

in this matter. In the D.C. Circuit,¹⁶³ an agency adjudicator may be subject to disqualification if “a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (cleaned up). Respondents do not even attempt to meet this standard.¹⁶⁴ While Respondents allege that certain Commissioners sought information from a third party and considered Respondents’ settlement proposal before voting to issue a complaint, no court has found that such run-of-the-mill conduct—in isolation or taken together—demonstrates unconstitutional prejudgment or bias. *Contra Withrow*, 421 U.S. at 50 n.16 (citing qualifying but inapposite examples); *see also Cement Institute*, 333 U.S. 701 (concluding that the parties had failed to show “that the minds of [the Commission’s] members were irrevocably closed”).

Third, Respondents maintain that it violates the Equal Protection Clause of the Fourteenth Amendment for this enforcement action to have been brought by the FTC rather than the Antitrust Division of the U.S. Department of Justice (“DOJ”). Resp. Post-Tr. Br. at 240–41 (citing U.S. Const. amend. XIV, § 1). Once again, Respondents’ argument has been rejected by the Commission and the courts.

At the threshold, Respondents make the same crucial misstep that doomed a similar equal-protection challenge in *Otto Bock*. Respondents’ challenge rests on the assumption an FTC enforcement action and a DOJ enforcement action are mutually exclusive, such that the

¹⁶³ The Part 3 rules provide for the disqualification of any Commissioner “in accordance with legal standards applicable to the proceeding in which such motion is filed.” 16 C.F.R. § 4.17(c).

¹⁶⁴ Respondents cite unverified win-loss figures to suggest that the Commission prejudices appeals from initial decisions. Resp. Post-Trial Br. at 237-39. These figures do not account for cases where, for example, the Commission declined to review an initial decision or dismissed counts of a complaint. *See, e.g., McWane v. FTC*, 783 F.3d 814, 823 n.7 (11th Cir. 2015). Nor can “statistics alone” establish bias. *In re IBM Corp.*, 618 F.2d 923, 930 (2d Cir. 1980).

commencement of one prevents the pursuit of the other. But that assumption is wrong. The Commission recognized in *Otto Bock* that because both the FTC and DOJ share concurrent jurisdiction, “either agency could have brought an action against Respondent.” 2019 WL 5957363, at *51 (citing *Cement Institute*, 333 U.S. at 694-95 (upholding concurrent jurisdiction to enforce statutes giving the agencies “cumulative remedies against activity detrimental to competition”). It follows that “[t]o the extent that the agencies choose to divide their workload, such that one brings an action rather than both doing so, this hardly gives a basis for complaint.” *Id.* (citing *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 862 (9th Cir. 2018) (having “two cops on the beat is nothing unusual”). Any differences in adjudicatory procedures or their outcomes therefore cannot give rise to any constitutional defects, as Respondents would be subject to the procedures applicable to an FTC action regardless of whether the DOJ brought its own action against them in parallel.

Moreover, like the respondents in *Otto Bock*, Respondents here fail to explain how they have purportedly “been prejudiced by any differences in procedures” as between “federal court litigation versus the administrative litigation process.” 2019 WL 5957363, at *50. Any differences in procedures between Part 3 adjudication and federal district court litigation are inconsequential, especially since many of the Part 3 rules are modeled from the Federal Rules.¹⁶⁵ As for appeals, legal conclusions by either the Commission or by a federal district court are reviewed *de novo* by the courts of appeal, and any difference between the standards for reviewing factual findings “is a subtle one—so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact

¹⁶⁵ Respondents misconstrue the Court’s reference to “rules [that] were changed after I came to the Federal Trade Commission because of rulings I continually made applying Federal Rule of Evidence.” Resp. Br. at 243 (quoting Final Pretrial Hr’g Tr. 66). The Court’s statement does not support Respondents’ assertion that the Commission has “changed procedural rules when ALJs have ruled against it.” *Id.*

have produced a different outcome.” *Dickinson v. Zurko*, 527 U.S. 150, 163 (1999). The most notable difference between appeals from federal district court decisions and Part 3 adjudicatory decisions cuts in Respondents’ favor; that is, their ability to select which court of appeal will hear their appeal from an adverse decision. Respondents’ claim that differences in adjudicatory procedures “can be outcome determinative,” Resp. Post-Tr. Br. at 243, does not withstand scrutiny.¹⁶⁶

Even if there were any outcome-determinative differences between federal court litigation and FTC administrative adjudication, they would not amount to denial of equal protection. Respondents must show not only that the allocation of matters between DOJ and the FTC makes “classifications” that lead to disparate treatment, but also that the allocation arrangement lacks a “rational relationship to a legitimate governmental purpose.” *Tennessee v. Lane*, 541 U.S. 509, 522 (2004).¹⁶⁷ Here, the agencies’ allocation arrangement serves the legitimate purpose of “[c]onserving government resources” by avoiding duplicative efforts between agencies with concurrent jurisdiction and enabling each agency to develop unique and industry-specific expertise. *Holt v. Howard*, 806 F.3d 1129, 1133 (8th Cir. 2015); *see also Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008). Rational basis review is satisfied, foreclosing Respondents’

¹⁶⁶ It is difficult to square Respondents’ abstract complaints about the fairness of the Part 3 process with the due process they actually received: Respondents successfully introduced almost all of the thousands of their proposed trial exhibits, called eight expert witnesses and over a dozen other witnesses at the hearing, excluded evidence from a competitor to Grail, and submitted post-trial filings totaling over eight hundred pages (not including the post-trial reply filings due today).

¹⁶⁷ Heightened review of a policy can be undertaken if a provision discriminates based upon a suspect classification or interferes with a fundamental right. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-13 (1976). A suspect class is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Respondents have not argued—nor could they—that merging parties (or companies in Respondents’ industries) constitute a suspect class or that their consummation of a business acquisition is a fundamental right. Thus, rational basis review applies here.

equal-protection challenge. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.”).

VII. Complaint Counsel’s Case Rests on a Foundation of Credible Industry Participants and Respondents’ Own Ordinary Course Documents

After 245 pages of misstatements and misrepresentations where Respondents fail to accurately address the relevant facts and legal standards, Respondents continue to obfuscate their lack of valid support by exaggerating the probative value of their own witnesses—all the while leveling inaccurate potshots at Complaint Counsel’s witnesses and evidence. Resp. Post-Tr. Br. § VII.¹⁶⁸ A peak behind Respondents’ smokescreen reveals their charade. Respondents primarily relied on paid witnesses to support their case, calling 24 witnesses at trial, 21 of whom were financially bound to Respondents.¹⁶⁹ Although Respondents submitted over 2,500 exhibits into evidence, they used only 13 ordinary course documents with their employee witnesses throughout the weeks-long trial. Instead, Respondents in large part had their witnesses take the stand and testify with the support of made-for-litigation demonstratives rather than ordinary course documents.¹⁷⁰

¹⁶⁸ Complaint Counsel addresses the factual flaws in Respondents’ argument in Complaint Counsel’s responses to their proposed Conclusions of Law and Findings of Facts. For brevity, Complaint Counsel only highlights a select cross-selection of illustrative examples pervasive throughout Respondents’ conclusions and findings.

¹⁶⁹ Respondents called four third-party witnesses, one of whom—Matt Strom—was Grail’s paid consultant during the Acquisition. (Strom (Morgan Stanley) Tr. 3473). Of the remaining three witnesses, Respondents called Konstantin Fiedler, FMI’s Chief Operating Officer, who { [REDACTED] }, along with two other witnesses Jorge Velarde and Dr. Cance (who was also called by Complaint Counsel).

¹⁷⁰ Respondents then cite to these made-for-litigation documents in their findings of fact as evidentiary support for their proposed findings in direct violation of this Court’s order. *See, e.g.*, (Response to RPF 368.1, 422, 430.1, 439.1, 442, 446, 459).

Throughout their briefing, Respondents repeatedly seek to characterize their witnesses' testimony as "uncontroverted" as if by sheer force of repetition, they can overcome the actual record in the case. Instead, as Complaint Counsel's Reply Brief and Responses to Respondents' Factual Findings show, Respondents' testimony was time and again shown to be either self-serving speculation without support or foundation, or contradicted by Complaint Counsel's witnesses and Respondents' normal course documents and admissions.

For example, Respondents cite to their witnesses throughout their briefing to support their claim that "no other test like [Galleri is] commercially available or even in development," ostensibly arguing that Galleri resides in a market of one. *See, e.g.*, Resp. Post-Tr. Br. at 4; (Cote Tr. 3727). Grail's own S-1 statement, however, directly contradicts this—identifying Exact, Guardant, Helio, and Singlera (among others) as competitors in its filing to the Securities and Exchange Commission. (PX4082 (Grail) at 167, 211 (Email attaching Grail 2020 S-1/Amended, Sept. 2020)). Respondents likewise rely heavily on their witnesses to support their contention that Exact/Thrive's CancerSEEK test is not sufficiently developed to pose a competitive threat to Galleri. Resp. Post-Tr. Br. at 36-37. Again, Grail's ordinary course documents beg to differ.

{ [REDACTED] }
 (PX4443 (Grail) at 003 (Email from A. Chen, Grail, to J. Ofman, Grail, Jun. 13, 2020) (*in camera*)). And in response to the competition threat from Exact/Thrive, { [REDACTED] }
 [REDACTED]
 [REDACTED]
 [REDACTED] } (PX4456 (Grail) at 013 { [REDACTED] }
 [REDACTED] } (*in camera*)). Respondents' documents do

not fit the story Respondents wish to tell this Court, so instead Respondents ask this Court to ignore their documents and believe the post-Acquisition testimony of their biased, paid witnesses.

Throughout this litigation, Respondents have sought to make this case a trial-by-expert, pushing past evidentiary rules and this Court's orders in the process, in a futile attempt to plug the holes in their case. Respondents initially attempted to impermissibly add the expert report of Dr. Serafin into evidence despite not providing adequate notice under the rules. *See* Order Memorializing Bench Rulings, *In re Illumina, Inc. and GRAIL, Inc.*, Docket No. 9401, at 2 (Aug. 25, 2021) (excluding the declaration and deposition of George Serafin). At trial, Respondents presented the biased testimony of their experts (including the testimony of Dr. Abrams who sat on one of Grail's advisory boards) that was in large part unsupported and/or contradicted by industry participants best situated to testify as to market realities. *See, e.g.*, (Response to RPF 161, 191, 472, 587, 589-92, 594.2, 596, 598-99, 600.3, 600.4, 602, 604, 604.1, 652, 667-69, 672.1, 672.2, 673-74) (providing illustrative examples of unsupported claims); (Response to RPF 2028-39) (explaining Dr. Abrams entanglements with Grail).

As explained extensively in Complaint Counsel's Responses to Respondents' Proposed Findings of Fact, Respondents' expert testimony is not credible and often directly contradicted by statements of industry participants and, at times, by Illumina and Grail's own statements. For example, Respondents rely heavily on Dr. Cote to establish that { [REDACTED] } Resp. Post-Tr. Br. at 77. However, just two months prior in February 2022, Illumina represented to a federal court that BGI's technology is "unproven and immature." Pl.'s Reply in Support of Mot. for Permanent Inj.,

Illumina, Inc. v. BGI Genomics Co., Ltd., Docket No. 3:19-cv-03770, at 10 (N.D. Cal. Feb. 16, 2022).¹⁷¹

Respondents' gamesmanship continued post-trial when, instead of substituting the testimony of Dr. Katz for Dr. Willig per this Court's Order, *see* Order Granting Respondents' Motion for Leave to Substitute a Replacement Expert Witness, *In re Illumina, Inc. and GRAIL, Inc.*, Docket No. 9401, at 2 (Oct. 12, 2021), Respondents cite to Dr. Katz in *addition* to Dr. Willig's testimony throughout the post-trial briefing, even though the opinions expressed by Dr. Katz in his trial deposition impermissibly exceeded the scope of Dr. Willig's opinion. *See* (Response to RPF 2040-56).

Failing to plug all the holes in their sinking ship through experts, and unable to find ordinary course documents to buttress their claims, Respondents instead turn to citing unreliable screenshots and websites, *see, e.g.*, (Response to RPF 587, 590, 596, 602, 642.2), and even, at times, misciting the underlying source. *See, e.g.*, (Response to RPF 159.2, 468, 612, 624, 709.3, 735, 758, 784.6, 801.1, 998.5, 1047.4, 1699, 1812). In contrast, Complaint Counsel presented the testimony of 11 third-party witnesses including a witness from the American Cancer society, six of Grail's MCED test rivals, and an NGS platform provider. Each third party's testimony was corroborated not only by the other MCED test developers, but by the witnesses' ordinary course documents as well as Complaint Counsel's expert witnesses. Moreover, as explained above, Respondents' own documents corroborate the testimony of each MCED test developer who all testified to the following: that they have invested substantial money into the

¹⁷¹ In addition to being factually incorrect, Respondents' citations to their experts at times violates this Court's order limiting expert testimony to opinion testimony. (Response to RPF 81, 82-107, 122-39, 422, 444, 457, 470-71, 580, 588, 784, 943).

research and development of MCED tests; that each MCED test is intended to detect a high number of cancers in an asymptomatic patient population; that each MCED test developer competes head-to-head with Grail's Galleri test and intends to continue to compete in the future; and that each MCED test is dependent on Illumina's NGS platform. (CCFF §§ V, VI, VII.B.3-5).

Respondents, however, ask this Court to ignore the testimony of Grail's competitors (and Illumina's own customers) because they are competing with Grail and, thus, cannot be trusted. Putting Respondents' nonsensical argument aside, the consistency of Complaint Counsel's witnesses' testimony, which is supported by Respondents' own documents, establish MCED test developers' credibility.

Respondents also ask this Court to engage in a hyper-technical misreading of caselaw that would effectively preclude vertical enforcement. Complaint Counsel's legal theories, in contrast, are grounded in decades of legal precedent—including Supreme Court precedent, economic principles as established by the testimony of our three experts, and well supported by both testimony and documents. This Court should follow the well-trodden path of its sister courts and find that post-Acquisition Illumina and Grail will have the ability and incentive to disadvantage its rivals and has a substantial likelihood of lessening competition.

VIII. Divestiture Is the “Natural Remedy” for Illumina's Illegal Acquisition

Respondents object to the divestiture of Grail's ongoing business, arguing that such a remedy would be “overbroad and unnecessarily punitive.” Resp. Post-Tr. Br. at 277. The “legitimate objective” in a Section 7 case is to “restore the competitive intensity” lost from the Acquisition. *Aetna*, 240 F. Supp. 3d at 60 (quoting *Sysco*, 113 F. Supp. 3d at 72). Far from being “punitive” and “overbroad,” divestiture of an ongoing business is considered by courts to be the

“natural remedy” for a Section 7 violation. *du Pont 1961*, 366 U.S. at 329; *see also Ford*, 405 U.S. at 573 (stating that “[c]omplete divestiture is particularly appropriate where . . . acquisitions violate the antitrust laws”); *RSR Corp. v. FTC*, 602 F.2d 1317, 1326 n.5 (9th Cir. 1979) (stating that “complete divestiture of all pre-merger assets is the usual remedy for a Section 7 violation.”) Conduct remedies, in contrast “are inappropriate except in very narrow circumstances.” DOJ, Merger Remedies Manual § II (2020); *see also Steves & Sons*, 988 F.3d at 720 (noting that “conduct remedies are disfavored”).

Respondents also rehash their alleged efficiencies defense to argue that a divestiture of Grail would harm “the interest of the general public.” Resp. Post-Tr. Br. at 278 (internal quotations omitted).¹⁷² As explained *infra*, § V, and in Complaint Counsel’s post-trial brief, *see* CC Post-Tr. Br. § II.G.2., Respondents’ alleged efficiencies are wholly inadequate to rebut Complaint Counsel’s *prima facie* case and, thus, are also insufficient to avoid the “natural remedy” of a divestiture. *du Pont 1961*, 366 U.S. at 329. Further, in passing the Clayton Act, Congress determined that the public interest is served by competition. *See FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (“Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”); *Brown Shoe*, 370 U.S. at 344 (stating that “we cannot fail to recognize Congress’ desire to promote competition”). Here, restoring the status quo through a divestiture of Grail’s standalone business

¹⁷² Respondents also claim that undoing the Acquisition will deny Grail critical funding. *See* Resp. Post-Tr. Br. at 279-80. Prior to the Acquisition, however, Grail was backed by significant investors including Jeff Bezos and Bill Gates, (CCFF ¶ 5855), and had successfully raised \$1.9 billion in funding, (CCFF ¶¶ 5850-51). Mere weeks before the Acquisition, Grail [REDACTED] (CCFF ¶ 5904). And, should the Acquisition be undone, investors have already expressed an interest in “making a more significant investment in Grail.” (CCFF ¶ 195). Accordingly, Grail itself says that it will be “well positioned for any outcome.” (CCFF ¶ 196).

will both preserve competition in the research, development, and commercialization of MCED tests and, through such competition, will lead to improved cancer screening tests that will save countless lives.

Respondents also argue that, for reasons completely under their own control, “divestiture would be fundamentally inequitable to Respondents.” Resp. Post-Tr. Br. at 280. Specifically, Respondents argue that because they have already closed the Acquisition, a divestiture would “affect private property interests.” Resp. Post-Tr. Br. at 280. This, however, runs contrary to well established law. “[I]t is well settled that the Commission may order full divestiture in a consummated merger case when a violation of the Clayton Act has been found.” *Otto Bock*, 2019 WL 2118886, at *55 (Chappell, A.L.J.). “[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.” *du Pont 1961*, 366 U.S. at 326; *see also Otto Bock*, 2019 WL 2118886, at *57 (Chappell, A.L.J.). Thus, “[t]he mere fact that divestiture may have an adverse economic impact on Respondent does not compel a lesser remedy.” *In re Polypore Int’l, Inc.*, 149 F.T.C. 486, 949 (F.T.C. Mar. 1, 2010). And here any costs to Respondents of unwinding the consummated Acquisition are entirely of their own doing.¹⁷³ (CCFF ¶¶ 218-22) (Illumina explaining to investors

¹⁷³ Respondents also claim that it would be unfair to unwind the Acquisition because the Commission “withdrew its preliminary injunction and allowed the Transaction to close under U.S. law.” Resp. Post-Tr. Br. at 280. It appears Respondents misunderstand the purpose of preliminary injunctions. As the Commission explained in its motion to dismiss the preliminary injunction in federal court:

[t]he FTC is authorized to seek a preliminary injunction or temporary restraining order *only if* necessary to preserve the *status quo*. The EC’s prohibition on closing now moots the FTC’s PI Complaint as no temporary restraining order or preliminary injunction is currently needed to maintain the *status quo* pending the administrative trial. Therefore, the FTC moves to dismiss its Complaint without prejudice because relief is not necessary at this time.

that it closed the Acquisition despite knowing that doing so could result in the imposition of “fines, penalties, remedies or restrictions” by government or regulatory authorities). As the Fourth Circuit explained “if courts were required to choose the remedy least burdensome to the defendant—rather than the one that best promotes competition—conduct remedies would be the norm because they generally burden defendants less.” *Steves & Sons*, 988 F.3d at 720. But, the court added, “that would go against Congress’s policy judgment that divestiture is ‘the remedy best suited to redress the ills of an anticompetitive merger.’” *Steves & Sons*, 988 F.3d at 720 (quoting *Cal. v. Am. Stores Co.*, 495 U.S. 271, 285 (1990)).

CONCLUSION

For the foregoing reasons, the evidence presented at trial and admitted into the record establishes that Illumina’s acquisition of Grail, as consummated on August 18, 2021, violated Section 7 of the Clayton Act and Section 5 of the FTC Act, as alleged in the Complaint, and justifies entry of the Proposed Order that was enclosed with Complaint Counsel’s post-trial brief and any such other relief that the Court deems necessary and proper.

Pl.’s *Ex Parte* Application To Dismiss the Complaint Without Prejudice, 6, *FTC v. Illumina, Inc. and Grail, Inc.*, No. 3:21-cv-00800 (S.D. Cal. May 21, 2021) (Dkt. 120) (emphasis added). At that time, Complaint Counsel was unaware that Respondents would take the unprecedented step of closing the Acquisition despite the EC’s prohibition against doing so. (CCFF ¶¶ 218-22).

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Respectfully submitted,

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