PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENTS ILLUMINA, INC. AND GRAIL, INC.'S ANSWERING BRIEF TO COMPLAINT COUNSEL'S APPEAL BRIEF

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GLOSSARY OF RECORD REFERENCES

ABBREVIATION	MEANING
ID	Initial Decision
IDF	Chief Judge Chappell's Findings of Fact
Compl.	Complaint
CC	Complaint Counsel
OB	Complaint Counsel's Opening Appeal Brief
CCB	Complaint Counsel's Post-Trial Brief
CCFF	Complaint Counsel's Post-Trial Findings of Fact and Conclusions of Law
RB	Respondents' Post-Trial Brief
RRB	Respondents' Post-Trial Reply Brief
RFF	Respondents' Post-Trial Findings of Fact and Conclusions of Law
RRFF	Respondents' Post-Trial Reply Findings of Fact and Conclusions of Law
PX	Complaint Counsel's Trial Exhibit
RX	Respondents' Trial Exhibit
IH	Investigational Hearing
Tr.	Trial Transcript

PRELIMINARY STATEMENT

This is a case about a vertical merger (the "Transaction") that reunited Illumina, Inc. ("Illumina") with the company it founded, GRAIL, Inc. ("Grail"), to revolutionize cancer screening. Even though this life-saving Transaction will accelerate the adoption of Grail's groundbreaking cancer-screening test, Galleri, Complaint Counsel ("CC") seeks to unwind it based on speculation that Illumina may (theoretically) disadvantage putative rival tests many years in the future if and when they launch. As Chief Judge Chappell ("the ALJ") correctly found, CC failed to meet its burden to prove that the Transaction may substantially lessen competition. Redoubling its efforts before what it hopes will be a favorable forum, CC seeks to undo the ALJ's decision (the "Decision") based on "legal" propositions that are unsupported by the law, cherry-picked anecdotes that are contradicted by the overwhelming weight of the evidence, and a series of double standards unrecognized in the law. Based on a voluminous trial record and many hours of live testimony, the ALJ correctly rejected CC's challenge to the Transaction. The Decision should be affirmed.

Illumina is a global leader in next generation sequencing ("NGS"), a cutting-edge technology for genetic and genomic analyses. Illumina has pursued its mission to improve human health by unlocking the power of the genome, including by catalyzing greater NGS adoption. Illumina has realized this strategy in part by driving down sequencing costs dramatically as well as by improving its NGS systems and the ease of its sequencing workflows. The results of this innovation are stark: when Illumina launched its first instrument in 2007, the cost to sequence a full human genome was about $10 million; today, it costs far less than $1,000. Illumina's innovation in sequencing and attendant lower prices are so well-known that *Forbes* coined the term "Flatley's Law" to describe the price reductions achieved during the tenure of

Illumina's former CEO, Jay Flatley, who testified at trial about the innovation and R&D efficiencies that would result from the Transaction.

Illumina's reduced prices are not altruistic; Illumina benefits when entities develop their downstream applications on Illumina's NGS platform—rather than using alternative NGS platforms or other upstream technologies like polymerase chain reaction ("PCR"). Illumina's innovations have allowed its NGS systems to be used in a wide array of applications, leading Illumina to expand from focusing on serving research markets to serving clinical customers using NGS to transform disease management. Illumina first embarked on this expansion in 2013, when it acquired the noninvasive prenatal testing company ("NIPT"), Verinata. A few years later, Illumina vertically integrated in a different area, oncology therapy selection, by developing its own slate of therapy selection workflows. Through Illumina's entry, these markets have experienced lower prices, increased entry, output and innovation, all to the benefit of patients.

Illumina's entry into NIPT was also the genesis of Grail. Following a discovery by Illumina that its prenatal screening tests identified undiagnosed cancer in pregnant women, Illumina embarked on a multi-year, multi-billion dollar research project to determine whether blood tests could be used to detect cancer early. In 2015, Illumina founded Grail—so named because the "holy grail" of detecting cancer through a blood test had never been achieved—to develop a test capable of detecting multiple cancers at an early stage. In 2017, Grail was spun off to facilitate its investment in extensive, population-scale clinical trials needed to develop and validate Galleri. Illumina retained a 12% equity interest in Grail and received the right to a substantial royalty from Grail's future revenues, in perpetuity. Since then, Grail has

demonstrated that it can detect more than 50 types of cancer in asymptomatic patients and accurately localize the cancer in positive cases (*i.e.*, detect cancer signal of origin).

In June 2021, Grail launched Galleri as the first NGS blood-based multi-cancer screening test in the United States as a laboratory developed test ("LDT") but it faces significant hurdles to making Galleri available at an affordable cost. Illumina is uniquely situated to bring Galleri to the masses; the reunited company will accelerate the adoption of Galleri at scale and reduce the cancer burden in the U.S. and worldwide, while saving thousands of lives and billions of dollars in healthcare costs. As the Decision correctly found, Galleri is the only test of its kind on the market, and no competing test will exist in the foreseeable future, including because no putative rival is even undertaking clinical trials of a test that can both detect 50 cancer types (or anywhere close) ***and*** localize the cancer.

In seeking to undo the Transaction, CC asks the Commission to do what no court ever has (or ever should). It asks the Commission to unwind a vertical merger where:

- The alleged relevant market is unspecified and comprises products that, save one (Galleri), are pre-commercial, may never launch and are likely to be dissimilar to each other;
- CC never offered an economic model showing that the alleged anticompetitive effects of the Transaction outweigh its benefits, as is its burden;
- No empirical evidence supports CC's claim that the upstream firm (Illumina) would have the incentive and ability to harm downstream rivals;
- The alleged foreclosure strategy that CC imagines could not benefit Illumina for years, if it ever could, but would cause serious damage to Illumina's upstream business;
- There is ongoing entry in the upstream market, whereas there will not be meaningful entry in the downstream market for years;
- The only other vertical transaction involving the upstream firm (Illumina) was followed by a period of increased (not decreased) competition;

- The upstream firm made a binding, long-term commitment making it impossible (absent severe penalties) to raise downstream rivals' costs; and
- The Transaction will result in substantial, merger-specific efficiencies that will save lives and billions of dollars.

What's more, CC based its case upon a series of double standards, seeking affirmance of favorable findings and discounting the rest. For example, CC (1) seeks an affirmance of the ALJ's market definition—which was favorable to CC—while ignoring his findings on the market regarding Grail's advanced development relative to its putative rivals and low likelihood of diversion; (2) relies extensively on testimony from interested third parties who testified for CC but ignores the ALJ's findings about the testimony—favorable to Respondents—credited by the ALJ; (3) contends that the number of early-stage cancers Galleri can screen for has not been, and must be, substantiated by prospective clinical trial data from asymptomatic individuals, while the number of cancers screened for by other putative multi-cancer early detection ("MCED") tests can be proven simply through the unsubstantiated assertions of their executives; (4) asserts that CC need not provide robust proof of the harm from foreclosure in the future, as the future is unknown, but Respondents must quantify any future efficiencies from the Transaction with precision; and (5) argues that the Open Offer is insufficient because contracts cannot constrain Illumina's conduct, but that Grail could realize every efficiency through contract.

There is no legal or factual basis for the relief CC seeks. On the contrary, the ALJ's Decision should be affirmed for at least five independent reasons:

No Substantial Lessening of Competition. Based on the testimony of 56 fact and 10 expert witnesses (including three former DOJ chief economists) and an extensive documentary record, the ALJ found that CC failed to show that the Transaction may substantially lessen competition, because the Transaction does not incentivize Illumina to harm any downstream customer. The ALJ found that CC failed to show that Illumina's alleged

foreclosure tactics would materially divert, in the foreseeable future, sales from other putative MCED tests to Galleri that would outweigh the upstream losses Illumina likely would incur. This finding was unsurprising, as CC admitted during closing arguments that it had no evidence of foreclosure attempts by Illumina to date, despite Illumina's 12% interest and subsequent acquisition of Grail.

Relatedly, the ALJ found that CC had failed to show that the putative MCED tests in development "will be close substitutes to Galleri", given that many of them were focused on detecting only a single cancer, those that were multi-cancer had poor accuracy metrics, and none is capable of localizing cancers using a blood-based assay, particularly with comparable accuracy to Galleri. The lack of "close substitutes" makes foreclosure unprofitable and irrational.

Crediting Illumina's executives' testimony, the ALJ also found that the majority of Illumina's revenue in the next decade is expected to come from Illumina's sequencing business, and that Illumina does not expect to profit from Grail until [redacted], and will not recoup its losses incurred from the Transaction until [redacted]. This finding further underscores that CC's theory makes no economic sense: Illumina cannot rely on losses from an unprofitable downstream business to make up losses from alleged foreclosure upstream. The ALJ was uniquely positioned to evaluate credibility, and there is no basis to disturb his findings. CC's foreclosure theory also fails for other reasons, including that NGS costs represent an ever-shrinking portion of MCED test revenues and margins. When input costs are a small share of downstream revenues, this constrains the ability to foreclose downstream firms. (*See* § I below.)

The Open Offer Addresses the Alleged Concern. Before announcing the Transaction, Illumina reached out to customers, including potential Grail rivals, to assure them

that the Grail acquisition would not impact their relationships with Illumina. Based on its subsequent discussions during negotiations, Illumina developed a binding 12-year supply commitment (the "Open Offer") that memorialized the full set of protections that customers had requested. The Open Offer was announced on March 30, 2021, and went into effect on August 18, 2021, though any interested customer may sign until August 18, 2027. The Open Offer guarantees, *inter alia*, customers the ***same access*** to Illumina's sequencing products that Grail has at the ***same or lower prices*** as the customer enjoyed before the Transaction. The ALJ found that the protections of the Open Offer are presently operating in the market to constrain Illumina, making it a fact that CC needed to address to carry its burden, which it never did. The ALJ also found, after careful review of the full record, that even if (contrary to his findings) Illumina might have an incentive to attempt to foreclose putative rivals (*e.g.,* by raising rivals' costs or foreclosing supply or services), the Open Offer ***effectively constrains*** Illumina from acting on that supposed incentive, both in the short term and the long term. As the ALJ stated, "[t]he Open Offer constrains Illumina from using virtually any of the tools that CC asserts will raise rivals' costs or otherwise foreclose Grail's alleged rivals", as shown by "well qualified" and "persuasive" experts. The ALJ also observed that the fact that Illumina made the Open Offer available evidences Illumina's motivation to maintain its customers, rather than to foreclose or otherwise disadvantage them. And Illumina's customers agree that the Open Offer's benefits are legion: ***10*** companies—[redacted] have signed the Open Offer or supply agreements incorporating its terms (and a fourth expressed its intent to sign). And, further underscoring its commitment, Illumina has offered to enter into a binding consent decree formalizing these commitments—similar to those that the FTC has approved in other vertical cases—including with a government monitor. Here, too,

having observed witnesses first hand, the ALJ was uniquely qualified to make these findings, and there is no basis to disturb them. (*See* § II below.)

Overwhelming Evidence of Efficiencies. Even if CC's criticisms were correct (and they are not), the ALJ's dismissal should be affirmed, because any alleged harm arising from the Transaction is outweighed by merger-specific efficiencies, including that the reunification of Illumina and Grail will save tens of thousands of lives in the U.S. and many more throughout the world. The Transaction will (1) accelerate market access to a life-saving test; (2) lead to new R&D innovations; (3) eliminate double margins and a royalty Grail was otherwise required to pay; and (4) lead to supply chain, operational and international efficiencies, resulting in lower prices and faster testing for patients. While the ALJ did not reach these efficiencies, they are fully supported by the overwhelming weight of the evidence. In dismissing the efficiencies, CC ignores unrefuted testimony of numerous fact witnesses and Illumina's past analogous experience. (*See* § III below.)

Failure to Prove Relevant Markets. Dismissal of CC's case should also be affirmed because CC failed to prove either its alleged relevant product market or any related product market. While the ALJ correctly found that each of Grail's putative rivals is years away from launching any kind of MCED test and that CC failed to prove that any of these putative tests is "reasonably interchangeable" with Galleri, he nevertheless found that there was a relevant market for the research, development and commercialization of MCED tests. This was error. Such a market (1) runs counter to the *Brown Shoe* factors; (2) fails to satisfy the hypothetical monopolist test; (3) disregards interchangeability; (4) is impermissibly speculative and both over- and under-inclusive; and (5) depends on subjective policy assessments, rather than established law and objective evidence. CC also failed to prove a related product market.

Without attempting to define or prove the contours of any such alleged market, CC declared "Illumina's NGS instruments and consumables" as the related product market. (*See* § IV below.)

Unconstitutionality/Impropriety of the Challenge. Finally, the Commission should affirm dismissal, because CC's challenge to the Transaction and its proposed remedy run afoul of the U.S. Constitution, including Article I, Article II, the Due Process Clause, the Equal Protection Clause and the Seventh Amendment. CC's proposed divestiture remedy and its web of punitive implementing obligations are extreme and unnecessary, especially when an order adopting the terms of Illumina's Open Offer would be sufficient to protect competition and preclude any alleged harm and preserves the substantial efficiencies from the Transaction. (*See* § V below.)

As discussed below, and described in detail in Respondents' post-trial papers—which are incorporated in full by reference and made part of this appeal (without any waiver)—CC's attempt to scuttle a life-saving transaction should be denied and the Commission should affirm the ALJ's decision.

STATEMENT OF FACTS

The facts most pertinent to this case are set out in detail in Respondents' Proposed Findings of Fact and Conclusions of Law and Respondents' Reply to CC's Proposed Findings of Fact and Conclusions of Law, which total more than 8,000 paragraphs and 3,000 pages. Those facts are incorporated in full by reference and made part of this appeal (without any waiver). The ALJ properly found facts sufficient to justify dismissal of CC's case. *First*, the ALJ found that CC failed to show that the Transaction may substantially lessen competition, because the Transaction does not incentivize Illumina to harm any downstream customer developing a putative MCED test. *Second*, the ALJ also found, after careful review of the full record, that even if (contrary to his findings) Illumina might have an incentive to attempt to foreclose any

alleged Grail rival, the Open Offer effectively constrains Illumina from acting on that supposed incentive. Facts not reached by the ALJ compel the same result.

STANDARD OF REVIEW

The Commission reviews the Court's decision *de novo*. 16 C.F.R. § 3.54(a). However, its fact determinations are entitled to "some deference". *In re Trans Union Corp.*, 2000 WL 257766, at *4 (F.T.C. Feb. 10, 2000). It is Chief Judge Chappell, "as trier of the facts, who . . . lived with the case, and who . . . had the opportunity to closely scrutinize witnesses' overall demeanor and to judge their credibility." *In re Horizon Corp.*, 97 F.T.C. 464, 857 n.77 (1981) ("[A]bsent a clear abuse of discretion, the Commission will not disturb on appeal the ALJ's conclusions as to credibility."); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1070-71 (11th Cir. 2005) (emphasizing ALJ's credibility findings in overturning Commission).

ARGUMENT

I. COMPLAINT COUNSEL FAILED TO SHOW THAT THE TRANSACTION IS LIKELY TO SUBSTANTIALLY LESSEN COMPETITION

While CC complains of "error", CC offers no basis to disturb the ALJ's conclusion that CC failed to show that the Transaction is likely to substantially lessen competition. CC ignores the ALJ's well-supported findings; makes legal arguments that distort the ALJ's rulings and/or the law; and promotes a "factual" narrative that is against the weight of the evidence.

A. The ALJ Correctly Found that Illumina Has No Incentive to Foreclose.

To carry its burden, CC was required to make a "fact-specific" showing that the Transaction is likely to result in a substantial lessening of competition in the alleged relevant market. *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019). It could not rely on speculative "possibilit[ies]", *id.*, or "guesswork"; nor could it ignore the actual facts. *FTC v.*

RAG-Stiftung, 436 F. Supp. 3d 278, 311 (D.D.C. 2020). Actual evidence of a probable anticompetitive effect was required. *Brown Shoe Co. v. United States*, 370 U.S. 294, 328, 332 (1962). "[A]ntitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116-17 (D.D.C. 2004).

CC failed to make the required showing for multiple independent reasons. (RRFF¶¶ 2607-4164.) CC alleges that the Transaction will harm competition because it purportedly gives Illumina the ability and incentive to foreclose Grail's putative rivals. To support its case, however, CC applied the wrong standard, ignoring longstanding case law and economic theory and effectively presuming that a vertical acquisition by a party with market power is anticompetitive.

By any standard, CC's foreclosure theory foundered, because it never: (1) addressed that an attempt to foreclose Grail's putative rivals would hurt Illumina's NGS sales and reputation; (2) addressed that NGS costs are today a small part—and soon will be an even smaller part—of MCED test revenues and margins; (3) offered any basis to predict material diversion ***to*** Galleri resulting from the alleged foreclosure strategy; (4) considered viable alternative NGS products for MCED development; and (5) addressed Illumina's prior successful vertical integrations, which resulted in expanded output, new entry and lower prices, not anticompetitive harm. CC's proof failed to match its rhetoric.

B. Complaint Counsel's Legal Attack on the Decision is Baseless.

Without any real basis to challenge the ALJ's findings, CC argues the ALJ committed legal error by (1) failing to find foreclosure based on Illumina's alleged market share alone; (2) misapplying "the *Brown Shoe* functional factors"; and (3) requiring CC to "show both

ability and incentive *and* some additional evidence of competitive harm". (OB8-11.) CC is wrong.

1. Control of an Input Alone is Insufficient.

Citing *Brown Shoe*, CC argues the ALJ's decision should be reversed because Illumina "controls complete access to a critical input—NGS platforms necessary for MCED tests". (OB8.) While the *Brown Shoe* Court noted that Section 7 may be violated where the "share of the market foreclosed is so large that it approaches monopoly proportions", 370 U.S. at 328, ***no court*** has blocked a vertical merger based on the share of the market foreclosed alone. In *Brown Shoe*, the court required actual evidence of a probable foreclosure effect and assessed many factors beyond market share in its determination. *See id.* at 328, 332. No court has adopted CC's *Brown Shoe* interpretation, while many have required more of the government than CC contends is required. *E.g.*, *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 566 (2d. Cir. 1983) (noting that courts in vertical cases require evidence as to "the likelihood and size of any market foreclosure"); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 (2d Cir. 1979) ("The Supreme Court's insistence that each merger challenged under [Section] 7 'be viewed . . . in the context of its particular industry,' . . . and that the Clayton Act protects 'Competition, not Competitors,' contravenes the notion that a significant level of foreclosure is itself the proscribed effect" of Section 7.) (citations omitted).

CC's approach betrays an antipathy to vertical mergers unsupported by economics and the case law, which recognize that vertical integration is often procompetitive. As one current and one former Commissioner observed in dissenting from the Commission's withdrawal of the Vertical Merger Guidelines, "the fact remains that vertical mergers are different animals from mergers of competitors, changing incentives in ways that are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers", and "[a]s such, they require an

approach that fully accounts for their good as well as their bad effects" because "[a]nything less will hurt consumers, not help them". Fed. Trade Comm'n, Dissenting Statement of Commissioners Phillips and Wilson Regarding the Withdrawal of the Vertical Merger Guidelines, at 3-4. CC's opposition to vertical integration here will hurt consumers by depriving them of swifter, cheaper access to a life-saving test and should be rejected.

2. The ALJ Properly Applied the *Brown Shoe* Factors.

CC next argues that even if the ALJ did not err in declining to rule the Transaction illegal based on Illumina's alleged input control alone, requiring CC to "prove all [of the *Brown Shoe*] factors in every case" was error. (OB9.) CC's argument misstates the ALJ's decision. He did not hold CC must "prove all [of the *Brown Shoe*] factors in every case", but rather that "[CC]'s brief does not argue the existence of three of the factors and the record has not proved the other factors by a preponderance of the evidence". (ID192.)

Regardless, the *Brown Shoe* factors, taken together, fully support the ALJ's decision. CC makes no argument as to three of the six factors (OB10), and the ALJ expressly rejected CC's arguments as to the remaining three, discussed below, as "unsupported and unpersuasive". (ID193).

First, the ALJ correctly held that the "foreclosure" factor considers to what extent the merger "will cause market foreclosure" and not whether the merger will give Illumina "the power to foreclose", as CC suggests. (ID190.) CC failed to meet its burden on this factor because it did not show that the Transaction would remove any NGS products from the market. (ID191.)

Second, the ALJ rejected CC's argument as to the "nature and purpose" of the Transaction for the same reasons he rejected CC's incentives analysis, as discussed below. (ID191-92.) Further, the purpose of the Transaction is plainly procompetitive. While Illumina

acquired the remaining shares of Grail to improve Illumina's overall business, it also did so to accelerate the widespread adoption of Galleri and thus save lives. (RRFF¶208.) CC cites no evidence that Illumina acquired Grail with the intent to foreclose any putative rival, and the ALJ made no such finding.

Third, CC failed to show any barriers to entry. The Transaction has spurred investment in early cancer detection and in liquid biopsy more broadly. Shortly after the merger was announced, analysts predicted that the deal would accelerate investment and innovation in MCED test development, with one observing that "the recent acquisition of GRAIL by ILMN has catalyzed the excitement in the market to new highs—even ahead of our prior expectations", and "there is an expectation that more companies will increasingly pursue liquid biopsy screening as ILMN's acquisition of pre-revenue GRAIL has 'validated' the liquid biopsy early detection theses." (RFF¶928.) These predictions came true. Since Illumina announced its acquisition, Exact purchased Thrive (IDF¶272), [redacted] Actual market behavior is inconsistent with CC's speculative theory that the Transaction will harm innovation or dampen incentives to invest in NGS-based cancer testing. (RFF¶933.) CC's theory is further undermined by its representation that "innovation is vibrant in this 'rapidly evolving market landscape'". (CCB3.)

3. Complaint Counsel Misunderstands the ALJ's Explanation of the Ability and Incentives Analysis.

CC also contends (incorrectly) that the ALJ applied the wrong ability and incentives analysis in rejecting its challenge to the Transaction. (OB10.) CC rests its case on cherry-picked passages of the ALJ's Decision, rather than the Decision as a whole. A full and fair reading of the Decision shows the ALJ applied the correct legal standard to CC's allegations of foreclosure. The ALJ recognized that determining whether the Transaction will foreclose

competition "is necessarily both highly complex and specific to the facts of the case"; requires a multi-factor analysis performed "in the context of [the] particular industry" at issue; and turns on "real-world effects" rather than speculation of antitrust theory alone. (ID194-97.)

In truth, it was (and is) CC's case that is based on a mistaken legal framework, including the following incorrect propositions: (1) ability alone is enough (*e.g.*, upstream market share is sufficient) (OB8), whereas *Brown Shoe* requires actual evidence of a probable foreclosure effect, *Brown Shoe*, 370 U.S. at 328, 332; (2) real-world facts (*e.g.*, the Open Offer) need not be considered (OB29), whereas real-world effects must be considered, *AT&T*, 916 F.3d at 1038; (3) unproven assumptions (*e.g.*, 100% diversion) are sufficient (OB21), though "antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future," *RAG-Stiftung*, 436 F. Supp. 3d at 311 (citations omitted); (4) harm need not be probable or imminent (*e.g.*, impact on non-existent tests) (CCB129-30), though alleged future harm to competition must be "sufficiently probable and imminent" to warrant relief, *United States v. Marine Bancorp.*, 418 U.S. 602, 623 n.22 (1974); and (5) harm and efficiencies need not be balanced (CCRB 112-13), though efficiencies may serve as evidence that a merger would not be illegal, *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020).

C. Complaint Counsel's Challenge to the ALJ's Findings Is Contrary to the Overwhelming Weight of the Evidence.

CC argues that the ALJ erred in finding that CC failed to show that the Transaction gave Illumina an "incentive to foreclose or disadvantage Grail's MCED competitors". (OB12-28.) But CC ignores and/or distorts the evidence and the ALJ's well-grounded credibility determinations. CC's arguments are unfounded.

1. Complaint Counsel's Specific Contentions Are Misplaced.

CC faults six of the ALJ's findings concerning Illumina's alleged incentive to foreclose (OB12-28), but its arguments run counter to the overwhelming weight of the evidence and ignore the ALJ's credibility determinations.

Differentiation. CC complains that the ALJ found Galleri is differentiated from other putative MCED tests but ignores the evidence supporting the Court's finding. (OB22-26.) The vast differences between the characteristics of the putative MCED tests and Galleri show that they will be too dissimilar to permit any successful diversion to Galleri through an alleged foreclosure strategy. (ID177.)

As the ALJ found and as explained in Respondents' post-trial papers, the tests differ in the ***number of cancers detected***; in the ***number of tests performed***; in whether they detected ***cancer signal of origin***; in their ***sensitivity***; in their ***specificity***; in their ***positive predictive values*** ("PPV"); and in their connection to ***existing standard-of-care protocols***. (ID143-48; RB100-08; RFF¶¶839-45.) Any one of these differences is likely sufficient to foreclose CC's case. Collectively, they leave no doubt that Galleri is too different from its purported rivals to permit the Transaction to run a meaningful risk of competitive harm.

CC asserts that (i) Galleri cannot really detect more than 50 cancer types, (ii) Galleri's ability to localize the cancer signal (*i.e.*, cancer signal of origin) is insignificant because some patients may undergo confirmatory diagnostic evaluation, and (iii) Galleri's attributes (*e.g.*, specificity and PPV) are exaggerated. (OB24.) But CC does not (and cannot) cite any evidence to support its assertions: just the say so of counsel and the opinions of an economist unqualified to address these scientific issues. For example, Galleri's ability to detect 50 cancer types has been demonstrated with published data and has been analytically and clinically validated under stringent regulatory guidelines. (IDF¶¶228, 231; RRFF¶6288.) And,

as CC admitted during closing arguments, other than Galleri, ***no*** tests being sold right now test for 50 or even seven cancer types. (Tr. 4601.)

Similarly, the ALJ found that none of the MCED tests in development match Galleri's tissue of origin capability, which is 96% accurate. (ID146; RRFF¶3280.) The ALJ also found, citing FDA guidance, that such localization capabilities are "a necessary component" of an MCED test for it to be "clinically useful." (ID147.) That some Galleri patients may undergo targeted confirmatory follow-up is irrelevant when *no* putative Grail rival has demonstrated the ability to localize cancer from a blood test alone, and some even resort to invasive, full-body PET-CT scanning.

Galleri, unlike any other test in development, has also demonstrated a groundbreaking 99.5% specificity, which results in an extremely low false positive rate. (ID146.) By contrast, the only other putative MCED test that has undergone any kind of clinical trial has a 95.3% specificity after one blood draw, and requires two blood tests and a PET-CT scan to even return a result to the patient. (ID146.)

CC could have called any number of experts to address these issues, but it did not—it failed to call even a single medical expert. CC cited to the testimony of certain of the putative MCED-test developers, but they all acknowledged on cross examination the differentiating features of their hoped-for tests. (RFF¶¶730-37.)

CC nitpicked the testimony of Respondents' witnesses, but its critiques ignore the ALJ's credibility determinations. (ID144 n.30, ID145 n.31, ID175 n.57.) That CC disagrees with witness testimony is not a legitimate basis for disturbing it.

CC contends that the ALJ could not have found Galleri to be differentiated from the MCED tests in development because all such tests supposedly serve the same basic purpose

and Grail's alleged rivals are working hard to catch up. (OB22-26.) At that level of generality, any differentiation inquiry is meaningless. CC suggests that it need not account for the differences between Galleri and its putative rivals because "[a]ny differences . . . are evidence of current competition rather than evidence of a lack thereof." (OB24.) But CC cannot ignore the attributes of the tests at issue, because the essential attributes of a market "provide[] the context against which to measure [] competitive effects". *Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc.*, 386 F.3d 485, 496 (2d Cir. 2004). Here, "most of the in-development tests are focused solely on detecting a single cancer, with companies aspiring to add screening capabilities for additional cancers, after conducting additional clinical trials." (ID145.) Rather than seriously contest the ALJ's findings, CC says—without credible evidentiary support—that "Grail's rivals are close to commercialization and nipping at its heels". (OB25.) The ALJ correctly found that developing a cancer screening test that can detect more than one cancer type is challenging and requires many years of research, development and clinical validation, and the putative MCED developers identified by CC were at least ***five to seven years*** away from launching any kind of MCED test. (ID144-45.)

Diversion. CC contends the ALJ erred in finding that CC failed to prove its "claim that the likelihood of high diversion incentivizes Illumina to harm Grail's purported rivals". (ID178.) CC complains that it was not required to prove "specific diversion ratios"; and "evidence of similarity among MCED tests" and evidence that developers "view each other as competitors" demonstrate "customer diversion will likely occur". (OB20-22.) But the ALJ did not require CC to prove any specific diversion ratio; he found that the evidence did not support CC's claim that diversion would likely be material enough to give Illumina an incentive to foreclose any purported Grail rival. CC suggests that the Court should have inferred a likelihood

of significant diversion because MCED test developers, in self-serving testimony, described themselves as "competitors" to Galleri, and should have ignored the evidence demonstrating that Galleri is unique and unlikely to be viewed as a close substitute. (IDF¶201-14, 840-42.) CC also relies on cherry-picked quotes from the parties' ordinary course documents, which CC rarely showed to any witness at trial. (*E.g.*, RRFF¶¶ 3245-49, 3295-96.) In their proper context, these documents are plainly based on outdated public information and do not accurately reflect the development and commercial status of any supposed Galleri rival. (*E.g.*, RRFF¶3340.) Further, the parties use the term "competitor" to describe products which CC ***agrees*** are not in the relevant product market (*e.g.*, single-cancer screening tests) (IDF¶267; RRFF¶3482.) And in the rare cases these documents were shown to witnesses, their testimony debunked CC's contention that other MCED tests are reasonable substitutes for Galleri. (*E.g.*, RRFF¶¶3231, 3449, 3524.)

CC offered no empirical evidence of diversion, just the blithe assertion of its economic expert that because Galleri is the only commercially available test, foreclosure of any second MCED test entrant will necessarily result in 100% diversion to Grail. (CCB110; CCFF¶3099.) That is not analysis; it is raw assumption, contradicted by the facts and blind to commercial reality. If the diversion rates were lower than 100%, any attempt by Illumina to foreclose the identified "rivals" would be economically irrational, as it would miss the opportunity to sell more NGS products and to expand demand in ways Galleri would not, resulting in a larger downstream pie into which Illumina could sell its profitable NGS products. (RFF¶¶826-28.) To understand the costs and benefits (if any) of attempted foreclosure, and therefore reliably assess Illumina's incentives to attempt it, requires an analysis of these real-world dynamics. But CC glossed over them entirely, failing to carry its burden. *See HTI Health*

Servs. v. Quorum Health Grp., Inc., 960 F. Supp. 1104, 1136 (S.D. Miss. 1997); *Crouse-Hinds Co. v. InterNorth, Inc.*, 518 F. Supp. 416, 433 (N.D.N.Y. 1980).

No Probable and Imminent Harm. CC argues that the ALJ erred in finding Illumina lacks a current or near-term incentive to harm GRAIL's rivals because (i) the ALJ allegedly ignored the "fact" that there is innovation competition today between Grail and other Illumina customers, (ii) Illumina allegedly will not lose much from foreclosing Grail's "rivals", and (iii) Illumina purportedly stands to profit handsomely if it does. (OB12-17.) Each of these contentions was considered by the ALJ, and correctly rejected.

While CC argued Illumina had a present "incentive to suppress innovation competition" (OB14-15), CC failed to prove it, even admitting as much at closing argument (*see* Tr. 4613). The fact that innovation competition may exist does not establish an incentive, let alone a strong incentive, to foreclose it. That is especially so where, as the ALJ found here, foreclosing Grail's purported rivals would negatively impact Illumina's present sales, industry reputation and future opportunities, for at best speculative future gains. (ID173-74; RFF¶¶853-67.) CC was required to show that Illumina would stand to gain from present day foreclosure despite (1) the current state of other tests allegedly in development and (2) the significant downside Illumina would face to its present sales, industry reputation and future opportunities. CC failed to show that the upstream losses (present and future) that Illumina would incur by attempting to foreclose Grail's putative rivals would be offset by any incremental profits it would make from diversion to Galleri at some undetermined point in the future. (RFF¶¶851-52.) It made no effort to quantify Illumina's lost NGS sales, the harm to its reputation, or the sales it would supposedly gain from Grail's putative rivals. And it offered no evidence that ***any*** rival test sales would be diverted to Galleri—let alone that diversion would be of such a magnitude

that it would recoup Illumina's certain upstream losses of current sales and, more significantly, future business opportunities.

Next, CC argues that "consideration of the financial impact of commercialization strengthens Illumina's present incentive to foreclose". (OB15-16.) CC asks the Commission to significantly weigh the fact that Illumina, and others, project that, over time, the market for clinical testing (including both MCED testing and other NGS-based clinical tests) could be huge, and that revenues and profit pools will shift from sequencing to clinical testing. But CC's own evidence shows that the [redacted] As Illumina's CEO Francis deSouza explained, "the testing business for many, many years will not have a profit, will lose business, and that's very typical in clinical testing businesses". (RFF¶¶869-871.) Illumina's NGS business will remain its core business and account for most of its profits for "many, many years". (RFF¶872.) And clinical testing services will not reach the projected estimate of $56 billion before ***2035***. (IDF¶815.) Any harm that CC hypothesizes will occur as a result of changes projected to occur in ***2035*** is in no way "probable and imminent", as required for CC to show a violation of the Clayton Act. *Arch Coal*, 329 F. Supp. 2d at 115 (citations omitted).

Price Discrimination and Reputation. CC criticizes the ALJ's conclusion that an attempt by Illumina to foreclose Grail's rivals could cause Illumina's customers to choose not to invest in Illumina's systems, resulting in lost Illumina sales and undermining its business strategy. (OB17.) CC describes this finding as "nonsensical" because "causing MCED customers to no longer invest in current or future MCED NGS applications is a harm that will

result from the Acquisition". (OB17.) But of course Illumina would be harmed by "foreclosing" its customers; sufficient foreclosure would eliminate Illumina's profitable NGS business.

CC's argument that foreclosing Grail's rivals would not result in Illumina losing sales from its non-MCED customers because "Illumina possesses the ability to identify Grail's competitors and price discriminate" also fails. (OB17.) CC ignores that targeted MCED test developers would have developed non-MCED applications that would increase demand for Illumina's NGS products. (RFF¶¶850-850.4; 852.) And it neglects to account for the customer who, while not "targeted" by an alleged foreclosure strategy, nonetheless avoids Illumina systems for fear of suffering from opportunistic hold-up. (RFF¶858.) Multiple credible witnesses (omitted by CC) addressed the fact, accepted by the ALJ, that foreclosing Grail's rivals would damage Illumina's business, which will be focused on applications unrelated to MCED testing for many years, and whose profits lie largely in the future, dependent on customers developing a range of future clinical applications. (RRFF¶3570.)

Margin Analysis. CC further contends the ALJ (i) "erroneously focused on whether Illumina possessed some incentive to favor Grail pre-Acquisition rather than analyzing whether the Acquisition increased this incentive" and (ii) wrongly assumed "that total foreclosure (or a raising rivals' costs strategy) is the only means by which Illumina could disadvantage other MCED tests". (OB18-19.) Here again, CC distorts the Decision and attacks a strawman. The ALJ neither found that Illumina's pre- and post-Transaction incentives were identical, nor assumed total foreclosure was required for CC to make its case. (ID168-70.). The ALJ determined that Dr. Scott Morton's analysis of Illumina's margins from its customers with and without the merger (a key element of her incentives analysis) was unreliable because it assumed, without any basis, that Illumina would earn royalties from other MCED customers

similar to the one Grail owed Illumina pre-merger, even though that royalty was unique to the Illumina/Grail agreement, stemming from Illumina's equity stake in Grail. (ID174-75.) And, without that erroneous assumption, Dr. Scott Morton's margin analysis falls apart. The ALJ's rejection of Dr. Scott Morton's analysis and conclusions was correct.

Illumina's Prior Vertical Integration. Finally, CC argues that the ALJ improperly dismissed "Illumina's past conduct when vertically integrated". (OB26-27.) CC again misrepresents the ALJ's findings. The ALJ did not misunderstand the law or ignore Illumina's past vertical integrations; for good reasons he found CC's allegations unsupported. (ID183 n.61.)

First, while Illumina did give Grail special pricing and other benefits upon formation and when it was wholly owned by Illumina, CC mischaracterizes this support. (RRFF¶¶3669-3708.) Illumina's support of Grail, six years ago, was the only way Illumina could get Grail off the ground, and likely the only way Grail could have made the advances resulting in Galleri's launch—years before any other MCED test would have launched but for Illumina's investment—which benefits patients worldwide. (RRFF¶3696.) Illumina's prior ownership of Grail is irrelevant to the different circumstances today, now that Grail has developed and launched its MCED test, Illumina has continued to grow and strengthen its clinical capabilities, the costs of sequencing have fallen dramatically, and Illumina is bound by the Open Offer. In seeking to use Illumina's early support of Grail against the Transaction, CC attacks the very thing that sparked MCED development in the first place and ignores that Illumina has always owned part of Grail and had a stake in its future revenues. CC could not cite a single instance over the last four years when Illumina has hampered the competitiveness or development of any supposed Grail rival, despite Illumina's prior full and then partial (and now

full again) ownership of Grail. (Tr. 4613 ("[CC]: I am not aware of any evidence of clogging with the 12 percent ownership prior to this. No.").) Nor is there any such evidence since Illumina closed the Transaction.

Second, CC's contention that Illumina declined to grant Roche IVD rights in 2017, and, in 2018, evaluated internally whether it made sense for Illumina to partner with Roche, is likewise unhelpful to CC's challenge. CC did not examine the therapy selection market or the impact of Illumina's vertical integration, including whether there has been foreclosure in therapy selection or a loss of consumer welfare due to Illumina having its own therapy selection test. CC cites fees that Illumina charged for IVD rights and labels them "excessive", without analyzing their reasonableness, their relationship to fees charged by other platform developers, the effect of those fees on downstream investment and innovation, or downstream prices or output. If CC had performed any sort of analysis, it would have discovered that vertical integration in therapy selection never resulted in the parade of horribles and innovation harms that CC portends for the alleged MCED market. (RFF¶¶966-73.) The therapy selection market is thriving. (RFF¶967.)

Third, CC suggests Illumina disadvantaged rivals in NIPT after it acquired Verinata, citing only the testimony of Matthew Rabinowitz, the Chairman of Natera. The ALJ found that Dr. Rabinowitz's concerns about the Transaction, which Dr. Rabinowitz claimed were born from his purported NIPT experience, "carrie[d] scant probative weight in proving that the Acquisition will create or exacerbate entry barriers . . .". (ID192.) The market facts starkly refute CC's claims about the NIPT experience. Since the acquisition, between 2015 and 2019, the number of NIPT tests conducted by Verinata's rivals on Illumina's platforms in the U.S. more than doubled, output expanded, and, critically, Verinata's share of NIPT sales ***decreased***

while rival sales ***increased***. (RFF¶956 & Figure 7.) There has also been a steady stream of new entry and substantial investment into NIPT testing in the U.S. since the Verinata acquisition, with a dramatic decline in test pricing. (RFF¶¶962-63.4.) Illumina has played a major role in expanding payor coverage for NIPT, resulting in much broader market access. (RFF¶¶1131.12, 1225.) Illumina's vertical entry into NIPT was decidedly procompetitive. (RFF¶¶963.1-63.4.)

2. Complaint Counsel Grounded Its Case on Speculation and Cherry-Picked Anecdotes.

In criticizing Chief Judge Chappell, whose reasoning CC calls "nonsensical", and who they accuse of "out-sourcing" his findings, CC elides the fact that it grounded its case on a series of assumptions that are contrary to the undisputed evidence. For example, CC assumed:

- The merger would provide Illumina a huge near term upside (OB4), when Illumina's losses are unlikely to be recouped until at least 2030, if at all (ID173);
- Imminent MCED launches by putative Grail rivals (OB14), when none has a marketable product (IDF¶201), none has sales, and none has a certain launch timeline (IDF¶202-03);
- Close substitutes for Galleri (OB21), when the features of the alleged rivals are different or unknown (IDF¶202-06);
- No significant loss of upstream sales (OB15), when there is intensifying upstream competition and the NGS input is small relative to projected MCED margins (IDF¶807-16); and
- No significant harm to reputation (OB17), when foreclosure would unquestionably diminish Illumina's reputation and credibility (ID183).

CC ignored established law that harm to competition must be "sufficiently probable and imminent" to warrant relief. *Marine Bancorp.*, 418 U.S. at 623 n.22.

Despite its criticism of the ALJ, it is CC that failed to meaningfully model anticompetitive effects or balance procompetitive justifications. CC was required to present a model showing any anticompetitive effects of the Transaction outweigh its efficiencies. *See, e.g.*, *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161, 237 (D.D.C. 2018). As Respondents'

expert Dr. Carlton explained, vertical merger analysis requires a complete model that reflects all the various economic factors that can arise, including efficiencies, profit margins at both stages of production, reputational and contractual constraints on the merged firm, demand curves, substitution patterns, diversion ratios and upstream competition. (RFF¶¶802-04.) Ultimately, if the model does not "take account of the efficiencies, or more broadly, the incentive to lower price, you risk preventing a merger that would bring large benefits to society because you've failed to balance the benefits against the possible harms." (RFF¶803.1.) Rather than engage in this balancing, CC asserted a series of simplistic, and factually inaccurate, assumptions about alleged anticompetitive effects. CC did not account for ***any*** efficiencies; it assumed the Transaction, which has undeniable life-saving and other benefits, will be the very rare vertical merger to generate ***no*** merger-specific efficiencies at all.

II. COMPLAINT COUNSEL FAILED TO ACCOUNT FOR THE OPEN OFFER, WHICH REMOVED ANY REALISTIC RISK OF HARM

Even if the Transaction might otherwise have given Illumina an ability and incentive to foreclose Grail's putative rivals (which it did not), the Open Offer prevents any possible anticompetitive harms. As the ALJ found, the Open Offer represents an additional basis for rejecting CC's case and affirming the ALJ's decision.

A. The Open Offer Fully Addresses Complaint Counsel's Allegations of Potential Harm.

While CC declined any meaningful engagement with Illumina to address CC's alleged concerns, the Open Offer was designed to do—and does—exactly that. The Open Offer, effective since August 2021, provides customers all-encompassing protections against foreclosure, including (among others):

- Access to Illumina's product and support services that is equivalent to that provided to Grail or any other For-Profit Entity (IDF¶890);

- Access to Illumina's current and future sequencing products (and information about final product specifications for such products) that is equivalent to that provided to Grail (IDF¶896-901);

- Uninterrupted supply of all sequencing products purchased by the customer and equitable allocation of supply during any supply shortage (IDF¶905-08);

- Access to the pricing that the customer received before the Grail transaction (IDF¶915-17);

- Access to standardized, volume-based pricing ("Universal Pricing") that can improve if any other customer receives better pricing under a most-favored-nation ("MFN") clause (IDF¶918-21);

- Assurance that sequencing prices will not increase beyond inflation over the full 12-year term and that prices will ***decrease*** by at least 43% by 2025 (IDF¶926, 929);

- Rights, under Illumina's core intellectual property, to use the products purchased under the Open Offer (IDF¶965-68);

- Protection from the improper use of customers' competitively sensitive information (IDF¶969-70);

- The unilateral right of the customer to terminate the supply agreement at any time and for any reason (with no corresponding right of Illumina to do so) (IDF¶881); and

- Robust enforcement provisions, including biannual audits of Illumina's compliance and binding arbitration in the event of any dispute. (IDF¶978-88.)

The Open Offer provides customers benefits that without the Transaction, would have been unavailable. (RFF¶999.) CC's expert could not identify a single supply agreement that Illumina had previously entered into with any of its customers that had protections on pricing, access to products and services, firewalls, audits and arbitration like those in the Open Offer. (RFF¶1025.2) The Open Offer provides protections that Illumina's customers are not willing to extend to their own customers (RFF¶1025.3), and even extends beyond what customers and purported MCED test developers asked of Illumina in individual negotiations (RFF¶1011.6). It does so to guarantee that ***all*** Illumina oncology customers, including any

putative Grail competitors, are secure in their supply relationships with Illumina on terms that enable their development of clinical applications on Illumina platforms. (IDF¶876-79, ID153.)

Although customers have another five years to sign up for the Open Offer (IDF¶945), many have done so already. At the time the record closed, [redacted] and that after entering into the agreement [redacted] "no longer has any objections to the Acquisition and has no further edits that it would like to make to its current supply agreement with Illumina". (ID189.)

B. The ALJ Correctly Considered the Open Offer in Considering Whether Complaint Counsel Met its Burden.

CC argues (wrongly) that the ALJ "applied the wrong legal standard" to the Open Offer and should have treated the Open Offer as a remedy rather than a factor in CC's *prima facie* case. (OB28.) Evaluating the effect of any merger requires consideration of its effect on competition, which necessarily entails consideration of the economic reality, including existing contractual constraints. *See, e.g.*, *AT&T*, 916 F.3d at 1038; *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 46 (D.D.C. 2002).

Neither CC nor its economics expert properly accounted for the Open Offer in balancing the alleged harms of the Transaction against its demonstrated efficiencies, instead dismissing it as a conduct remedy purportedly insufficient to alleviate CC's concerns about the

Transaction. (OB29-30.) However, the Open Offer is a binding contractual commitment (just like Illumina's supply agreements) and real-world fact that affects Illumina's incentives and conduct. CC was required, as part of its *prima facie* case, to account for all relevant, real-world facts, including the Open Offer, to bear its burden to show that the Transaction will likely result in foreclosure. *See FTC v. Arch Coal, Inc.*, No. 04-cv-00534, ECF No. 67 at 7-8 (D.D.C. July 7, 2004); *United States v. Atl. Richfield Co.*, 297 F. Supp. 1061, 1067-69 (S.D.N.Y. 1969). This is especially true in a vertical merger where the government must make a fact-specific showing of anticompetitive harm.

The case law supports Respondents' position. Relying on *Otto Bock*, CC argues that a fix needs to be analyzed during plaintiffs' *prima facie* case only when "the fix has been fully implemented across the market". (OB30.) That order (striking an affirmative defense) does not support CC. And in its merits opinion, the Commission held that a fix ***should*** be considered as part of plaintiffs' *prima facie* case where the merger and the fix would become operative together, and where the fix was advanced at the same time as the complaint. *In re Otto Bock HealthCare N. Am., Inc.*, 2019 WL 5957363, at *43 (F.T.C. Nov. 1, 2019). Both conditions are met here.[1]

CC's attempt to distinguish *AT&T* also fails. *First*, CC claims that unlike in *AT&T*, a customer would not know of a breach in real-time. But Illumina must provide customers with a written report confirming compliance with the Open Offer, and customers must be notified within 10 days, of any potential noncompliance. (RRFF¶4468.) *Second*, while CC

[1] *United States v. Aetna, Inc.* does not support CC's assertion that it is Respondents' burden to show that the Open Offer "replace[s] the competitive intensity" lost from the Acquisition. (OB29.) The *Aetna* court held that part of defendants' burden of production included "producing evidence that the divestiture will actually occur", since that was in dispute. 240 F. Supp. 3d 1, 60, 63 (D.D.C. 2017). No such dispute exists here—the Open Offer indisputably is operative.

argues that the arbitration in *AT&T* would prevent any anticompetitive harm from taking effect, the same would be true here under the Open Offer's arbitration provision. (RRFF¶4494.) *Third*, CC contends that AT&T's arbitration commitment stems from provisions in the Comcast-NBCU consent, and is distinguishable. (OB32.) However, the FTC and DOJ have used consents similar to the Open Offer for decades in many industries and cases, as supported by an FTC retrospective. (RFF¶1078.1.)

The AAI's amicus brief joins CC in faulting the ALJ's consideration of the Open Offer. The AAI's criticisms fall flat because, *inter alia*, it (1) mischaracterizes the Open Offer as merely a behavioral remedy, when it is much more: an extensive set of commitments that materially affect the competitive landscape; (2) mispresents the origin, development and operation of the Open Offer, which was not "late-proposed" or "litigation-driven" and is not enforceable only by Illumina; (3) falsely assumes CC proved the Transaction to be anticompetitive (without regard to the Open Offer), when the ALJ found the opposite based upon the full record, to which the AAI did not even have access; (4) suggests CC had insufficient opportunity to analyze the Open Offer, when CC refused to engage with Respondents regarding the Open Offer and rejected it on philosophical grounds, forcing Respondents to play whack-a-mole with dribbled out nit-picky criticisms; (5) misconstrues the ALJ's decision, which properly applied *Baker Hughes*, insofar as it is applicable in the context of this vertical merger, where CC failed even to make out a *prima facie* case; and (6) misstates the law, which is clear that contractual commitments proposed before or shortly after the filing of a complaint are analyzed as a part of the government's *prima facie* case, *e.g.*, *AT&T*, 310 F. Supp. 3d at 239-41; *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1298 (W.D. Mich. 1996); *Otto Bock*, 2019 WL 5957363, at *43.

C. Complaint Counsel's Claims of Fact Error Regarding the Open Offer Are Mistaken.

Unable to show that the ALJ applied the wrong legal standard, CC (wrongly) argues "the Open Offer does not eliminate Illumina's ability and incentive to harm Grail's rivals and, in turn, diminishes competition". (OB32.)

Alleged Ability. CC contends the ALJ erred in finding the "Open Offer constrains Illumina from using virtually any of the tools [CC] asserts will raise rivals' costs or otherwise foreclose Grail's alleged rivals" because its product access terms are incomplete. (OB33-34.) CC argues that the Open Offer's requirement that all customers get access to the same pre-release sequencing products and the same information about final product specifications at the same time as Grail is insufficient because the provision only mentions final product specifications and "does not prevent Grail from having knowledge of Illumina's technology in development before its competitors". (OB33.) CC never explains why access to information about final product specifications is insufficient and ignores evidence regarding how tests are developed. Specifically, CC ignores testimony from Dr. Aravanis that neither Grail nor any other test developer could do anything useful with information about products in development. (Tr. 1930-31.) Deciding to develop a clinical test to the wrong NGS specifications would harm Grail's development efforts. And if the putative specifications that Grail received early turned out to be the "final" product specifications, it would violate the Open Offer.

Similarly, CC faults the pricing term because it (i) relates only to Illumina's highest throughput instruments and (ii) does not address price per read. (OB34.) Both arguments are meritless. *First*, the Open Offer's price protections are not limited to Illumina's highest throughput instruments. The Open Offer provides for MFN pricing that ensures

customers are treated no less favorably than Grail or any other For-Profit Entity, and all Supplied Products—including the NextSeq, Illumina's mid-throughput instrument—are covered under the Open Offer's MFN provisions.[2] (RFF¶¶1017-19; 2001.1.) Each MCED test developer that has signed the Open Offer has the same pricing for the NextSeq instrument as Grail. (RFF¶¶1017-19; 2001.1.) *Second*, CC's price per read argument makes no sense. Price per gigabase is the industry standard (CCFF¶¶1363, 1638, RRFF¶1722), and for a given instrument and flow cell, the price per read corresponds to the price per gigabase. (RRFF¶4676.) Illumina describes the price reduction using price per gigabase because it allows for normalizing different capacity flow cells and comparing different kits' pricing on an "apples-to-apples basis". (RRFF¶4676.) And because the number of reads in an S4 300 flow cell kit is constant, if Illumina reduced price *per gigabase* of the S4 300 flow cell by 43%, it would ***also*** reduce the price *per read* by 43%. (RRFF¶4676.)

Alleged Incentive. CC dismisses the Open Offer as a "behavioral remed[y]" that "cannot alter a company's incentives", relying on *H&R Block* and the DOJ Merger Remedies Manual. (OB35.) The argument is misplaced. *H&R Block* concerns a narrow remedy—a "pledge[] to maintain TaxACT's current prices"—that lacked the depth and breadth of the Open Offer and did not mandate baseball-style arbitration with an arbitrator empowered to restore the status quo. *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 82 (D.D.C. 2011). Similarly, the DOJ Manual speaks in generalities that do not account for the extensive detail of the Open Offer.

[2] CC doubles down on its incorrect argument that the Open Offer only applies to the highest-throughput instrument by arguing that this unfairly requires the market to switch to each new sequencer marketed by Illumina. (OB34.) But elsewhere CC contends this switch would happen regardless. (CCB71 (arguing that only Illumina's highest throughput instrument is suitable for MCED tests).)

CC also dismisses the ALJ's finding that Illumina would be further constrained by counterincentives created by the Open Offer. *First*, CC claims that Illumina would not face any backlash from failing to adhere to the Open Offer's commitments because any arbitration will remain confidential. (OB35.) But Illumina is obligated to provide customers with a written report "confirming compliance with the commitments" in the Open Offer and must notify customers of any potential finding of noncompliance within 10 days. (IDF¶¶982-83.)

Second, CC claims that the ALJ failed to account for the motives of Respondents' witnesses and otherwise assign the proper weight to their testimony. None of CC's claims of contradictory testimony holds water. For instance, there is no contradiction in Ms. Berry's testimony on discretionary discounts. The Open Offer provides customers with access to volume-based net prices "that are no less favorable" than those provided to Grail or another customer that purchases the same volume of NGS products (an "Equivalent Customer"). (RRFF¶5005.) Therefore, if Illumina offered Grail or an Equivalent Customer a discretionary discount that exceeded the Universal Pricing discounts, then Illumina would be obliged to reduce the price for other Open Offer customers at the same volume levels to match the discretionary discount. (RRFF¶5005.) Because Grail's prices under the Open Offer are ***public***, any such discount would become immediately apparent to any competitor. (RRFF¶4468.)

Third, CC's criticisms of the ALJ's treatment of third-party witnesses miss the mark. CC criticizes the ALJ for ignoring the testimony of Mr. Daly (who CC didn't call at trial) regarding Illumina's access to competitors' sensitive information. But [redacted], rendering the allegations incredible. (RRFF¶4767.) Daly also testified that [redacted]

[redacted] (RRFF¶4767.) CC also asserts that the ALJ was wrong to ignore the testimony of its third-party witnesses who "read, negotiated, and are subject to the Open Offer" (OB38), while CC relied on witnesses who were barely familiar with its terms. For example, Exact's CEO Kevin Conroy had not even read the Open Offer at the time of the trial and, beyond what counsel described to him, knew nothing about what the Open Offer requires Illumina to do (IDF¶994), and [redacted] (RFF¶1075.2.)

* * *

Even if Illumina could somehow evade the provisions of the Open Offer (which it cannot), Illumina has agreed to enter into a consent decree providing the same protections. (RFF¶1070.) The Proposed Consent Order would make the terms of the Open Offer binding on Illumina for all of its for-profit oncology customers, regardless of whether they signed the Open Offer. (RFF¶1071.) Consent decrees are effective measures for resolving antitrust disputes and have long been used by the FTC. (RFF¶¶1000.3, 1072.1.) CC has provided no good reason why the Proposed Consent Order's terms would be less effective than past consent decrees. On the contrary, consent orders are especially appropriate when, as here, defendants are willing to be legally bound by them. *See, e.g.*, *Butterworth*, 946 F. Supp. at 1298; *United States v. Comcast Corp.*, 808 F. Supp. 2d. 145, 147 (D.D.C. 2011); *AT&T*, 916 F.3d at 1041.

III. THE TRANSACTION WILL GENERATE ENORMOUS BENEFITS THAT EASILY OFFSET THE ALLEGED HARM

As explained in Respondents' Post-Trial Brief, vertical mergers often generate large efficiencies that benefit consumers. To establish its *prima facie* case, CC needed to show not only that the Transaction will likely result in competitive harm, but also that the alleged harm

outweighs the Transaction's procompetitive benefits. *See, e.g., Deutsche Telekom*, 439 F. Supp. 3d at 207; *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir. 1999); *AT&T*, 310 F. Supp. 3d at 190. CC cannot make this showing because even if the Transaction could be said to give Illumina the ability and incentive to harm competition, and even if the Open Offer were unable to eliminate any realistic risk of harm, the benefits of fully reuniting Illumina and Grail easily outweigh the alleged harm.

The overwhelming and unrefuted evidence showed that the Transaction will result in numerous, merger-specific benefits, including that it will save thousands of lives (in the U.S. alone, and many more throughout the world) and billions of dollars. The further unification of Illumina and Grail will accelerate market access to a life-saving test; lead to new innovations from R&D synergies; reduce costs through eliminating a royalty that Grail would otherwise owe Illumina and eliminating double marginalization ("EDM"), the savings from which will be passed on to consumers; and lead to supply chain, operational and international efficiencies, resulting in lower prices and faster testing for patients. (RB181-231; RFF¶¶1106-79.)

While the ALJ did not need to reach the efficiencies, they are supported by a variety of unrefuted evidence. They are supported by every Illumina and Grail witness to address them, including: Francis deSouza, Dr. Alex Aravanis, Dr. Phil Febbo, Ammar Qadan, Jay Flatley, Hans Bishop, Dr. Joshua Ofman, Aaron Freidin and Dr. Arash Jamshidi. (RFF¶1108.) They are supported by "analogous past experience", U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) § 10, including Illumina's vertical acquisition of Verinata, which resulted in expanded access to NIPT testing and the discovery that spawned Grail. And they are supported by the testimony of highly qualified experts, including three former DOJ chief economists, and reluctant admissions by CC's experts.

Illumina's former Chairman, Jay Flatley, testified—without contradiction—that the Illumina Board unanimously concluded that the Transaction will generate these efficiencies. (RFF¶1110.) When it approved the Transaction, the Illumina Board included a Nobel Laureate, a former FDA commissioner, financial experts, and veterans of the biotech industry. (RFF¶1111.) Each of these directors came to his or her independent conclusion, based on a wealth of experience, that the Transaction will generate efficiencies. (RFF¶1112.) On the flip side, CC offered no fact evidence—not a single witness—to say otherwise. (RFF¶1116.) CC either conducted no cross-examination of these witnesses on the Transaction's benefits or its questioning affirmed the efficiencies. (RFF¶1109.) The proof of efficiencies is conclusive and uncontroverted. (RFF¶1116.)

The following table is illustrative of the trial testimony supporting each efficiency:

No.	Efficiency	Witness	RFF
1	**Saves Lives**	Aravanis, deSouza, Febbo, Flatley, Bishop, Freidin, Jamshidi, Ofman, Conroy, Chahine, Fiedler, Nolan, Rabinowitz, Carlton, Deverka	¶¶1117, 1119-26
2	**Accelerates Market Access**	Aravanis, deSouza, Febbo, Flatley, Qadan, Bishop, Della Porta, Freidin, Ofman, Conroy, Gao, Nolan, Rabinowitz, Deverka	¶¶1127-35
3	**R&D Innovations**	Aravanis, deSouza, Febbo, Flatley, Bishop, Jamshidi, Klausner, Carlton	¶¶1136-45
4	**Reduced Royalty Burden**	Aravanis, deSouza, Freidin, Strom, Carlton	¶¶1146-51
5	**Eliminated Double Margin**	Aravanis, deSouza, Carlton	¶¶1152-55
6	**Supply Chain and Operational Efficiencies**	Aravanis, deSouza, Flatley, Bishop, Carlton	¶¶1156-67

No.	Efficiency	Witness	RFF
7	**Accelerated Fruits of International Expansion**	Aravanis, deSouza, Febbo, Flatley, Bishop, Freidin	¶¶1168-73

CC argues that the ALJ incorrectly presumed that the Transaction would result in efficiencies. (OB39.) This argument is a straw man. While the ALJ rightly recognized that there is widespread recognition that many vertical mergers create vertical integration efficiencies, the Decision did not address efficiencies. (ID133.) The ALJ concluded that the FTC failed to meet the "first hurdle" of its *prima facie* case because it failed to show that the Transaction is likely to substantially lessen competition, even when efficiencies are disregarded. (ID193.)

To the extent CC asserted any specific criticisms of the Transaction's efficiencies, those criticisms are misplaced. They bear no relationship to the evidence presented at trial, as Respondents explained in detail. (RB229-30.) For example, CC effectively concedes the Transaction's most important efficiency: that it will save lives. CC admits that cancer screening saves lives and that accelerating the adoption of a multi-cancer screening test will save even more lives. (RFF¶¶1117-19, 1122.) CC appears to dispute only that reuniting Illumina and Grail will accelerate the adoption of the Galleri test. If evidence matters more than rhetoric, then there can be no doubt that reuniting Illumina and Grail will accelerate the adoption of Galleri. How could it not? Illumina is the world's foremost expert in NGS technology. Its brand is synonymous with innovative and low-cost sequencing. (RFF¶855.) It has single-handedly driven down the cost of sequencing 4,000-fold. (RFF¶855.1.) Illumina's established track record of successful acquisitions have resulted in technology innovation and acceleration, new products and lower costs for consumers. Numerous witnesses testified (without contradiction) to

Illumina's ability to accelerate Galleri's commercialization, advance innovation and access to NGS testing, and save lives. (RFF¶1121.)

CC argues that the efficiencies should be disregarded because they are not independently verified beyond executives' testimony. (CCB40-41.) As Respondents explained, CC's argument incorrectly assumes that it is Respondents' burden to assess and weigh efficiencies against the alleged harm—not so in a vertical merger. (RB87-88.) Even if the burden were on Respondents, CC cites to no authority that unrefuted witness testimony from the parties cannot be used to substantiate efficiencies.[3] CC ignores ordinary course documents and other record evidence that support Respondents' efficiencies. (RRB83-84; RRFF¶5061.)

Even if some of the efficiencies resulting from the reunion of Illumina and Grail were disregarded, there can be no serious question that the Transaction will create a number of substantial efficiencies. Some, like the reduced royalty burden, have already been realized as a matter of indisputable fact. In its haste to condemn the Transaction, CC made no effort to weigh any of the efficiencies against alleged harm. While Respondents quantified a number of verified efficiencies, even some that should require no quantification (*e.g.*, the value of a life saved), CC neither quantified nor weighed any element of alleged harm or any efficiency. It declared that there can be no good rationale for the Transaction and therefore the Transaction should be unwound—evidence be damned. The Clayton Act requires more.

[3] The only authority that CC cites to for this point is an oral ruling from *United States v. Bertelsmann SE*, 21-cv-02886, Hearing Tr. 2772 (D.D.C. Aug. 17, 2022), which found that an expert's efficiency claims were not verified. But CC fails to mention that the court relied upon the fact that the expert's model was out of date and contained inconsistencies and other flaws. *Id.* at 2752. Here, Dr. Carlton relied on unrefuted witness testimony, ordinary course documents, studies and the unrefuted testimony of other experts to verify the acceleration efficiencies in this case. None of these were found to be inaccurate or even contested.

IV. COMPLAINT COUNSEL FAILED TO PROVE THE REQUISITE ANTITRUST MARKETS.

While the ALJ properly dismissed CC's case, the Decision erred in finding CC proved its alleged relevant market and in not requiring CC to prove its alleged related product market.

A. Complaint Counsel Cannot Establish its Alleged Relevant Antitrust Markets.

CC alleges that the relevant product market is the research, development and commercialization of MCED tests. Such a market would include Galleri and any other test in development, so long as its developers contend that it will detect more than one cancer type and use NGS, no matter its anticipated features, functions, or launch timeline. (CCB56-57.) Yet CC fails to identify the attributes that determine whether a cancer screening test is an "MCED test" that is reasonably substitutable for Galleri in the "arena within which significant substitution in consumption or production" will occur. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (citations omitted). The ALJ recognized this, holding that if CC "were required to prove the interchangeability of the tests themselves to prove a relevant product market, it would not be able to meet its burden". (ID162 n.51.)

Despite that, he found that because companies were engaged in researching and developing MCED tests, there was a relevant market for the research, development and commercialization of MCED tests. That was error. CC was required to show its proposed market consists of "products that have reasonable interchangeability for the purposes for which they are produced". *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); (RB29-41). In addition, the test of reasonable interchangeability requires that courts "consider only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function." *United States v.*

Microsoft Corp., 253 F.3d 34, 53-54 (D.C. Cir. 2001). The putative test developers identified by CC do not expect to launch a screening test for more than one cancer type for many years. (ID143.) Because of that, and for the reasons explained below, CC's proposed market fails.

First, CC's proposed market is impermissibly speculative because, other than Galleri, it comprises only products still in development, many in very early stages. (RB19-20.) In some instances, CC failed to present ***any*** evidence—*i.e.*, development plans, data, budgets or trials—showing that a test is even in development beyond bare testimony. (RRB33-35.) There is no guarantee that other putative MCED tests will mature into commercialization, no verifiable timeline for when they might launch and no way to predict whether they will be substitutes or complements to Galleri, if they ever launch. (RB21-22.) The proposed market is also flawed because it is simultaneously over- and under-inclusive. (RB26-29.)

Second, the alleged market fails to satisfy the *Brown Shoe* practical indicia. (*See* RB41-64.) CC failed to even address three of the seven factors: "unique production facilities", "sensitivity to price changes" and "specialized vendors". (CCB50-57.) As to the remaining four factors, its argument as to two of them ("peculiar characteristics and uses" and "distinct customers") is devoted to a nonissue: whether MCED tests are different from tests for patients already diagnosed with cancer and tests that screen for a single cancer type. (CCB51-54.) CC suggests the "distinct prices" and "industry recognition" factors support its theory, but these arguments fail: CC's contention that Galleri and other putative MCED tests share a distinct price are based on mischaracterizations of the record (RRB21-22); and its "industry recognition" argument that Grail "considers other MCED test developers as its [redacted]" and "they view Grail as the same" (CCB56) collapses under the weight of the fact that there is such a high degree of uncertainty as to what these tests will eventually look like, and each of the MCED

developers called by CC offered inconsistent testimony as to who the supposed competitors would be (RRB22-23).

Third, CC's supposed application of the hypothetical monopolist test also fails to support its proposed market. (RB64-70.) CC applied its hypothetical monopolist test to the wrong set of products (ID162) and did not attempt to conduct a SSNIP test on the highly differentiated putative MCED tests that CC lumped together in one, impermissibly overbroad market with Galleri. (RB69.) CC did not perform any quantitative analysis to determine whether a SSNIP for one MCED test would result in customers switching to another putative MCED test. (RB65.) Nor did CC attempt to fill the information gaps in its assessment using surveys or other means, including information about the preferences and likely switching behavior of clinicians, patients and payors related to the products it includes and excludes from its proposed MCED market. *See Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 616 (8th Cir. 2011); (RB68-69.)

Fourth, CC's proposed market is flawed because it fails to define an innovation or R&D market. (RB70-72.) CC effectively asks the Commission to relieve it of its burden because the market is nascent and several companies are doing R&D in the hope of developing MCED tests. (RB70.) The law does not set a different standard for establishing a nascent market or an innovation one. *Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc.*, No. C-09-3854 MMC, 2010 WL 1541257, at *3 (N.D. Cal. Apr. 16, 2010), *aff'd*, 433 F. App'x 598 (9th Cir. 2011). And CC made no showing to support its proposed R&D market: it did not apply the *Brown Shoe* test to the putative MCED products at the R&D stage (RB70-71) and CC's economic expert did not perform any analysis to determine whether the hypothetical monopolist test would be met in an R&D market. (RB72.)

B. Complaint Counsel Failed to Establish its Alleged Related Antitrust Markets.

CC alleges that the Transaction will harm competition because it will empower and incent Illumina to raise costs to Grail's rivals who will have no alternative to Illumina's NGS instruments and consumables. (CCB61-62.) Because CC claims that Illumina's NGS instruments and consumables are essential for MCED test development, it bears the burden to prove that there is a related product market for NGS instruments and consumables in which Illumina has market power. *See Arch Coal*, 329 F. Supp. 2d at 116 ("[P]laintiffs have the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined."). Yet, CC does not even try to define a related product market. (RB76-77.) As such, it necessarily fails to meet its burden. (RB85.) This failure is especially fatal to CC's case given the recent developments in the NGS market that demonstrate imminent NGS entry that will constrain Illumina's ability to engage in the alleged anticompetitive conduct CC fears. (RB77-85.)

V. COMPLAINT COUNSEL'S CHALLENGE AND REMEDY ARE UNJUSTIFIED, VIOLATE THE U.S. CONSTITUTION AND SHOULD NOT BE ALLOWED

Finally, CC's challenge to the Transaction and its divestiture request should be rejected for three additional reasons: (1) CC's challenge and proposed remedy run afoul of the U.S. Constitution; (2) there are less extreme remedies than the proposed divestiture; and (3) the proposed divestiture would be needlessly punitive and impractical.

A. Complaint Counsel's Challenge Violates the U.S. Constitution.

As explained in Respondents' Post-Trial Brief, CC's challenge to the Transaction, including its required remedy, should be rejected because it violates the U.S. Constitution.

Article I. Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States", U.S. Const. art. I, § 1, "to ensure that the lines of

accountability [between the people and their elected representatives] would be clear", *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). Congress can delegate that power to another entity only if it provides an "intelligible principle" by which that entity can exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Congress gave the FTC the power to bring antitrust actions within the agency instead of in an Article III court whenever the FTC in its unfettered discretion decides to do so. *See* 15 U.S.C. § 45(b). That was a delegation of legislative power, as "the mode of determining" which cases are assigned to administrative tribunals "is completely within congressional control". *Crowell v. Benson*, 285 U.S. 22, 50 (1932). Congress gave the FTC no guidance, much less an intelligible principle, with which to exercise that power. *See* 15 U.S.C. §§ 45(b), 53(b). CC's challenge is unconstitutional as a product of FTC's improperly delegated legislative power.

Article II. Similarly, Article II vests "[t]he executive Power . . . in a President of the United States of America", who must "take care that the laws be faithfully executed". U.S. Const. art. II, § 1, cl. 1; *id.* § 3. CC's challenge runs afoul of Article II, because it seeks to undo the Transaction in a proceeding in which the President cannot adequately oversee the faithfulness of the presiding officers, violating the "take Care" clause. There is no question that FTC ALJs enjoy two layers of protection from the President. *See Otto Bock*, 2019 WL 5957363, at *49; (RFF¶1181.) "Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over" FTC ALJs. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010). These removal procedures are therefore "contrary to Article II's vesting of the executive power in the President." *Id.*

The removal procedures applicable to FTC Commissioners also violate Article II. The Supreme Court has recognized only one narrow and inapplicable "exception[] to the President's unrestricted removal power" over principal officers. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 (2020). Under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), Congress may grant for-cause removal protection to multi-member agency heads if the agency mirrors the FTC "as it existed in 1935," when the FTC "was said not to exercise any executive power." *Seila*, 140 S. Ct. at 2198-99. Since then, the Supreme Court has recognized that the "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2. This is because Commissioners exercise vast enforcement, investigative, and prosecutorial authority, as is evidenced in this case. *Humphrey's Executor* no longer supports insulating modern-day FTC Commissioners from removal.

Due Process. CC's challenge to the Transaction also runs afoul of the Fifth Amendment's Due Process Clause. "A fair trial in a fair tribunal is a basic requirement of due process". *Kaley v. United States*, 571 U.S. 320, 345 (2014) (citations omitted). While the combination of investigative and adjudicative functions does not necessarily constitute a due process violation, it can constitute a due process violation, where, as here, "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable". *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The FTC's challenge to the Transaction creates an unconstitutional potential bias because the same people who voted out the complaint against Respondents and/or have prosecuted this case against them will adjudicate the matter. *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016).

Equal Protection. The Equal Protection Clause of the Fifth Amendment commands that the government shall not "deny to any person within its jurisdiction the equal

protection of the laws". U.S. Const. amend. XIV, § 1. The Equal Protection Clause protects against "arbitrary and irrational discrimination" by the Government, *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988), and demands that "all persons similarly situated should be treated alike", *Tennessee v. Lane*, 541 U.S. 509, 522 (2004). Any difference in treatment "run[s] afoul of the Equal Protection Clause" when there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose". *Montgomery v. Louisiana*, 577 U.S. 190, 231 (2016). The parties to a merger challenged by the FTC are treated very differently from the parties to a merger challenged by DOJ, as they are subject to differences in: the forum for adjudicating the merits; the preliminary injunction standard; substantive legal standards and policies; consequence of a U.S. district court ruling against the challenge; the independence of the factfinder; applicable procedural and evidentiary rules; the permanent injunction forum; the ability to challenge a merits decision before a circuit court appeal; and differences in circuit court appellate standards. There is no rational basis for these differences, which can be outcome determinative.

Seventh Amendment. CC's proposed remedy would also violate the Seventh Amendment because it would deny Respondents the right to a jury trial on the issue of disgorgement. The Seventh Amendment protects the right to a civil jury trial, a "fundamental" component of our legal system that "remains one of our most vital barriers to governmental arbitrariness". *Reid v. Covert*, 354 U.S. 1, 9-10 (1957).

B. Divestiture Would Be an Extreme and Unnecessary Remedy.

Even if the Commission could constitutionally impose a remedy, there are less extreme remedies than the proposed divestiture, including an order embodying the terms of the Open Offer, which would be more than sufficient to address the alleged harm. A divestiture order would be disproportionate to any legitimate need as it would eliminate the life-saving

benefits of the Transaction in order to address concerns that are unproven and, in any case, eliminated by the Open Offer. As stated, Illumina's Open Offer eliminates all of the alleged concerns raised by CC. Illumina has committed to formalize these binding contractual commitments in a consent order. Because CC's proposed divestiture bears no "reasonable relation to [any] unlawful practices", *Jacob Siegel v. FTC*, 327 U.S. 608, 611-13 (1946), an order requiring Illumina to abide by the terms of the Open Offer would be a more appropriate and effective remedy than divestiture. *See AT&T*, 916 F.3d at 1041.

Divestiture is an equitable remedy. *United States v. E.I. du Pont de Nemours & Co.* ("*du Pont III*"), 366 U.S. 316, 326 (1961). "Equitable relief in an antitrust case should not embody harsh measures when less severe ones will do". *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 100 (D.D.C. 2002) (internal quotations omitted). "Courts are not authorized in civil proceedings to punish . . . and relief must not be punitive." *du Pont III*, 366 U.S. at 326. The proposed divestiture order would have been impermissibly punitive, as illustrated by Respondents' mark-up of CC's proposed order, attached as Appendix A; it goes far beyond addressing the alleged anticompetitive effects.

C. The Proposed Divestiture Would Be Needlessly Punitive and Impractical.

In addition to being unnecessary, the proposed divestiture order would be impermissibly punitive. Respondents object to each and every one of the provisions in the proposed order for the reasons set out above. Some of the more objectionable provisions of the proposed order—illustrated in Appendix A—would be unduly punitive. CC seeks, for example, to: require divestiture within 180 days of issuance of the order, even though this would compel a fire sale, force Illumina to incur a substantial loss on its investment and give less time for divestiture than has been allowed in previous FTC orders (Proposed Order § II.A); extend Respondents' obligations regarding confidentiality and use of Respondents' information for five

years after the Divestiture Date (*id.* § II.J); require Illumina to disgorge any profits earned naturally through the Transaction (*id.* § II.B); require Respondents to seek Commission approval before acquiring any interest in any business that, in the previous 12 months, engaged in, or had plans to engage in, the business of developing, marketing, or selling MCED tests (*id.* § VII); mandate annual compliance reports from Respondents for nine years (*id.* § VIII.A.2); and burden Respondents under its Proposed Order for 10 years (*id.* § XII), even though this length of time is not warranted by any evidence in this case. For these reasons, among others, the proposed order is impractical, unnecessarily punitive, and it seeks to impose on Illumina obligations that go far beyond addressing the alleged anticompetitive effects.

Further, Respondents have not been offered a hearing on the specific relief requested. Absent such a hearing, Respondents should not be subject to *any* of the relief sought by CC.

CONCLUSION

For all the foregoing reasons, CC's challenge to the full reunification of Illumina and Grail should be rejected, and they should be permitted to get about the business of revolutionizing cancer care.

Dated: November 2, 2022

Respectfully submitted,

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APPENDIX A
FILED *IN CAMERA*

APPENDIX B

Rule 3.45(e) and 3.52(f) Notice

Pursuant to Rules 3.45(e) and 3.52(f) of the Commission's Rules of Practice, attached is (1) a copy of the pages from Respondents' Answering Brief containing *in camera* material and (2) the relevant *in camera* orders issued by Judge Chappell.

Notice of the Commission's intent to disclose the *in camera* material on pages 5-6, 20 and 27 of Respondents' Answering Brief relating to Illumina, Inc. should be made to counsel for Illumina, Inc. in this proceeding: David R. Marriott, Sharonmoyee Goswami, Cravath, Swaine & Moore LLP, Worldwide Plaza, 825 Eighth Avenue, New York, NY 10019.

Notice of the Commission's intent to disclose the *in camera* material on page 39 of Respondents' Answering Brief relating to Grail, Inc. should be made to counsel for Grail, Inc. in this proceeding: Michael G. Egge, Marguerite M. Sullivan, Latham & Watkins LLP, 555 Eleventh Street NW, Suite 1000, Washington, D.C. 20004.

Notice of the Commission's intent to disclose the *in camera* material on pages 13 and 27 of Respondents' Answering Brief relating to [redacted]

Notice of the Commission's intent to disclose the *in camera* material on pages 32-33 of Respondents' Answering Brief relating to [redacted]

Notice of the Commission's intent to disclose the *in camera* material on page 33 of Respondents' Answering Brief relating to [redacted]

Notice of the Commission's intent to disclose the *in camera* material on page 27 of Respondents' Answering Brief relating to [redacted]

Notice of the Commission's intent to disclose the *in camera* material on page 27 of Respondents' Answering Brief relating to [redacted]

foreclosure tactics would materially divert, in the foreseeable future, sales from other putative MCED tests to Galleri that would outweigh the upstream losses Illumina likely would incur. This finding was unsurprising, as CC admitted during closing arguments that it had no evidence of foreclosure attempts by Illumina to date, despite Illumina's 12% interest and subsequent acquisition of Grail.

Relatedly, the ALJ found that CC had failed to show that the putative MCED tests in development "will be close substitutes to Galleri", given that many of them were focused on detecting only a single cancer, those that were multi-cancer had poor accuracy metrics, and none is capable of localizing cancers using a blood-based assay, particularly with comparable accuracy to Galleri. The lack of "close substitutes" makes foreclosure unprofitable and irrational.

Crediting Illumina's executives' testimony, the ALJ also found that the majority of Illumina's revenue in the next decade is expected to come from Illumina's sequencing business, and that Illumina does not expect to profit from Grail until [redacted], and will not recoup its losses incurred from the Transaction until [redacted]. This finding further underscores that CC's theory makes no economic sense: Illumina cannot rely on losses from an unprofitable downstream business to make up losses from alleged foreclosure upstream. The ALJ was uniquely positioned to evaluate credibility, and there is no basis to disturb his findings. CC's foreclosure theory also fails for other reasons, including that NGS costs represent an ever-shrinking portion of MCED test revenues and margins. When input costs are a small share of downstream revenues, this constrains the ability to foreclose downstream firms. (*See* § I below.)

The Open Offer Addresses the Alleged Concern. Before announcing the Transaction, Illumina reached out to customers, including potential Grail rivals, to assure them

that the Grail acquisition would not impact their relationships with Illumina. Based on its subsequent discussions during negotiations, Illumina developed a binding 12-year supply commitment (the "Open Offer") that memorialized the full set of protections that customers had requested. The Open Offer was announced on March 30, 2021, and went into effect on August 18, 2021, though any interested customer may sign until August 18, 2027. The Open Offer guarantees, *inter alia*, customers the ***same access*** to Illumina's sequencing products that Grail has at the ***same or lower prices*** as the customer enjoyed before the Transaction. The ALJ found that the protections of the Open Offer are presently operating in the market to constrain Illumina, making it a fact that CC needed to address to carry its burden, which it never did. The ALJ also found, after careful review of the full record, that even if (contrary to his findings) Illumina might have an incentive to attempt to foreclose putative rivals (*e.g.,* by raising rivals' costs or foreclosing supply or services), the Open Offer ***effectively constrains*** Illumina from acting on that supposed incentive, both in the short term and the long term. As the ALJ stated, "[t]he Open Offer constrains Illumina from using virtually any of the tools that CC asserts will raise rivals' costs or otherwise foreclose Grail's alleged rivals", as shown by "well qualified" and "persuasive" experts. The ALJ also observed that the fact that Illumina made the Open Offer available evidences Illumina's motivation to maintain its customers, rather than to foreclose or otherwise disadvantage them. And Illumina's customers agree that the Open Offer's benefits are legion: ***10*** companies—[redacted] have signed the Open Offer or supply agreements incorporating its terms (and a fourth expressed its intent to sign). And, further underscoring its commitment, Illumina has offered to enter into a binding consent decree formalizing these commitments—similar to those that the FTC has approved in other vertical cases—including with a government monitor. Here, too,

acquired the remaining shares of Grail to improve Illumina's overall business, it also did so to accelerate the widespread adoption of Galleri and thus save lives. (RRFF¶208.) CC cites no evidence that Illumina acquired Grail with the intent to foreclose any putative rival, and the ALJ made no such finding.

Third, CC failed to show any barriers to entry. The Transaction has spurred investment in early cancer detection and in liquid biopsy more broadly. Shortly after the merger was announced, analysts predicted that the deal would accelerate investment and innovation in MCED test development, with one observing that "the recent acquisition of GRAIL by ILMN has catalyzed the excitement in the market to new highs—even ahead of our prior expectations", and "there is an expectation that more companies will increasingly pursue liquid biopsy screening as ILMN's acquisition of pre-revenue GRAIL has 'validated' the liquid biopsy early detection theses." (RFF¶928.) These predictions came true. Since Illumina announced its acquisition, Exact purchased Thrive (IDF¶272), [redacted] Actual market behavior is inconsistent with CC's speculative theory that the Transaction will harm innovation or dampen incentives to invest in NGS-based cancer testing. (RFF¶933.) CC's theory is further undermined by its representation that "innovation is vibrant in this 'rapidly evolving market landscape'". (CCB3.)

3. Complaint Counsel Misunderstands the ALJ's Explanation of the Ability and Incentives Analysis.

CC also contends (incorrectly) that the ALJ applied the wrong ability and incentives analysis in rejecting its challenge to the Transaction. (OB10.) CC rests its case on cherry-picked passages of the ALJ's Decision, rather than the Decision as a whole. A full and fair reading of the Decision shows the ALJ applied the correct legal standard to CC's allegations of foreclosure. The ALJ recognized that determining whether the Transaction will foreclose

that it would recoup Illumina's certain upstream losses of current sales and, more significantly, future business opportunities.

Next, CC argues that "consideration of the financial impact of commercialization strengthens Illumina's present incentive to foreclose". (OB15-16.) CC asks the Commission to significantly weigh the fact that Illumina, and others, project that, over time, the market for clinical testing (including both MCED testing and other NGS-based clinical tests) could be huge, and that revenues and profit pools will shift from sequencing to clinical testing. But CC's own evidence shows that the [redacted] As Illumina's CEO Francis deSouza explained, "the testing business for many, many years will not have a profit, will lose business, and that's very typical in clinical testing businesses". (RFF¶¶869-871.) Illumina's NGS business will remain its core business and account for most of its profits for "many, many years". (RFF¶872.) And clinical testing services will not reach the projected estimate of $56 billion before ***2035***. (IDF¶815.) Any harm that CC hypothesizes will occur as a result of changes projected to occur in ***2035*** is in no way "probable and imminent", as required for CC to show a violation of the Clayton Act. *Arch Coal*, 329 F. Supp. 2d at 115 (citations omitted).

Price Discrimination and Reputation. CC criticizes the ALJ's conclusion that an attempt by Illumina to foreclose Grail's rivals could cause Illumina's customers to choose not to invest in Illumina's systems, resulting in lost Illumina sales and undermining its business strategy. (OB17.) CC describes this finding as "nonsensical" because "causing MCED customers to no longer invest in current or future MCED NGS applications is a harm that will

putative Grail competitors, are secure in their supply relationships with Illumina on terms that enable their development of clinical applications on Illumina platforms. (IDF¶876-79, ID153.)

Although customers have another five years to sign up for the Open Offer (IDF¶945), many have done so already. At the time the record closed, [redacted] and that after entering into the agreement [redacted] "no longer has any objections to the Acquisition and has no further edits that it would like to make to its current supply agreement with Illumina". (ID189.)

B. The ALJ Correctly Considered the Open Offer in Considering Whether Complaint Counsel Met its Burden.

CC argues (wrongly) that the ALJ "applied the wrong legal standard" to the Open Offer and should have treated the Open Offer as a remedy rather than a factor in CC's *prima facie* case. (OB28.) Evaluating the effect of any merger requires consideration of its effect on competition, which necessarily entails consideration of the economic reality, including existing contractual constraints. *See, e.g.*, *AT&T*, 916 F.3d at 1038; *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 46 (D.D.C. 2002).

Neither CC nor its economics expert properly accounted for the Open Offer in balancing the alleged harms of the Transaction against its demonstrated efficiencies, instead dismissing it as a conduct remedy purportedly insufficient to alleviate CC's concerns about the

CC also dismisses the ALJ's finding that Illumina would be further constrained by counterincentives created by the Open Offer. *First*, CC claims that Illumina would not face any backlash from failing to adhere to the Open Offer's commitments because any arbitration will remain confidential. (OB35.) But Illumina is obligated to provide customers with a written report "confirming compliance with the commitments" in the Open Offer and must notify customers of any potential finding of noncompliance within 10 days. (IDF¶¶982-83.)

Second, CC claims that the ALJ failed to account for the motives of Respondents' witnesses and otherwise assign the proper weight to their testimony. None of CC's claims of contradictory testimony holds water. For instance, there is no contradiction in Ms. Berry's testimony on discretionary discounts. The Open Offer provides customers with access to volume-based net prices "that are no less favorable" than those provided to Grail or another customer that purchases the same volume of NGS products (an "Equivalent Customer"). (RRFF¶5005.) Therefore, if Illumina offered Grail or an Equivalent Customer a discretionary discount that exceeded the Universal Pricing discounts, then Illumina would be obliged to reduce the price for other Open Offer customers at the same volume levels to match the discretionary discount. (RRFF¶5005.) Because Grail's prices under the Open Offer are ***public***, any such discount would become immediately apparent to any competitor. (RRFF¶4468.)

Third, CC's criticisms of the ALJ's treatment of third-party witnesses miss the mark. CC criticizes the ALJ for ignoring the testimony of Mr. Daly (who CC didn't call at trial) regarding Illumina's access to competitors' sensitive information. But [redacted], rendering the allegations incredible. (RRFF¶4767.) Daly also testified that [redacted]

[redacted] (RRFF¶4767.) CC also asserts that the ALJ was wrong to ignore the testimony of its third-party witnesses who "read, negotiated, and are subject to the Open Offer" (OB38), while CC relied on witnesses who were barely familiar with its terms. For example, Exact's CEO Kevin Conroy had not even read the Open Offer at the time of the trial and, beyond what counsel described to him, knew nothing about what the Open Offer requires Illumina to do (IDF¶994), and [redacted] (RFF¶1075.2.)

* * *

Even if Illumina could somehow evade the provisions of the Open Offer (which it cannot), Illumina has agreed to enter into a consent decree providing the same protections. (RFF¶1070.) The Proposed Consent Order would make the terms of the Open Offer binding on Illumina for all of its for-profit oncology customers, regardless of whether they signed the Open Offer. (RFF¶1071.) Consent decrees are effective measures for resolving antitrust disputes and have long been used by the FTC. (RFF¶¶1000.3, 1072.1.) CC has provided no good reason why the Proposed Consent Order's terms would be less effective than past consent decrees. On the contrary, consent orders are especially appropriate when, as here, defendants are willing to be legally bound by them. *See, e.g.*, *Butterworth*, 946 F. Supp. at 1298; *United States v. Comcast Corp.*, 808 F. Supp. 2d. 145, 147 (D.D.C. 2011); *AT&T*, 916 F.3d at 1041.

III. THE TRANSACTION WILL GENERATE ENORMOUS BENEFITS THAT EASILY OFFSET THE ALLEGED HARM

As explained in Respondents' Post-Trial Brief, vertical mergers often generate large efficiencies that benefit consumers. To establish its *prima facie* case, CC needed to show not only that the Transaction will likely result in competitive harm, but also that the alleged harm

Microsoft Corp., 253 F.3d 34, 53-54 (D.C. Cir. 2001). The putative test developers identified by CC do not expect to launch a screening test for more than one cancer type for many years. (ID143.) Because of that, and for the reasons explained below, CC's proposed market fails.

First, CC's proposed market is impermissibly speculative because, other than Galleri, it comprises only products still in development, many in very early stages. (RB19-20.) In some instances, CC failed to present ***any*** evidence—*i.e.*, development plans, data, budgets or trials—showing that a test is even in development beyond bare testimony. (RRB33-35.) There is no guarantee that other putative MCED tests will mature into commercialization, no verifiable timeline for when they might launch and no way to predict whether they will be substitutes or complements to Galleri, if they ever launch. (RB21-22.) The proposed market is also flawed because it is simultaneously over- and under-inclusive. (RB26-29.)

Second, the alleged market fails to satisfy the *Brown Shoe* practical indicia. (*See* RB41-64.) CC failed to even address three of the seven factors: "unique production facilities", "sensitivity to price changes" and "specialized vendors". (CCB50-57.) As to the remaining four factors, its argument as to two of them ("peculiar characteristics and uses" and "distinct customers") is devoted to a nonissue: whether MCED tests are different from tests for patients already diagnosed with cancer and tests that screen for a single cancer type. (CCB51-54.) CC suggests the "distinct prices" and "industry recognition" factors support its theory, but these arguments fail: CC's contention that Galleri and other putative MCED tests share a distinct price are based on mischaracterizations of the record (RRB21-22); and its "industry recognition" argument that Grail "considers other MCED test developers as its [redacted]" and "they view Grail as the same" (CCB56) collapses under the weight of the fact that there is such a high degree of uncertainty as to what these tests will eventually look like, and each of the MCED

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

In the Matter of	)	
Illumina, Inc., a corporation,	)	Docket No. 9401
and	)	
GRAIL, Inc., a corporation,	)	
Respondents.	)	

ORDER ON RESPONDENT ILLUMINA, INC.'S THIRD MOTION FOR *IN CAMERA* TREATMENT

I.

By Orders issued August 12, and August 24, 2021, the original motion and the second motion for *in camera* treatment filed by Respondent Illumina, Inc. ("Respondent" or "Illumina") were denied without prejudice in part, with leave to refile ("August 12 and August 24 Orders"). The August 12 and August 24 Orders directed Illumina to thoroughly review all documents for which it seeks *in camera* treatment, and to strictly narrow its requests in any subsequent motion to only those documents that comply with the Commission's strict standards for *in camera* treatment.

On August 28, 2021, Illumina filed a third Motion for *in Camera* Treatment of Certain Trial Exhibits ("Motion"). Federal Trade Commission Complaint Counsel filed an opposition to the Motion on September 1, 2021.

II.

After setting forth the standards by which motions for *in camera* treatment are evaluated, both the August 12 and August 24 Orders determined that the sheer number of documents for which Illumina sought *in camera* treatment far exceeded the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45. In the instant Motion, Illumina has pared down its requests for *in camera* treatment to 975 exhibits. Illumina

supports the Motion with a declaration from its vice president of Global IP and Litigation that provides additional details about the documents for which Illumina seeks *in camera* treatment.

Illumina asserts that it is a technology company engaged in highly sensitive work with a core focus on research and technical development and that the evidence in this case uses highly confidential documents concerning proprietary information on new and current products. Illumina further asserts that the merger at issue concerns a company in a nascent market, which heightens the potential for highly confidential information and heightens the risk that revealing those documents could result in serious competitive injury to Illumina. Illumina argues that because of the highly sensitive nature of its operations and the subject matter of this litigation, Illumina necessarily has a substantial number of highly sensitive documents to be used as exhibits in this litigation.

Complaint Counsel asserts that some of the designations of testimony from depositions and investigational hearing transcripts reflect information that has been described in public statements by non-parties. Complaint Counsel further asserts that a number of Illumina's testimony designations consist of vague statements that, if disclosed, could not result in serious competitive injury.

With respect to documents in the categories identified by Illumina as financial data, pricing and pricing strategy, sales and marketing strategy, regulatory strategy, strategic initiatives, third party/customer information, and GRAIL information, Illumina has met its burden of demonstrating that the documents in these categories are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents Illumina identifies as falling under these categories.

With respect to transcripts from investigational hearings and depositions, Illumina continues to seek *in camera* treatment for vast portions of its transcripts. Illumina's proposed designations are overbroad and include testimony that does not meet the criteria for *in camera* treatment. For example, as pointed out by Complaint Counsel, Illumina seeks *in camera* treatment for a portion of an investigational hearing transcript that describes public statements that a nonparty made about its research program and sales organization. Illumina also seeks *in camera* treatment for a portion of an investigational hearing transcript that discusses common industry abbreviations and general facts about Illumina's products. In addition, Illumina seeks *in camera* treatment for testimony of an employee describing his professional background and responsibilities. Such testimony does not appear to be confidential. To the extent that the transcript portions at issue do convey non-public information, such information does not appear to be sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury. Granting *in camera* treatment for general statements in depositions or investigational hearing transcripts would prevent inquiry on these topics at trial on the public record, which would detract from the public understanding of decisions at the Commission. *See In re Bristol-Myers Co*., 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). Accordingly, with respect to Illumina's request for *in camera* treatment for the designations from the investigational hearing transcripts and depositions, Respondent's motion is DENIED WITHOUT PREJUDICE.

III.

Illumina will be given a final opportunity to file a revised motion for *in camera* treatment, significantly narrowing the designations in its depositions and investigational hearing transcripts for which it seeks *in camera* treatment. If Illumina cannot comply with the directives in this and the August 12 and August 24 Orders, its next motion will be denied, without the right to refile. Illumina's deadline for filing a revised motion for *in camera* treatment for the designations in investigational hearing and deposition transcripts is September 7, 2021. Complaint Counsel may file an opposition by September 9, 2021.

Illumina shall prepare a proposed order listing, by exhibit number, the documents that have been granted *in camera* treatment by this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: September 3, 2021

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

In the Matter of	)	
Illumina, Inc., a corporation,	)	Docket No. 9401
and	)	
GRAIL, Inc., a corporation,	)	
Respondents.	)	

ORDER GRANTING RESPONDENT ILLUMINA, INC.'S FOURTH MOTION FOR *IN CAMERA* TREATMENT

By Order issued September 3, 2021, the third motion for *in camera* treatment filed by Respondent Illumina, Inc. ("Respondent" or "Illumina") was denied without prejudice in part ("September 3 Order"). The September 3 Order directed Respondent to narrow the designations in its depositions and investigational hearing transcripts for which it seeks *in camera* treatment. In its fourth motion for *in camera* treatment, filed on September 8, 2021, Respondent seeks *in camera* treatment for limited designations in its depositions and investigational hearing transcripts and for three additional documents ("Motion"). Complaint Counsel did not file an opposition to the Motion.

Respondent has now complied with the September 3 Order. *In camera* treatment, for a period of five years, to expire on September 1, 2026, is GRANTED for the designated testimony in the deposition and investigational hearing transcripts identified in its Motion.

In addition, Illumina requests *in camera* treatment for three additional exhibits that it asserts contain confidential information regarding a confidential third-party partnership that has not been publicly disclosed. Illumina has demonstrated that these exhibits meet the standards for *in camera* treatment. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the designated portions of PX6050 and PX6066 and for RX2767.

Illumina was previously ordered to prepare a proposed order listing, by exhibit number, the documents that have been granted *in camera* treatment by previous orders. Illumina shall include the exhibits and designated testimony that have been granted *in camera* treatment by this Order in that proposed order. Illumina shall file the proposed order one day before the close of the hearing record in this case.[1]

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: September 10, 2021

[1] Pursuant to Federal Trade Commission ("FTC") Rule of Practice 3.44(c), an order closing the hearing record will be issued three business days after the completion of the evidentiary hearing.

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OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
Illumina, Inc., a corporation,	)	Docket No. 9401
and	)	
GRAIL, Inc., a corporation,	)	
Respondents.	)	

ORDER GRANTING RESPONDENT ILLUMINA, INC.'S SUPPLEMENTAL MOTION FOR *IN CAMERA* TREATMENT

On February 22, 2022, Respondent Illumina, Inc. ("Respondent" or "Illumina") filed a Supplemental Motion for *In Camera* Treatment ("Motion"). Respondent states that it has identified an additional 49 documents that were admitted by consent of the parties at trial, are proposed trial exhibits, or documents that were otherwise omitted from Illumina's prior motions for *in camera* treatment that Illumina asserts contain sensitive information, the disclosure of which will likely result in a clearly defined, serious injury to Illumina if publicly released. Respondent further states that Complaint Counsel does not oppose the motion.

The standards by which Respondent's Motion is evaluated are set forth in the August 12, 2021 Order on Respondent's motion for *In Camera* Treatment. Illumina's motion seeks *in camera* treatment for 49 potential trial exhibits that it states fall into at least one of the following categories: (1) trade secrets and product development; (2) financial data; (3) pricing and pricing strategy; (4) sales and marketing strategy; (5) regulatory strategy; (6) strategic initiatives; (7) third party/customer information; and (8) sensitive personal information. Illumina supports its motion with a declaration from its Vice President, Global IP and Litigation that provides additional details about the documents for which Illumina seeks *in camera* treatment. The declaration asserts that the materials disclose confidential and competitively sensitive information, including: the development and content of Illumina's proprietary and next generation sequencing innovations; financial documents depicting revenues, expenses, profits, and losses; pricing methods and policies; sales and marketing strategy; and analysis and efforts to get approval from the U.S. Food and Drug Administration. The declaration also describes in

detail the significant steps Illumina takes to protect the information from disclosure and maintain its confidentiality. With respect to the sensitive personal information, the declaration explains the harm that would occur from disclosure.

Illumina has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment to expire on September 1, 2026 is GRANTED for the documents for which Illumina seeks *in camera* treatment for a period of five years identified in Exhibit A of its Motion.[1] Illumina shall include these exhibits in the proposed order it was directed to prepare by Order issued February 18, 2022.

Illumina has also met its burden of demonstrating that the exhibit discussing trade secrets is entitled to extended protection. Accordingly, indefinite *in camera* treatment is GRANTED for PX2853. In addition, permanent *in camera* treatment is GRANTED for the sensitive personal information contained in PX2863.

ORDERED:

D.Mic hael Chappell
Chief Administrative Law Judge

Date: February 25, 2022

[1] Previous *in camera* treatment orders issued in September 2021 set September 1, 2026 as the expiration dates for *in camera* treatment of materials granted protection for five years. That expiration date is applied to the exbibits in this motion in order to make the expiration date of *in camera* treatment consistent for all exhibits in this case.

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In the Matter of	)	
Illumina, Inc., a corporation,	)	Docket No. 9401
and	)	
GRAIL, Inc., a corporation,	)	
Respondents.	)	

ORDER ON RESPONDENT GRAIL, INC.'S THIRD MOTION FOR *IN CAMERA* TREATMENT

I.

By Orders issued August 12 and August 24, 2021, the original motion and the second motion for *in camera* treatment filed by Respondent GRAIL, Inc. ("Respondent" or "GRAIL") were denied without prejudice, with leave to refile ("August 12 and August 24 Orders"). The August 12 and August 24 Orders directed GRAIL to thoroughly review all documents for which it seeks *in camera* treatment, and to strictly narrow its requests in any subsequent motion to only those documents that comply with the Commission's strict standards for *in camera* treatment.

On August 28, 2021, GRAIL filed a third Motion for *in Camera* Treatment of Certain Trial Exhibits ("Motion"). Federal Trade Commission Complaint Counsel filed an opposition to the Motion on September 1, 2021. On September 2, 2021, GRAIL filed a motion for leave to file a reply in support of its Motion, together with a proposed reply ("Reply"). The motion for leave to file a reply is GRANTED. The Motion for *In Camera* Treatment is DENIED WITHOUT PREJUDICE.

II.

After setting forth the standards by which motions for *in camera* treatment are evaluated, both the August 12 and August 24 Orders determined that the sheer number of

documents for which GRAIL sought *in camera* treatment far exceeded the number of documents that would reasonably be expected to be entitled to the protection contemplated by Rule 3.45. In the instant Motion, GRAIL has pared down its requests for *in camera* treatment to 674 exhibits and has shortened the requested amount of time for *in camera* treatment for the majority of the identified documents. GRAIL supports the Motion with a declaration from its general counsel that provides additional details about the documents for which GRAIL seeks *in camera* treatment.

GRAIL asserts that multi-cancer screening is a nascent technology and that, while there are other companies developing other types of early cancer detection tests, those tests are behind GRAIL in development. GRAIL further asserts that information about GRAIL's current and future products is competitively sensitive and that the disclosure of this otherwise confidential material would allow potential competitors to copy GRAIL's technology, and develop commercial strategies designed to undermine GRAIL's current products. GRAIL explains that the documents contain sensitive information that GRAIL asserts is indispensable to GRAIL's operations. GRAIL argues that because GRAIL's research and development efforts, and their results, are central to the subject matter of this litigation, GRAIL necessarily has a substantial number of highly sensitive documents contained in the exhibit lists in this litigation.

Complaint Counsel asserts that some of the designations of testimony from depositions and investigational hearing transcripts reflect information that has been revealed in public filings. Complaint Counsel further asserts that a number of GRAIL's testimony designations consist of vague statements that, if disclosed, could not result in serious competitive injury.

III.

With respect to documents that GRAIL places in the category of trade secrets and product development, GRAIL has reduced the number of documents for which it seeks *in camera* treatment. GRAIL states that these documents contain the technical specifications for GRAIL's multi-cancer early detection test, Galleri, and information regarding GRAIL's development of future tests and versions of those tests. GRAIL has met its burden of demonstrating that the documents in this category are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Further, GRAIL has demonstrated that the need for confidentiality for the detailed information in these documents is not likely to decrease over time. Accordingly, extended *in camera* treatment, for a period of ten years, to expire September 1, 2031, is GRANTED for the 18 documents identified in the trade secrets and product development category.

With respect to documents in GRAIL's categories of financial data, pricing and pricing strategy, sales and marketing strategy, regulatory strategy, and strategic initiatives, GRAIL has met its burden of demonstrating that the documents in these categories are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to

expire on September 1, 2026,[1] is GRANTED for the documents GRAIL identifies as falling under the categories of financial data, pricing and pricing strategy, sales and marketing strategy, regulatory strategy, and strategic initiatives.

With respect to documents that contain details regarding individuals' compensation, job performance, personal phone numbers, personal email addresses, and home addresses, the request to protect this sensitive personal information is GRANTED. GRAIL shall redact such sensitive personal information from the documents listed in the category of sensitive personal information

With respect to transcripts from investigational hearings and depositions, GRAIL continues to seek *in camera* treatment for vast portions of its transcripts. GRAIL's proposed designations are overbroad and include testimony that does not meet the criteria for *in camera* treatment. For example, Complaint Counsel cites to a press release in which GRAIL's Chief Executive Officer Hans Bishop publicly stated that a benefit of the transaction is to accelerate access to the Galleri test. Yet, GRAIL seeks *in camera* treatment for testimony from Hans Bishop that, because GRAIL has a small team and Illumina has a large team that has experience getting a PMA approval for the certain technologies, Illumina can assist GRAIL in the PMA approval process, which will accelerate patient access to the Galleri test. Such testimony provides little further detail to statements that have been publicly made. An observation that Illumina has more employees than GRAIL cannot be a well-kept secret. An observation by someone in GRAIL about Illumina's perceived capabilities are vague and general.

In its Reply, GRAIL states that, in response to Complaint Counsel's objections to portions of two transcripts, it now agrees to de-designate certain portions of the investigatory hearing transcript and deposition transcript of Hans Bishop. However, GRAIL's de-designations from these two transcripts do not remedy GRAIL's overbroad designations from the remaining transcripts. Indeed, GRAIL seeks *in camera* treatment for portions of 17 transcripts. Each example noted by Complaint Counsel was intended only as "one of several instances" where GRAIL over designated *in camera* material. These examples are not the only instances. Other instances where GRAIL seeks *in camera* treatment for material that is not sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury include: PX7108 21:1-24:6 (testimony that many IPOs were occurring in 2020; comparable companies had positive market performance; GRAIL wants to be opportunistic in taking advantage of favorable financings; in 2020, market conditions were favorable for raising capital publicly); PX7103 57:23-58:8 (testimony describing in general how the Galleri test works); PX7098 60:15-61:2 (testimony describing in general GRAIL's strategy for reimbursement from payers for use of the Galleri test); PX7078 at 22:1-13 (testimony that Morgan Stanley

[1] For documents in these categories, GRAIL differentiated between exhibits, seeking *in camera* treatment for periods of two, three, or five years, depending on the sensitivity of each document. In order to make the expiration date of *in camera* treatment consistent across exhibits, which furthers the public interest in administrative efficiency, *in camera* treatment for a period of five years is granted to the documents for which GRAIL sought protection for five years or less. *See In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, at *20 n.1 (May 25, 2011).

offered advice on how the agreement with Illumina would be perceived by the public market and assisted on various modeling activities, without revealing the specific advice or the details of the various modeling activities). The foregoing are examples and are not the only instances of testimony that does not meet the *in camera* treatment standard.

Granting *in camera* treatment for general statements in depositions or investigational hearing transcripts would prevent inquiry on these topics at trial on the public record, which would detract from the public understanding of decisions at the Commission. *See In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). Accordingly, with respect to GRAIL's request for *in camera* treatment for the designations from the investigational hearing transcripts and depositions, Respondent's motion is DENIED WITHOUT PREJUDICE.

IV.

GRAIL will be given a final opportunity to file a revised motion for *in camera* treatment, significantly narrowing the designations in its depositions and investigational hearing transcripts for which it seeks *in camera* treatment. If GRAIL cannot comply with the directives in this and the August 12 and August 24 Orders, its next motion will be denied, without the right to refile. GRAIL's deadline for filing a revised motion for *in camera* treatment for the designations in investigational hearing and deposition transcripts is September 8, 2021. Complaint Counsel may file an opposition by September 10, 2021.

GRAIL shall prepare a proposed order listing, by exhibit number, the documents that have been granted *in camera* treatment by this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: September 3, 2021

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

In the Matter of	)	
Illumina, Inc., a corporation,	)	Docket No. 9401
and	)	
GRAIL, Inc., a corporation,	)	
Respondents.	)	

ORDER ON NON-PARTIES' MOTIONS FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission ("FTC" or "Commission") and the Scheduling Order entered in this matter, certain non-parties, identified below, filed motions for *in camera* treatment for designated materials that FTC Complaint Counsel and/or Respondents Illumina, Inc., and GRAIL, Inc. have listed on their exhibit lists as materials that might be introduced at trial. Neither Complaint Counsel nor Respondents opposed the motions filed by the non-parties.

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence "be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b).

A. Clearly defined, serious injury

"[R]equests for *in camera* treatment must show 'that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.'" *In re Kaiser Aluminum & Chem. Corp.*, 1984 FTC

LEXIS 60, at *1 n.1 (May 25, 1984), quoting *In re H. P. Hood & Sons, Inc.*, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is "the principal countervailing consideration weighing in favor of disclosure." *Id.*

The FTC recognizes the "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co*., 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). A full and open record also provides guidance to persons affected by the Commission's actions and helps to deter potential violators of the laws that the Commission enforces. *Hood*, 1961 FTC LEXIS 368, at *6-7. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be given *in camera* treatment. *Id*. at *10-11. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 1980 FTC LEXIS 99, at *4-5; *In re Crown Cork & Seal Co.*, 1967 FTC LEXIS 128, at *2-3 (June 26, 1967).

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3-4 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts which contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only "in unusual circumstances," including circumstances in which "the need for confidentiality of the material . . . is not likely to decrease over time . . . ." 16 C.F.R. § 3.45(b)(3). "Applicants seeking indefinite *in camera* treatment must further demonstrate 'at the outset that the need for confidentiality of the material is not likely to decrease over time' 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration." *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (Apr. 25, 1990). In *DuPont*, the Commission rejected the respondent's request for

indefinite *in camera* treatment. However, based on "the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry, . . ." the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 1961 FTC LEXIS 368, at *12. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 1961 FTC LEXIS 368, at *12; *General Foods*, 1980 FTC LEXIS 99, at *2; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g.*, *McWane*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes "sensitive personal information," ("SIP") the Administrative Law Judge shall order that such material be given *in camera* treatment. 16 C.F.R. § 3.45(b). "Sensitive personal information" is defined as including, but not limited to, "an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records." 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals' names and addresses, and witness telephone numbers have been found to be "sensitive personal information" and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers' names or other personal data when it was not relevant). "[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." 16 C.F.R. § 3.45(b)(3).

III.

The non-parties listed below filed separate motions for *in camera* treatment. Each motion included the documents for which *in camera* treatment is sought and was properly supported by a declaration of an individual within the company who had reviewed the

documents at issue. These declarations supported the applicants' claims that the documents are sufficiently secret and sufficiently material to their businesses that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of FTC decisions. *See Kaiser Aluminum*, 1984 FTC LEXIS 60, at *2 ("A public understanding of this proceeding does not depend on access to these data submitted by these third party firms."). Moreover, in evaluating the specific motions of each of the non-parties under the standards set forth above, requests for *in camera* treatment by non-parties warrant "special solicitude." *Crown Cork*, 1967 FTC LEXIS 128, at *2; *ProMedica*, 2011 FTC LEXIS 101, at *3-4. *See also Kaiser Aluminum*, 1984 FTC LEXIS 60, at *2-3 ("As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.").

American Cancer Society, Inc. ("ACS")

ACS seeks *in camera* treatment for two portions of one deposition transcript that it asserts constitute competitively sensitive confidential information. ACS supports its motion with a declaration from its chief legal and risk officer. The declaration asserts that the deposition contains confidential information concerning ACS views, activities, and current processes, in addition to its business relationships with companies concerning the development of multi-cancer early detection tests, and that such information is competitively sensitive. The declaration also describes in detail the significant steps ACS takes to protect the information from disclosure and maintain its confidentiality.

ACS has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the following portions of the deposition transcript of Dr. William D. Chance: PX7086 (35:1-36:6 and 39:24-43:17).

Caris Life Sciences, Inc. ("Caris")

Caris seeks *in camera* treatment for all or portions of nine documents that it asserts constitute competitively sensitive confidential business documents or trade secrets. Caris supports its motion with a declaration from its general counsel. The declaration asserts that Caris has spent millions of dollars on the research and development projects described in the confidential documents and that the documents contain proprietary information that is highly valuable, especially to Caris' competitors. The declaration also describes in detail the significant steps Caris takes to protect the information from disclosure and maintain its confidentiality.

Caris has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. In order to make the expiration date of *in camera* treatment consistent across exhibits

provided by non-parties, which furthers the public interest in administrative efficiency,[1] *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8319, PX8320, PX8321, PX9130, and CarisLifeSciences SDT_Illumina 02492-02495, and for the designated portions of PX9131, PX9134, and FTCCarisLife-00000477-00000487.

With respect to the one document for which Caris seeks indefinite *in camera* treatment, Caris has demonstrated that the detailed information about technical specifications of Caris' testing products will not cease to be competitively sensitive. Accordingly, indefinite *in camera* treatment is GRANTED for the document identified as PX9137.

Element Biosciences, Inc. ("Element")

Element seeks *in camera* treatment for seven documents and portions of one deposition transcript that it asserts constitute competitively sensitive confidential business documents and technical trade secrets. Element supports its motion with a declaration from its co-founder and chief executive officer. The declaration asserts that the documents and deposition contain confidential information relating to Element's proprietary technology, business development and marketing strategies, product and pricing strategies, competitive and positioning analysis, and communications with Element's partners and potential customers, and that such information is competitively sensitive. The declaration also describes in detail the significant steps Element takes to protect the information from disclosure and maintain its confidentiality.

Element has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified by Bates numbers: ELEMENT 00001-017, 00018-032, 00033-046, 00047-063, 00261-321, 00339-365 and 00366-385.

With respect to the deposition transcript, Element has narrowed its request to only those portions meeting the standards for *in camera* treatment. *In camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the following portions of the deposition transcript of Dr. Molly He (PX7124): 4:20-21; 4:23-24; 5:3-4; 22:20-22; 23:7-11; 23:12; 23:15; 24:2-25; 25:18-25; 26:2-25; 27:1-3; 9-25; 28:1; 28:4-12; 15-18; 23-25; 29:2-20; 23-25; 30:1-15; 24-25; 31:1-10; 13-16; 22-25; 32:1; 14-15; 17-20; 22-25; 33:1-25; 34:3-5; 7-16; 35:11-21; 36:4-10; 43:8-25; 44:1; 3-7; 10-20; 22-25; 45:4-5; 10-13; 15-16; 18-25; 46:1-5; 10-11; 13-14; 16-25; 47:1-7; 11-12; 16-19; 23-25; 48:1-8; 10-15; 51:18-23; 25; 52:1-4; 10; 12-13; 53:16-19; 22; 57:7-19; 24-25; 58:1-10; 18-25; 59:1-3; 60:6-7; 11-16; 18; 61:5-12; 62:4-14; 18-21; 64:5-23; 65:6-22; 66:3-11; 13-14; 16-19; 22-23; 67:9-15; 20-21; 24-25; 68:1-2; 9-10; 12-13; 20-23; 25; 69:1-2; 12; 16-20; 70:5-6; 11-13; 71:4-5; 72:3-16; 19-24; 74:20-23; 75:20-22; 25; 77:1-7; 78:6-7; 11-12; 14-25; 79:1-5; 19-22; 81:1; 9; 14; 82:11-13; 83:11-22; 25; 84:7; 85:6-9; 13-19; 86:2-4; 15-16; 87:17; 21-22; 88:8;

[1] *See In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, at *20 n.1 (May 25, 2011).

89:23; 90:13; 20; 23; 24; 91:1; 24; 92:2; 14; 95:18-25; 96:6-8; 12-16; 97:1-2; 24; 98:14; 15; 99:18-19; 100:1-7; 10-12; 18-19; 101:1-2; 4-5; 21-25; 102:1-3; 103:16-17; 104:9-15; 105:21; 24-25; 106:1-5; 11; 12-16; 107:6-8; 10; 12-13; 16; 23-25; 108:1-4; 7-10; 14; 15-17; 24-25; 109:1-6; 12-14; 110:6-8; 111:3-7; 116:5-6; 8; 19; 20-24; 117:5-7; 10-18; 21-24; 118:5-8; 119:5; 6-8; 9; 120:20; and 126:6.

Emory University and Dr. Charles Hill ("Emory")

Emory seeks *in camera* treatment for two documents that it asserts constitute competitively sensitive confidential documents. Emory supports its motion with a declaration from one of its employees. The declaration asserts that the documents contain confidential technical proprietary business information relating to Emory's research and healthcare activities, including clinical information, and financial data, including the cost/pricing of Emory's suppliers for materials and supplies, and that such information is competitively sensitive. The declaration also describes in detail the significant steps Emory takes to protect the information from disclosure and maintain its confidentiality.

Emory has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. In addition, Emory has met its burden of demonstrating that documents relating to its technical scientific processes are entitled to extended protection. Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified as PX8493 and PX8494.

Exact Sciences, Corp. ("Exact")

Exact seeks *in camera* treatment for several documents and portions of six deposition transcripts that it asserts constitute competitively sensitive confidential business documents and testimony. Exact supports its amended motion[2] with a declaration from a senior employee. The declaration asserts that the documents and depositions contain confidential proprietary business information, product research and development, marketing strategies, including potential acquisitions, product and pricing strategies, competitive analysis, and communications relating to negotiations with Exact's suppliers, and that such information is competitively sensitive. The declaration also describes in detail the significant steps Exact takes to protect the information from disclosure and maintain its confidentiality.

Exact has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. In addition, Exact has met its burden of demonstrating that documents relating to its products in development are entitled to extended protection. Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the

[2] Exact filed a motion for leave to amend its original motion for *in camera* treatment. Exact asserts that, after Exact had filed its original motion, it received notification from Illumina of additional exhibits from Exact that Respondents intend to introduce at trial. Exact's motion to file an amended motion for *in camera* treatment is GRANTED.

documents and designated deposition and investigational hearing testimony identified in Exact's amended motion.

Freenome Holdings, Inc. ("Freenome")

Freenome seeks *in camera* treatment for several documents and portions of deposition or investigational hearing transcripts that it asserts constitute competitively sensitive confidential business documents and testimony. Freenome supports its motion with a declaration from its chief executive officer. The declaration asserts that the documents contain confidential information about the company, including Freenome's business strategies and innovations, proprietary technology information, medical research and scientific data, product research and development strategies, competitive positioning, pricing, and internal email communications/exchanges relating to acquisitions and vendor-customer relationships, and that such information is competitively sensitive. The declaration also describes in detail the significant steps Freenome takes to protect the information from disclosure and maintain its confidentiality.

Freenome has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. While Freenome has over designated materials for which it seeks indefinite *in camera* treatment, Freenome has met its burden of demonstrating that documents relating to product development strategy, presentations to the United States Food and Drug Administration, and the information contained in its responses to the FTC's CID and the European Commission's request for information, as well as the designated portions of the transcripts of investigational hearings and depositions are entitled to extended protection. Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified in Freenome's motion as falling into categories I and II, and to the designated portions of the documents identified as falling into Category V. The documents listed in categories III and IV consist of ordinary business records, and not trade secrets. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified in categories III and IV.

Goldman Sachs & Co. LLC ("Goldman Sachs")

Goldman Sachs seeks *in camera* treatment for five documents that it asserts constitute competitively sensitive confidential business documents. Goldman Sachs supports its motion with a declaration from an associate. The declaration asserts that the documents contain confidential proprietary business information relating to client services, internal methodologies and strategies when advising clients, financial analysis, merger and acquisition information, and Goldman Sachs' non-public engagements with companies and potential clients, and that such information is competitively sensitive. The declaration also describes in detail the significant steps Goldman Sachs takes to protect the information from disclosure and maintain its confidentiality.

Goldman Sachs has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. However, these documents consist of ordinary business records,

and not trade secrets. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8409, PX8410, PX8411, PX8412 and PX9166 (001-003).

Guardant Health, Inc. ("Guardant")

Guardant seeks *in camera* treatment for 69 documents, including portions of five testimony transcripts, that Guardant states fall into one or more of four categories: (a) documents regarding the regulatory status of Guardant's tests, including regulatory applications and approvals; (b) documents discussing sensitive details of Guardant's business operations; (c) documents discussing Guardant's business strategies and product development and commercialization plans, and (d) testimony of Guardant senior executives discussing the foregoing sensitive topics. Guardant supports its motion with a declaration from its vice president of IP litigation and licensing. The declaration asserts that the documents contain confidential technical proprietary information and business strategies, regulatory processes, marketing and distribution plans, competitive analysis, research and development activities, clinical information, financial data, and internal email communications/exchanges relating to its competitors. The declaration also describes in detail the significant steps Guardant takes to protect the information from disclosure and maintain its confidentiality.

Guardant has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified by exhibit number and or bates number as: PX8523 (GH_000014534-14561), GH_000006725, GH_000009441-9445, GH_000009659-9663, GH_000014562-14566, PX8305 (GH_000001681-2120), PX8307 (GH_000006580), PX8312 (GH_000002506-2691), PX8346 (GH_000002257-2505), GH_000002182-2256, GH_000006734-6757, GH_000012973, GH_000012974, GH_000013056, PX8309 (GH_000006705-6724), PX8310 (GH_000006801), PX8314 (GH_000006588), PX8474 (GH_000007777_R-7968_R), PX8495 (GH_000010475-10482), PX8498 (GH_000008731-8735), PX8499 (GH_000008990-8907), PX8503 GH_000009446-9514), PX8506 (GH_000010357-10360), PX8507 (GH_000010627-10629), PX8508 (GH_000011457-11463), PX8520 (GH_00009195-9201), PX8521 (GH_000009218-9219), PX9068 (001-030), GH_000007025-7055, GH_000007425, GH_000007443, GH_000007489, GH_000007490, GH_000007591, GH_000007864_R-7942_R, GH_000008162_R-8190_R, GH_000008191_R-8209_R, GH_000008210_R-8311_R, GH_000008850-8853, GH_000009201, GH_000009351, GH_000009518-9556, GH_000010357, GH_000010378-10380, GH_000012690, GH_000012723, GH_000012724, GH_000013011-13012, GH_000013115-13120, GH_000014475, and for the designated portions of documents identified as PX8306 (GH_000006253), X8311 (GH_000006819), PX8313 (GH_000006254-6494), GH_000011983, PX8496 (GH_000013176-13178), PX8501 (GH_000009376-9377), PX8502 (GH_000009401-9404), PX8504 (GH_000010208-10283), PX8505 (GH_000010340-10352) GH_000008336-8337, GH_000008352-8355, GH_000008714-8716, GH_000010555, GH_000010567.

With respect to the deposition transcripts, Guardant has narrowed its request to only those portions meeting the standards for *in camera* treatment. *In camera* treatment, for a

period of five years, to expire on September 1, 2026, is GRANTED for the following investigational hearing and deposition transcripts:

William Getty (IH): PX7040 (34:18-25; 35:1-8; 36:1-3; 56:16-18; 56:21-22; 56:24; 57:1; 57:3-6; 57:8-9; 57:17-25; 58:1; 81:23-25; 82:1-5; 85:18-25; 86:1-2; 86:14-25; 87:9-17; 87:19-24; 88:2-5; 88:16-21; 91:15-21; 92:16-25; 93:1-5; 93:7; 93:9; 93:11-17; 93:25; 94:1-15; 94:20-21; 94:23; 95:5-6; 95:12; 95:17-25; 96:1-4; 96:6-13; 98:4-7; 101:15-22; 103:1-2; 103:7-8; 103:13-18; 104:13-14; 104:25; 105:1-7; 105:12-20; 106:10-12; 106:19-21; 106:24; 114:9-12; 114:21-25; 115:3-6; 115:25; 116:1-9; 117:1-5; 117:16-20; 118:15; 118:17; 118:22; 118:25; 119:2-4; 119:7-8; 122:2-25; 123:1-14; 129:6-14; 141:18-25; 142:1-4; 142:12-15; 142:18-25; 143:1-4; 149:20-21; 151:2-7; 151:11-25; 152:1-25; 153:4-15; 174:8-11; 174:17-18; 174:20; 174:25; 175:1; 191:22-23; PX7040 (051-081(index)) and PX7040 (083 (errata)).

Darya Chudova (IH): PX7045 (25:25; 26:1-3; 26:7-10; 27:24-25; 28:1-2; 28:12-15; 36:5-16; 39:19-25; 40:1-6; 40:15-25; 41:1-16; 41:18; 41:23-25; 42:25; 43:1-8; 43:17; 45:10-13; 48:5-8; 48:22; 49:24-25; 50:1-5; 50:8; 50:15; 65:4-18: 76:1-5; 81:6-11; 81:15-23; 84:22-25; 85:1-25; 86:1-4; 86:8-20; 88:11-21; 91:2-22; 93:10-12; 93:15; 93:18-19; 94:5-8; 94:19-22; 95:3-18; 96:1; 96:7-12; 99:25; 100:1-6; 100:11-25; 101:1-6; 101:10-15; 101:17-23; 102:8-9; 103:4-17; 105:10; 109:9-25; 110:1-10; 110:13-23; 111:5-18; 113:23-25; 114:1-7; 114:10-16; 114:19-25; 115; 4-9; 116:21-25; 117:1-25; 118:1-11; 121:7-25; 122:1-6; 122:17-25; 123:1-3; and PX7045 (034-054 (index)).

Nitin Sood: PX7090 (24:15-18; 25:5-9; 27:19-25; 28:1-3; 28:5-7; 28:17; 32:18-25; 33:1-12; 33:17-19; 35:5-6; 35:24-25; 36:3-10; 37:1-4; 37:12-15; 37:21-25; 38:1-7; 38:11-12; 39:10-11; 39:14-16; 39:20; 39:24-25; 40:3-4; 40:6-15; 40:23-25; 41:4-5; 41:8-10; 41:13-16; 41:21-25; 42:8; 42:12-24; 43:6-12; 44:3-9; 44:11-12; 44:19; 44:24-25; 45:1-2; 53:15-17; 52:23-25; 53:2-3; 53:5-7; 54:15-17; 55:3-5; 63:4-6; 63:12-14; 64:5-6; 64:17-19; 67:17-19; 67:25; 68:1-22; 71:19-21; 71:23-25; 72:1; 74:4-6; 75:1; 75:4-5; 76:20-24; 77:20; 77:24-25; 78:1; 78:8-9; 78:17; 78:19; 78:22-25; 79:1-2; 99:21-23; 102:1-2; 104:11-12; 106:1-10; 108:15-16; 119:19-20; 124:23-24; 125:2-18; 135:19-25; 136:1-5; 136:11-12; 137:10-12; 137:15-16; 137:18-20; 137:23-25; 138:1-7; 138:16-19; 138:22-24; 139:3-10; and PX7090 (040-068 (index)).

Darya Chudova: PX7100 (20:17; 21:2; 21:22-23; 22:8; 25:14; 25:21; 25:25; 26:1-2; 27:7-10; 27: 19-25; 28:1; 28:3; 28:15; 29:1-13; 30:24-25; 31:5-8; 33:14-24; 34:2-5; 34:9; 34:11-15; 35:1-2; 35:5-18; 38:15-17; 39:6; 39:20; 40:4; 41:16-25; 42:1; 42:11; 42:24-25; 43:1-3; 45:15-25; 46:1-4; 47:6-25; 52:13-25; 53:1-25; 54:1-13; 54:16-25; 55:1-16; 55:22; 56:11-23; 57:8-25; 58:1-2; 58:6-13; 60:21-25; 61:1-17; 62:8-21; 63:2; 63:5; 63:12-22; 63:24-25; 64:1-20; 65:6-25; 66:1-4; 66: 8-16; 67:5-15; 67:19-25; 68:1-19; 68:21-22; 70:15; 72:6-11; 72:14; 74:5; 78:25; 79:1-15; 79:25; 80:1; 85:14-24; 86:1-25; 87:1-22; 95:15-21; 95:23-25; 96:1-3; 96:13-17; 96:20-25; 97:1-17; 98:7-15; 99:17-25; 100:1-4; 100:9-10; 100:14-19; 102:23–25; 103:1-13; 107:3-16; 110:3-6; 118:20-25; 119:1-2; 119:15-18; 121:15-22; 122:12-13; 123:13-15; 126:22-25; 127:1-19; 128:16-17; 129:10-24; 130:10-13; 130:18-19; 131:6-9; 131:14-17; 131: 21-25; 132: 5-8; 132:12-22; 133:14-24; 134:1-11; 134:14-18; 138:2-8; 138:17-23; 139:3-4; 139:8-25; 140:1-3; 140:6-9; 140:12-17; 140:21-25; 141:1; 141:5-7; 141:10-16; 141:19-25; 142:1-3; 142:12-14; 143:6-16; 144:20-25; 145:1-25; 146:1-25; 147:1-

3; 147:6-25; 148:1-21; 149:5-21; 149:23-25; 150:1-17; 151:1-7; 151:13-23; 151:25; 152:1-5; 152:8-16; 152:23-24; 153:2-24; 154:2-3; 154:6-21; 154: 25; 155:1-17; 155:19-25; 156:1-17; 156:23-25; 157:1-25; 158:1-5; 158:9-25; 159:1-14; 160:25; 161:1-13; 169:24; 177:9-18; 178:15-21; 178:25; 179:1-3; 179:6-12; 181:15-25; 182:1-16; and PX7100 (050-092 (index)).

William Getty: PX7105 (14:13-16; 14:22-25; 15:1-3; 15:22-25; 16:1; 18:8-15; 21:22; 43:1-4; 43:7-8; 47:16-17; 52:7-12; 52:21-24; 72:3-4; 72:13; 72:16; 77:9; 113:19-21; 113:24-25; 114:1; 114:4-21; 115:8-10; 115:16-20; 116:2-4; 116:16; 116:20-25; 117:1-2; 117:7-8; 117:18-20; 120: 9-11; 120:21-22; 120:25; 121:1; 121:9-11; 121:15-19; 122:15; 122:18-19; 122:24; 123:2-3; 124: 19; 124:22-24; 126:14; 127:21-22; 127:24-25; 128:1-3; 128:10-12; 129:10; 129:13-14; 129:24; 130:10; 130:19; 131:15; 131:22; 131:24; 132:15; 132:22; 132:24; 133:1-2; 133:7; 133:9; 133:16; 133:18; 133:20; 134:4; 134:13; 134:19; 135:1; 135:3-4; 135:7; 136:16; 136:18; 137:9; 137:17; 137:20; 138:4; 138:9; 138:11; 138:14; 138:17-18; 139:5; 140:14; 141:13-14; 142:18; 143:9; 143: 11-12; 143:17-18; 144:1-2; 144:10-11; 144:20-21; 145:9; 145:13; 145:18-19; 146:5-7; 147:16-18; 147:24; 148:1-2; 148:19-20; 149:5; 149:11; 149:23; 151:10-11; 151:17-23; 152:4-5; 152: 11-12: 152:15-16; 152:19; 153:24; 154:4; 154:6-7; 154:10-12: 155:3-5; 155:8-10; 155:18-19; 156:1; 156:8-11; 15:16; 156:18-23; 156:25; 157: 1-4; 157:9-10; 157:14-17; 157:21-22; 158:7-8; 158:11-12; 159:4; 159:15-20; 159:25; 160:7-8; 160:15-16; 160:25; 161:1; 161:9-10; 161:13-17; 161:19-21; 161:23-25; 162:2; 162:8-10; 162:13-15; 162:23; 163:3; 163:7; 163:10; 163:12-13; 164:17-19; 164:21; 164:23; 165:5; 165:7; 165:11-12; 164:17; 165:22-23; 166:1-2; 166:5; 166:9; 166:13-14; 166:20-21; 166:25; 167:1-3; 167:17-19; 171:5-6; 172:3-11; 173:1-2; 173:11; 173:23-25; 174:1-3; 175:12; 177:24-25; 178:1-4; 178:6-10; 178:15-17; 180:17; 180:19; 181:1; 181:6; 185:20; 187:11-12; 187:15-16; 187:20-23; 188:8-11; 189:2-4; 189:8-9; 189:15; 190:4; 190:14; 190:19-20; 190:22; 191:6-8; 191:11-13; 191:17; 191:25; 192:3-4; 192:6-8; 192:12-13; 192:15-21; 192:25; 193:3-5; 193:14-15; 193:18-19; 193:24-25; 194:1; 194:4; 194:7; 194:15; 195:2-8; 195:13-14; 195:16-18; 195:23-25; 196:14-17; 196:22-23; 197:22; 198:18; 198:21-22; 199:8; 199:13-15; 200:18-21; 201:8; 201:12-14; 202:25; 203:1; 203:16-17; 203:20-21; 204:4; 204:20-22; 206:6-7; 207:4-5; 207:13-14; 207:16-19; 208:8-9; 208:16; 208:21; 209:1-2; 209:8-9; 209:11; 209:14-15; 209:18-22; 210:4-6; 210:8; 210:12; 210:14; 210:22-23; 212:13; 212:18-20; 212:22; 212:24-25; 213:1-2; 213:4-5; 213:10-13; 213:16; 228:19-23; 228:25; 229:1-2; 230:12-14; 232: 20-21; 233:1-4; 233:16-17; 236:9; 237:11; 240:18; 243:18; 244:8-9; 245:8-12; 245:18-19; 245: 21-24; 248:23-25; 249:1-12; PX7105 (066-120 (index)); and PX7105 (121 (errata)).

In addition, permanent *in camera* treatment is GRANTED for the sensitive personal information contained in PX7040 at 9:11-12; 9:16-17.

Helio Health ("Helio")

Helio seeks *in camera* treatment for six documents and portions of one deposition transcript that it asserts constitute competitively sensitive confidential business documents and testimony. Helio supports its motion with a declaration from its chief executive officer. The declaration asserts that the documents contain Helio's business practices and strategies, intellectual property and trade secrets, clinical trial data, product research and development, and sales and commercial strategies, and that such information is competitively sensitive. The

declaration also describes in detail the significant steps Helio takes to protect the information from disclosure and maintain its confidentiality.

Helio has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8651, PX8652, PX8653, PX8655 and RX0894 and for the designated portions of the transcript of Ken Chahine, PX7077.

Invitae Corporation ("Invitae")

Invitae seeks *in camera* treatment for twelve documents and portions of four deposition transcripts that it asserts constitute competitively sensitive confidential business documents and testimony. Invitae supports its motion with a declaration from its general counsel and secretary. The declaration asserts that the documents and depositions contain confidential information relating to Invitae's proprietary processes and technology, business strategies, financial data, including detailed pricing of its products, internal data on current and future products, competitive analysis, commercial agreements, and internal email communications regarding competitive strategies, and that such information is competitively sensitive. The declaration also describes in detail the significant steps Invitae takes to protect the information from disclosure and maintain its confidentiality.

Invitae has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8331, PX8333, PX8334, PX8335, PX8366, PX8337, PX8338, PX8339, PX8340, PX8355, PX9176 and PX9177.

With respect to the deposition transcripts, Invitae has narrowed its request to only those portions meeting the standards for *in camera* treatment. *In camera* treatment, for a period of five years, to expire on September 1, 2026, is GRANTED for the following deposition transcripts:

PX7044 (Deposition of Joshua Stahl) p. 38, line 23 to p. 39, line 2; p. 99, line 15; p. 100, line 2 to line 3; p. 128, line 9; p. 131, line 19 to line 20; p. 131, line 25; p. 132, line 1; p. 132, line 4 to line 6; p. 133, line 23 to p. 134, line 15; p. 134, line 20 to line 21; p. 135, line 9 to line 11; p. 135, line 16 to line 19; p. 135, line 21 to p. 136, line 8; p. 137, line 14 to line 21; p. 138, line 25 to p. 139, line 3; p. 139, line 6; p. 139, line 8 to line 9.

PX7046 (Deposition of Sean Emerson George) p. 31, line 2; p 39. Line 14 to line 15; p. 40, line 4 to line 8; p. 51, line 15 to line 24; p. 52, line 7; p. 55, line 11 to line 12; p. 55, line 14; p. 55, line 16 to line 17; p. 60, line 10; p. 61, line 18; p. 61, line 21 to line 22; p. 65, line 17 to line 18p 74, line 25; p. 76, line 5 to line 6; p. 77, line 20 to line 22; p. 77, line 24 to p. 78, line 1; p. 78, line 4 to line 6; p. 78, line 9; p. 78, line 17; p. 78, line 22; p. 80, line 17 to line 19; p. 81, line 5 to line 6; p. 81, line 8; p. 83, line 21 to line 24; p. 89, line 16 to line 17; p. 95, line 13 to line 17; p. 98, line 1 to line 2; p. 98, line 8 to line 9; p. 103, line 23 to p. 104,

line 1; p. 107, line 19 to line 23; p. 108, line 2 to line 11; p. 113, line 10 to line 11; p. 122, line 19 to line 20; p. 122, line 24; p. 123, line 1; p. 123, line 19; p. 124, line 1; p. 124, line 3 to line 12; p. 125, line 5 to line 6; p. 125, line 25 to p. 126, line 1; p. 126, line 11 to line 12; p. 128, line 1 to line 2; p. 130, line 12 to line 13; p. 130, line 21; p. 132, line 23; p. 148, line 25 to p. 149, line 1; p. 149, line 17 to line 18; p. 150, line 6 to line 12; p. 168, line 11.

PX7075 (Deposition of Joshua Stahl) p. 51, line 2 to p. 54 line 22; p. 55, line 4 to p. 57, line 25; p. 58, line 13 to line 24; p. 63, line 7 to p. 64, line 4; p. 64, line 24 to p 65, line 24; p. 66, line 1 to line 18; p. 66, line 25 to p. 67, line 19; p. 70, line 3 to line 12; p. 77, line 12 to p. 78, line 11; p. 80, line 5 to line 18; p. 95, line 17 to line 22; p. 96, line 4 to line 11.

PX7081 (Deposition of Sean Emerson George) p.21, line 10 to line 11; p.21, line 22; p. 22, line 8 to line 9; p. 22, line 11 to line 15; p. 25, line 5 to line 8; p. 34, line 20 to line 23; p. 46, line 10 to line 11; p. 63, line 13; p. 63, line 21 to p. 64, line 6; p. 65, line 19 to p. 66, line 9; p. 67, line 13 to p. 68, line 5; p. 68, line 9 to line 18; p. 69, line 6 to line 16; p. 69, line 22 to line 25; p. 70, line 2 to line 9; p. 81, line 8 to line 12; p. 96, line 2 to p. 99, line 25.

Laboratory Corporation of America Holdings ("Labcorp")

Labcorp seeks *in camera* treatment for 20 documents and a deposition transcript that it asserts constitute competitively sensitive confidential business documents and testimony. Labcorp supports its motion with a declaration from its chief scientific officer and senior vice president. The declaration asserts that the documents and depositions contain confidential information and testimony relating to its business strategies, current and future test offerings in development, competitive strategies and analyses, supply agreements and acquisition data, and internal email communications with its employees relating to products, new business opportunities and potential partnerships, and that such information is competitively sensitive. The declaration also describes in detail the significant steps Labcorp takes to protect the information from disclosure and maintain its confidentiality.

Labcorp has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8574, PX8575, PX8577, PX8578, PX8579, PX8580, PX8581, PX8582, PX8586, PX8587, PX8588, PX8589, PX8592, PX8593, PX8594, PX8595, PX8596 and PX8597. In addition, Labcorp has met its burden of demonstrating that its document relating to long-term strategy and potential tactics for important company initiatives is entitled to extended protection. Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the document identified as PX8576.

With respect to the deposition transcript of Marcia Eisenberg, Labcorp has not narrowed its request to only those pages containing confidential information. Accordingly, Labcorp's motion is DENIED WITHOUT PREJUDICE for the transcript identified as PX7122. Labcorp may file a renewed motion seeking *in camera* treatment for only those

pages and line numbers that contain information that meets the strict standards for *in camera* treatment.

Morgan Stanley & Co., LLC ("Morgan Stanley")

Morgan Stanley seeks *in camera* treatment for 25 documents that it asserts constitute competitively sensitive confidential business documents. Morgan Stanley supports its motion with an affidavit from a managing director. The affidavit asserts that the documents contain confidential advice regarding potential private and public transactions, its business processes and strategies, and advisory work/services provided to GRAIL. The affidavit further asserts that the documents reflect confidential, commercially sensitive information about potential GRAIL transactions, the identity of potential investors and advisory clients, financial data, sales and marketing strategies and valuation analyses, and that such information is competitively sensitive. The affidavit also describes in detail the significant steps Morgan Stanley takes to protect the information from disclosure and maintain its confidentiality.

Morgan Stanley has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. However, these documents consist of ordinary business records, and not trade secrets. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as RX2614, RX2622, RX2627, PX8472, PX8467, RX2672, PX8473/RX2629, PX8457, and for the designated portions of RX2643, PX8460, RX2667/PX8461, PX8462, PX8458, PX8466, RX2668, RX2671/PX8471, PX8463, RX2607/PX8470, PX8459, PX8465 and PX7078.

Natera, Inc. ("Natera")

Natera seeks *in camera* treatment for several documents and portions of four deposition transcripts that it asserts constitute confidential competitively sensitive documents and testimony. Natera supports its motion with a declaration from its chief business officer. The declaration asserts that the information it seeks to protect contains trade secrets concerning the technical specificity and research and development efforts for its blood-based cancer screening tests, and highly sensitive business information concerning these tests, including its plans for marketing and commercializing the tests, and its analysis of competition in the industry. The declaration also describes in detail the significant steps Natera takes to protect the information from disclosure and maintain its confidentiality.

Natera has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8379, PX8630, FTC-V-ILLUMGRAIL-NAT-00024380-FTC-V-ILLUMGRAIL-NAT-00024413, and for the following portions of PX7111 (15:21-16:1; 18:19-19:4; 20:7-10; 20:13-30:5; 30:7-34:21; 35:1-20; 39:17-40:3; 40:8-10; 40:16-22; 41:6-16; 42:3-44:22; 46:16-22; 47:7-20; 48:1-50:1; 51:4-20; 52:3- 54:17; 55:18-56:6; 56:20-57:19; 57:22-58:4; 59:5-60:20; 61:21; 62:4-66:14; 67:7-78:20; 79:3-81:13; 82:22-83:7; 84:10-102:14; 114:4-116:6; 119:12-15; 119:22-120:15;

123:11-124:19; 131:12-132:17; 133:5-134:3; 134:22-136:5; 136:11-143:1; 144:21-146:6;147:8-150:3; 150:12-152:14; 156:11-165:8; 166:4-174:14; 177:4-188:21; 191:7-207:15; 208:10-224:14; 225:8-229:20; 230:14-16; 231:1-255:5; 255:11-260:1; and the glossary attached at pages 068-112); the following portions of PX7113 (36:2-37:2; 38:1-54:4; 56:9-21; 57:14-59:18; 60:2-66:9; 67:10-74:16; 75:6-11; 75:16-18; 76:1-77:7; 77:16-79:21; 80:4-82:15; 82:22-84:8; 84:12-88:5; 89:6-11; 89:19-94:13; 95:10-15; 96:4-100:8; 100:20-101:2; 101:19-109:14; 110:2-114:7; 114:19-115:2; 115:6-116:13; 117:1-123:4; 134:9-17; 138:4-140:9; 142:4-146:4; 147:17-149:9; 149:20-151:7; 152:10-15; 153:6-18; 156:1-3; 156:16-157:4; 159:11-160:5; 160:14-22; 161:18-162:12; 163:10-164:14; 165:18; 166:11-171:22; 172:6-173:22; 174:8-176:2; 177:8-9; 178:16-179:4; 179:6-18; 180:13-182:7; 182:18-183:8; 183:14-187:19; 188:21-189:11; 189:17-193:15; 194:9-198:18; 198:20-205:10; 206:13-208:13; 209:12-215:2; 216:22-217:17; 217:22-218:9; 218:11-221:3; 223:11; 225:22-231:11; 233:8-262:16; 263:5-265:16; 266:5-283:22; 285:21-286:7; 286:15-289:19; 290:5-297:5; 297:15-298:3; 300:6-303:18; and the glossary attached at pages 311-369); the following portions of PX7053 (19:6-15; 19:19-22; 20:7-10; 22:17-23; 24:4-5; 24:13-18; 25:1-3; 25:12-26:7; 28:7-8; 31:6-10; 34:15-35:2; 35:15-37:15; 38:1-2; 38:11-13; 39:22-41:17; 42:4-45:22; 46:18-51:5; 55:4-63:16; 64:8-69:14; 69:17-70:4; 70:9-72:10; 72:24-81:1; 81:16-86:15; 88:4-89:16; 89:21-91:25; 92:12-96:1; 96:11-98:20; 99:2-100:23; 028-053); and the following portions of PX7054 (9:4-12; 12:19-22; 17:20-18:5; 18:7-21; 25:17-23; 28:7-18; 30:20-21; 38:22-39:15; 39:20-46:6; 47:22-50:4; 51:2-24; 52:1-53:1; 53:21-69:5; 69:12-74:11; 76:6-9; 76:19-94:19; 97:16-119:6; and the glossary attached at pages 033-050).

In addition, Natera has met its burden of demonstrating that documents relating to its non-public trade secret information are entitled to extended protection. Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified as PX8532; FTC-V-ILLUMGRAIL-NAT-00007346-7377; FTC-V-ILLUMGRAIL-NAT-00008081-8135; FTC-V-ILLUMGRAIL-NAT-00008156-8275; FTC-V-ILLUMGRAIL-NAT-00008453-8545; FTC-V-ILLUMGRAIL-NAT-00008561-8699; FTC-VILLUMGRAIL-NAT-00012371-12393; FTC-V-ILLUMGRAIL-NAT-00015761-15817; NAT-FTC_00000525-533; NAT-FTC_00006273-6284; and NAT-FTC_00000003-00000009.

Omniome, Inc. ("Omniome")

Omniome seeks *in camera* treatment for eight documents and portions of an investigational hearing transcript and a deposition transcript that it asserts constitute confidential competitively sensitive documents and testimony. Omniome supports its motion with a declaration from its executive chairman. The declaration asserts that the information it seeks to protect contains Omniome's trade secrets regarding its technology and Omniome's sensitive business information, including confidential plans to commercialize its product. The declaration also describes in detail the significant steps Omniome takes to protect the information from disclosure and maintain its confidentiality.

Omniome has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on

September 1, 2026, is GRANTED for the documents identified as OMNIOME-FTC-ILL-00001216, OMNIOME-FTC ILL-00001469, OMNIOME-FTC-ILL-00001522, and the following portions of the deposition transcript of Ken Song (13:18-14:6; 15:7-16:17; 18:25-20:3; 20:17-31:1; 31:8-33:1; 33:13-34:11; 37:24-38:18; 39:9-13; 41:12-43:9; 44:23-25; 45:9-47:8; 48:19-49:2; 52:13-53:20; 54:22-55:7; 55:16-56:20; 101:10-21; 102:24-105:13) and the following portions of the IH transcript of Ken Song (14:6-15:2; 15:21-16:5; 17:22-18:20; 18:23-20:11; 21:9-22:11; 22:22-25:18; 27:1-6; 28:6-29:1; 46:3-6; 46:18-21; 52:11-13; 53:5-56:24; 59:23-64:3; 66:22-67:18; 68:9-20; 69:1-72:1; 72:5-73:3; 73:18-74:5; 74:25-77:1; 77:13-81:22; 82:3-83:22; 84:2-85:23; 86:2-24; 87:3-88:18; 88:22-92:25; 95:21-98:24; 99:14-101:7; 104:6-7; 104:13-22; 105:3-107:23; 109:14-110:20; 137:2-7; 138:4-139:7; 140:16-25; 142:13-143:16; 143:21-145:2; 145:8-15).

In addition, Omniome has met its burden of demonstrating that documents relating to its non-public trade secrets are entitled to extended protection. Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified as OMNIOME-FTC ILL-00000069, OMNIOME-FTC-ILL-00000001, OMNIOME-FTC-ILL-00000570, OMNIOME-FTC-ILL-00000773, and OMNIOME-FTC-ILL-00001001.

Pacific Biosciences of California, Inc. ("PacBio")

PacBio seeks *in camera* treatment for portions of one declaration submitted in the investigation of this matter that it asserts constitute confidential competitively sensitive information. PacBio supports its motion with a declaration from its president and chief executive officer. The declaration in support of its motion asserts that the information it seeks to protect describes PacBio's product roadmap, research and development plans, and strategic priorities. The declaration also describes in detail the significant steps PacBio takes to protect the information from disclosure and maintain its confidentiality.

PacBio has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the following portions of PX8399 (¶¶ 5 (partial), 7-10, and 11 (partial)).

Personal Genome Diagnostics, Inc. ("PGDx")

PGDx seeks *in camera* treatment for several documents that it asserts constitute confidential competitively sensitive documents and testimony. PGDx supports its motion with a declaration from its head of legal and business operations. The declaration asserts that the information it seeks to protect contains business strategies, financial reports, pricing analyses and strategies, and marketing plans and assessments. The declaration also describes in detail the significant steps PGDx takes to protect the information from disclosure and maintain its confidentiality.

PGDx has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8366, PX8550, PX8551, PGDX_00018805, PGDX_00018797, PGDX_00020563, and for the following portions of PX7049 31:3-24; 38:21-23; 40:6-16; 41:17-23; 42:3-11; 42:13-19; 43:20-24; 44:8; 44:11-13; 45:10-16; 46:11-20; 46:22; 47:2-16; 47:22-25; 48:1-8; 48:10-11; 48:15; 48:19; 48:21-25; 53:19-25; 54:3-5; 75:11-15; 75:17-20; 75:22-25; 76:1-10; 76:13-15; 78:7-9; 78:11-16; 78:18-19; 79:12-25; 80:2-5; 80:17-22; 99:21-23; 100:22-25; 102:1-15; 103:10-17; 103:23-25; 104:1-11; 104:18-22; 105:7; 105:12-13; 105:23; 106:15-25; 107:1-17; 107:20-25; 108:1-15; 108:17-25; 114:7-25; 115:1-17; 117:7-22; 118:1-10; 118:16; 118:18-19; 119:2; 119:4-13; 119:16-25; 120:1; 120:5-8; 121:24-25; 122:1-7; 123:13; 123:15; 123:23-24; 124:1-3; 124:6-7; 124:11; 124:13-14; 124:22; 125:3; 125:14; 125:24; 126:16-20; 127:8; 128:15-20; 141:5-17; 141:19-21; 146:9-25; 147:1; 147:6; 147:12-14; 148:10-25; 149:1-4; 149:18; 150:5; 150:8; 150:16; 150:19-22; 151:3-5; 151:13-20; 152:15; 152:17; 152:18-21; 153:6-10; 153:23-25; 154:1-4; 154:9-17; 154:21-22; 155:3-8; 155:14-25; 156:1-3; 156:5; 156:9-22; 156:25; 163:8-15; 163:17-25; 164:1-17; 165:21-25; 166:1-11; 166:13-14; 166:16; 166:23-25; 167:1-5; 167:7-9; 167:12-13; 167:20-25; 168:1-8; 169:21-25; 170:1-6 and for the following portions of PX7112 (19:5; 19:10-18; 19:25; 20:4; 20:20; 20:22; 21:11-24; 22:6-7; 22:13; 22:16; 22:20-25; 23:1-2; 23:6-12; 23:19-23; 24:6-9; 24:12-13; 24:17-24; 25:1-5; 25:7-15; 25:17; 25:22-25; 70:8-10; 70:13-15; 70:19-20; 70:23; 72:8; 72:19; 73:8; 73:15; 73:17; 74:15-20; 74:23; 74:25; 75:6; 75:12; 75:20; 76:9; 76:11; 76:14; 76:18; 77:1; 77:5; 77:22-25; 78:1; 78:7; 78:11; 78:22-25; 79:1-2; 79:13; 79:15-22; 79:24-25; 80:5; 80:6; 80:15-16; 81:1-2; 81:7-8; 81:9; 81:13; 81:19-21; 86:20; 88:2-9; 89:6; 89:10-13; 89:15; 89:20; 89:25; 90:8; 90:13; 90:16; 91:14; 91:23; 92:5; 93:10; 104:23-25; 105:1-15; 105:20-25; 106:1; 106:3; 106:18; 106:23-25; 107:1; 108:23-25; 109:1-4; 109:7-9; 109:14-17; 111:10; 111:13; 111:17-20; 112:4-7; 112:10; 112:13; 112:18-21; 114:16-25; 115:1-5; 115:10-11; 116:3-12; 117:23-25; 118:1-7; 118:10-11; 124:4-7; 124:14-16; 125:7; 125:18-22; 127:21-23; 128:11; 128:16-22; 129:2-5; 129:7; 129:8-13; 129:15; 129:17-19; 129:25; 130:1-2; 130:9-14; 130:16; 137:10; 137:11; 137:17; 137:24; 146:13-17; 146:23-25; 147:10-18; 147:21; 147:24-25; 148:3-5; 148:8; 148:13; 148:19; 148:20-24; 149:1; 149:21; 149:22; 149:23; 150:3; 150:4; 150:5-12; 150:14-15; 151:9-10-; 151:12-13; 151:24-25; 152:4; 152:12-13; 152:15-19; 152:21-25; 153:1-8; 153:11-13; 153:19-24; 154:1-4; 154:6-10; 154:13-15; 154:17-19; 154:21-23; 154:25; 155:1-2; 155:5-6; 155:10-13; 155:15-17; 155:19-23; 156:1-2; 156:4-6; 156:8-12; 156:14-18; 156:20-25; 157:1-6; 157:9-25; 158:1-20; 158:23-25; 159:1-5; 159:8-10; 159:14-21; 159:23-24; 160:1-6; 160:9: 160:11-13; 160:16-19; 160:23-25; 161:1-7; 161:9-14; 161:16-18; 161:20-22; 162:20-24; 163:2-4; 163:6-8; 164:3; 164:23-25; 165:1-3; 165:4-11; 165:20-22; 166:6-11; 166:15-18; 166:20-21; 166:23-25; 167:1-3; 167:5-6; 167:8-21; 168:4-8; 168:10-11; 170:4-7; 170:12-16; 170:22-25; 171:1; 171:8-15; 171:17-20; 175:2; 175:18-23; 176:2-25; 177:1; 186:25; 187:1-12; 188:5-6; 189:6-7; 189:12-13; 189:17; 189:25; 190:2; 190:3; 190:9; 190;12-17; 191:4; 191:7; 191:9; 191:13-14; 191:23; 192:1; 192:7; 192:9-11; 192:17-18; 192:20; 193:6; 193:11; 193:17; 193:19; 193:22; 193:24; 193:25).

In addition, PGDx has met its burden of demonstrating that documents relating to intellectual property and trade secrets are entitled to extended protection. Accordingly, *in*

camera treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified as PX8548, PX8549, and PGDX_00018797.

Progenity Inc. ("Progenity")

Progenity seeks *in camera* treatment for portions of an investigational hearing transcript and a deposition transcript that it asserts constitute confidential competitively sensitive information. Progenity supports its motion with a declaration from its chief scientific officer. The declaration asserts that the information it seeks to protect includes forward-looking plans involving products that are currently in development. The declaration also describes in detail the significant steps Progenity takes to protect the information from disclosure and maintain its confidentiality.

Progenity has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the following portions of PX7047 (48:1-49:7; 72:3-24; 80:11-23; 81:2-83:21; 84:14-85:11; 86:17-90:21; 91:15-93:25; 94:1-15: 95:1-12; 112:13-113:1; 136:5-13; 138:16-139:14; 140:5-24; 143:2-24; 150:18-152:19) and PX7082 (16:3-15; 17:1-18:7; 51:24-52:13; 52:21-55:25; 59:6-9; 59:13-14; 59:20-21; 60:1; 60:17-18; 60:24-25; 61:22-23; 97:13-98:21; 101:7-102:2; 102:3-9; 106:14-107:8; 109:12-17; 116:20-117:10; 119:9-120:13).

Quest Diagnostics Incorporated ("Quest Diagnostics")

Quest Diagnostics seeks *in camera* treatment for eight documents and portions of one document and a deposition transcript that it asserts constitute confidential competitively sensitive documents and testimony. Quest Diagnostics supports its motion with a declaration from its general manager. The declaration asserts that the information it seeks to protect consists of strategic planning and product development documents and supplier contracts. The declaration also describes in detail the significant steps Quest Diagnostics takes to protect the information from disclosure and maintain its confidentiality.

Quest Diagnostics has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire, on September 1, 2026, is GRANTED for the documents identified as PX8554; PX8555; PX8558; PX8559; Quest 002219-299; PX8553; PX8557; PX8556; PX8552; the second sentence of Paragraph 6 of PX8552; and for the following portions of PX7116 (38:6 to 38:15; 48:11 to 49:7; 50:2 to 52:2; 53:3 to 55:1; 55:13 to 57:25; 59:9 to 62:24; 65:2 to 65:20; 71:5 to 72:18; 74:25 to 80:6; 82:19 to 83:23; 84:24 to 89:9; 89:25 to 91:18; 92:9 to 92:16; 99:22 to 101:15; 102:6 to 105:17; 106:18 to 107:5; 111:12 to 112:7; 112:21 to 119:21; 120:15 to 122:25; 126:25 to 132:25; 135:21 to 136:3; 144:2 to 154:2; 159:12 to 159:18; 160:14 to 160:19; 161:9 to 163:11; 164:23 to 165:1; 192:5 to 193:4; and 193:13 to 193:17).

Roche Sequencing Solutions, Inc., Foundation Medicine, Inc., and Ariosa Diagnostics, Inc. ("Roche")

Roche seeks *in camera* treatment for 87 documents that it asserts constitute confidential competitively sensitive documents and testimony. Roche supports its motion with a declaration from a senior employee of one of its divisions. The declaration asserts that the documents or information it seeks to protect fall into one or more of the following categories: financial forecasts and information; customer-specific pricing and sales information; supplier-specific pricing information and contract terms; customer/supplier negotiations and internal customer/supplier strategy; business plans and competitive strategy; proprietary technical information; and documents obtained pursuant to a limited license. The declaration also describes in detail the significant steps Roche takes to protect the information from disclosure and maintain its confidentiality.

Roche has met its burden of demonstrating that the documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. For documents containing business plans, competitive strategy, and customer/supplier negotiations, *in camera* treatment for a period of five years is appropriate.[3] Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8324/RX0502, PX8325, PX8326; PX8394; PX8566; PX9084; PX9085; PX9086; PX9090; PX9091; PX9092; PX9106; PX9107; PX9108; PX9109/RX0507; RX0486; RX0508; RX2696; RX2699; and RX2700.

For documents containing proprietary technical information, *in camera* treatment for a period of ten years is appropriate.[4] Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified as PX8327/RX0510; PX8328/RX0511; PX8329/RX0512/RX2709; PX8351; PX8352/RX0503; PX8354; PX8395; PX8396; PX8397; PX8447/RX2698; PX8449; PX8450/RX2701; PX8564; PX8565; PX8614; PX9069; PX9070; PX9072; PX9073; PX9075; PX9076; PX9077; PX9078/RX0504; PX9079; PX9080; PX9081; PX9087; PX9096; PX9097; PX9098; PX9099; PX9100; PX9101; PX9102; PX9114; RX0485/RX2713; RX0506; RX0509; RX2694; RX2695; RX2697; RX2702; RX2703; RX2704; RX2705; RX2706; RX2707; RX2708; PX2711; and PX2712.

Roche's motion is DENIED WITHOUT PREJUDICE for the deposition transcripts identified as PX7043, PX7068/RX3800, PX7074, and PX7118/RX3844 because Roche did not narrow its request to only the portions of testimony containing confidential information. Roche may file a renewed motion seeking *in camera* treatment for only those pages and line numbers that contain information that meets the strict standards for *in camera* treatment.

[3] In order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which furthers the public interest in administrative efficiency, *in camera* treatment for a period of five years is granted to those documents for which Roche sought protection for less than five years.

[4] In order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which furthers the public interest in administrative efficiency, *in camera* treatment for a period of ten years is granted to those documents for which Roche sought protection for ten years or more.

Singular Genomics Systems, Inc. ("Singular")

Singular seeks *in camera* treatment for two documents and portions of a deposition transcript that it asserts constitute confidential competitively sensitive documents and testimony. Singular supports its motion with a declaration from its general counsel. The declaration asserts that the information it seeks to protect consists of sensitive business plans or strategies, projections, and/or customer outreach, including the performance of Singular's product capabilities. The declaration also describes in detail the significant steps Singular takes to protect the information from disclosure and maintain its confidentiality.

Singular has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8562 and PX8563.

Singular's motion is DENIED WITHOUT PREJUDICE for the deposition transcript identified as PX7117 because Singular did not narrow its request to only the portions of testimony containing confidential information. Singular may file a renewed motion seeking *in camera* treatment for only those pages and line numbers that contain information that meets the strict standards for *in camera* treatment.

StageZero Life Sciences, Ltd. ("StageZero")

StageZero seeks *in camera* treatment for two documents and portions of a deposition transcript that it asserts constitute confidential competitively sensitive documents and testimony. StageZero supports its motion with a declaration from its director of laboratory operations. The declaration asserts that the information it seeks to protect consists of analyses of critical business decisions and development of cancer detection tests. The declaration also describes in detail the significant steps StageZero takes to protect the information from disclosure and maintain its confidentiality.

StageZero has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8540 and PX8543 and the following portions of PX7114 (14:25-15:132; 16:20 -18:2; 18:25-19:24; 21:7-21:15; 21:22-22:2; 22:21-24:10; 24:21-25:10; 25:16-27:23; 28:8-29:6; 29:21-40:12; 41:8-42:16; 44:7-54:18; 55:7-55:14; 60:15-66:8; 68:25-69:6; 69:14-70:14; 71:19-71:24; 75:11-75:20; 76:13-76:18; 76:24 -77:1; 77:5-78:15; 78:22-78:25; 79:14-81:6; 84:6-84:20; 87:6-99:17; 89:6-90:11; 91:8-91:11; 94:18-95:12; 96:1-96:5; 97:4-99:12; 100:14 -101:19; 104:25-105:7; 106:1-108:10; 108:18-109:5; 111:11-112:16; 112:23-113:7; 115:1-115:10 and 116:2 -117:15).

Tempus Labs, Inc. ("Tempus")

Tempus seeks indefinite *in camera* treatment for investigational hearing testimony and seven documents that it asserts constitute confidential competitively sensitive documents and testimony. Tempus supports its motion with a declaration from its general counsel. The declaration asserts that the documents and/or testimony contain trade secrets and information proprietary and material to Tempus' operations, including descriptions of Tempus' products in development, information about its costs, and future plans to seek regulatory approval. The declaration also describes in detail the significant steps Tempus takes to protect the information from disclosure and maintain its confidentiality.

Tempus has met its burden of demonstrating that the information is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Tempus has sought indefinite *in camera* treatment for all of its information, without distinguishing between ordinary business records, such as financial predictions, and trade secrets, such as product development details. Without this necessary distinction, Tempus' motion is GRANTED in part.

In camera treatment, for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified as PX8348; PX8380; PX8382; PX8383; PX8385; PX9211; and TEMPUS-FTC-0001311-1314; and for the following portions of PX7056 (20:3; 20:10; 20:16; 31:11; 31:21; 31:25; 32:3; 32:7; 32:15-20; 33:1-18; 42:6-10; 45:1-4; 45:7-15; 45:21-46:14; 48:1-49:1; 49:14-50:2; 50:6-7; 50:9-17; 50:21-51:12; 52:12-54:2; 54:18-55:8; 55:15-24; 56:4-58:1; 59:14-18; 61:7-18; 61:21; 61:24; 62:2-8; 62:13-63:25; 64:2-3; 65:4-16; 66:2-19; 66:25-75:25; 78:5-7; 78:13-79:8; 80:4-82:6; 82:9-84:21; 84:25-89:15; 89:17-94:19; 95:11-23; 96:18-100:4; 100:18-102:8; 103:5-7; 104:22-105:9; 105:11-13; 105:22-24); and the following portions of PX7080 (28:2-20; 37:1; 37:5-11; 37:13; 38:7-13; 38:15-39:8; 42:18, 42:20, 42:22-43:7; 33:14-20; 34:18-20; 34:22-35:8; 45:21-46:9; 46:11-18; 47:1-11; 48:5-19; 48:21-49:3; 49:13-53:5; 53:8-9; 54:14-55:10; 55:12-19; 55:21-56:8; 59:8-16; 59:19-60:6; 60:19-61:9; 62:11-62:22; 63:11-65:12; 65:15-19; 65:21-66:3; 66:5; 66:7-14; 66:16-67:13; 67:15-68:10; 68:12-14; 68:16-18; 69:12-14; 69:17-70:7; 71:14-21; 72:2-5; 72:7-22; 73:12-14; 73:17-18; 74:2-75:6; 75:9-11; 75:13-76:14; 77:21-87:9; 87:11-12; 87:16-18; 88:1-90:20; 91:14; 92:2-20; 93:17-95:2; 95:6-7; 96:18-98:15; 99:7-21; 107:16-108:1; 99:22-101:5; 117:10-118:6; 118:17-119:8).

Tempus' request for permanent *in camera* treatment for the sensitive personal information contained in PX7056 at 7:9-10; 7:14 is GRANTED.

Thermo Fisher Scientific Inc. ("Thermo Fisher")

Thermo Fisher seeks *in camera* treatment for all or portions of seventeen documents, including a deposition and investigational transcript that it asserts constitute confidential competitively sensitive documents and testimony. Thermo Fisher supports its motion with a declaration from its vice president of product management, platforms and research. The declaration asserts that the documents fall into one or more of the following categories: strategic plans containing strategic objectives and considerations; competitive analysis and financial information; and R&D plans and R&D-related contracts. The declaration also

describes in detail the significant steps Thermo Fisher takes to protect the information from disclosure and maintain its confidentiality.

Thermo Fisher has met its burden of demonstrating that the information it seeks to protect is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. For documents containing strategic objectives and considerations, competitive analysis, and financial information, *in camera* treatment for a period of five years is appropriate. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the documents identified as PX8444, RX2728, RX2730, RX2732, RX2735, and RX2737.[5]

For documents containing R&D plans and R&D-related contracts, *in camera* treatment for a period of ten years is appropriate. Accordingly, *in camera* treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the documents identified as PX8649, PX8650, RX2729, RX2731, RX2733, RX2734, RX2736, and RX2738.

With respect to the investigational hearing transcript and deposition transcript, Thermo Fisher has narrowed its request to only those portions meeting the standards for *in camera* treatment.

In camera treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the following portions of the Andrew Felton Investigational Hearing Transcript (PX7070): 26:9-26:15; 26:22-27:12; 27:25-28:15; 57:2-57:21; 32:12-32:25; 34:1-34:21; 34:25-35:15; 48:15-49:3; 57:22-60:18; 68:7-69:13; 70:3-71:5; 38:5-38:9; and 51:3-51:8.

In camera treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the following portions of the Andrew Felton Deposition Transcript (PX7097/RX3823): 27:7-27:9; 27:11-27:19; 32:23-33:1; 33:4; 35:4-35:6; 35:9-35:21; 68:3-68:6; 68:8-68:17; 68:20-68:21; 103:4-103:7; 103:9-103:11; 105:4-105:8; 105:10-105:15; 120:10-120:15; 173:21-173:23; 173:25-174:12; 174:14-174:22; 174:24-175:4; 175:7 176:2; 176:5-176:13; 23:9-23:11; 23:13-23:22; 29:2-29:5; 29:8-29:10; 36:14-36:19; 36:23-37:2; 37:4-37:5; 42:12-42:15; 42:17-42:21; 42:23-43:1; 52:20-52:23; 60:10-60:15; 60:22-60:23; 60:25-61:14; 61:18-61:20; 61:22-62:6; 62:8-62:16; 62:18-62:20; 70:21-70:25; 71:8-71:11; 71:13-71:25; 72:3-72:7; 72:12-72:14; 72:16-72:21; 72:24-73:12; 73:14-74:4; 74:7-74:14; 74:16-74:25; 75:2-75:16; 75:23-75:25; 76:3-76:5; 76:7-76:14; 76:17-76:25; 77:3-77:12; 78:13-78:14; 78:16; 79:1-79:5; 79:12-79:17; 79:19-79:21; 79:23-79:25; 80:13-80:18; 80:21-81:7; 81:10-81:14; 82:9-83:4; 83:7-83:19; 83:21-83:22; 83:25-84:11; 85:5-85:9; 85:11; 86:2-86:5; 86:7-86:23; 86:25-87:9; 87:12-87:13; 87:15-87:24; 88:1-88:6; 88:8-88:11; 89:1-89:7; 91:11-91:22; 91:24-91:25; 103:23-104:1; 104:3-104:6; 105:22-106:9; 107:16-109:2; 109:6-110:7; 110:19-110:21; 110:24-111:6; 111:9-111:25; 112:4-112:5; 112:8-112:11; 113:1-113:3;

[5] Thermo Fisher carefully carved out specific pages of exhibits for which it requested a higher level of *in camera* treatment. For example, PX8649 is categorized as "business strategy, competitive analyses"; however, Thermo Fisher notes that pages 017, 021, 024, and 236 of this exhibit contain R&D plans and information. Where an exhibit contains both categories of confidential information, the entire exhibit has been given the higher level of protection.

113:6-113:12; 113:20-113:23; 114:9-114:11; 114:14-114:21; 114:24-115:2; 115:7-115:11; 115:13-115:15; 115:17-115:23; 116:1-116:8; 116:12-117:2; 115:9-115:11; 124:8-124:17; 140:23-141:9; 141:17-142:1; 142:6-142:10; 142:13-143:2; 143:4-143:11; 143:13-143:19; 144:1-144:4; 148:19-149:16;149:18-149:22; 149:25-150:2; 150:18-150:24; 151:1-151:8; 152:3-152:13; 152:15-152:21; 152:23-152:25; 153:13-153:15; 153:17-154:5; 154:8-154:9; 155:13-155:21; 160:13-161:10; 172:9-173:1; 48:23-49:2; 49:4; 49:14-49:18; and 158:18-159:4.

In camera treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the following portions of the Andrew Felton Investigational Hearing Transcript (PX7070): 36:10-37:21; 38:1-38:3; 38:14-38:18; 55:8-55:12; 55:17-55:20; 55:22-55:23; and 56:1-57:1.

In camera treatment for a period of ten years, to expire on September 1, 2031, is GRANTED for the following portions of the Andrew Felton Deposition Transcript (PX7097/RX3823): 21:23-21:25; 22:2-22:5; 22:7-22:13; 30:4-30:7; 30:9-30:22; 30:24-31:8; 31:10-31:17; 31:20-31:24; 32:2-32:10; 32:13-32:14; 93:17-93:20; 93:22-94:7; 94:9-94:12; 117:21-117:23; 118:1-118:3; 118:5-118:21; 118:24-119:1; 119:3-119:10; 119:13-119:16; 119:18-119:24; 120:2-120:9; 125:5-125:8; 125:15-125:16; 125:19-125:22; 125:24-126:1; 126:4-126:13; 126:20-126:22; 126:24-127:24; 128:1-128:6; 128:8-129:8; 129:10-129:20; 129:23-130:21; 130:24-131:16; 131:18-131:22; 131:25-132:6; 132:8-132:11; 132:13-132:15; 132:18-133:20; 133:23-134:3; 134:6-135:12; 135:14-136:12; 136:15-137:20; 137:23-138:9; 138:12-138:15; 138:17-139:3; 139:5-139:6; and 168:1-168:24.

Permanent *in camera* treatment is GRANTED for the sensitive personal information contained in PX7070 at 8:16-8:19.

Thermo Fisher's request for *in camera* treatment of the declaration submitted in support of its motion is DENIED. A non-party may obtain *in camera* treatment only for material "offered into evidence." 16 C.F.R. § 3.45(b). However, the declaration is protected by FTC Rule 3.45(e).

Third Rock Ventures, LLC ("Third Rock")

Third Rock seeks indefinite *in camera* treatment for one deposition transcript, in its entirety, which Third Rock asserts contains competitively sensitive confidential business information. In the alternative, Third Rock seeks *in camera* treatment of certain highlighted portions a deposition. However, this alternative request seeks to protect all but eight pages of the deposition. Third Rock supports its motion with a declaration from a partner in the company. The declaration asserts that the deposition includes information on research and development, future clinical studies, regulatory approval status, research concerning the commercialization of a test, and details on marketing strategies. The declaration also describes in detail the significant steps Third Rock takes to protect the information from disclosure and maintain its confidentiality.

Third Rock has failed to meet its burden of demonstrating that the entire deposition, or all but eight pages of it, meets the standard for *in camera* treatment. In addition, Third Rock has sought indefinite *in camera* treatment for all of its information, without distinguishing between ordinary business records, such as financial predictions, and trade secrets, such as product development details. Therefore, Third Rock's motion is DENIED WITHOUT PREJUDICE. Third Rock may file a renewed motion seeking *in camera* treatment for only those pages and line numbers that contain information that meets the strict standards for *in camera* treatment. Third Rock shall seek indefinite *in camera* treatment only for the material meeting the highest standard described in this Order.

Ultima Genomics, Inc. ("Ultima")

Ultima seeks *in camera* treatment for two documents, one deposition transcript, and the declaration that it submitted in support of its motion, which Ultima asserts constitute highly confidential and competitively sensitive information. Ultima supports its motion with a declaration from its chief commercial officer. The declaration asserts that the documents and deposition contain proprietary information, including confidential information about Ultima's finances and competitive strategy. The declaration also describes in detail the significant steps Ultima takes to protect the information from disclosure and maintain its confidentiality.

Ultima has met its burden of demonstrating that the two documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on September 1, 2026, is GRANTED for the two documents identified as PX8570 and ULTIMA-FTC-00000027.

Ultima's motion is DENIED WITHOUT PREJUDICE for the deposition transcript identified as PX7119 because Ultima did not narrow its request to only the portions of testimony containing confidential information. Ultima may not shield the name of its chief commercial officer from public disclosure. Ultima may file a renewed motion seeking *in camera* treatment for only those pages and line numbers that contain information that meets the standard for *in camera* treatment.

Ultima's motion is DENIED as to the declaration submitted in support of its motion for *in camera* treatment. A non-party may obtain *in camera* treatment only for material "offered into evidence." 16 C.F.R. § 3.45(b). However, the declaration is protected by FTC Rule 3.45(e).

IV.

Several of the non-parties did not identify the documents for which they seek *in camera* treatment by a PX or RX number. If either party seeks to introduce these documents as exhibits, counsel shall prepare a proposed order showing that, by this Order, the document has been granted *in camera* treatment, the length of time extended for *in camera* treatment, and identifying each document by its PX or RX number.

All of the documents for which *in camera* treatment has been granted shall also be treated as confidential under the Protective Order issued in this case and may only be disclosed to those entities covered by the Protective Order. Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order.

The parties are permitted to elicit testimony that includes references to, or general statements derived from, the content of information that has been granted *in camera* treatment. 16 C.F.R. § 3.45. However, any testimony revealing the confidential information from documents that have been granted *in camera* treatment shall only be provided in an *in camera* session. Counsel shall segregate their questions of witnesses in such a manner that all questions on *in camera* materials will, to the extent practicable, be grouped together and elicited in one *in camera* session during the examination of a witness.

For those non-parties whose motion was denied without prejudice in part or in full, each non-party may refile a motion for *in camera* treatment by August 26, 2021. Each non-party is directed to carefully and thoroughly review all documents for which it seeks *in camera* treatment, and to strictly narrow its requests to only those documents that comply with the Commission's strict standards for *in camera* treatment. Any refiled motion shall include a sworn statement containing sufficient detail regarding the documents to identify the bases for the request for *in camera* treatment and demonstrate that such documents are entitled to *in camera* treatment.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 19, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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Sarah Wohl
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November 3, 2022

/s/ Sharonmoyee Goswami
Sharonmoyee Goswami

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