCED test will also expand testing opportunities for a Grail MCED test; some of those opportunities will not be available in the future if Illumina slows its innovation now, for the same reason: the progression of individuals from the asymptomatic stage to symptomatic cancer.

The Commission bases its finding of harm in a market for R&D, or its finding of harm to innovation, on the assumption that Grail, and others, are racing to innovate future commercialized MCED tests. But the Commission merely assumes this is the necessary or material spur, it does not prove it. All the Commission has done is show that Grail and

other competitors identify each other as competitors. What the Commission fails to show is that the presence of other competitive firms is a necessary or material spur to innovation. It is not. Post-merger, Illumina has the incentive to continue to innovate Grail's commercialized MCED test, regardless of the competitive efforts of other firms.

## II. The Commission's Evaluation of the Likelihood and Magnitude of Illumina's Efficiency Claims Was Insufficient and Biased Against Efficiency Claims in Vertical Mergers

This Court has not recently[2] been asked to consider the efficiency claims of a party to a merger.

### A. Consideration of Efficiency Claims is a Required Step in the Evaluation of the Competitive Effects of a Merger

Under the burden-shifting approach applied to evaluating the competitive effects of a merger, courts routinely consider efficiency claims. *See, e.g.*, *United States v. AT&T,* 310 F. Supp. 3d, 161, 191 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019) ("One way defendants [may

[2] In this Court's most recent review of a Commission merger decision, the respondent "did not contend that the acquisition would lead to enhanced efficiencies benefitting competition." *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008).

rebut the Government's prima facia case] is to offer evidence that 'post-merger efficiencies will outweigh the merger's anticompetitive effects.'"). The Commission evaluated the respondents' efficiency claims as a potential "offset [to] the likely anticompetitive effects from [the merger]." Comm.Opp. at 74-75. (*See* Petitioners' Brief at 58-70 (discussing efficiency claims)). However, the Commission raises the possibility that it, and this Court, can reject any efficiency claim as irrelevant to the analysis of the legality of a merger and "that efficiencies alone [cannot] immunize[] an otherwise unlawful transaction." Comm.Opp. at 75. This claim misreads the law and is thus subject to *de novo* review. *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008) ("We review *de novo* all legal questions pertaining to Commission orders.").

If this is indeed the FTC's position, it reflects the very dated (and misguided) hostility to efficiencies in three early Clayton Act Section 7 Supreme Court decisions: *Brown Shoe v. United States*, 370 U.S. 294, 344 (1962), *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963) (which the Commission quotes approvingly), and *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967). The Supreme Court has since

recognized efficiency claims in a series of seminal non-merger antitrust matters. *Leegin Creative Leather Prods. v. PSKS, Inc.,* 551 U.S. 877 (2007) (minimum vertical price agreements); *State Oil v. Khan*, 522 U.S. 3 (1997) (maximum vertical price agreements); *Broadcast Music, Inc.*, *v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (horizontal price and non-price restraints); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical non-price restraints); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977) (antitrust injury). Most recently, in *Alston*, the Supreme Court reiterated that, under the "burden-shifting" approach used to adjudicate "rule-of-reason" restraint of trade cases, the defendant can rebut the plaintiff's prima facia case by showing a procompetitive rationale for a challenged restraint. *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021). Notably, "antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes." *Id*. at 2161.

Appellate courts have considered efficiency claims in mergers since at least the FTC's challenge to University Health's proposed acquisition of the assets of a competing hospital. *FTC v. Univ. Health, Inc.*, 938 F.2d

1206 (11th Cir. 1991). "[I]n certain circumstances, a defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market." *Id*. at 1222. To that court, it was

> clear that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition. . . . [E]vidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition.

*Id*. Other appellate courts have considered efficiency claims. *See*, *e.g.*, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir. 1999) ("the evidence shows that a hospital that is larger and more efficient … will provide better medical care than either of those hospitals could separately."); *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019) (efficiency claims relevant to the competitive effects analysis); *FTC v. H.J. Heinz*, 246 F.3d 708, 720 (D.C. Cir. 2001) (the "trend among lower courts is to recognize the [efficiency] defense"); *United States v. Anthem, Inc.*, 855 F.3d 345, 355 (D.C. Cir. 2017) ("evidence of efficiencies could rebut a prima facia showing"); *FTC v. Penn State Hershey Med. Ctr.*, 838

F.3d 327, 347 (3rd Cir. 2016) (to overturn a district court's denial of an injunction against the merger of two hospitals, they "must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); *St. Alphonsus Med. Ctr.-NAMPA v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015) ("because Section 7 of the Clayton Act only prohibits those mergers whose effect 'may be substantially to lessen competition,' a defendant can rebut a prima facie case with evidence that a proposed merger will create a more efficient combined entity and thus increase competition.").

Likewise, district courts routinely consider efficiencies in analyzing the competitive effects of a proposed merger. *See* TechFreedom, *Comments on Request for Information on Merger Enforcement*, Docket No. FTC-2022-0003 (Apr. 21, 2022), at 19-20 (collecting cases).

### B. Vertical Mergers May Generate Significant Efficiencies

Antitrust scholars widely recognize that vertical integration and vertical mergers likely have procompetitive effects and create

procompetitive efficiencies, whatever their potential anticompetitive effects. The Government's own Vertical Merger Guidelines recognize this:

> Vertical mergers combine complementary economic functions and eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers. Vertical mergers combine complementary assets, including those used at different levels in the supply chain, to make a final product. A single firm able to coordinate how these assets are used may be able to streamline production, inventory management, or distribution. *It may also be able to create innovative products in ways that would not likely be achieved through arm's-length contracts.*

U.S. Dept. of Just. & FTC, Vertical Merger Guidelines (June 30, 2020), at 11 (emphasis added).[3]

### C. The Commission Predetermined That Illumina's Efficiencies Were Insufficient or Irrelevant to Its Rebuttal of Plaintiff's Allegations

Illumina has identified significant potential merger-specific efficiencies. *See* Petitioners' Brief at 13-14, 58-59, 64-70. Of course, neither the Commission nor this Court need accept Illumina's assertions at face value, but the Commission ignores and cherry-picks evidence in

[3] On September 15, 2021, over the objections and dissent of two Commissioners, the FTC withdrew its approval of the 2020 Vertical Merger Guidelines.

the record to confirm a previously expressed and pre-determined bias against efficiency claims. That hostility is clear:

> [T]he 2020 [Vertical Merger Guidelines'] flawed discussion of the purported procompetitive benefits (i.e. efficiencies) of vertical mergers, especially its treatment of the elimination of double marginalization (EDM), could become difficult to correct if relied on by courts. . . . Until new guidance is issued, the FTC will . . . not presume efficiencies for any category of mergers.

Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, & Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021), at 2. Likewise, Commissioner Alvaro Bedoya has said "we need to step back and question the role of efficiency in antitrust enforcement." Prepared Remarks of Commissioner Alvaro M. Bedoya, Federal Trade Commission (Sept. 22, 2022), at 8.

The Commission Opinion here was written by Chair Khan, joined by Commissioners Slaughter and Bedoya. It cites a series of *horizontal* merger cases to assert that efficiencies are "inherently difficult to verify and quantify" and may be "mere speculation." Comm.Opp. at 75. But "we must never forget that the economics of vertical relationships is fundamentally different from the economics of horizontal relationships,"

cautions Michael Salinger, former Director of the FTC's Bureau of Economics. Michael Salinger, *Is it Live or Is it Memorex? Models of Vertical Mergers and Antitrust Enforcement* (Sept. 7, 2005), at 1 (emphasis added). "Two rivals generally have a mutual incentive to increase their prices. A company and either its supplier or distributor generally have a mutual incentive to lower their prices." *Id*.

### D. The Commission's Analysis of Illumina's Efficiency Claims Was Pre-Determined by its Bias Against Efficiency Claims

The Commission's hostility to efficiency claims is apparent in its treatment of Illumina's claims:

- "Respondents fail to demonstrate that [their] R&D claims are independently verifiable." They are "vague," "generic," "aspirational," and "fail to identify the nature or timing of *specific, concrete* research advances." Comm.Opp. at 76-77 (emphasis added).
- Claims of market access acceleration efficiencies and lives saved are "based on the unsupported and vague assertions of management personnel." *Id.* at 77.

- "Respondents have failed to demonstrate that the [GRAIL] royalty reduction is merger specific." *Id.* at 83.
- "[T]he estimate of predicted [supply chain and operational] savings fails the test of being 'reasonably verifiable by an independent party.'" Grail's pre-merger investments in test capacity and new technology combined with "Respondents' failure to provide detailed assumptions and accounting data" "make it difficult [for the Commission] to tell what incremental value, if any, the Acquisition will provide. This efficiency claim therefore fails." *Id.* 84-85.
- "Respondents fail to demonstrate that [efficiencies related to international expansion are] verifiable, merger specific or would be passed through to consumers in the relevant, United States market." *Id.* 85-86.
- "Even assuming [ ] that the asserted efficiencies and procompetitive benefits were properly verified and proven to be merger specific" "[r]espondents' assumption of passthrough

> [to customers] are speculative and do not meet the required level of rigor." *Id.* at 86-87.[4]

In summary: "Respondents' claims of efficiencies and any procompetitive effects are inadequate . . . [and] *to the extent they might somehow come to pass [they are] not likely to benefit the public*." *Id.* at 76 (emphasis added).

Illustrating its predetermined biased view against Illumina's efficiency claims, the Commission, in rejecting portions of Illumina's claims, credits the testimony of complaint counsel's expert that "innovation competition could save more lives." *Id.* at 83. The ALJ summarizes her testimony on this point:

> Relying on her background in empirical industrial organization, Complaint Counsel's economic expert witness, Dr. Fiona Scott Morton, opined that although Grail was first to reach the market with an LDT of its Galleri MCED test, "there is no guarantee that Grail will remain in the lead.

[4] The Commission has a fundamental misunderstanding of pass-through. It is an economic fallacy that, to the extent a merger increases market power, there is less likelihood that productive efficiencies will be passed on. Rather, "the pass-through rate of merger-specific efficiencies is likely to be highest when the threat of post-merger price increase is greatest. … [F]irms with market power have a substantial incentive to reduce their prices when their costs fall, and [ ] this incentive likely increases with the degree of market power." *See* Michael Vita & Paul Yde, Comment to the Antitrust Modernization Commission, *Merger Efficiencies & Pass-Through Analysis* (Mar. 16, 2005), at 4.

> Grail's rivals continue to invest in alternative approaches, and one of those approaches *might* turn out to be superior in the future. A rival *might* make a discovery or advancement at any time, and leapfrog ahead of Grail." Dr. Scott Morton further opined: "Grail's rivals continue to invest in alternative approaches (including approaches that **[Redacted]** and one of those approaches *might* turn out to be superior in the future. . . . A rival *might* make a discovery or advancement at any time, and leapfrog ahead of Grail, or provide an alternative test that allows more cases of cancer to be detected or a subset of cancers to be detected with more accuracy."

IND at 147-148 (citations omitted, emphasis in original). *Speculative*, *vague*, *unverified*, *unverifiable*, *generic*, and *aspirational* are adjectives that come immediately to mind. The ALJ was blistering: "Dr. Fiona Scott Morton's qualifications to give opinions for this case are minimal." *Id.* at 147 n. 35. The ALJ found her claims about future innovation absent the merger to be unsupported. *Id.* at 148.

The Commission's reliance on her testimony illustrates its determination to find any basis, however speculative, to reject Illumina's efficiency claims. Evaluated in comparison to its crediting of Dr. Scott Morton's claims, the Commission's efficiency analysis is substantially one-sided against Illumina. Evaluated with knowledge of the Commissioner's pre-decision hostility to efficiencies in vertical mergers,

the Commission's review is clearly biased. Evaluated in comparison to the broad acceptance of efficiencies in vertical mergers and vertical integration, the Commission's characterization of Illumina's efficiency claims is incomplete and not credible. Evaluated against the Commission's blind acceptance of highly speculative claims about potential entry, the Commission's dismissal of all potential efficiencies is nothing less than arbitrary and capricious. 5 U.S.C. § 706(2)(A).

The Commission's review of Illumina's efficiency claims is inconsistent with the "substantial evidence standard" and should be reviewed carefully and without deference. *Chicago Bridge & Iron*, 534 F.3d at 422 ("Substantial evidence is evidence that provides a substantial basis of fact from which the fact in issue can be reasonably inferred."). The Commission ignored or casually dismissed testimonial and documentary evidence inconsistent with a pre-determined conclusion. Where the Commission "ignores evidence contrary to its hypothesis," no deference is due and the "substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." *Tenneco, Inc.*, 689 F.2d at 357.

### E. Evaluation of Efficiency Claims and Anticompetitive Effects Should Be Symmetrical in Vertical Mergers

The Commission repeatedly applied a different evidentiary standard to Illumina's efficiency claims than it applied to testimony or uncertain evidence supportive of possible harm. Petitioners' Brief at 63-64. This was unfair to Illumina, and unnecessary under the law.

Merger analysis deals in probabilities, not certainties. *AT&T*, 916 F.3d at 1032 ("Although Section 7 requires more than a 'mere possibility' of competitive harm, it does not require proof of certain harm" but "reasonable probability."). But the Commission, in evaluating the efficiencies proffered by Illumina, required the company to prove those efficiencies to a far higher level of certainty than the government's burden of showing a "reasonable probability" of competitive harm.

The Commission relies on *horizontal* merger cases (Comm.Opp. at 75), which are inapt. In such cases, there is a presumption of possible competitive harm because a competitor is eliminated. Not so in vertical cases. *See United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 164 (D.D.C. 2018). The theoretical and empirical literature recognize the greater likelihood that vertical mergers are procompetitive:

> Vertical integration has two main direct or first-order efficiency effects. Firstly, it improves vertical co-ordination between the downstream and upstream units of the firm, by enabling the two units to internalize the impact of their business decisions on each other's profit; secondly, it induces cost savings through economies of scope, by allowing the merging parties to share costs that are common to the different stages of the productive process. In contrast, the risk that vertical integration enhances market power [ ] is an indirect or *second-order* effect, as it depends on some additional anti-competitive behaviour taking place post-merger. . . . The theoretical and empirical evidence that vertical integration creates efficiency effects largely explains why vertical mergers are generally presumed to be welfare enhancing and to pose substantially fewer competition concerns than horizontal mergers." For a vertical merger to decrease consumer welfare, it would be necessary that the *second-order* effect of enhanced market power overcomes the *first-order* efficiency gains from both vertical co-ordination and economies of scope.

Background Note by the Secretariat, OECD, Vertical Mergers in the Technology, Media and Telecom Sector (June 7, 2019), at 27, https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf.

The evaluation of the potential competitive effect of a vertical transaction should treat possible benefits and possible harms as symmetrical: the reasonableness, verifiability, and merger-specificity required to show likelihood of future, post-merger efficiencies should be no greater than the reasonableness, verifiability, merger-specific

competitive harms underlying the Commission's concern in a vertical merger. In a vertical merger, a respondent should be required only to show there is a reasonable probability it will obtain its claimed efficiencies.

## III. The Commission's Skepticism of Illumina's Open-Offer is Inconsistent with the Agency's Long Practice of Accepting Similar Commitments

In *United States v. AT&T*, the district court properly incorporated into its analysis of the potential anticompetitive effects of the vertical merger of AT&T (distribution) and Time-Warner (content), Turner Broadcasting's irrevocable offers of no-blackout arbitration agreements. 310 F. Supp. 3d 161 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir 2019). The government alleged the combined firm would threaten to withhold or otherwise interfere with distribution of Time-Warner/Turner content from AT&T's competitors. There, "the district court's finding of the efficacy of Turner Broadcasting's irrevocable offers of no-blackout arbitration agreements means the merger is unlikely to afford Turner Broadcasting increased bargaining leverage." 916 F.3d at 1042-1043.

Illumina has already offered a 12-year supply commitment (the "Open Offer") for "all its United States oncology testing customers who purchase NGS products for developing and/or commercializing oncology tests." IND 178. The Open Offer contains various price and non-price commitments. *Id.* at 178-179. The ALJ concluded that "the Open Offer effectively constrains Illumina from harming Grail's alleged rivals and rebuts the inference that future harm to Grail's alleged rivals, and thus future harm to competition, is likely." *Id.* at 178.

The Commission disagreed: "behavioral remedies have long been disfavored in merger cases." Comm.Opp. at 66. True, but only with respect to remedies in horizontal, not vertical, merger matters; remedies in allegedly anticompetitive vertical mergers frequently are resolved through behavioral or contractual commitments. Structural remedies are not well-suited to vertical mergers: the merging parties are not competitors, and divesting assets may require the parties to forego important efficiencies. Thus, the Commission regularly accepts contractual/behavioral remedies in vertical mergers (and in monopolization cases based on exclusionary conduct). *See, e.g.*, FTC, *The*

*FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics* (Jan. 2017), at Table 1 (showing the Commission accepted non-structural remedies in 100% of their challenges to vertical mergers). The Commission considers its remedies successful if they maintain or restore competition in the relevant market. All non-structural remedies in vertical merger matters reviewed in the report were considered successful. *Id.* at 1-2.

The Commission notes several concerns about the Open Offer: (i) internal pricing of NGS platforms to Grail is non-transparent and can be manipulated; (ii) Illumina's "guaranteed" pricing may exceed the price available in the absence of the acquisition; (iii) Illumina could easily breach various service and support commitments through plausible but untrue explanations; (iv) Illumina could share information with Grail as part of its development efforts but not share in a timely manner with Grail's competitors; (v) Illumina could modify its product to give Grail a competitive edge; (vi) Illumina could share competitively sensitive information from Grail's competitors with Grail, and (vii) the Open Offer lacks effective enforcement mechanisms. Comm.Opp. at 66-73.

These concerns are speculative, but not unique to this matter and they are addressable. The Commission regularly enters into orders that rely on the type of commitments and practices Illumina extended in its Open Offer to address its competitive concerns in vertical mergers. In *Northrop Grumman/Orbital ATK*, the Commission required Northrop to commit to non-discrimination provisions in its dealing with competitors to Orbital, with respect to support, staffing, resource allocation, design decisions, offers, participation in collaborative agreements, and use of technologies; it also required the adoption of firewalls. Decision and Order at § II, *In the Matter of Northrop Grumman Corp. & Orbital ATK, Inc.*, Docket No. C-4652 (F.T.C. Dec. 3, 2018).

In *Teva/Allergan*, a transaction with both horizontal and vertical aspects, the Commission resolved its concern that the combined firm would have the incentive and ability to withhold supply of active pharmaceutical ingredients from current or future competitors by requiring Teva to enter into supply agreements with respect to all users of any of eight active pharmaceutical ingredients, at pre-acquisition pricing, in commercial quantities, with related services provided

consistent with past practice. Decision and Order at § IV, *In the Matter of Teva Pharma. Indus. & Allergan PLC*, Docket No. C-4589 (F.T.C. Sept. 7, 2016).

In *General Electric/Avio*, the Commission required GE Aviation not to interfere with, or limit, the bids or participation of Avio under existing agreements to supply inputs for jet engines to GE's competitor, including with respect to staffing, service, and transitional services. The Order also required the adoption of a firewall to prevent the sharing of competitively sensitive information. Decision and Order at §§ III, IV, V, *In the Matter of Gen. Elec. Co.*, Docket No. C-4411 (F.T.C. Aug. 27, 2013).

In *Fresenius Medical Care*, the FTC feared that the acquisition of an exclusive license to distribute a pharmaceutical product used in dialysis treatment would give Fresenius, an owner of hundreds of dialysis clinics throughout the United States, the ability to increase Medicare reimbursement payments for the drug because its price, post-merger, would no longer be determined by the market but by Fresenius' determination of an internal transfer price. The Commission resolved its concern through a consent order restricting Fresenius from artificially

inflating its internal costs/prices to increase Medicare reimbursement. Decision and Order at § II, *In the Matter of Fresenius Med. Care AG & Co.*, Docket No. C-4236 (F.T.C. Oct. 20, 2008).

In *Valero/Kaneb*, the Commission alleged that Valero's post-merger operation of certain Kaneb refined petroleum product terminals would give Valero, a bulk supplier of refined petroleum products, an incentive and ability to foreclose access by its competitors to the Kaneb terminals. To address its concerns, the Commission entered into a consent order with Valero requiring that it, among other things, operate the terminals in a reasonable and non-discriminatory way, and, in no way inconsistent with terms and conditions offered to itself. Decision and Order at § VI, *In the Matter of Valero, L.P.*, Docket No. C-4141 (F.T.C. July 22, 2005).

In *Intel*, the Commission challenged conduct that allowed Intel to maintain a monopoly in Central Processing Units and to create a monopoly in markets for graphics processing units. To address, on a going forward basis, Intel's past conduct, the Commission prohibited Intel from product designs that would intentionally limit interoperability of certain

CPU/GPU interfaces, prohibited Intel from making any engineering or design changes (to the relevant products) "if that change . . . degrades the performance of the Relevant Product sold by a competitor . . . and [did] not provide an additional benefit to the Relevant Product sold by [Intel]." Intel was also required to "use reasonable efforts to ensure that any Product Roadmap it discloses to any person will be, at the time of disclosure, accurate and not misleading." Decision and Order §§ II, V, VI, *In the Matter of Intel Corp.*, Docket 9341 (F.T.C. Oct. 29, 2010).

In short, the Commission had no reasonable basis for concluding that Illumina's Open Offer was insufficient to avoid potential harms to competition merely because it was not structural relief.

## CONCLUSION

The Commission has frequently accepted consent orders in vertical mergers that are non-structural and based on commitments similar to those in Illumina's Open Offer. The court should direct the Commission to accept Illumina's previously expressed willingness to memorialize the Open Offer into an Order. The Court should allow the FTC to identify changes, consistent with past practice, to improve the scope, oversight,

and enforcement of Illumina's open-offer commitments, including incorporation of a monitor to enforce, audit, and report on compliance with such an order.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

On June 12, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Bilal Sayyed

## CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 6,386 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, in 14-point font, using Microsoft Office 365.

/s/ Bilal Sayyed