UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

BRIEF OF PROPOSED *AMICI CURIAE* THE AMERICAN ANTITRUST INSTITUTE AND THE HON. WILLIAM J. BAER

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October 24, 2022

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STATEMENT OF INTEREST

On October 3, 2022, the American Antitrust Institute ("AAI") and the Hon. William J. Baer (collectively, "Proposed *Amici*") moved for leave to file an *amicus* brief and requested permission to file the brief on October 24, 2022. *See* Mot. for Leave and Req. for Ext'n of Time of Am. Antitrust Inst. & the Hon. William J. Baer. All parties are deemed to have consented to *Amici*'s requested relief because no party filed a response in opposition to the motion within 10 days. 16 C.F.R. § 3.22(d). Proposed *Amici* now submit the proposed *amicus* brief.

AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

The Hon. William J. Baer is a visiting fellow in Governance Studies at the Brookings Institution. He is the former Director of the Bureau of Competition of the Federal Trade Commission and former Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. He has twice been named by Global Competition Review as the best competition lawyer in the world and twice been recognized by Best Lawyers as the best antitrust lawyer in Washington. He was named by The National Law Journal as one of "The Decade's Most Influential Lawyers." In 2015 the Federal Trade Commission honored him with the Miles W. Kirkpatrick Lifetime Achievement Award, and in 2017 AAI presented him with the Alfred E. Kahn Award for Antitrust Achievement.

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[1] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

Proposed *Amici*'s interest in this matter is that they are public interest advocates who seek to improve the administration of the antitrust laws and ensure that antitrust enforcement best serves the interests of competition and consumers. The Commission's decision in this matter affects the Proposed *Amici* because those goals cannot be achieved without appropriate analysis of merging parties' attempts to remedy their own otherwise-anticompetitive mergers. Without a framework for determining whether these so-called "fixes" fully protect competition and consumers, adjudicators may place too great a burden on the government and cause underenforcement. This is exactly what happened in the case at hand. The Chief Administrative Law Judge ("ALJ") erred in considering Respondents' late-proposed "remedy" as an elemental part of the merger and failed to require Respondents to demonstrate that the remedy eliminated the merger's risk to competition. That fundamental error ignored both the plain language and the goals of Section 7 of the Clayton Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Proposed *Amici* submit this brief because the ALJ utilized the wrong approach in evaluating Respondents' proposed remedy—a unilateral contract Respondent Illumina, Inc. ("Illumina") has offered to all of its U.S. oncology customers (the "Open Offer"). Rather than treating the Open Offer as a remedy and requiring Respondents to demonstrate its efficacy, the ALJ placed the burden on Complaint Counsel for the Federal Trade Commission ("FTC" or "Commission") to show in its *prima facie* case that the merger as modified by the Open Offer would substantially lessen competition. This was error.

This case involves an important recurring issue in Section 7 enforcement that impacts the FTC's merger review process: the point at which an adjudicator should consider the merging parties' preferred remedy for an anticompetitive merger. The issue, which implicates the imprecisely coined term "Litigating the Fix," presents the question whether: (a) the fact-finder

should consider the proposed remedy as part of the merger agreement, placing the burden on the FTC to show that the effect of the merger with the remedy may be substantially to lessen competition; or (b) once the FTC demonstrates that the effect of the merger may be substantially to lessen competition, the burden should shift to the merging parties to show that their preferred "fix" eliminates the risk to competition and consumers. The merging parties in this case—Illumina and Grail, Inc. ("Grail")—wrongly convinced the ALJ to adjudicate their merger as purportedly remedied by the Open Offer.

Proposed *Amici* assert that the incipiency goal of Section 7 of the Clayton Act ("Section 7"), Section 7's legislative history, and judicial precedent demand a different approach than the one applied by the ALJ. The burden in cases like this one should shift to the merging parties to demonstrate that their proposed remedies are concrete, comprehensible, and enforceable measures that eliminate the risk to competition and consumers. Here, the ALJ erred by crediting a "fix" that is not actually a fix. Behavioral remedies like the Open Offer are inconsistent with the merging parties' profit-maximizing incentives, and empirical evidence from consummated mergers shows that these remedies are difficult to monitor and enforce and consistently fail to prevent harm to competition and consumers.

The ALJ thus misallocated the burdens and contravened Section 7. Particularly where proposed fixes are behavioral, heightened skepticism is warranted and deference needs to be shown to the Commission in assessing whether the proffered relief restores the competition lost from the merger. Proposed *Amici* urge the Commission to ensure effective enforcement of the Clayton Act by adopting the correct analytical framework as described more fully below.

ARGUMENT

Congress designed Section 7 of the Clayton Act to interdict mergers threatening anticompetitive effects in their incipiency. The ALJ's approach, which allowed a remedy Respondents proposed late in the Commission's investigation to alter the proof required for Complaint Counsel to make out a *prima facie* case, undermines that goal by facilitating under-deterrence and false negatives. Instead, Proposed Amici urge that the Commission, and other adjudicators, should apply the *Baker Hughes* burden-shifting framework. If Complaint Counsel proves its *prima facie* case, the burden should shift to the merging parties to show that the "remedy" removes all anticompetitive risk, especially where, as here, the proposed remedy is behavioral and requires the merged company to police itself. The ALJ's decision should be overturned.

I. Consumers Should Not Bear the Risk of Failed Remedies for Clayton Act Violations

Whether fact-finders should adjudicate a merger as "modified" or instead analyze the "fix" as part of a burden-shifting framework raises recurring competition policy questions that implicate Section 7's incipiency goal and the statutory text. A framework consistent with both is essential to effective Section 7 enforcement.

a. Section 7 of the Clayton Act Prevents Anticompetitive Mergers in Their Incipiency

By congressional design, U.S. merger law proscribes mergers that *threaten* harm to competition. Under the Hart Scott Rodino Act ("HSR"), for example, firms wishing to combine are subject to mandatory pre-notification and waiting periods, ensuring that deals of a certain size are scrutinized *ex ante* based on predicted rather than actual effects. 15 U.S.C. § 18(a). Section 13(b) of the FTC Act provides for preliminary injunctive relief when the FTC has "reason to believe" that a corporation "is about to violate" Section 7 of the Clayton Act.

15 U.S.C. § 53(b). And, under Section 7, liability obtains before the transaction's consummation. The merger is illegal if its effect "*may be* substantially to lessen competition, or to *tend to* create a monopoly" in any line of commerce. 15 U.S.C. § 18 (emphasis added).

Under Section 7, the federal antitrust agencies and the courts recognize that both horizontal and vertical mergers are illegal if they threaten harm to competition and consumers. Section 7's legislative history provides valuable insight into what the statute's language was designed to accomplish. When Congress first passed the Clayton Act in 1914, Section 7 encompassed only acquisitions of stock and share capital, as courts had determined that mergers were beyond the provision's reach. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 337–38 (1963). Congress expanded Section 7's purview to include a merger's effects on competition through the 1950 Amendments to the Clayton Act by deleting the provision's original "acquiring-acquired" language. *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962). Leading up to its passage, the "pervading congressional consideration . . . was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. "Congress saw the process of concentration in American business as a dynamic force," and "it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." *Id*. at 317–118 (noting that Congress "hoped to make plain that [Section] 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."). Accordingly, Congress chose to erect a "barrier" to rising concentration, and "a keystone in the erection of [the] barrier . . . was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." *Id*. at 17.

The prophylactic nature of Section 7's incipiency mandate, and the overarching *ex ante* enforcement scheme as a whole, reflect Congress's low risk tolerance for anticompetitive mergers. By consciously choosing a prediction-based regime over a regime focused on *ex post* evidence of actual competitive effects, Congress demonstrated "that its concern was with probabilities, not certainties." *Id*. at 323; *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015) ("[T]o demonstrate the likelihood of success on the merits, 'the government need only show that there is a reasonable probability that the challenged transaction will substantially impair competition.'" (quoting *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997))).

A necessary implication of this approach is that consumers should not bear the risk of failed remedies; the merging parties do. Merger Remedies Manual, Antitrust Div. U.S. Dep't of Just., 5 (Sept. 2020), https://www.justice.gov/atr/page/file/1312416/download ("[R]isk should be borne by the parties . . . . Consumers should not bear the risk of a failed remedy."); William Baer, Acting Associate Att'y Gen., Remarks at Am. Antitrust Institute's 17th Ann. Conf. (June 16, 2016), https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute ("The Clayton Act directs antitrust enforcers and the courts to employ a low risk tolerance and zealously protect the American economy and American consumers from mergers that may reduce competition[.]"); *see also* Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"* 5–6 (forthcoming October 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4246000 (The incipiency standard places greater weight "on the avoidance of harmful mergers ('false negatives') over prevention of beneficial mergers ('false positives')" and counsels courts to "err on the side of over-deterrence rather than under-deterrence.").

Section 7's incipiency mandate and corresponding insistence on predictive assessments of probabilities to assign liability, as well as the rule that "doubts are to be resolved against the transaction," *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989), all bear directly on how fact-finders may properly evaluate parties' proposed merger remedies. Here, however, the ALJ's Initial Decision approves the parties' self-imposed remedy without accounting for these core aspects of merger law. By allowing the merging parties to "Litigate the Fix" without applying the *Baker Hughes* burden-shifting framework, the Initial Decision distorted the congressional calculus and placed undue risk of a failed remedy on consumers.

b. Litigating the Fix Should Not Permit Merging Parties to Make an End Run Around Section 7's Incipiency Mandate

Litigating-the-Fix strategies, like the merging parties' strategy here, have been historically rare but are becoming more prevalent. *See* Salop & Sturiale, *Fixing "Litigating the Fix,"* at 14 (showing statistically that vast majority of challenged mergers are resolved by negotiated consent decree, voluntary restructuring, or abandonment). When merging parties are unable to reach a voluntary settlement with federal enforcers and choose instead to try to persuade a fact-finder of the merits of a self-imposed remedy, they are effectively conceding that the merger, as proposed, threatens anticompetitive harm and violates Section 7. Moreover, they are admitting that the expert agency tasked with protecting consumers under a prophylactic statutory regime finds the balance of probabilities weighs against the remedy's acceptance.

Merging parties that seek to voluntarily cure their own anticompetitive mergers thus appear before fact-finders as the fox promising to guard the henhouse better than the farmer. They have strong economic incentives to seek weak or ineffective remedies, and they benefit from informational imbalances that create a strategic advantage during remedy negotiations. Agencies, by contrast, must determine whether to "prescribe or proscribe behavior in the face of

possible complexity of the product, the transaction, the relationship to rivals, and uncertainty about the future." John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement* 24 (Nov. 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959588.[2] As outsiders, enforcers are at a distinct disadvantage. They must attempt to successfully anticipate and block all anticompetitive conduct in the face of the continuing profit-maximizing incentives for merged entities that stand to benefit immensely from utilizing the information readily available to them. *Id.* at 24–25.

The prevalence of false negatives in merger review historically only adds more cause for skepticism of Litigating-the-Fix strategies. The FTC's self-study of negotiated consent decrees between 2006 and 2012 found a significant number of failures. Fed. Trade Comm'n, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics*, at 7 (Jan. 2017), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. For example, the study's data indicate that there was at least some significant competitive harm in 34% of all horizontal merger orders. *Id.*; *see also* Salop & Sturiale, *Fixing "Litigating the Fix," Id.* at 6, 15–18 (summarizing and discussing "systematic false negative concerns in negotiated consent decrees" and noting that "[b]esides anecdotes of dramatic failures," the FTC study shows "a worrisome number of consents were considered outright failures or achieved success only after substantial delays").

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[2] For example, the 2010 Google-ITA merger negotiations required that the government predict the appropriate restraints on the merging parties where the parties did not compete directly and neither had a presence in the market where the risk of anticompetitive effects was the highest. However, "Google had both the ability and intent to develop a comparative flight search services product," one that would compete with the software ITA had licensed to other actors such as Orbitz and Expedia, "and by doing so would place itself in direct competition with customers of ITA." *Id.* at 19.

Litigating the "fix" without a framework for burden shifting increases the likelihood of these false negatives beyond acceptable limits. If the ALJ's approach is permitted, the FTC will become incentivized to adopt a policy of agreeing to less onerous consent decrees and underenforcing Section 7.[3] Working backwards from trial to the HSR filing and investigation illustrates this point. If the FTC bears the evidentiary burden of showing as part of its *prima facie* case that the effect of the merger with the remedy may be substantially to lessen competition, then merging parties have more incentive to reject the FTC's proposed consent decree and propose a weaker remedy to be litigated. Salop & Sturiale, *Fixing "Litigating the Fix,"* at 19–20. Likewise, the FTC may propose a weaker consent decree rather than risk losing at trial to an even weaker remedy. *Id.* at 20. Finally, given the above, merging parties are more likely to be aggressive in their proposal in the original HSR filing and refrain from voluntarily proposing effective remedies in the original HSR filing. *Id.*

The latitude in timing from this last disincentive accords merging parties a meaningful advantage. If a remedy is not proposed until after the HSR filing, or even later—on the eve of litigation, as was the case here—then the FTC has less time to analyze the proposed remedy, seek a motion *in limine* to exclude the proposed remedy, and litigate. *Id.* In these scenarios the proposed remedy becomes a moving target, leading to courts analyzing the merger on incomplete or amorphous information. Transcript of Merger Remedies Conference Call with Professors John Kwoka and Spencer Weber Waller, The Capitol Forum (Sept. 14, 2021), https://thecapitolforum.com/resources/transcript-of-merger-remedies-conference-call-with-

[3] Litigated fixes are most likely to arise when the proposed merger has significant competitive issues but the proposed remedy does not clearly resolve those concerns to the FTC's satisfaction—*i.e.*, the situations where a risk to competition is most at stake. *See* David Gelfand & Leah Brannon, *A Primer on Litigating the Fix*, Antitrust, Vol. 31, No. 1, Fall 2016.

professors-john-kwoka-and-spencer-weber-waller/. As described below, the risk to competition increases when the proposed fix involves behavioral commitments.

II. When the FTC Presents a *Prima Facie* Case of Risk that a Merger Will Be Anticompetitive, the Burden Should Shift to the Respondents to Show that the Remedy Eliminates the Risk.

The ALJ erred by crediting Illumina's Open Offer as an elemental part of the merger and failing to engage in burden shifting. The ALJ did not require Respondents to show that their purported fix eliminated the risk to competition. Instead, the ALJ should have first considered whether Complaint Counsel made a *prima facie* showing that the deal as proposed threatened harm to competition, and then shifted the burden to Respondents to demonstrate that the Open Offer eliminated that risk.

a. The ALJ should have applied the burden-shifting framework from Baker Hughes.

To perform the "uncertain task of assessing probabilities" as required by Section 7 and to implement Congress's objective of protecting the public interest through the issuance of injunctive relief, the D.C. Circuit established the correct burden-shifting framework for evaluating the FTC's likelihood of success on the merits in these merger cases. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990). Courts have applied this approach to vertical mergers such as the one at issue in the case at hand. *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (applying the *Baker Hughes* burden-shifting framework after noting that neither party challenged its application before the district court); *see also United States v. UnitedHealth Group Inc.*, No. 1:22-cv-0481, 2022 WL 4365867, at *7 (D.D.C. Sept. 21, 2022) (noting that the parties agreed that the *Baker Hughes* framework applied to the government's theories). Parties and courts reasonably rely on burden-shifting because it is the standard mode of analysis in the vast majority of antitrust cases. *See e.g., NCAA v. Alston*,

141 S. Ct. 2141, 2160 (2021) (rule-of-reason burden-shifting framework "presumptively" applies in Sherman Act Section 1 cases); *United States v. Microsoft Corp*., 253 F.3d 34, 59 (D.C. Cir. 2001) (rule-of-reason burden-shifting framework applies in Section 2 cases).

Under the *Baker-Hughes* burden-shifting framework, "the government meets its prima facie burden in vertical merger cases by making a 'fact-specific showing that the proposed merger is likely to be anticompetitive.'" *UnitedHealth Group*, 2022 WL 4365867, at *7 (quoting *AT&T*, 916 F.3d at 1032). The burden then shifts to the merging parties to "rebut the [government's *prima facie* case]." *Sysco*, 133 F. Supp. 3d at 23.[4] And finally, if the merging parties are successful, "the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* (quoting *Baker Hughes*, 908 F.2d at 983).

By considering the merging parties' proposed remedies during their rebuttal case, the adjudicator can best address the "key question in assessing any proposed remedy: [D]oes the remedy maintain or restore competition in the markets affected by the merger?" Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Comm'n, FTC v. Sysco*: Old-School Antitrust with Modern Economic Tools* (Sept. 18, 2015), https://www.ftc.gov/system/files/documents/public_statements/802381/150918gcrspeech.pdf; *see also Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'") (quoting *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961)). Burden shifting thus also prioritizes the public interest by requiring the merging parties to prove that the proposed remedy fully replaces the

[4] And *Baker Hughes* itself expressly noted a behavioral remedy as part of the second step in the framework, further solidifying the sequence in which courts are to consider this type of remedy on the effects of the proposed merger. *Id.*

competition lost by the merger. This delineated framework better guards against merging parties' self-interest. Indeed, government agencies are often left to rely on private entities to monitor and report behavioral remedy violations. The present case is no exception, as Illumina drafted the terms of Open Offer and would be the one to enforce it.

b. The burden-shifting framework has been successfully applied by courts in a variety of contexts.

For both horizontal and vertical mergers, the *Baker Hughes* burden-shifting framework properly allocates the risk during merger review in light of Section 7's protective design. Adjudicators should follow the example of the courts in the cases listed below to avoid blending the burden-shifting steps. They should wait to consider the merging parties' proposed remedies until after determining whether the government has proved its *prima facie* case that the proposed merger would substantially lessen competition.[5]

Courts regularly follow this approach in considering a host of proposed remedies. In *United States v. Aetna Inc.*, for example, the court clearly laid out the proper sequencing for a structural remedy. It explained that, "[i]n *rebuttal*, a defendant may introduce evidence that a proposed divestiture would 'restore [the] competition lost by the merger counteracting the anticompetitive effects of the merger." 240 F. Supp. 3d 1, 60 (D.D.C. 2017) (quoting *Sysco*, 113 F. Supp. 3d at 72) (emphasis added). In that case, after the DOJ proved threatened anticompetitive effects from the proposed merger of two healthcare companies using market-share evidence and data demonstrating that the parties competed against one another in relevant markets, the court turned to the second step of the *Baker Hughes* framework to consider

[5] This is especially true in the context of behavioral remedies. As discussed below, behavioral remedies are essentially non-binding promises that often evade government scrutiny. By assigning considerations of behavioral remedies to the second *Baker Hughes* step, courts put the onus on the merging parties to prove the efficacy and likelihood of the promised remedies.

defendants' proposed divestiture of certain assets as a remedy. *Id.* at 42–46. While finding that the divestiture was likely to happen, the court concluded that the remedy would not likely address anticompetitive effects, particularly because the competitor would likely "struggle to put together a competitive provider network in the available time frame." *Id.* at 73.

In *FTC v. Sysco*, the court took the same approach to assessing the adequacy of divestitures proposed by the parties. The merger there was between the two largest foodservice distribution companies in the United States. The merging parties sought to justify their otherwise anticompetitive merger by proposing to divest 11 of one of the party's distribution centers to the third largest foodservice distribution company. *Sysco*, 113 F. Supp. 3d. at 21. This proposal amounted to approximately $4.5 billion in sales. *Id.* But the court, noting that Supreme Court guidance requires that "[t]he relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition,'" *id.* at 72 (quoting *Ford*, 405 U.S. at 573), found that the parties had not met their burden of showing that the anticompetitive effects would be ameliorated. *Id.* at 73.

Courts have similarly recognized that remedies dependent on the actions of others—such as government regulators or new entrants—should be evaluated at the second step of the *Baker Hughes* burden-shifting framework. *See, e.g.*, *Aetna*, 240 F. Supp. 3d. at 49 (crediting the government's *prima facie* case for anticompetitive effects and noting, among other things, that the "regulatory tools" available to government agencies often do not address the anticompetitive issues at hand). Courts also consider entry arguments at the second step. *Id*. at 52 (concluding that, "[a]s part of its rebuttal case, a defendant may introduce evidence that entry by new competitors will ameliorate the feared anticompetitive effects of a merger," but finding that new entry there would not be "timely, likely, and sufficient" enough to counteract the anticompetitive

effects of the merger); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 47 (noting defendants' "first point of rebuttal" is that the relevant markets lack significant barriers to entry); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d. 36, 73 (D.D.C. 2011) (considering barrier to entry in defendants' rebuttal arguments in the second step of the *Baker Hughes* framework).

And adjudicators rightfully and repeatedly consider behavioral remedies, those for which the public must rely on the non-binding promises of the merging companies, during merging parties' rebuttal. *See, e.g.*, *Sysco*, 113 F. Supp. 3d at 73 (classifying as a rebuttal argument defendants' assertion that buyer of divested asses would develop more distribution centers); *United States v. Franklin Electric Co., Inc.*, 130 F. Supp. 2d 1025, 1026 (W.D. Wis. 2000) (analyzing a licensing agreement proposed by defendants and concluding that the government's *prima facie* case "remains unrebutted"); *H & R Block*, 833 F. Supp. 2d at 82, 85 (stating that a pledge to maintain current prices for three years "cannot rebut a likelihood of anticompetitive effects in [the present] case" and crediting market incentives that would likely stifle price and future competition over a proposed two-brand strategy remedy).

The present case should be no exception. Similar to *Franklin Electric*, Illumina's acquisition of Grail creates the potential for informational imbalances in relevant markets that advantage one competitor over another. As Complaint Counsel noted, Grail would have access to information regarding Illumina's technology in development—access not afforded to Grail's competitors as the agreement only requires that Illumina share *final* product specification—giving it an undue advantage. *Cf. Franklin Electric*, 130 F. Supp. 2d at 1034 (reasoning that proposed licensing agreements give one party "so much information . . . as to raise new and independent questions about the actual 'competition' that can occur").

III. Adhering to the Defined Steps Under *Baker Hughes* Is Especially Important When Merging Parties Propose Behavioral Remedies.

Behavioral remedies present even greater challenges to regulators because they require the merged firm to police itself. As the FTC and the DOJ have learned from lessons in the past, these types of remedies almost never successfully prevent harm to competition.

Antitrust law broadly sorts remedies into two categories: structural remedies and behavior (or conduct) remedies. "[A] structural remedy to an otherwise anticompetitive merger creates or preserves legally and operationally independent firms so as to maintain competition in the affected market." Kwoka & Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, at 3. The typical structural remedy involves divestitures. In contrast, a behavioral remedy "permits integration [of the merging parties] subject to operating rules intended to prevent the merged firm from subsequently undermining market competition." *Id.* at 4. Behavior remedies typically "allow the parties to integrate fully, but then impose certain operating rules on their business behavior so as to prevent competition from being undermined or compromised." *Id.*

While behavioral remedies may take many forms, their "common feature . . . is that they are in effect attempts to require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives." *Id.* at 5. They also "typically [are] more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent." Department of Justice, Antitrust Division Policy Guide to Merger Remedies 8 (Oct. 2004), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf. As a result, behavioral remedies have four considerable costs: (1) the direct costs of monitoring parties' actions, (2) the costs of evasion, (3) the potential of restraining procompetitive behavior, and (4) the difficulty of adaptation to changing market conditions. Kwoka & Moss, *Behavioral*

Merger Remedies: Evaluation and Implications for Antitrust Enforcement, at 6. This is why the ALJ was wrong to blithely accept Illumina's Open Offer and assume Illumina would act contrary to its fiduciary duties to shareholders.

The DOJ accepted behavioral commitments in the 2009 Live Nation-Ticketmaster merger and came to regret that decision. Prior to the merger, Ticketmaster held contracts with over three quarters of large venues in the United States. Live Nation handled one-third of major concert events, was the leading owner-operators of concert venues, and provided ticketing services. The $2.5 billion merger melded together artist management, concert promotion, and ticking into a monolithic, multi-level supply chain in the live music business. *See* Letter from Diana Moss, President, American Antitrust Institute, to Makan Delrahim, Assistant Attorney General, *supra*. The DOJ, joined by 17 states, raised significant concerns regarding both vertical and horizontal anticompetitive consequences. But rather than demand structural fixes to the anticompetitive consequences, the DOJ approved the merger subject to decree conditions, effective for 10 years. *Id.* This decree prohibited Live Nation-Ticketmaster from (1) retaliating against venue owners who contracted for primary ticketing services with a rival; (2) requiring that a venue use Ticketmaster's primary ticketing services when that venue wanted only to obtain concerts promoted by the merged firm; (3) mandating that venues take Live Nation-Ticketmaster's concerts as a condition for obtaining ticketing services; and (4) using ticketing data in their non-ticketing business. Kwoka & Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, at 15–16.

The DOJ's review at the conclusion of the 10-year decree period uncovered rampant failures, including six different accounts of instances where Live Nation-Ticketmaster violated the decree through threats, conditions, and retaliations designed to force venue operators into

contracting with Ticketmaster as their primary ticketing service. *United States v. Ticketmaster Ent., Inc. & Live Nation Ent. Inc.*, Motion to Modify Final Judgment and Enter Amended Final Judgment, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 8, 2020). This decree illustrates Judge Richard Posner's warning that "'regulatory decrees' [are a] confession of failure to restore competitive conditions." Richard A. Posner, *Antitrust Law* 273 (2d ed. 2001).

Mergers such as Ticketmaster's illustrate the inherent flaws and challenges of behavioral remedies. First, asymmetry of information leads to lack of clarity regarding explanations for merged parties' actions. Kwoka & Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, at 23. Second, it is difficult to foresee and fully specify the conduct that violates the drafted decree. *Id.* at 24. Third, countervailing incentives are likely to strain compliance with the decree. Consent orders "cannot abolish the merged firm's incentive to maximize profit, especially when some of the proscribed behavior would seem perfectly normal." *Id.* at 25. Fourth, oversight of compliance with consent orders—when possible—is likely resource intensive. *Id.* at 27. When independent agency oversight is not viable, "behavioral settlements rely largely on the reporting of problems by adversely affected parties to reveal non-compliance." *Id.* at 28. And finally, a behavioral remedy has the unenviable task of "navigat[ing] the twin risks of not committing itself sufficiently into the future, versus imposing restraints that will lock the parties (and the market) into a static or incorrect set of assumptions." *Id.* at 30.

Subsequent to the failed settlement with Ticketmaster and Live Nation, the DOJ amended its approach to remedies and spelled out key principles for evaluating them. *See* Merger Remedies Manual, at 3–5 (outlining six principles: (1) "Remedies Must Preserve Competition"; (2) "Remedies Should Not Create Ongoing Government Regulation of the Market"; (3) "Temporary Relief Should Not Be Used to Remedy Persistent Competitive Harm"; (4) "The

Remedy Should Preserve Competition, Not Protect Competitors"; (5) "The Risk of a Failed Remedy Should Fall on the Parties, Not on Consumers"; (6) "The Remedy Must Be Enforceable"). As summarized by Professor Elhauge, "the fact is that even the best-designed behavioral remedies have a hard time really changing the operation of markets, create perverse incentive, and are difficult to administer, which is why the U.S. agencies generally favor structural remedies over behavioral ones." Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 Antitrust Law Journal 501, 510 (2009). Therefore, to genuinely meet Section 7's demand, a remedy "almost always needs to be structural, preserving an independent competitive force in the marketplace, rather than behavioral, simply placing limits on the merged firm's ability to use or profit from increased market power." William Baer, Acting Associate Attorney General, Remarks at American Antitrust Institute's 17th Annual Conference.[6]

IV. The ALJ Erred By Failing to Apply the *Baker Hughes* Burden-Shifting Framework.

The case at hand demands application of the *Baker Hughes* burden-shifting framework. Illumina's Open Offer is a behavioral remedy made for litigation rather than to alleviate the risk of harm to competition. *See* Compl. Counsel's Post-Trial Br., at 161–66 (explaining that Respondents published the Open Offer on its website mere days before the FTC issued its Complaint), 166–82 (explaining the Open Offer's flaws and fallacies); Compl. Counsel's Post-Trial Reply Br., at 175–89; Compl. Counsel's Appeal of the Initial Decision, at 29–39. Illumina drafted the Open Offer; it was not negotiated between contracting parties and Illumina even rejected efforts by Grail's rivals to enter into meaningful negotiations. *See* Compl. Counsel's Post-Trial Br., at 161–66. Because Illumina is the only viable supplier of NGS platforms that

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[6] Notably, empirical 'meta-analysis' of several merger retrospectives demonstrates that even structural divestiture relief often fails to resolve competitive problems. John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 Antitrust Law Journal 837, 860–61 (2017).

meet the requirements of multi-cancer early detection test developers, Grail's competitors were faced with a false choice: Either they sign the Open Offer, or they risk never obtaining the supply they need to compete with Illumina. *See* Compl. Counsel's Appeal of the Initial Decision, at 38–39. Indicative of the Open Offer's unilateral terms, several of Grail's competitors did not sign the Open Offer despite being placed in this coercive positive. *See* Initial Decision, at 119–20.

Rather than eye the Open Offer with skepticism during Illumina's rebuttal arguments, the ALJ analyzed it as part of the merger, placing the burden on Complaint Counsel to disprove the efficacy of the merging parties' preferred behavioral remedy in restoring the competition lost from the merger they recognize to be anticompetitive. The ALJ incorrectly reasoned that the burden-shifting standard requiring the *complete* restoration of competition applied "the wrong standard to assessing the effectiveness of the Open Offer." Initial Decision, at 178.[7] This approach wrongly accepted the Respondents' proffered fix and failed to require them to demonstrate that it would preserve the competitive *status quo* ante.

Proposed Amici therefore urge the Commission to reverse the ALJ's Initial Decision, apply the *Baker Hughes* burden-shifting framework, and give deference to the FTC by requiring that the proposed remedy eliminate the risk to competition.

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[7] Indeed, the ALJ flipped the *Baker Hughes* burden-shifting on its head in reasoning that "[h]olding the Open Offer to the standard of a remedy for a violation puts the proverbial cart before the horse." *Id.* at 182.

CONCLUSION

For the foregoing reasons, the Initial Decision of the ALJ should be reversed.

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Dated: October 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I requested to file the foregoing document electronically by email and requested that it be accepted for filing in the FTC's E-Filing System, which will send notification of such filing to:

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I further certify that pursuant to 16 C.F.R. § 3.52, this brief complies with the type-volume limitation of 16 C.F.R. § 3.52(j), because the brief contains 5,823 words, excluding the parts of the brief exempted by 16 C.F.R. § 3.52(k). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 12-point font.

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