PUBLIC

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF DR. FIONA SCOTT MORTON

This Court should deny Respondents' Motion *In Limine* to Exclude Expert Testimony of Dr. Fiona Scott Morton ("Motion"). The Motion disregards this Court's Scheduling Order regarding motions *in limine* as well as prior rulings regarding the general admissibility of expert opinions in a bench trial. Moreover, following Respondents' logic, the only experts qualified to opine on this merger would require expertise not only in the field of economics but also the scientific fields of next-generation sequencing ("NGS") and Multi-Cancer Early Detection ("MCED"). Dr. Scott Morton's expertise as an industrial organization economist is undisputed, and at no time has Dr. Scott Morton represented that she is serving as a scientific, regulatory, or reimbursement expert.[1] Despite Dr. Scott Morton's credentials, Respondents assert that Dr. Scott Morton is incapable of analyzing the factual record in formulating her expert opinion because she does not have expertise relating to NGS and MCED technology that {[redacted]

[1] {[redacted]}

[redacted]} To the extent that Respondents take issue with the materials that Dr. Scott Morton relied upon in formulating her expert opinion, this Court's prior rulings make clear that this goes to the weight and credibility, and not the admissibility, of her testimony.

BACKGROUND

Complaint Counsel retained Dr. Scott Morton to provide her expertise as an economist to analyze Illumina's proposed acquisition of Grail (the "Proposed Acquisition").[3] Dr. Scott Morton is currently the Theodore Nierenberg Professor of Economics at the Yale University School of Management.[4] Her research focuses on empirical industrial organization, including the study of competition among firms and the role of market structures.[5] To analyze the Proposed Acquisition, Dr. Scott Morton "studied depositions and investigational hearings of industry participants, industry and company documents and data, as well as information obtained from public sources."[6] She used this information and her economic expertise to reach her conclusion that "the proposed transaction between Illumina and Grail will likely harm potential competition among MCED test developers by reducing innovation and creating an incentive to raise rivals' costs or foreclose rivals, which would in turn, result in harm to consumers."[7]

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2 [redacted]}

3 {[redacted]}

4 {[redacted]}

5 {[redacted]}

6 [redacted]}

7 {[redacted]}

ARGUMENT

I. The High Bar for Motions *in Limine* Compels Denial of Respondents' Motion

Rule 3.43(b) of the Commission Rules of Practice states that only relevant, material, and reliable evidence shall be admissible. 16 C.F.R. § 3.43(b). This Court has consistently relied on *Daubert* to assess the admissibility of expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579, 588 (1993); *see also In re LabMD, Inc.*, Docket No. 9357, Order Denying Motions *In Limine* To Exclude Proffered Experts at 2 (May 5, 2014) (Chappell, J.) (*In re LabMD*); *In re McWane Inc.*, Docket No. 9351, Order Denying Motions *In Limine* To Preclude Admission of Expert Opinions And Testimony at 4 (Aug. 16, 2012) (Chappell, J.) (*In re McWane*). Under *Daubert*, "courts consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue." *In re McWane* at 4. Here, Dr. Scott Morton is a well-regarded industrial organization economist and properly relied on the factual record to inform her economic analysis of the Proposed Acquisition. Further, the methodology used by Dr. Scott Morton to analyze this transaction is routinely used by economists performing similar analyses.[8]

This Court stated in its Scheduling Order, as well as in prior decisions, that parties should only seek to exclude evidence when it is "clearly inadmissible on all potential grounds." *In re Illumina, Inc.*, Docket No. 9401, Scheduling Order at ¶ 13 (Apr. 26, 2021) (citations omitted) ("Scheduling Order"); *see also In re LabMD*; *In re McWane*. Here, Respondents seek to exclude clearly admissible evidence, most of which is undisputed, that serves primarily as the factual basis for Dr. Scott Morton's analysis of the Proposed Acquisition. Dr. Scott Morton's reliance and citation to the record as the bases for her expert opinion is not "inadmissible on all potential

[8] *See infra* Section II & III; *see also supra* n.3.

grounds," and is routine practice for economic experts. *See In re Urethane Antitrust Litig.,* 152 F. Supp. 3d 357, 361 (D.N.J. 2016) (*In re Urethane*); *see also In re Processed Egg Products Antitrust Litig.*, 81 F. Supp. 3d 412, 418–25 (E.D. Pa. 2015) (*In re Processed Egg Products*) (stating that an economic expert may rely heavily on the factual record when evidence is consistent with orthodox economic theory). Thus, on its face, Respondents' Motion fails to meet this Court's high standard.

Further, Respondents' Motion fails to consider that this is a bench trial where the judge is fully capable of weighing the evidence, as the Scheduling Order and prior case law make clear. *See* Scheduling Order at ¶ 13 (explaining that "the risk of prejudice . . . is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence"); *see also In re McWane* at 4. Respondents instead cite to cases involving jury trials, like *Highland Capital Mgmt.*—where Respondents notably replace the word "jury" with "[fact finder]"—to support their argument.[9] As this Court has held, rather than exclude evidence, the "better approach under *Daubert* in a bench trial is to permit the expert testimony and allow 'vigorous cross-examination'" and the "presentation of contrary evidence" to test the admissible evidence. *In re McWane* at 4. Respondents have already deposed Dr. Scott Morton and will have the opportunity to subject her economic analysis to additional cross-examination during trial when this Court can assess the validity of her analysis.

II. Dr. Scott Morton Has the Relevant Expertise as an Economist to Offer Opinions Based on Reasonable Assumptions From Record Evidence

Dr. Scott Morton considered a variety of evidence, including documents and testimony, in analyzing the competitive effects of the Proposed Acquisition.[10] Like expert testimony admitted

[9] Respondents' counsel cite to case law that all involve jury trials. *See generally Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461 (S.D.N.Y. 2005); *Wilson v. Muckala*, 303 F.3d 1207 (10th Cir. 2002); *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001).

[10] {[redacted]}

in other matters before this Court,[11] as well as expert testimony in similar antitrust proceedings,[12] Dr. Scott Morton's reliance on such evidence as a basis for her economic analysis is reasonable and well-accepted. Dr. Scott Morton need not personally have developed a relevant product or have received medical training to opine on product market definition, competitive effects, or entry, as such a standard would render most, if not all, economic expert testimony inadmissible.

In their Motion, however, Respondents argue that Dr. Scott Morton is not qualified to "opine on both the MCED test market and the NGS market" because she does not have expertise in MCED tests, NGS platforms, regulatory approval, or reimbursement.[13] For example, Respondents argue that "Dr. Scott Morton claims that MCED tests 'all have a similar intended use'" and "appears to base this opinion entirely on third party lay witness testimony and publicly available documents from the American Cancer Society website."[14] Respondents do not explain why Dr. Scott Morton cannot rely on testimony of MCED test developers about the intended use of their own products, as well as Grail's own S-1 form used in pursuit of its initial public offering, to inform her economic analysis regarding product market definition, product substitution, and the application of the hypothetical monopolist test.[15] Respondents only assert, without basis, that "Dr.

[11] *In re Altria Group, Inc.*, Docket No. 9393 (FTC 2021) (pending); *In re Otto Bock HealthCare North America, Inc.*, Docket No. 9378 (FTC May 6, 2019).

[12] *See, e.g.*, *AT&T*, 310 F. Supp. 3d 161 (D.D.C. 2018); *see also In re Urethane,* 152 F. Supp. 3d 357 (D.N.J. 2016); *In re Processed Egg Products,* 81 F. Supp. 3d 412 (E.D. Pa. 2015).

[13] Motion at 4–5.

[14] Motion at 5 {[redacted]}

[15] *See* {[redacted]}

Scott Morton is unqualified to interpret such documents, let alone opine on them" even while its own experts do the same.[16]

Longstanding case law permits an economic expert's reliance on the factual record to inform an economic analysis. It is "beyond dispute" that probative expert testimony requires "assumptions that are 'reasonable' in light of the record evidence." *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 221 (D.D.C. 2018); *see also id.* (citing *United States v. General Dynamics*, 415 U.S. 486, 498 (1974)). Economic experts routinely apply their methodologies by relying on such record evidence to determine "the scope of the relevant market, the market share held by relevant suppliers, barriers to entry" as well as likely future competitive effects. *In re Urethane*, 152 F. Supp. 3d at 361; *see also In re Processed Egg Products*, 81 F. Supp. 3d at 418–25. Here, Dr. Scott Morton appropriately reviewed the factual record as an input to her economic analysis.

Respondents seek to support their flawed Motion by improperly analogizing certain case law. For example, Respondents cite to *In re Whirlpool Corp.* to assert that courts "routinely exclude expert opinions and testimony from economic experts who do not have the requisite expertise to opine on such topics."[17] In *Whirlpool*, plaintiffs sought to exclude portions of an expert's testimony because they alleged the "marketing data and observations" of the testifying economic expert were "beyond his expertise." *In re Whirlpool*, 45 F. Supp. 3d at 756–57. The court held that the economic expert's opinion did not exceed his expertise because he "support[ed] all of his comments on these topics by direct citations to the record or to various third-party literature sources." *Id.* While the court did exclude portions of the expert's testimony that relied on third-party market research from *Consumer Reports*, it did so because these opinions were "not

[16] *See* Motion at 5; *see also* {[redacted]}.

[17] Motion at 4.

based on information or data normally relied upon by economists in forming conclusions." *Id.* (noting that the "majority of the Plaintiff's challenges to [the economic expert's] assumptions go to weight, not admissibility"); *see also Nat'l Communs. Ass'n v. AT&T*, 1998 WL 118174, at *42–49 (S.D.N.Y. Mar. 16, 1998) (excluding limited testimony that the expert conceded was outside their expertise).

Similar to the expert testimony admitted in *Whirlpool*, Dr. Scott Morton supports her economic analyses relating to market definition and competitive effects with testimony from relevant MCED test developers and potential NGS sequencing developers, as well as market participants' own documents.[18] Dr. Scott Morton does not opine on particular technical characteristics of these products, but instead makes reasonable assumptions based on the factual record in order to evaluate, *inter alia*, the market structure, the likelihood of NGS entry, and the likely competitive effects of the Proposed Acquisition. *See AT&T*, 310 F. Supp. 3d at 221; *see also In re Urethane*; *In re Processed Egg Products*.

III. Dr. Scott Morton's Report Neither Selectively Rehashes Evidence Nor Improperly Weighs Witness Credibility

Respondents argue that Dr. Scott Morton is "merely selectively rehash[ing] documentary and testimony evidence" and "improperly weigh[ing] the credibility of witnesses."[19] Respondents' reliance on *Highland Capital Mgmt.* is misplaced, as it involved the exclusion of the "facts" section of an expert report that the judge determined was "presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Highland Capital Mgmt.*, 379 F. Supp. 2d at 468–69. This case, and the additional supporting case law cited by Respondents, are

[18] *See, e.g.*, {[redacted]}

[19] Motion at 6–8.

inapposite, as each involves a jury trial and not a bench trial, which inherently involves less risk of prejudice.[20]

Dr. Scott Morton does not simply rehash facts to provide her own narrative; instead these facts are a basis for her expert economic opinions.[21] Nor does Dr. Scott Morton's review of the factual record, including testimony and documentary evidence, "usurp the domain of the fact finder."[22] Instead, her review of the factual record is critical for her conclusions to rest upon "assumptions that are reasonable in light on the record evidence" in order to evaluate the relevant markets. *AT&T*, 310 F. Supp. 3d at 221. To the extent Respondents believe Dr. Scott Morton's conclusions improperly rest upon third-party testimony over Respondents' executives' testimony, this speaks to weight, not the admissibility of her opinions.

CONCLUSION

For these reasons, Complaint Counsel respectfully requests that the Court deny Respondents' Motion *in Limine* to Exclude Testimony of Dr. Fiona Scott Morton.

Date: August 18, 2021

Respectfully submitted,

s/ Joseph R. Neely

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[20] See *supra* n.9; *see also* Scheduling Order at ¶ 13.

[21] *See, e.g.*, {[redacted]}

[22] Motion at 7.

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[PROPOSED] ORDER

Upon Respondents' Motion *In Limine* to Exclude Expert Testimony of Dr. Fiona Scott Morton, it is hereby:

ORDERED that Respondents' motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August _____, 2021

Exhibit A

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit B

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit C

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit D

(CONFIDENTIAL – REDACTED IN ENTIRETY)

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
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The Honorable D. Michael Chappell
Administrative Law Judge
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I also certify that I caused the foregoing document to be served via email to:

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