IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE PAVERS AND ROAD BUILDERS BENEFIT FUNDS, Plaintiff, v. FRANCIS deSOUZA, JOHN THOMPSON, FRANCES ARNOLD, CAROLINE D. DORSA, ROBERT S. EPSTEIN, SCOTT GOTTLIEB, GARY S. GUTHART, PHILIP W. SCHILLER, SUSAN SIEGEL, and ALEX ARAVANIS, Defendants, -and- ILLUMINA, INC., Nominal Defendant.	C.A. No. 2024-1337-PAF PUBLIC VERSION FILED: December 30, 2024

VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

Plaintiff The Pavers and Road Builders Benefit Funds ("Plaintiff"), by its attorneys, submits this Verified Stockholder Derivative Complaint ("Complaint") on behalf of Illumina, Inc. ("Illumina" or the "Company") against certain current and former members of Illumina's board of directors ("Board") and Illumina officers related to the Company's acquisition of GRAIL, Inc. ("GRAIL" or "Grail"). These allegations are based on Plaintiff's knowledge as to itself and, as to all other matters, on information and belief, including counsel's investigation, publicly available documents, and internal corporate records produced by Illumina in response to Plaintiff's books and records demand pursuant to 8 *Del. C.* § 220 ("Section 220").

NATURE OF THE ACTION

1. This Complaint arises from one of the most flagrant breaches of fiduciary duty and positive law in recent corporate history: Illumina's $8 billion re-acquisition of GRAIL, a decision that violated binding standstill obligations ("Standstill Obligations") under Article 7(1) of the European Union Merger Regulation ("EU Merger Regulation" or "EUMR") and flouted U.S. antitrust law.

2. The Standstill Obligations expressly barred Illumina from closing its acquisition of GRAIL ("GRAIL Merger" or "Merger") until receiving clearance from the European Commission ("EC"). The Standstill Obligations serve as a critical safeguard to maintain market competition during regulatory review. Despite receiving clear warnings regarding the risks and consequences of breaching this obligation, Illumina's officers and directors knowingly and unlawfully closed the transaction on August 18, 2021.

3. This action directly exposed Illumina to regulatory scrutiny and massive fines, including a €432 million penalty levied by the EC—the largest such fine in EU history. Although that penalty was later vacated on jurisdictional grounds, the breach has inflicted a legion of other costly harms upon the Company.

4. In the US, the Federal Trade Commission ("FTC") only dropped its injunction action aimed at blocking the Merger's close on the assumption that Illumina would not violate the Standstill Obligations. Proven wrong, the FTC

successfully sought to unwind the Merger, culminating in a divestment order affirmed by the Fifth Circuit. Days later, on December 17, 2023, Illumina announced that it would drop further challenges and divest Grail at a huge loss.

5. The self-serving conduct of Illumina's directors and officers is perhaps the most troubling aspect of this case. Faced with the heightened liability risks of closing the Merger without regulatory clearance, the Board prioritized shielding itself rather than protecting the Company or its stockholders.

6. During the Audit Committee's deliberations, legal advisors from Covington & Burling LLP ("Covington") emphasized the need to protect directors and officers from claims related to the anticipated fallout. The Board responded by revamping the Company's Directors and Officers ("D&O") insurance coverage, dramatically increasing its Side A coverage—which protects the Board and officers from personal liability—while eliminating Side B and C coverage which would have protected the Company. Unsurprisingly, given the Board was contemplating a flagrant violation of positive law, this new coverage cost the Company tens of millions in increased premiums.

7. Despite these self-serving protective measures, Illumina's directors and officers failed to uphold their fiduciary duties to the Company and its stockholders. The Board approved closing the Merger in disregard of explicit warnings from legal counsel about regulatory risks and in knowing violation of the EU Standstill

Obligations. The directors compounded their misconduct by justifying their illegal actions under a pretext of "moral obligation," asserting that accelerating GRAIL's cancer detection technology would "save lives." This emotionally compelling rhetoric was proven in court to lack any factual basis. It masked a bad faith decision to prioritize personal and speculative interests over sound corporate governance.

8. The consequences of the GRAIL acquisition have been devastating for Illumina and its stockholders. Illumina incurred extraordinary financial penalties and obligations, legal fees, and administrative expenses as a direct result of its decision to close the Merger in defiance of regulatory orders. Legal challenges by the EC and FTC have drained Illumina's resources, forcing it to divert critical time and capital from its core operations. Moreover, this decision has irreparably harmed Illumina's relationships with regulators, investors, and clients, severely undermining the Company's market position and tarnishing its reputation as a leader in next-generation sequencing ("NGS") technology.

9. Beyond the EC fine, the Board's fiduciary breaches have already directly caused Illumina to incur at least $3,643,700,000 in monetary damages. The deal's structure also included massive contingent obligations tied to Grail revenue milestones that remain Illumina's responsibility even after divesting Grail, burdening Illumina's balance sheet for more than a decade to come and, if triggered, subjecting it to billions in additional payments.

10. Since the Merger's close, Grail has plummeted in value, a further indicator of the extraordinary harm to Illumina flowing from the Board's illegal actions. Illumina acquired Grail at a valuation of over $8 billion, but was forced to divest it earlier this year at a valuation of $2.74 billion, while more recent disclosures value Grail at just $448.3 million.

11. The market has responded accordingly. Illumina stock closed at $508.65 the day before the Merger closed—just off its all-time high set the previous day. The Board's shocking decision to close the Merger ushered in a rapid decline from which Illumina's stock has never recovered. By the time GRAIL's divestment was finalized, Illumina's stock had fallen over 80%. That harm persists. Illumina's trailing 52-week average is just $128.80, representing the destruction of over $80 billion in market capitalization from Defendants' fiduciary breaches.

12. This Complaint seeks to hold Illumina's directors and officers accountable for their egregious breaches of fiduciary duty and violations of positive law. Plaintiff, on behalf of Illumina, seeks full redress for the billions in financial losses, as well as corporate governance reforms, to ensure compliance with legal and ethical standards going forward, and accountability for the defendants whose actions have caused lasting harm to Illumina and its stockholders.

PARTIES

A. Plaintiff

13. ***The Pavers and Road Builders Benefit Funds*** is a pension fund for more than 2,500 members of Laborers' Local 1010. Plaintiff has been a stockholder in Illumina at all times relevant to the claims asserted in this action. As of the date of this Complaint, Plaintiff holds 12,139 shares of Illumina Class A common stock.

B. Nominal Defendant

14. ***Illumina*** is a biotechnology company incorporated under the laws of the state of Delaware. Illumina's principal executive offices are located at 500 Illumina Way, San Diego, California. Illumina is the leading global supplier of NGS systems for genetic and genomic analysis, which include NGS instruments, consumables, and ancillary services. Illumina common stock is publicly traded on the Nasdaq Global Select Market under the ticker symbol "ILMN."[1]

C. Director Defendants

15. ***Francis A. deSouza*** joined Illumina in 2013.[2] He served as President from 2013 to 2016[3] and CEO from 2016 until his resignation on June 11, 2023.[4]

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[1] Illumina, Inc., Annual Report (Form 10-K) (Feb. 16, 2024) ("2023 10-K"), at 29.

[2] Illumina, Inc., Definitive Proxy Statement (Schedule 14A) (Apr. 14, 2022) ("2022 Proxy"), at 7.

[3] *Id.*

[4] Press Release, *Illumina announces CEO transition plan*, Illumina, Inc. (June 11, 2023), https://investor.illumina.com/news/press-release/details/2023/Illumina-announces-CEO-transition-plan/default.aspx.

deSouza was also a member of Illumina's Board from 2014 to June 11, 2023.[5] deSouza was instrumental to the Board's decision to close the Merger despite the Standstill Obligations.[6] In 2019, the year before the announcement of the GRAIL Merger, deSouza's total compensation was $1,521,949.[7] Over the next three fiscal years, Illumina paid him approximately $52.8 million for his service as CEO,[8] even as the Company's market capitalization declined precipitously. As part of deSouza's compensation in 2022, the Board's Compensation Committee, then comprised of Defendants Dorsa, Epstein, and Guthart, awarded him a "special grant" of $12.5 million in stock options and $12.5 million in performance stock units to "help ensure [his] retention and focus on innovation and increasing stockholder value."[9] After forcing through the GRAIL Merger and resigning from Illumina, deSouza joined Moonwalk Biosciences, Inc. as an advisor.[10] Moonwalk Biosciences was co-founded by Defendant Alexander M. Aravanis, former Illumina Chief Technology

[5] 2022 Proxy at 7.

[6] ILMN-220_001094.

[7] 2022 Proxy at 58.

[8] *Id.*; *see also* Illumina, Inc., Preliminary Proxy Statement (Schedule 14A) (Apr. 7, 2023) ("2023 Proxy"), at 66, 71.

[9] ILMN-220_004321 at -324; 2023 Proxy at 56, 66.

[10] *Francis deSouza*, LinkedIn, https://www.linkedin.com/in/francisdesouza/details/experience/.

Officer ("CTO"),[11] and funded by ARCH Ventures Partners ("ARCH"), an early investor in both GRAIL and Illumina.[12]

16. ***John W. Thompson*** served as a member of Illumina's Board of Directors from 2017 to 2023.[13] He served as Board Chairman from May 2021 to May 25, 2023, when he lost his bid for reelection.[14] He was also a member of the Audit Committee.[15] Thompson participated in the Board's decision to close the Merger despite the Standstill Obligations.[16]

17. ***Frances Arnold*** has served on the Illumina Board since 2016.[17] She participated in the Board's decisions to acquire GRAIL and to close the Merger despite the Standstill Obligations.[18]

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[11] *Alex Aravinas*, Moonwalk Biosciences, https://moonwalk.bio/team/alex-aravinas-md-phd/; *see also Alex Aravinas*, LinkedIn, https://www.linkedin.com/in/alex-aravanis-md-phd-3a9345/.

[12] Press Release, *Moonwalk Biosciences Launches with $57 Million in Financing to Advance a New Class of Precision Epigenetic Medicines*, Moonwalk Biosciences (Jan. 4, 2024), https://moonwalk.bio/news/moonwalk-biosciences-launches-with-57-million-in-financing-to-advance-a-new-class-of-precision-epigenetic-medicines/.

[13] Francis deSouza, *Illumina Names John W. Thompson to Its Board of Directors, Bringing More Than 40 Years of Technology Leadership to Illumina*, LinkedIn (Feb. 20, 2017), https://www.linkedin.com/pulse/illumina-names-john-w-thompson-its-board-directors-bringing-desouza/.

[14] Illumina, Inc., Form 8-K (May 25, 2023), at 5.

[15] 2022 Proxy at 14.

[16] ILMN-220_001094.

[17] *Board of Directors*, Illumina, Inc., https://www.illumina.com/company/about-us/board-of-directors.html.

[18] ILMN-220_001094.

18. ***Caroline D. Dorsa*** has been a director of Illumina since 2017.[19] She is the Chair of the Audit Committee.[20] Dorsa participated in the Board's decision to close the Merger despite the Standstill Obligations.

19. ***Robert S. Epstein*** has served on the Illumina Board since 2012.[21] He participated in the Board's decisions to acquire GRAIL and to close the Merger despite the Standstill Obligations.[22] From October 2016 to March 1, 2017, Epstein served as the Board's observer and advisor to the GRAIL Board, for which he was compensated at a rate of $40,000 per year.[23]

20. ***Scott Gottlieb*** has served on the Illumina Board since 2020.[24] Gottlieb participated in the Board's decision to close the Merger despite the Standstill Obligations.[25]

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[19] *About Us*, Illumina, Inc., https://www.illumina.com/company/about-us/board-of-directors.html.

[20] Illumina, Inc., Definitive Proxy Statement (Schedule 14A) (Apr. 4, 2024) ("2024 Proxy"), at 13; 2023 Proxy at 12.

[21] *Board of Directors*, Illumina, Inc., https://www.illumina.com/company/about-us/board-of-directors.html.

[22] ILMN-220_001094.

[23] Illumina, Inc., Definitive Proxy Statement (DEF 14A) (Apr. 6, 2018) ("2018 Proxy"), at 36.

[24] *Board of Directors*, Illumina, Inc., https://www.illumina.com/company/about-us/board-of-directors.html.

[25] ILMN-220_001094.

21. ***Gary S. Guthart*** has served on the Illumina Board since 2017[26] and is a member of the Audit Committee.[27] Guthart participated in the Board's decision to close the Merger despite the Standstill Obligations.[28]

22. ***Philip W. Schiller*** has served on the Illumina Board since 2016.[29] Schiller participated in the Board's decisions to acquire GRAIL and to close the Merger despite the Standstill Obligations.[30]

23. ***Susan E. Siegel*** has served on the Illumina Board since 2019.[31] Siegel participated in the Board's decisions to acquire GRAIL and to close the Merger despite the Standstill Obligations.[32]

24. deSouza, Thompson, Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel are collectively referred to herein as the "Director Defendants."

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[26] *Board of Directors*, Illumina, Inc., https://www.illumina.com/company/about-us/board-of-directors.html.

[27] 2024 Proxy at 11.

[28] ILMN-220_001094.

[29] *Board of Directors*, Illumina, Inc., https://www.illumina.com/company/about-us/board-of-directors.html.

[30] ILMN-220_001094.

[31] *Board of Directors*, Illumina, Inc., https://www.illumina.com/company/about-us/board-of-directors.html.

[32] ILMN-220_001094.

D. Officer Defendants

25. ***Alexander M. Aravanis*** served as Illumina's Senior Director of R&D from 2013 to 2016 before leaving to co-found GRAIL.[33] At GRAIL, he held several key leadership roles as Chief Scientific Officer, Head of R&D, and Chief Medical Officer, spearheading the development of its MCED Tests.[34] In May 2020, deSouza rehired Aravanis as Illumina's CTO and Head of Research and Product Development. As "cosponsor" of the GRAIL Merger, Aravanis played a pivotal role in guiding the Board's decisions and managing all aspects of the transaction. When the GRAIL Merger closed, Aravanis immediately sold all of his 1,361,824 shares of GRAIL stock for $5 million. He subsequently left Illumina in 2023.

26. deSouza and Aravanis are collectively referred to as the "Officer Defendants," and collectively with the Director Defendants, "Defendants."

E. Relevant Non-Parties

27. ***GRAIL***, a Delaware corporation, was originally founded as a subsidiary of Illumina. Spun off on February 28, 2017, GRAIL's leadership was dominated by former Illumina executives. GRAIL's flagship product, Galleri, is a multi-cancer

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[33] *Alex Aravanis*, LinkedIn.com, https://www.linkedin.com/in/alex-aravanis-md-phd-3a9345/.

[34] Press Release, *Illumina Welcomes Alex Aravanis as Chief Technology Officer and Appoints Mostafa Ronaghi to Lead Entrepreneurial Development*, Illumina, Inc. (May 4, 2020), https://www.illumina.com/company/news-center/press-releases/2020/891cfd5a-7bbe-4d2b-967f-93394b8f2bff.html.

early detection ("MCED") test designed to screen for up to 50 different cancers using Illumina's NGS technology to detect cancer DNA through a simple blood draw. In August 2021, Illumina reacquired GRAIL at a valuation of over $8 billion, transforming it into a subsidiary named "GRAIL, LLC." On June 3, 2024, Illumina announced plans to divest GRAIL, distributing 85.5% of its shares to Illumina stockholders. The divestment was finalized on June 24, 2024, when GRAIL, LLC reverted to its prior form as GRAIL, Inc., a Delaware corporation.[35]

28. ***ARCH*** is an American venture capital firm and early investor in both Illumina and GRAIL. The company co-led Illumina's seed round in 1998[36] as well as GRAIL's Series A and B rounds.[37] As of November 25, 2020, entities affiliated with ARCH owned 45 million (52.94%) of GRAIL's Series A preferred stock and 18,710,240 (6.05%) of GRAIL's Series B preferred stock, representing 63,710,240

[35] For clarity and because the successor entity assumed the liabilities tied to the alleged misconduct, both GRAIL, Inc. and GRAIL, LLC are collectively referred to as "GRAIL."

[36] Press Release, *Illumina Licenses Core Technology, Completes Seed Financing, Recruits Key Managers*, Illumina, Inc. (Aug. 5, 1998), https://investor.illumina.com/news/press-release-details/1998/Illumina-Licenses-Core-Technology-Completes-Seed-Financing-RecruitsKey-Managers/default.aspx.

[37] Press Release, *Illumina Forms New Company to Enable Early Cancer Detection via Blood-Based Screening*, Business Wire (Jan. 10, 2016), https://www.businesswire.com/news/home/20160110005039/en/; Press Release, *GRAIL Closes Over $900 Million Initial Investment in Series B Financing to Develop Blood Tests to Detect Cancer Early*, GlobeNewswire (Mar. 1, 2017), https://www.globenewswire.com/news-release/2017/03/01/929515/0/en/GRAIL-Closes-Over-900-Million-Initial-Investment-in-Series-B-Financing-to-Develop-Blood-Tests-to-Detect-Cancer-Early.html.

(9.35%) shares of GRAIL's Class A common stock on an as-converted basis. Robert Nelsen, the Managing Director and Co-Founder of ARCH, was a member of GRAIL's Board of Directors from 2016 through the GRAIL Merger. Defendants Arnold, Epstein, and Gottlieb all have ties to Arch-backed companies.

29. ***Charles Dadswell*** served as Illumina's General Counsel, Senior Vice President, and Secretary from 2013 to October 3, 2024.[38] Dadswell was named Interim CEO on June 11, 2023 after deSouza resigned, holding that position until the Board appointed Jacob Thaysen as Illumina's new CEO in September 2023.[39] Illumina announced that Dadswell will serve as an advisor to Thaysen and the Board through March 31, 2025.[40] In the months leading up to the closing of the GRAIL transaction, Dadswell gave multiple presentations to the Illumina Board about the

[38] Press Release, *Charles Dadswell to step down as General Counsel, Illumina initiates search for successor*, Illumina, Inc. (Oct. 3, 2024), https://www.prnewswire.com/news-releases/charles-dadswell-to-step-down-as-general-counsel-illumina-initiates-search-for-successor-302267306.html.

[39] Maria Dinzeo, *After Guiding Illumina Through Harrowing Merger Fight, GC Charles Dadswell to Depart*, Law.com (Oct. 3, 2024), https://www.law.com/corpcounsel/2024/10/03/after-guiding-illumina-through-harrowing-merger-fight-gc-charles-dadswell-to-depart/?slreturn=20241017155832.

[40] Press Release, *Charles Dadswell to step down as General Counsel, Illumina initiates search for successor*, Illumina, Inc. (Oct. 3, 2024), https://www.prnewswire.com/news-releases/charles-dadswell-to-step-down-as-general-counsel-illumina-initiates-search-for-successor-302267306.html.

EC and FTC's regulatory proceedings, and he attended Audit Committee meetings where directors discussed the Board's D&O Insurance.[41]

30. ***Jay Flatley*** served as Illumina's CEO for 17 years from 1999 through 2016, Executive Chairman of the Illumina Board from 2016 to 2020, and Chairman of the Board from 2020 to 2021.[42] While he was serving as Executive Chairman of Illumina's Board, Flatley was also Chairman of GRAIL's Board of Directors from January 2016 to February 2017. Flatley "resigned" from GRAIL's Board in February 2017, but he continued to serve as a GRAIL Board observer "in his personal capacity."[43]

31. ***Sam A. Samad*** was Illumina's CFO and Senior Vice President from January 2017 to July 2022,[44] responsible for the Company's finance, accounting, investor relations, internal audit, and treasury functions up until his unexpected resignation, which Illumina announced on June 9, 2022.[45]

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[41] *See, e.g.*, ILMN-220_000525-526, ILMN-220_000847, ILMN-220_000849, ILMN-220_000873-74.

[42] *Leadership*, Denali Therapeutics, https://www.denalitherapeutics.com/leadership; *see also* Press Release, *GRAIL Plans to Raise in Excess of $1B in Series B Funding*, GRAIL (Jan. 5, 2017), https://grail.com/press-releases/grail-plans-to-raise-in-excess-of-1b-in-series-b-funding/.

[43] 2018 Proxy at 70.

[44] *Sam Samad*, Idexx, https://www.idexx.com/en/about-idexx/corporate-governance/sam-a-samad/#:~:text=Sam%20Samad,Age%3A%2054.

[45] Press Release, *Joydeep Goswami Appointed Interim CFO; Sam Samad To Depart Illumina*, Illumina, Inc. (June 9, 2022), https://investor.illumina.com/news/press-release-

32. ***Richard D. Klausner*** was Senior Vice President and CMO at Illumina from 2013 to 2014 and Chief Opportunity Officer until February 2016, when he left to found GRAIL.[46] He remained a GRAIL director from inception through its acquisition by Illumina. Klausner also founded and managed Milky Way Investments Group ("Milky Way"), an investment entity registered in the British Virgin Islands. Through Milky Way, Klausner invested $125 million in GRAIL's Series D funding round, coinciding with Illumina's plans to reacquire GRAIL. During this time, Illumina elevated Aravanis, a GRAIL co-founder, to its CEO role and transitioned its then-CTO to GRAIL's board. By the time of the Merger, Milky Way's stake in GRAIL had ballooned to $250 million. Klausner's extensive connections with ARCH are also notable. In 2013, he co-founded Juno Therapeutics with former GRAIL CEO Hans Bishop, backed by ARCH.[47] Klausner went on to co-found ARCH-backed Altos Labs alongside Barron and Bishop, where Illumina board member Arnold serves as a director.[48] He also holds board positions at four other ARCH-backed companies.[49]

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details/2022/JOYDEEP-GOSWAMI-APPOINTED-INTERIM-CFO-SAM-SAMAD-TO-DEPART-ILLUMINA/default.aspx.

[46] *Dr. Richard Klausner*, LinkedIn, https://www.linkedin.com/in/drrichardklausner.

[47] *Dr. Richard Klausner*, LinkedIn, https://www.linkedin.com/in/drrichardklausner; *see also Portfolio*, ARCH VENTURE PARTNERS, https://www.archventure.com/portfolio/.

[48] *About*, Altos Labs, https://www.altoslabs.com/about; 2022 Proxy at 6.

[49] *Dr. Richard Klausner*, LinkedIn, https://www.linkedin.com/in/drrichardklausner;

33. ***Hans Bishop*** was GRAIL's CEO from 2019 to 2021, and is involved with four of ARCH portfolio companies, each of which has ties to other former Illumina or GRAIL officials.

34. ***Mostafa Ronaghi*** served as Illumina's Senior Vice President of Entrepreneurial Development from 2020 to 2021, and as its Senior Vice President and CTO from 2008 to 2020. Ronaghi was appointed to the GRAIL Board on May 4, 2020, just two weeks after Illumina's Board began discussions about acquiring GRAIL, and served through the GRAIL Merger.

SUBSTANTIVE ALLEGATIONS

A. Illumina Monopolizes the NGS Market

35. Illumina was founded in 1998 to develop, manufacture, and market life sciences tools. Illumina has developed the technology that allows researchers and clinicians to quickly, accurately, and efficiently identify the order of the component blocks, or nucleotides, in a DNA sample. This technology is referred to as "next-generation sequencing" or NGS. Illumina's technology is known as "short read" sequencing, the predominant NGS technology for more than a decade.

36. Shortly before the time period relevant to the Merger, the FTC put Illumina on notice that it was viewed as a monopolist, alleging in December 2019: "In the United States, Illumina has complete dominance over the market for [NGS]

Portfolio, ARCH Venture Partners, https://www.archventure.com/portfolio/.

products, with a share of over 90%. Historically, Illumina has faced little competition for its NGS instruments and consumables."[50] That market reality continues to the present: Illumina still boasts over 90% of the U.S. market share of clinical genomics testing, and its platforms have become deeply embedded.[51]

37. Illumina's dominance in the NGS market is secured by formidable barriers to entry. Developing DNA sequencing systems requires immense time, capital, and expertise, navigating complex scientific, legal, and commercial challenges. These systems rely on advanced chemistry, precision optics, and cutting-edge semiconductors, making competition exceptionally difficult.

38. Proudly acknowledging its dominance, Illumina describes itself in SEC filings as "the global leader in sequencing- and array-based solutions for genetic and genomic analysis." The Company's directors and officers knew—or should have known—that Illumina operates as a monopolist in this critical market.

[50] *IMO Illumina, Inc. & Pac. Biosciences of Cal., Inc, (PacBio)*, Dkt. No. 9387 (Dec. 17, 2019) (Complaint), at ¶1.

[51] Jeffrey Rosenfeld, *Illumina and the State of the Genomics Market*, GEN Edge (Aug. 29, 2024), https://www.genengnews.com/topics/omics/illumina-and-the-state-of-the-genomicsmarket/#:~:text=According%20to%20a%20recent%20DeciBio,DNA%20samples%20for%20Illumina%20sequencing.

B. Illumina's Directors and Officers Are Obligated to Ensure Antitrust Compliance

39. As officers and directors of a Delaware corporation, Illumina's Board and executives are duty-bound to ensure compliance with antitrust laws. Given Illumina's NGS market dominance, that duty is paramount when pursuing acquisitions. In the U.S., the FTC serves as a primary public enforcer of antitrust law. The EC serves as primary regulator for the EU's analogous competition law.

40. In the U.S., federal antitrust law bars monopolists like Illumina from using anticompetitive tactics to maintain or expand market power. Attempted acquisitions by monopolists invite FTC scrutiny, as seen in Illumina's 2019 attempt to acquire Pacific Biosciences of California, Inc. ("PacBio"), a competitor in the U.S. NGS market. The FTC sued to block the $1.2 billion deal, claiming it would eliminate a critical emerging competitor and reinforce Illumina's monopoly. The FTC viewed Illumina's justifications as pretextual; by a 5-0 vote, its commissioners authorized the agency to seek a TRO and preliminary injunction.[52]

41. Facing mounting pressure, the Board terminated the deal in January 2020, at the cost to Illumina of a $98 million termination fee.[53] Most of Illumina's current directors were involved, underscoring their familiarity with regulatory risks.

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[52] *IMO Illumina, Inc. & Pac. Biosciences of Cal., Inc, (PacBio)*, Dkt. No. 9387 (Dec. 17, 2019) (Complaint), at ¶82.

[53] Illumina, Inc., Current Report (Form 8-K) (Jan. 2, 2020), at Item 1.02.

C. Illumina: The Sole Processor of All U.S. MCED Tests

42. The Board was fully aware of Illumina's dominance in the U.S. DNA sequencing market, as evidenced by the failed PacBio deal and the Company's SEC filings. Illumina was also fully aware of a critical consequence of its monopoly: it positioned Illumina as an essential supplier to, and thus gatekeeper of, the related downstream market for multi-cancer early detection (MCED) tests.

43. MCED tests are poised to revolutionize cancer detection and treatment, with the potential to save millions of lives. Currently, cancers are mostly detected only after symptoms appear, often too late for effective treatment. MCED tests use liquid biopsy to detect early-stage cancer by analyzing DNA fragments shed into the bloodstream, enabling earlier, more effective treatment. A blood sample is collected, sent to a lab, and analyzed on Illumina's NGS platform, which accurately sequences the DNA to identify mutations or biomarkers linked to various cancers.

44. Given its monopoly, Illumina's NGS platforms are essential for MCED test development. All MCED tests rely on Illumina's short-read NGS technology, the only sequencing method that meets the requirements for these tests—high sensitivity, specificity, speed, throughput, and cost efficiency.

45. MCED test developers depend on Illumina at every stage, designing tests specifically for Illumina's sequencers. FDA approval for these tests hinges on

their performance with Illumina's platform, meaning developers rely on Illumina for key data, including design files and quality information.

D. Illumina Creates GRAIL

46. In 2013, Illumina acquired Verinata Health, Inc. ("Verinata"), which specialized in non-invasive prenatal tests ("NIPT") using Illumina's NGS technology. After the acquisition, Illumina's NIPT tests unexpectedly detected cancer signals, sparking the creation of GRAIL. As deSouza recounted, "we were processing samples from pregnant mothers" when a scientist noticed unusual "maternal DNA" in cases where the "fetal DNA in the blood was normal and healthy." In 2014, deSouza realized "we could be seeing the signals of cancer in a blood test."

47. By 2015, Illumina had detected cancer signals but needed "large clinical studies" and substantial investment to develop a reliable market ready test. So Illumina "spun out the technology into a company called GRAIL," raising over $2 billion and staffing it with over 40 Illumina employees.[54] This move addressed practical challenges for Illumina, including: (i) antitrust concerns due to MCED developers' reliance on Illumina's testing, and (2) investor concerns about Illumina's stock price reflected the large investment required to develop Galleri.

[54] Podcast, *How mission fuels risk-taking*, Masters of Scale, https://mastersofscale.com/francis-desouza-how-mission-fuels-risk-taking/.

48. Klausner, then Illumina's CMO, emphasized these issues in a July 14, 2015 email, stating a separate company would protect Illumina by avoiding competition with its customers and allowing GRAIL to fail without impacting Illumina's stock. This move also helped GRAIL attract top talent through equity and a strong scientific culture. [55]

49. In September 2015, Illumina incorporated GRAIL in Delaware as a wholly owned subsidiary.[56] GRAIL began operations in February 2016, with Illumina retaining a controlling stake after a Series A financing round.[57] Illumina recognized that a separate GRAIL would allow it to "capitalize on [the] screening market years earlier" while owning "a substantial portion of the value created."

50. GRAIL raised $120 million in Series A funding in early 2016, backed by Illumina, ARCH, as well as billionaires Bill Gates and Jeff Bezos. Despite this, Illumina retained 55% of GRAIL's equity and over 90% of its voting rights. Every member of GRAIL's initial board was an Illumina insider: Rastetter, Klausner, Nelsen, and Flatley (who served as Chairman).

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[55] *Id.* at ¶24.

[56] GRAIL, Inc., Form S-1/Amended (Sept. 17, 2020), at 171, 207, 248.

[57] *Id*.

E. Illumina Reduces its Controlling Ownership of GRAIL, Enhancing Competition in the MCED Test Market

51. In 2017, Illumina reduced its controlling stake in GRAIL, citing the "untenable" investment needed to develop GRAIL's MCED test. GRAIL's Series B round followed, dropping Illumina's ownership to about 12%.[58] This move was widely praised by investors and analysts, who saw GRAIL as a financial drag on Illumina. Cowen analysts called it a "huge win-win" in their January 5, 2017 report titled "Liberation Day – GRAIL and ILMN separation."[59]

52. Illumina executives like Flatley and deSouza recognized the procompetitive benefits from Illumina's loss of control of GRAIL. In a January 2, 2017 email, Flatley acknowledged that reducing Illumina's stake "leveled the playing field" for customers and "accelerate[d] the liquid biopsy market for all."

53. The GRAIL team, including Aravanis, continued developing the Galleri test,[60] with Flatley serving as a board observer while Illumina monitored GRAIL's progress as both an investor and customer.

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[58] Between February and December 2017, GRAIL raised $1.1 billion in Series B funding, with Illumina purchasing 3.5 million shares and ARCH entities buying 18.7 million shares. GRAIL, Inc., 2020 S-1/Amended (Sept. 17, 2020), at 171.

[59] Doug Schenkel, et al., *Liberation Day – GRAIL and ILMN Separation A Huge Win-Win*, Cowen and Co. (Jan. 5, 2017).

[60] Podcast, *How mission fuels risk-taking*, Masters of Scale, https://mastersofscale.com/francis-desouza-how-mission-fuels-risk-taking/.

F. Illumina's Senior Management and Board Drive a Hasty Reacquisition of GRAIL Before its IPO

54. In May 2019, GRAIL announced that its MCED test, dubbed Galleri, had received "Breakthrough Device" status from the FDA.[61] Then, in late 2019, GRAIL published data that deSouza would later claim provided the initial impetus for Illumina to consider reacquire GRAIL.[62]

55. GRAIL's cash burn remained high. GRAIL's operating losses for 2018 and 2019 were $287 million and $255 million, respectively.[63] Analysts estimated that GRAIL would continue to accrue similar or greater losses for the near future due to its ongoing and planned large clinical studies and the need to build out commercial infrastructure to support its planned product rollout.[64] In fact, Galleri was not projected to generate any revenues in 2019 or 2020.[65]

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[61] Press Release, *GRAIL Announces Significant Progress with Multi-Cancer Early Detection Test Including FDA Breakthrough Device Designation*, Business Wire (May 13, 2019).

[62] Podcast, *How mission fuels risk-taking*, Masters of Scale, https://mastersofscale.com/francis-desouza-how-mission-fuels-risk-taking/.

[63] GRAIL, Inc., Form S-1/Amended (Sept. 17, 2020), at F-9.

[64] Janney Analyst Report, *ILMN: Smoke, Mirrors & GRAIL: Higher Revenue, Less Transparency* (Jan. 6, 2017) ("[W]e don't see significant GRAIL revenue until 2020-2025 as FDA approval and private reimbursement are part of the treacherous post-commercial launch process.").

[65] *Id.*; *see also* Guggenheim, *ILMN: Don't Let a Shiny New Grail Distract You from the Strong Core Business; Reiterate BUY* (Sept. 21, 2020) ("Illumina said that it expects Galleri to launch commercially in 2021, as a multi-cancer screening test.").

56. On May 6, 2020, Grail completed its $390 million Series D financing round at a valuation of $4.15 billion, with Illumina participating.[66] But its costly operations and lack of revenues led it to make initial preparations for an IPO the very next month.[67]

57. By that time, deSouza had already begun laying the groundwork to reacquire GRAIL, ignoring the rationale behind Illumina's previous decision to reduce control over GRAIL. On April 28, 2020, deSouza persuaded the Board to shift Illumina's business strategy to oncology screening by reacquiring GRAIL. Joydeep Goswami, SVP of Corporate Development, presented GRAIL as the "furthest ahead in the market" with a projected valuation between $3 billion and $14 billion.[68] This presentation contained Illumina management's recommendation to conduct "further due diligence into GRAIL as a potential acquisition target."[69] The presentation also acknowledged Illumina's valuation at $4.15 billion from its recent Series D financing round, but did not mention the significant antitrust risks or the billions GRAIL still needed to bring Galleri to market.[70]

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[66] Press Release, *GRAIL Announces $390 Million Series D Financing*, Business Wire (May 6, 2020).

[67] Illumina, Inc., Amendment No. 1 to Form S-4 Registration Statement (Feb. 5, 2021), at 153.

[68] ILMN-220_000008, at -15.

[69] *Id.*

[70] ILMN-220_000014_UR, at -40.

58. On May 4, 2020, Illumina announced that Aravanis—then GRAIL's co-founder and Head of R&D—would return to Illumina as CTO in early June 2020, reporting to Illumina CEO deSouza.[71] Despite being heavily conflicted by virtue of owning over a million shares of GRAIL,[72] Aravanis would assist in deSouza's efforts to have Illumina buy Grail.

59. On July 31, 2020, GRAIL confidentially submitted its S-1 form to the SEC.[73] Later that same day, Illumina CEO deSouza met with GRAIL CEO Hans Bishop, "not[ing] that Illumina wanted to explore a potential acquisition of GRAIL."[74] On August 3, 2020, deSouza told Bishop that Illumina was interested in exploring a potential acquisition at a price of $6 billion.[75] GRAIL continued to pursue an IPO while these discussions progressed through August and September.[76] No documents presently available to Plaintiff indicate when—or even if—the Board authorized deSouza's communications with Bishop; much less the floated $6 billion

[71] Press Release, *Illumina Welcomes Alex Aravanis as Chief Technology Officer and Appoints Mostafa Ronaghi to Lead Entrepreneurial Development*, Business Wire (May 4, 2020).

[72] Aravanis owned 1,361,824 shares of GRAIL stock.

[73] Illumina, Inc., Amendment No. 1 to Form S-4 Registration Statement, (Feb. 5, 2021), at 153.

[74] *Id.*

[75] *Id*.

[76] *Id.* at 154-59.

price. Indeed, management only "request[ed] approval to engage with [GRAIL]" on August 4—*i.e.*, the day after.[77]

60. On August 4, 2020, the Board convened to discuss GRAIL. Aravanis, Dadswell, and Samad also attended, presenting GRAIL as key to transforming Illumina from a "a genomics tools & diagnostics company into a clinical testing and data driven healthcare company."[78] Aravanis led the meeting, outlining "key diligence areas, questions, and next steps" if the diligence review proceeds.[79] Dadswell briefly covered "antitrust considerations," though the minutes lack any details.[80] At the presentation's close, management informed the Board they would "engage in a timely manner, given [GRAIL was] already working towards an IPO," and proposed a "2-hour Special Board session in August."[81]

61. The following day, the Board with Dadswell and Samad participating, convened to discuss "follow up questions and actions" on GRAIL's "proposed acquisition."[82] They also discussed a recommendation to increase "D&O Insurance" from a $120 million to a $150 million total limit, with a $30 million

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[77] ILMN-220_000179, at -181.

[78] *Id.*

[79] ILMN-220_000173, at -17.

[80] *Id.*

[81] ILMN-220_000179, at -223.

[82] ILMN-220_000173, at -175.

increase in A-Side only coverage due to increased derivative actions and notable settlements (*e.g.*, McKesson, PG&E, Wells Fargo, Telsa)."[83] The cost was a $10 million retention and a $3.8 million premium.[84]

62. On August 5, GRAIL hired Morgan Stanley as financial advisor for Illumina's transaction evaluation. Two days later, GRAIL's board rejected Illumina's $6 billion offer in favor of an IPO. Three days later, on August 11, Illumina and GRAIL signed an NDA.

63. On August 25, the Board met with Dadswell, Aravanis, Goswami, Samad, and Chief Medical Office Phillip Febbo in attendance.[85] deSouza updated the Board on his discussions with GRAIL. Goswami presented an updated offer, revealing GRAIL's counterproposal of "$8B upfront [with] 9% royalties for 15 years."[86] Notably, "[n]o financial model was provided as a basis for this counter." Illumina's management, citing a likely higher post-IPO price "(>$11B based on recent market comps)," recommended continuing negotiations to secure a pre-IPO deal.[87]

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[83] ILMN-220_000179, at -397-98.

[84] *Id.* at -402.

[85] ILMN-220_000405.

[86] ILMN-220_000407, at-408.

[87] *Id.*

64. After the presentation, the Board approved a resolution to authorize "executive officers" to negotiate "an acquisition of [GRAIL] with an offer value up to $8.2 billion," considering "contingent consideration calculated on a net present value basis."[88] On September 1, the Board met with Dadswell, Goswami, and Samad in attendance. deSouza "provided updates on discussions with [GRAIL] since the August 25, 2020, Board meeting."[89] Goswami presented a new offer: $7.5 billion with 9% royalties above base case revenue for 10-years. GRAIL countered with $8 billion upfront and a tiered royalty structure.[90]

65. The Board unanimously approved a resolution authorizing the Company's "executive officers" "to offer and negotiate the terms of an acquisition of [GRAIL] with an offer value up to $9.5 billion (with the value of any contingent consideration calculated on a net present value basis)."[91] Management further recommended a "best and final" offer of $8 billion upfront and 2.5% royalties until $1 billion in cumulative royalties, then 9% for 15 years.[92]

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[88] ILMN-200_000405, at -406.

[89] ILMN-220_000425.

[90] ILMN-220_000427, at -428.

[91] ILMN-220_000425, at 426.

[92] ILMN-220_000427, at -430.

66. On September 6, 2020, the Board held a telephonic meeting attended by Dadswell, Aravanis, and Samad, among others.[93] deSouza provided an update on GRAIL discussions, then management, including conflicted Aravanis, presented.[94] Notably, the presentation's section on "Key Risks That Need to be Mitigated Going Forward," does not mention any antitrust issues.[95] The presentation noted that formal due diligence had not yet begun, focusing on GRAIL's 2035 market projections rather than a clear path for accelerating Galleri's market entry.[96]

67. On September 8, 2020, the Board convened again with deSouza, Dadswell, Goswami, and Samad attending.[97] Following an update by deSouza, the Board passed a resolution authorizing "executive officers … to finalize and execute a non-binding term sheet for the acquisition of GRAIL," consistent with the terms discussed."[98]

68. Adding urgency to Illumina's negotiations, on September 9, 2020, GRAIL registered for its IPO with the SEC.

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[93] ILMN-220_000443.

[94] *Id.* at -44.

[95] ILMN-220_000445, at -447.

[96] *Id.* at -71.

[97] ILMN-220_000474.

[98] *Id.* at -75.

69. On September 14, 2020, the Board met again by teleconference with Dadswell, Aravanis, Goswami, and Samad attending.[99] deSouza updated the Board on the GRAIL negotiations. Samad reviewed "updates to the valuation model as a result of due diligence review," which had "not materially impacted [the] deal model."[100] The valuation remained "at $12.2B," in line with earlier projections.[101]

70. This presentation confirmed that "Antitrust Efforts" would involve "reasonable best efforts" "to secure antitrust approvals, including behavioral commitments (but not including divestitures) and litigation to resist a regulator effort to block the transaction."[102] The reserve break-up fee was set at $300 million if antitrust approval was not secured within 12 months (or 15 months with an extension).[103] At the end of the meeting, the Board passed a resolution related to financing the GRAIL acquisition.[104]

71. On September 17, 2020, GRAIL filed an amended prospectus for its IPO.

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[99] ILMN-220_000476.

[100] *Id.* at -477; ILMN-220_000487 at -488.

[101] *Id*. This presentation continued to reference a launch of Galleri in 2021 and GRAIL's valuation as of 12/30/20. *Id.* at -490, -492.

[102] *Id.* at -500.

[103] *Id*.

[104] ILMN-220_000476 at -480-86.

72. On September 20, 2020, GRAIL's Board approved the acquisition by Illumina.

73. The next day, on September 21, 2020, Illumina announced its acquisition of the remaining 85.5% of GRAIL it did not already own. The $7.1 billion deal valued GRAIL at $8.3 billion and included potential contingent payments to GRAIL's non-Illumina stockholders. Illumina agreed to pay $3.5 billion in cash, $4.5 billion in Illumina stock (with a collar), and royalties of 2.5% on the first $1 billion in revenues and 9% of revenues exceeding $1 billion for 12 years.

74. Article VII of the Merger Agreement specified closing obligations, including Section 8.01(c), addressing conditions for completing the transaction:

> **No order**. No Governmental Authority ["Governmental Authority"] shall have enacted, issued, promulgated, enforced or entered any Law, whether temporary, preliminary or permanent (collectively, a "Restraint"), which is then in effect and has the effect of enjoining, restraining, prohibiting or otherwise preventing the consummation of the Transactions.

75. The Merger Agreement included provisions for amendments (Section 9.05) and waivers (Section 9.06), as well as an allowance to extend the Merger's closing beyond December 20, 2021 (Section 9.01(b)).

76. Analysts immediately raised concerns about the Merger, particularly its high price tag. A Canaccord analyst struggled to "justify[] the $8B acquisition

price," noting that "several other precision oncology companies appear further along." Wells Fargo analysts predicted challenges in "convince[ing] investors of its merits" and highlighting "skepticism [from doctors] on GRAIL's test performance and potential clinical utility."

77. Guggenheim analysts questioned its "strategic rationale" and the sharp increase in "valu[ation]" pointing out that when GRAIL was spun off, "the implied valuation was meaningfully below the predicted $8B valuation today." Illumina's stock dropped 5.3% after the announcement.

78. Cowen analysts also criticized the acquisition, stating, "We don't see the clear fit for acquiring a company that is still at a stage where clinical studies and clinical product development are still critical and will be for years," given that Illumina "has demonstrated that it is not great at (at least not yet) . . . developing clinical products that are commercialized by Illumina." Rather, GRAIL would benefit instead "from true clinical commercial infrastructure/reach that does not really exist at Illumina, and . . . arguably would benefit most from accessing new technologies that do not currently reside at Illumina."

G. The FTC and EU Begin to Take Action to Halt the Merger

79. In the months following announcement of the Merger, the Board paid little attention to Grail or the regulatory developments heralding the oncoming crisis.

80. As part of its three-day meeting of November 3-5, 2020, the Board received a thirty-minute "Grail Update," including its first update on "the ongoing antitrust regulatory reviews taking place in the United States and expected to take place in the United Kingdom."[105] A "GRAIL Update" by Goswami, Dadswell, and Samad noted, "US. UK [are the] only countr[ies] with potential jurisdiction; process will likely begin mid-November," and that "[d]etailed investor conversations" had successfully reversed the initial stock drop after the merger "leak."[106]

81. Three months later, on February 9, 2021, the Board met via video conference for 45 minutes to discuss the Merger.[107] Dadswell and legal counsel "reported that the United Kingdom Competition and Markets authority … was not reviewing the GRAIL acquisition and provided an update on the ongoing antitrust regulatory reviews taking place in the United States, including current status, expected next steps, and overall timing considerations."[108] A slide from the "GRAIL Update" presentation informed the Board that the "FTC decision date on the transaction is expected to be early April."[109] It also outlined plans for GRAIL to

[105] ILMN-220_000529; ILMN-220_000525, at -526.

[106] ILMN-220_000529, at -587.

[107] ILMN-220_000601, -615

[108] ILMN-220_000601, at -602.

[109] ILMN-220_000615, at -649.

operate as a "stand-alone division" with "G&A functions [] report[ing] to Illumina, all other functions will report into the division."[110]

82. By this time, Illumina had become fixated on closing the Merger. Despite ongoing regulatory scrutiny and acknowledgement of anticompetitive risks, deSouza's "2021 Corporate Goals," included "Clos[ing the] Grail acquisition."[111] A slide titled "Strategic Direction" emphasized "[c]losing the Grail acquisition" was "significant" to the Company's strategy."[112] The "Executive Summary" further underscored that the "Board agreed that the most critical issues facing Illumina and the Board over the next 1-2 years is closing the Grail acquisition…."[113]

83. During its February 9, 2021 meeting, the Board discussed self-evaluations acknowledging that integration planning for the GRAIL acquisition was underway and deemed "a critical issue for the near future, assuming the acquisition is approved by regulatory agencies."[114]

84. On February 26, 2021, the EC contacted Illumina via email to propose a call, which took place on March 4.

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[110] *Id.* at -649, -54.

[111] *Id.* at -670.

[112] *Id.* at -771.

[113] *Id.* at -780.

[114] *Id.* at -797.

85. On February 27, 2021, the Board met via video teleconference with Dadswell and Samad joining.[115] The Board approved a $1 billion bond issuance and a $750 million, five-year revolving credit facility to finance the GRAIL Merger.[116] Management outlined the necessity of maintaining liquidity, explaining how "ILMN's cash balance post-Grail is expected to drop to ~$1B," it was necessary to "provide liquidity backstop," and how the "rating agenc[ies needed] comfort around liquidity" as "[a]ll three rating agencies highlighted in the RAS/RES process that a revolving credit facility is a key factor in their assessment for Illumina."[117] Management explained how "Based on feedback from rating agencies, barring any unexpected shifts in our business, we should be able to maintain an investment grade rating with a $1.0B bond issuance."[118] This presentation further stated that the "$1B Issuance Necessary to Maintain our Minimum Cash Balance" and would "ensure adequate liquidity."[119]

86. On March 17, 2021, the Board met via video conference to review GRAIL's regulatory status. Dadswell, Goswami, and Samad also attended.[120] At

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[115] ILMN-220_000811.

[116] ILMN-220_000820, at -822.

[117] *Id.* at -823.

[118] *Id.* at -826.

[119] *Id.* at -834.

[120] ILMN-220_000847.

this meeting, the Board had a "GRAIL Regulatory Review Update," in which "deSouza provided a brief overview of antitrust regulatory matters related to the pending GRAIL acquisition."[121] Dadswell and Christine Varney of Cravath, Swaine & Moore LLP ("Cravath") "provided an update on the ongoing FTC review taking place in the United States and a recent notification received from the [EC] regarding a potential review of the transaction following a referral from the French competition authority," and "overall timing considerations related to each of the FTC and European Commission."[122]

87. On March 28, 2021, the Board convened via teleconference with Dadswell, Goswami, and Samad also attending.[123] Dadswell provided updates on "antitrust regulatory matters related to the pending GRAIL acquisition, including an update on the ongoing FTC review taking place in the United States and activities in Europe at both the member state and European Commission level regarding a communication received from the European Commission about a potential review of the transaction." Discussions also included overall timing considerations related to each of the FTC and European Commission.[124]

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[121] *Id.*

[122] ILMN-220_000847-48.

[123] ILMN-220_000849.

[124] ILMN-220_000849-50.

H. FTC Sues to Block Deal But Backs Down After EC Imposes Standstill Obligations, Assumes The Board Will Comply With Law

88. On March 30, 2021, the FTC filed an administrative complaint challenging the Merger. On April 1, it also filed a complaint in federal district court to block the Merger from closing, alleging that the Merger would stifle innovation in the U.S. MCED test market, as all such tests depend on Illumina for their results.

89. The FTC's decision should have come as no surprise to the Board. Historically, vertical mergers (like the Merger) received less scrutiny than horizontal mergers (between competitors), but there had been clear signs of changing times.

90. In February 2021, in a "groundbreaking" decision, the Fourth Circuit affirmed a district court divestiture order to a vertical merger—the first successful vertical merger challenge in decades, offering regulators a tested roadmap with which to build future vertical merger challenges.[125]

91. The next month, President Biden nominated Lina Kahn to head the FTC. Kahn had risen to prominence for her criticism of perceived lax FTC enforcement, and her appointment as FTC Chairperson was widely viewed as signaling a more aggressive stance on antitrust enforcement over the previous

[125] Kathy L. Osborn, et al., *Groundbreaking Fourth Circuit Decision Upholds Private Plaintiff's Successful Effort to Unwind a Consummated Merger*, National Law Review (Feb. 25, 2021), https://natlawreview.com/article/groundbreaking-fourth-circuit-decision-upholds-private-plaintiff-s-successful-effort.

administration. Indeed, the existing two democratic FTC commissioners at the time of Kahn's appointment had both called for increased scrutiny of vertical mergers.[126]

92. Remarkably, despite these important developments, the Board reversed its previous, reasoned approach to regulators and reflexively adopted a litigious posture. Specifically, in 2020, the Board had terminated Illumina's deal to acquire PacBio and paid a $98 million breakup fee when the FTC raised antitrust concerns, signaling its belief that continued resistance would cost more. But this time, it chose to fight. Illumina issued a press release stating it "disagrees with, and will oppose, the [FTC]'s challenge to its previously announced acquisition of GRAIL."[127]

93. Things soon got worse for Illumina. On April 19, 2021, the EC launched a preliminary investigation under the EUMR, Article 7(1), automatically triggering the Standstill Obligations that barred Illumina from closing the Merger without EC clearance. Violating these Standstill Obligations could result in fines up to 10% of the Company's prior-year global turnover under EUMR, Article 14(2)(b).

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[126] Tara L. Reinhart, et al., *Lina Khan's Appointment as FTC Chair Reflects Biden Administration's Aggressive Stance on Antitrust Enforcement*, Skadden, Arps, Slate, Meagher & Flom LLP (June 18, 2021), https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair.

[127] Press Release, *Illumina Committed to Pursuing GRAIL Acquisition to Accelerate Access to Breakthrough Multi-Cancer Early Detection Blood Test*, Business Wire (Mar. 30, 2021).

94. Illumina responded by doubling down on its regulator-defying approach. On April 28, 2021, Illumina filed suit in Luxembourg, contesting the EC's jurisdiction over the GRAIL transaction.

95. On May 5, 2021, the Board met via teleconference.[128] Dadswell provided "an update on the ongoing antitrust regulatory actions and reviews taking place in the United States and the European Union." Outside counsel provided further details regarding the "FTC's District Court action and European Union merger review," and "discussed, among other things: case and review strategies; expected next steps and timing considerations; and responses and actions by the Corporation."[129] A "GRAIL Update" presentation noted: (i) the FTC trial was set forth August 9, (ii) the EU jurisdiction ruling was expected by November (if expedited), and (iii) as a warning, that without expedition, an EU "judgment [would be] unlikely before late 2022 or 2023 depending on the Court's calendar."[130]

96. On May 21, 2021, the FTC withdrew its request for preliminary relief in federal court, citing the EC's Standstill Obligations and stating:

> Based on this new, post-Complaint information from the EC – *and our assumption that Defendants will abide by the laws of all jurisdictions in which they operate –the*

[128] ILMN-220_000873.

[129] ILMN-220_000873-74.

[130] ILMN-220_000876, at -945. A slide in the presentation informed the Board: "If a preliminary injunction is not issued by the District Court before September 20, the parties may close pending the EU clearance." *Id.* at -943.

> *FTC's understanding is that Defendants cannot currently close this transaction.* As such, at this time a preliminary injunction is no longer needed to maintain the *status quo* pending the completion of the administrative trial on the merits.

97. In a May 20, 2021 press release, the FTC stated that it had "sought relief in federal court to prevent Illumina and GRAIL from merging while the case is being decided on the merits in administrative court," noting that "a district court order was necessary to prevent the parties from consummating their merger." However, the FTC did not suspend its review of the Merger and only withdrew its request for a preliminary injunction because regulators did not expect Illumina to defy the EC's Standstill Obligations and close the merger in violation of positive law.

98. On May 26, 2021, Illumina held its annual meeting, during which Flatley resigned as Chairman of the Board.

99. On June 1, 2021, the U.S. District Court for the Southern District of California granted the FTC's motion to voluntarily dismiss its injunction action without prejudice.

100. On June 16, 2021, the EC began its Phase 1 investigation of the Merger, initiating a 90-working-day review period with a decision deadline of November 29, 2021.

101. On June 21, 2021, the Board met to discuss ongoing antitrust regulatory matters.[131] During the meeting, deSouza and Dadswell "provided an update on the ongoing antitrust regulatory matters in the U.S. and Europe related to the pending GRAIL acquisition," and discussed "the current status, expected next steps, potential responses, and overall timing considerations."[132]

I. Defying the Standstill Obligations, the Director Defendants Close the Merger While Shielding Themselves with Additional D&O Insurance

102. Driven by deSouza's push to close the Merger despite the Standstill Obligations and the FTC's challenge, the Board recognized the obvious liability risks and acted to shield themselves with greatly expanded D&O insurance coverage.

103. On July 14, 2021, Woodruff Sawyer presented a "D&O Renewal Update."[133] The presentation highlighted management's discussions with over 30 insurers and detailed how they "secured favorable terms," including limiting a premium "increase to 5% [upon] renewal" and agreeing to "an additional 10% [increase] at the time of closing GRAIL."[134] Management also focused on creating an "alternative program structure" with enhanced "Side A

[131] ILMN-220_000970.

[132] *Id.* at -972.

[133] ILMN-220_001161.

[134] *Id.* at -162.

coverage" and began securing "favorable Side A policy terms" "dedicated solely to GRAIL acquisition claims."[135]

104. On July 22, 2021, the EC initiated its in-depth investigation into the Merger.

105. On July 27, 2021, Paul Hastings attorneys Thomas O'Brien and Kevin Logue presented to the Board legal advice on antitrust reviews in the U.S. and Europe regarding the Merger. This document was withheld in its entirety as opinion work product.

106. On July 31, 2021, Audit Committee members Dorsa, Siegel, and Thompson met to discuss significantly increasing Illumina's D&O insurance coverage knowing the Board planned to close the Merger in violation of the Standstill Obligations and without resolving the FTC's challenge.[136] Samad reviewed Illumina's "current D&O insurance program," and then led a discussion on "timing considerations and potential next steps with respect to the ongoing regulatory reviews in the U.S. and Europe for the pending GRAIL acquisition and how such timing considerations and potential next steps impact renewal options and design considerations for the Corporation's D&O insurance program."[137] Dadswell

[135] *Id.*

[136] ILMN-220_005526-27.

[137] *Id*.

further discussed "renewal options and structures; potential pricing with respect to various renewal options and structures; and status of discussions, including next steps, with various insurance carriers who may participate in any new or renewal D&O insurance program."[138] deSouza, who attended this meeting by invitation of the Audit Committee, responded to questions and comments throughout these presentations.[139]

107. On August 3, 2021, the Audit Committee reconvened to approve enhanced D&O insurance.[140] deSouza again joined at the Committee's invitation. Covington's Skinner advised on "D&O insurance program and potential renewal options, design, and policy language considerations, including with respect to matters relating to [the Merger]." Woodruff Sawyer's Miner joined to discuss "renewal options and structures; potential pricing with respect to renewal options and structures; and status of discussions, including next steps, with various insurance carriers who may participate in any new or renewal D&O insurance program."[141] Miner confirmed progress in securing "additional Side A coverage dedicated solely

[138] ILMN-220_005527.

[139] *Id*.

[140] ILMN-220_001157.

[141] *Id.* at -160.

to GRAIL acquisition related claims," or non-indemnifiable claims, such as violations of positive law.[142]

108. At that meeting, the Audit Committee passed resolutions providing:

> **Resolved,** that the Committee hereby approves, and recommends to the Board of Directors, that the Corporation purchase D&O insurance with up to $300 million coverage, to be provided as reflected in the Meeting Materials, at a premium of up to $100 million.
>
> **Resolved,** that the Committee recommends to the Board of Directors that the Committee be empowered and given the authority to approve any changes to, and the documentation related to, the foregoing proposed D&O insurance commitments.[143]

109. Later that day, the Board convened.[144] Dadswell "provided an update on the ongoing antitrust regulatory actions and reviews taking place in the United States and the European Union," and covering "strategies; possible next steps and timing considerations.[145] Dorsa then "reported on the Audit Committee's meetings held on July 28, 2021, July 31, 2021, and August 3, 2021," including the Audit Committee's review of the Company's "D&O insurance program," to be "discussed further during tomorrow's executive session."[146]

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[142] ILMN-220_001161, at -162

[143] ILMN-220_001157, at -160.

[144] ILMN-220_000973.

[145] ILMN-220_000973, at -175.

[146] *Id*.

110. The following day, on August 4, 2021, the Audit Committee met with deSouza, Flatley, Dadswell, and Samad to discuss the renewal and significant increase of Illumina's D&O Liability Insurance.[147] The Audit Committee approved the following resolution:

> **Resolved,** that the Committee hereby approves, and recommends to the Board of Directors, that the Corporation purchase D&O insurance with $150 million coverage, to be provided as reflected in the Meeting Materials, at an annual premium of up to $3.8 million and with a retention of $10 million.[148]

111. Later that day, the Board convened with the same members of management in attendance.[149] During an executive session, the "independent members of the Board reviewed and discussed matters related to the Corporation's D&O insurance program, including possible changes relating to matters relating to Project Valor."[150] The purportedly independent members then "unanimously RESOLVED, that the Corporation purchase D&O insurance with up to $300 million coverage, to be provided as reflected in the Meeting Materials, at an annual premium of up to $100 million."[151] The executive session also included discussions on

[147] ILMN-220_001168.

[148] ILMN-220_001168, at -169.

[149] ILMN-220_000973, at -977.

[150] *Id.*

[151] *Id.* at -977-78.

"Project Valor" (i.e., the Merger), which continued after deSouza rejoined the meeting.[152]

112. On August 11, 2021, the EC suspended its investigation due to Illumina and GRAIL's failure to provide essential information.[153] In other words, Illumina's (ultimately, the Board's) decision to refuse to cooperate with the EC put Illumina in the position where it faced the deadline to consummate the Merger before receiving EC clearance. That refusal to cooperate with a law enforcement investigation, particularly where the consequence was to place the Company in a highly precarious legal position, strongly suggests the Board was acting in bad faith.

113. On August 13, 2021, the Board met again with Dadswell, Samad, and attorneys from Monckton Chambers, Slaughter and May, Covington, Paul Hastings, and Cravath.[154] During the "Project Valor Update" "deSouza reviewed the agenda and noted that this was an information[al] meeting for the directors to hear from management and the Corporation's legal advisors on the recommendation of management and the views of the legal advisors."[155]

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[152] *Id.* at -979.

[153] Press Release, *Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction*, European Commission (Aug. 19, 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

[154] ILMN-220_001084. Plaintiff obtained a fully unredacted version of these minutes through its Section 220 action.

[155] *Id.* at -085.

114. With pressure to make a decision at its zenith, and with the legal (and thus business) considerations strongly weighing in favor of abandoning the Merger, deSouza resorted to a factually unsupported ethical rational to convince the Board to break the law. Specifically, "*deSouza outlined the importance of Project Valor and the moral imperative of the Corporation to successfully complete its merger with Grail to accelerate the benefits from Grail in the US and around the world, noting that the Board's goal should be to do the right thing for the Corporation, for its shareholders, and for human health*."[156] This statement was false, and the Board knew or should have known that a Delaware corporation simply may not violate positive law, irrespective of any "moral obligation."

115. deSouza recommended actions to "put the Corporation in the best position to acquire Grail, including to close the transaction without final approval from the [EC], because waiting for approval would risk termination of the transaction."[157] He assured the Board "that the Corporation had been advised by counsel that there was no barrier in the U.S. antitrust process that prohibited closing the merger with Grail."[158] deSouza "also noted that the legal advisors would

[156] *Id*.

[157] *Id*.

[158] *Id*.

describe the process and consequences, and the structure to maintain Grail as a separate entity until receiving final approval, thereby respecting the EU process."[159]

116. During the meeting, the Board reviewed a memorandum from Paul Hastings. Slaughter and May highlighted that, [redacted] Paul Hastings outlined [redacted][160]

117. Without supporting materials, attorneys from Cravath discussed "the status of the FTC process and pending administrative FTC trial and likely outcome, expressing the view that [redacted] They speculated that [redacted]

[159] *Id*.

[160] ILMN-220_001084, at -086.

[redacted][161] An attorney from Covington then [redacted][162]

118. Of particular importance to the Board's consideration of its contemplated course of action, Woodruff Sawyer reviewed "both existing and proposed" insurance towers, explaining "the purpose of the insurance [was] to cover actions of officers and directors, and the cost of insurance."[163]

119. The following day (August 14, 2021), the Board met again to continue discussions on the GRAIL Merger.[164] During the meeting, the Board and management debated "the strategy and risks of closing the transaction in advance of clearance from the European Commission, and the operation of the hold separate arrangements and the possible impact on Grail's business."[165]

120. The following day (August 15, 2021), the Board met again.[166] deSouza delivered a "Project Valor Update," summarizing "prior discussions, including the

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[161] *Id*.

[162] *Id*.

[163] ILMN-220_001084, at -085.

[164] ILMN-220_001089.

[165] *Id*.

[166] ILMN-220_001092. Plaintiff obtained a fully unredacted version of these minutes through its Section 220 action.

management recommendations regarding the strategy to close the Grail transaction, the advice of outside advisors relating to that recommendation, the alternatives available to Illumina in the event Grail did not close, and an update on the base business plan of Illumina and a summary of the regulatory landscape."[167]

121. deSouza then introduced Sebastion Vos, European Chair of Covington's government policy practice, who euphemistically cautioned the Board that [redacted][168] Legal counsel thus explicitly warned the Board that closing the GRAIL Merger without regulatory clearance would harm the Company and require future remediation.

122. On August 17, 2021, the Board convened again.[169] deSouza "reviewed the agenda, which included a report on the insurance policies, a confirmation of management's recommendation to proceed with closing the Grail transaction, and a request that the Board make a determination on whether to proceed with the closing of the Grail transaction."[170] Samad provided an update on "the insurance program

[167] *Id*.

[168] *Id.* at -093.

[169] ILMN-220_001094.

[170] *Id*.

previously described and discussed with the Board." The Board resolved to close the GRAIL Merger and to increase the Company's D&O insurance coverage.[171]

123. Simply put, by approving the closing of the Merger, the Board knowingly violated positive law (the Standstill Obligations) and disregarded the serious risks of further violations under U.S. antitrust law. The Board was aware that all U.S.-based MCED tests depended on Illumina's technology, meaning the Merger raised serious and obvious antitrust concerns.

124. The Merger Agreement established an "Outside Date" of September 20, 2021, for closing the GRAIL Merger. Section 9.01(b)(i) of the Merger Agreement allowed for automatic extension of this date to December 20, 2021, with the option for the parties to agree on additional extensions under Section 9.05. Despite negotiating for these provisions, the Section 220 Documents reveal no evidence that the Board exercised its contractual right to extend the Outside Date or pursued further extensions to allow regulators sufficient time to complete their investigations. In other words, the Board failed to reasonably exhaust other options before it violated positive law, further evidence of bad faith.

[171] ILMN-220_001095-99.

J. The Market is Stunned by Illumina's Unprecedented Merger Closing in Violation of its Standstill Obligations

125. Illumina's decision to close the GRAIL Merger without regulatory approval understandably left reporters and analysts baffled. Citi analysts called the move "confusing," noting they "could not find any precedent for an acquirer intentionally closing a deal ahead of regulatory approval particularly in the case where the approval process has been somewhat contentious with the outcome uncertain." Cowen and Bank of America analysts labeled the action "surprising" and "aggressive," while SVB analysts remarked that the "rushed closing" raised "more questions than [] answers for investors." One reporter summed it up bluntly: "Illumina completes the GRAIL acquisition, regulators be damned."

126. In justifying its decision to the market, Illumina peddled half-truths and emotionally manipulative rhetoric lacking support.

127. In its press release, Illumina claimed, at best misleadingly, that there was no "legal impediment to acquiring GRAIL in the US," despite the FTC dropping its injunction action only because it believed Illumina "cannot implement the transaction without obtaining clearance from the European Commission."

128. Then on August 18, 2021, the Company hosted an analyst call where deSouza underscored the "high stakes," claiming a "moral obligation" to close the deal. Without any factual support, deSouza asserted that Illumina's involvement

could save "10,000 additional lives in the U.S." annually and insisted the acquisition was "the fastest way to make this test available to everyone, everywhere."

129. During the call, deSouza evaded direct questions about the FTC's position. When asked if "the FTC agreed to stand down," he merely stated, "there is no impediment for us to closing the deal here in the U.S. right now." Pressed further, he reiterated "the FTC has said, there is no hurdle to closing in the U.S. right now." This conflicted with the FTC's May 2021 statement, which clarified that it dismissed its injunction while continuing its investigation, relying on Illumina's compliance with EU Standstill Obligations.

130. Predictably, on August 20, 2021, the EC launched an investigation into Illumina's breach of the Standstill Obligations, emphasizing that such breaches are taken "very seriously" as they are "at the heart of [the EU's] merger control system."

131. That same day, deSouza doubled down in an interview, justifying the GRAIL Merger by claiming it could save "over 10,000 American lives" if reimbursement were accelerated by just one year. He again invoked a "moral obligation" to justify bypassing legal obligations, affirming Defendants' willingness to violate positive law to complete the Merger.

K. Illumina Defiantly Battles Regulators as GRAIL Bleeds Cash

1. Illumina's "Lives Saved" Justification Falls Flat

132. Defendants strategically closed the Merger just days before the FTC's Chief Administrative Law Judge ("ALJ") began a month-long trial to determine its legality. The trial diverted significant resources and management's attention, requiring live testimony from senior Illumina executives, including deSouza and Aravanis.

133. At trial, Illumina relied heavily on its claim that the Merger would accelerate Galleri's market entry and "save lives."[172] This justification, used by the Board to approve the illegal closing, was prominently featured in the press release titled "Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-

[172] ILMN-220_001084, at -085 ("de Souza outlined the importance of … the moral imperative of the Corporation to successfully complete its merger with Grail to accelerate the benefits from Grail in the US and around the world, noting that the Board's goal should be to do the right thing for the Corporation, for its shareholders, and for human health.").

Cancer Early-Detection Test."[173] Illumina doubled down on this rationale before the FTC, its Administrative Law Judge,[174] and ultimately the Fifth Circuit.[175]

134. Despite its army of elite counsel, Illumina failed to present credible evidence supporting its acceleration claim.[176] The FTC found Illumina's arguments

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[173] Press Release, *Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-Cancer Early-Detection Test*, Illumina, Inc. (Aug. 18, 2021); *see also id.* ("Illumina's acquisition of GRAIL will accelerate access and adoption of this life-saving test worldwide. … The reasons to reunite the two companies are compelling: The deal will save lives. … This can only be done if Illumina acquires GRAIL now. … Illumina's acquisition of GRAIL is driven by the believe that this test should be available to as many people as possible as quickly as possible. … Illumina's mandate is to save lives and transform healthcare.").

[174] *See Illumina, Inc. v. GRAIL, Inc.*, No. 9401 (FTC Nov. 3, 2022) (Respondents' Answering Brief to Complaint Counsel's Appeal Brief), at 1 ("[T]his life-saving Transaction will accelerate the adoption of Grail's groundbreaking cancer-screening test."), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401%20-%20RESPONDENTS%20ILLUMINA%2C%20INC%20AND%20GRAIL%2C%20INC_S%20ANSWERING%20BRIEF%20TO%20COMPLAINT%20COUNSEL_S%20APPEAL%20BRIEF%20-%20PUBLIC.pdf; *accord* Respondents' Answer and Defenses, at 1 ("This case involves a transaction that, if consummated, will save tens of thousands of lives."), https://www.ftc.gov/system/files/documents/cases/d09401_-_respondents_unopposed_motion_for_leave_to_amend_answer_to_add_affirmative_defenses_-_public.pdf; Respondents' Pretrial Brief, at 1 ("This case involves a vertical merger that will save thousands of lives."), https://www.ftc.gov/system/files/documents/cases/d09401__602415_respondents_pretrial_brief_-_public.pdf.

[175] *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. June 5, 2023) (Petitioners' Brief), at 3 ("[The Merger] will save countless lives."), *id.* at 5 ("Sometimes the price of an unconstitutional agency can be measured in lost dollars. This time, the price is lost lives. This Court should … clear[] the way for [Petitioners] to continue their life-saving work together.").

[176] *See* FTC Opinion (Mar. 31, 2023), at 78 ("Of course, any claim that a transaction leads to saved lives requires a close look."), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf. The ALJ did not have occasion to evaluate that evidence.

rested on "unsupported and vague assertions" from management,[177] including CMO Febbo's subjective belief that the Merger could streamline "regulatory path[s]," expedite "payers' … reimbursement," and improve "efficiencies."[178] Crucially, Febbo admitted Illumina had not identified any "specific areas" where it could accelerate Galleri's rollout.[179] This damming testimony revealed Illumina's justification as pretextual and manipulative.

135. Ultimately, the Fifth Circuit upheld the FTC's findings, concluding that Illumina had failed to show the Merger would cause "acceleration [to] actually occur, much less shown how it would be achieved."[180] The Fifth Circuit also noted that "Illumina's own financial modeling of the merger did not assume that Galleri's widespread commercialization would be accelerated," nor "account for the costs that would be associated with achieving any such acceleration."[181]

136. In short, within weeks of the illegal closing, Illumina's "lives saved" defense was thoroughly debunked. Years of appeals only confirmed the

[177] FTC Opinion at 78.

[178] *Id.* at 78-79.

[179] Complaint Counsel's Post-Trial Reply Brief, at 210, https://www.ftc.gov/system/files/ftc_gov/pdf/D09401CCPostTrialReplyBrief.pdf.

[180] *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. Dec. 15, 2023) (Opinion), at 33.

[181] *Id.*

baselessness of its claims. The evidence underscored that the Board knowingly violated positive law based on unsupported ethical rhetoric.

L. Illumina Faces Costly Hold Separate Payments and Tough EC Interim Measures

137. Hoping to appease the EC after violating the Standstill Obligations,[182] Illumina voluntarily implemented Hold-Separate Commitments upon the closing of the Merger. These required GRAIL to operate independently until the Merger was approved or definitively blocked, with no involvement from Illumina management, and vice versa. Illumina also pledged to fully fund GRAIL's day-to-day operations while precluding any synergy from the Merger.[183] It also precluded the possibility of any "life saving" Galleri acceleration.

138. Illumina made further monetary commitments to "preserve or procure the preservation of the economic viability, marketability and competitiveness of GRAIL, in accordance with good business practice," including "to make available, or procure to make available, sufficient resources for the development of GRAIL, on the basis and continuation of the existing business plans" and "take all reasonable

[182] ILMN-220_001085.

[183] ILMN-220_001111 ("In order to eliminate the possibility that the [Merger] . . . has any impact on competition in the EEA during the intervening period between Closing (as defined below) and the Decision Date (as defined below, Illumina hereby enters into the following Hold-Separate Commitments."); *see also* Press Release, *Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-Cancer Early-Detection Test*, Illumina, Inc. (Aug. 18, 2021) ("GRAIL will remain a separate and independent unit, pending ongoing regulatory and legal review."); *see also* ILMN-22_001112.

steps, … including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with GRAIL."[184]

139. The commitments obligated Illumina to fund GRAIL's ultra-expensive R&D and preserve its viability, even though GRAIL generated negligible revenue.

140. Under the Merger Agreement, Illumina was already obligated to pay GRAIL $35 million per month in "Continuation Payments."[185] But under the self-imposed Hold-Separate Commitments, Illumina was required to provide "sufficient resources for the development of GRAIL" based on GRAIL's costly "existing business plans." Additionally, Illumina pledged to implement "appropriate incentive schemes" enabling GRAIL's 24 "Key Personnel" executives to negotiate potentially millions in extra compensation "to remain with GRAIL."

141. Illumina was fully aware, through Merger diligence, that GRAIL's existing business plans would demand far more funding than the Continuation Payments. Ultimately, GRAIL's post-divestment disclosures revealed Illumina had injected a staggering *$3.09 billion in cash* into GRAIL from the Merger's close to divestment.

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[184] ILMN-22_001112-13.

[185] Illumina, Inc., Form 8-K (Sept. 21, 2020) ("If the Mergers are not consummated on or prior to December 20, 2020, the Company will make monthly cash payments to Grail of $35 million (the "Continuation Payments") until the earlier of the consummation of the Mergers or the termination of the Merger Agreement, subject to certain exceptions.").

142. Despite knowing the immense financial burden it had assumed, Illumina downplayed its obligation to investors, euphemistically disclosing it "will be required to take certain supportive measures to preserve GRAIL's viability, marketability and competitiveness, including with respect to the provision of resources to GRAIL and the retention and/or replacement of key personnel."[186]

143. Illumina's costly efforts to "respect[] the EU process," through the Hold-Separate Commitments failed to satisfy the EC. On September 20, 2021, the EC issued a Statement of Objections, warning of interim measures necessary "to restore and maintain effective competition" following Illumina's violations of the Standstill Obligations.[187] The EC criticized Illumina's Hold-Separate Commitments as insufficient, stating they failed to address "*a number of serious shortcomings identified in that proposal*."[188] The EC gave Illumina and GRAIL the opportunity to respond to the proposed interim measures, offering a chance to avoid formal adoption if satisfactory adjustments were made.[189]

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[186] Illumina, Inc., Form 8-K (Aug. 18, 2021), at 3.

[187] Press Release, *Mergers: The Commission adopts a Statement of Objections in view of adopting interim measures following Illumina's early acquisition of GRAIL*, European Commission (Sept. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4804.

[188] *Id.* (emphasis added).

[189] *See id.* ("GRAIL and Illumina now have the opportunity to respond to the Commission's Statement of Objections in writing and orally. After hearing the parties, the Commission may make the interim measures binding and Illumina and GRAIL would be legally obliged to comply with them.").

144. Illumina and GRAIL's response was grossly inadequate. On October 29, 2021, the EC took the unprecedented step of adopting legally binding interim measures.[190] It justified the measure as essential to prevent "potentially irreparable detrimental impact of the transaction on competition" and block "irreversible integration of the merging parties," while its investigation continued.[191]

145. Highlighting serious shortcomings in the Hold-Separate Commitments, the EC imposed stricter obligations and threatened severe penalties for non-compliance. The measures included periodic penalty payments and fines "up to 10% of [Illumina's] annual worldwide turnover under Articles 15 and 14 of the EU Merger Regulation…." [192]

146. The interim measures required:

- GRAIL shall be kept separate from Illumina and be run by (an) independent Hold Separate Manager(s), exclusively in the interest of GRAIL (and not of Illumina).
- Illumina and GRAIL are prohibited from sharing confidential business information, except where the disclosure is required to comply with the law or in line with the ordinary course of their supplier-customer relationship.
- Illumina has the obligation to finance additional funds necessary for the operation and development of GRAIL.

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[190] Press Release, *Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL*, European Commission (Oct. 29, 2021), https://ec.europa.eu/commission/presscorner/detail/it/ip_21_5661.

[191] *Id.*

[192] *Id.*

- The business interactions between the parties shall be undertaken at arm's length, in line with industry practice, hence without unduly favoring GRAIL to the detriment of its competitors.

- GRAIL shall actively work on alternative options to the transaction to prepare for the possible scenario in which the deal would have to be undone in case the Commission were to declare the transaction incompatible with the internal market.[193]

147. Unlike the Hold-Separate Commitments, where Illumina appointed its own monitoring trustee, the EC's interim measures mandated oversight by an EC-approved Trustee, with violations subject to crippling fines. While many of the EC's measures mirrored the Hold-Separate Commitments, their enforcement was significantly more stringent and fraught with risk, as Illumina now faced scrutiny from the very agency whose authority it had just flagrantly defied.

148. The EC's interim measures also introduced a pivotal new requirement: GRAIL had to "actively work on alternative options to the [Merger]." This directive, pointing to the EC's skepticism as to the Merger's legality, not only hinted at the likely outcome of its investigation but also imposed additional burdens on GRAIL's management, diverting further attention and resources from its operations.

M. Illumina Admits EC Fine Risk but Masks Massive Costs and Shields the Board from Fallout of Illegal Closing

149. On November 5, 2021, Illumina filed its first quarterly report since closing the Merger. While it acknowledged the risk of the EC "impos[ing] fines"

[193] *Id.*

for "noncompliance" with interim measures,[194] the Company concealed critical details about the illegal Merger closing, further highlighting the Board's bad faith.

150. Illumina notes that it is obligated to take "supportive measures to preserve GRAIL's viability, marketability and competitiveness, including with respect to the provision of resources to GRAIL…."[195] What goes unmentioned is this obligation would balloon to approximately $3 billion in cash payments. Illumina also stated that it would "continue to work with the [EC] on its review,"[196] but failed to mention that, on August 11, 2021, the EC put its review on hold due to "the parties' failure to provide essential information for the [EC]'s assessment…."[197]

151. Illumina also buried a critical "Form of Insurance Matters Agreement," as an exhibit, failing to reference it adequately in the Form 10-Q except as a "[m]anagement contract or corporate plan or arrangement."[198] This hidden document concealed the Board's decision to shield itself from liability with new extensive indemnification protections.

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[194] Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 5, 2021), at 4.

[195] *Id.* at 41.

[196] *Id*.

[197] Press Release, *Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction*, European Commission (Aug. 19, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

[198] Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 5, 2021), at 43.

152. The Insurance Matters Agreement provides sweeping indemnification to Illumina's Board and officers, shielding them from claims "arising out of or related to the Acquisition and/or any determinations or decisions in connection with regulatory approvals, rulings or other action or non- action sought in connection with the Acquisition."[199]

153. Section 220 documents reveal the true intent of the Insurance Matters Agreement:

- "Illumina has covered the cost of its Directors & Officers insurance.
- "Illumina will purchase additional coverage if necessary for Acquisition-related claims.
- "Illumina will pay for legal costs related to D&O insurance, including any litigation to enforce coverage rights.
- "Illumina will provide full cooperation in insurance-related litigation or claims."[200]

154. The Board's approval of this self-serving contract—crafted to maximize protection and insulate its illegal actions—coupled with its deliberate omission from the Company's disclosures, underscores its bad faith.

[199] Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 5, 2021), at Ex. 10.1.

[200] ILMN-110_001100, at -132.

N. The Board Rewards deSouza's Role in the Costly and Illegal Merger Closing with a Lucrative Compensation Package

155. On February 1, 2022, less than six months after approving the illegal Merger close—despite its financial toll on the Company—the Board considered a new, lucrative compensation package for deSouza. By this time, the Company had no assurance of victory in its ongoing battles with the FTC and EC, and its self-imposed Hold Separate Commitments were draining over $50 million per month while blocking any potential synergies from the Merger.

156. The meeting minutes show that "deSouza provided an update on the business, [and] certain operational matters," followed by a discussion of his "performance goals."[201] Remarkably, notwithstanding the Merger's fallout overshadowing all other Company challenges, the minutes fail to mention this crucial fact or deSouza's pivotal role in leading the illegal actions.

157. Nevertheless, the Board resolved to reward deSouza with a 2022 compensation package exceeding $27 million—*an extraordinary 87% increase from the previous year*.[202]

[201] ILMN-220_004321.

[202] ILMN-220_004323-24; ILMN-220_000609.

O. Illumina faces Regulatory Setbacks and Billions in Costs Flowing From the Illegal Merger Close

158. On July 13, 2022, the EU General Court upheld the EC's jurisdiction over the Merger.[203] While this decision would be overturned on appeal more than two years later, the initial loss allowed the EC's investigation and enforcement—including its costly binding interim measures—to proceed unchecked. Consequently, Illumina was burdened with substantial costs, liabilities, uncertainty, and distractions.

159. On September 1, 2021, the FTC's ALJ issued his Initial Decision, finding the FTC had failed to establish a *prima facie* antitrust violation.[204] Illumina seized on this provisional ruling to claim victory. A press release quoted Dadswell's misleading statement that it validated the Merger's purported life-saving-benefits—*despite the ALJ not addressing that issue*.[205]

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[203] *Illumina, Inc. v. Grail* LLC, Case T-227/21 (Judgment of the General Court (Third Chamber, Extended Composition) (July 13, 2022), https://curia.europa.eu/juris/document/document.jsf;jsessionid=1C615D460A9F86A44BD9ABEAF4A82B24?text=&docid=262846&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11493678.

[204] *Illumina, Inc. v. Grail, Inc.* (FTC Sept. 9, 2022) (Initial Decision), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

[205] Press Release, *Administrative Law Judge Rules in Favor of Illumina in FTC Challenge of GRAIL Deal*, Illumina, Inc. (Sept. 1, 2022), https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=695f87e8-5d42-4caa-9c9c-4539a2630068.

160. As the Board should have known, the victory was hollow. Illumina had ample reason to anticipate the ALJ's decision would have little bearing on the ultimate outcome. Under FTC rules, the ALJ's decision was merely a "recommended decision"[206] able to be "set aside" or reversed by the full FTC.[207]

161. FTC's Complaint Counsel filed an appeal the next day, September 2, 2021.[208]

162. The appeal would be decided by the same FTC commissioners that had voted unanimously to initiate the challenge, under the same Chairperson, Lina Kahn.[209]

163. The Commission would review the ALJ's findings under the least-deferential standard possible—*de novo.* The Commission was permitted to "exercise all the powers it could have exercised if it had made the initial decision,"[210]

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[206] 16 C.F.R. § 3.51.

[207] 16 C.F.R. § 3.54(a).

[208] Press Release, *Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail*, FTC (Sept. 12, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illuminas-proposed-acquisition-cancer-detection.

[209] Press Release, *FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail*, FTC (Mar. 30, 2022), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail.

[210] FTC Opinion at 22 (quoting 16 C.F.R. § 3.54(a)).

and would have "plenary authority to reverse ALJ decisions on factual as well as legal issues, *including factual findings based on the demeanor of a witness*."[211]

164. Meanwhile, on September 6, 2021, the EC issued its Phase II investigation decision, formally prohibiting the Merger under EU law ("EC Prohibition Decision").[212]

165. Evidence known to Illumina and the Board suggests close coordination between the FTC and EC throughout their investigations. Privileged communications disclosed in litigation revealed regular exchanges between the agencies, including discussions about the complainants and timing, predating the FTC's formal complaint in April 2021. The FTC even provided the EC with third-party contact details and engaged in numerous joint meetings.[213] Illumina later accused the FTC of "engineer[ing]" the EC investigation under the guise of an antitrust enforcement agreement between the EU and U.S.[214]

166. With Illumina's jurisdictional appeal pending in the EU Court of Justice, the agencies had a shared interest in ensuring GRAIL's

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[211] *Id.* (emphasis added).

[212] Press Release, *Mergers: Commission prohibits acquisition of GRAIL by Illumina*, European Commission (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

[213] *FTC v. Illumina, Inc.*, Case No. 3:21-cv-00800-CAB-BGS (S.D. Cal. May 26, 2021) (Opposition to FTC's Motion to Dismiss with Complaint), at 10-11 (D.I. 124).

[214] *Id.* at 11.

divestment. This incentivized ongoing collaboration to sustain pressure until one secured a decisive outcome.

167. Therefore, the FTC likely reviewed, if not directly influenced, the findings contained in the EC Prohibition Decision. Although based on EU law, the EC's reasoning aligned closely with the FTC's *de novo* review of the ALJ's Initial Decision, including findings the FTC would later adopt as part of its own antitrust analysis.

- "Illumina would have had the ability and the incentive to engage in foreclosure strategies against GRAIL's rivals."
- "The remedies offered by Illumina did not adequately address the Commission's competition concerns so that it could be concluded that competition would be preserved on a lasting basis. They did not fully remove Illumina's ability or incentives to foreclose GRAIL's rivals and would thus not have prevented the transaction's detrimental effect on competition."
- "In particular … [Illumina's] commitment[s] to conclude agreements with GRAIL's rivals under the conditions set out in a standard contract [*i.e.*, the "Open Offer"] … were unlikely to be effective in practice as they did not effectively address all the possible foreclosure strategies that Illumina could engage in."
- Therefore, the Merger "would have stifled innovation, and reduced choice in the emerging market for blood-based early cancer detection tests."[215]

[215] Press Release, *Mergers: Commission prohibits acquisition of GRAIL by Illumina*, European Commission (Sept. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

168. Illumina and the Board had ample reason to foresee the FTC would mirror the EC's conclusion that the Merger violated antitrust laws. This result was clear from the FTC and EC's coordination. Illumina knew of the agencies' close collaboration and their nearly identical frameworks for assessing the Merger. Illumina also knew that the FTC's decision not to seek an injunction was predicated on the reasonable—but ultimately incorrect—assumption that Illumina and the Board would not flagrantly violate the Standstill Obligations. Thus, even if Illumina succeeded in its jurisdictional challenge against the EC, the Board should have anticipated that the FTC would still unwind the Merger.

169. The Board also knew that appealing the FTC's eventual decision was unlikely to succeed. While the full FTC reviewed the ALJ's Initial Decision *de novo*, any appeal to a U.S. Court of Appeals would be constrained by the highly differential "substantial evidence" standard.[216] Under this standard, the Court of Appeals would uphold the FTC's findings "so long as they are supported by 'such relevant evidence as a reasonable mind might accept as adequate.'"[217] The Board should have recognized that prevailing on appeal was a long shot.

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[216] *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. Dec. 15, 2023) (Opinion) (quoting *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008)).

[217] *Id*. at 5-6 (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) and *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 354 (5th Cir. 2008)).

170. Therefore, by the time of the EC Prohibition Decision, the Board should have accepted that: (i) the FTC would likely order it to divest GRAIL, and (ii) prolonging legal challenges would only heap unnecessary costs, uncertainty, and distractions on Illumina. Unfortunately for the Company, the Board ignored this reality.

171. On September 15, 2021, just two weeks after the EC Prohibition Decision, the Board convened to discuss recent regulatory developments. Meeting materials warned of potential activist investor interest, specifically from Carl Icahn, described as "[v]ery willing to go to a fight."[218] While public messaging previewed a claim that Illumina would "continue to be pragmatic in our ongoing evaluation of the best path forward for GRAIL,"[219] there is no evidence the Board ever considered abandoning its combative strategy.[220] The mounting harm from the illegal Merger and its flawed defense would soon become undeniable.

172. On October 28, 2021, the EC renewed and expanded the interim measures Illumina was required to follow under threat of massive fines. This update compelled Illumina to prepare actively for a divestment order,[221] signaling the EC's

[218] ILMN-220_005381, at -394.

[219] *Id.* at -385.

[220] ILMN-220_004738.

[221] Press Release, *Mergers: Commission renews interim measures to ensure Illumina and GRAIL continue to be kept separate following the prohibition decision*, European

final decision was imminent. Given the FTC's active appeal of the ALJ's Initial Decision, the FTC was undoubtedly monitoring these developments.

173. The Board met again on November 1 and 2, 2021, to be briefed on the fallout from the Merger. Specifically, Illumina and GRAIL had missed revenue forecasts "due to continued weakness in Galleri Revenue,"[222] such that the Company's "Core Cash Forecast" was projected to reach a "low point in FY23."[223] That meant Illumina "require[d] a ~$1.0B financing issuance to maintain the necessary cash for ILMN Core operating purposes impacted by: GRAIL funding needs."[224]

P. Amidst Regulatory Setbacks and Predictable Investor Activism, the Board Moves to Entrench Itself

174. On December 4, 2022, the EC announced restorative measures following its prohibition of the Merger that supplanted the interim measures.[225] These included "swiftly and with sufficient certainty" separating Illumina and

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Commission (Oct. 27, 2022), https://ec.europa.eu/commission/presscorner/detail/en/mex_22_6467.

[222] ILMN-220_004762; *see also* ILMN-220_004769 ("due primarily to slower than expected ramp in Galleri sales").

[223] ILMN-220_004790.

[224] *Id.*

[225] Press Release, *Mergers: The Commission adopts a Statement of Objections outlining measures to unwind Illumina's blocked acquisition of GRAIL*, European Commission (Dec. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7403.

GRAIL to promptly restore "the pre-transaction situation."[226] This announcement compounded Illumina's pressures, especially with a final ruling on the EC's jurisdictional challenge still two years away. Moreover, with the FTC formulating its Opinion, the Board had strong reason to anticipate that the FTC would overturn the ALJ's Initial Decision and align with the EC's divestment mandate.

175. On January 4, 2023, Illumina executed a $750 million Credit Agreement with Bank of America, necessitated by its mounting cash shortfalls tied to funding GRAIL's operations.[227] By this point, the Board had been warned to expect investor activism due to its catastrophic GRAIL-related decisions.[228] Rather than address these concerns transparently, the Board used the Credit Agreement to entrench itself. Hidden deep within the 156-page agreement was a "Change in Control" provision, which triggered an event of default if a majority of the Board is removed or replaced within a two-year period without the incumbent Board's approval.[229] As the Board presumably knew, such "proxy puts" are notorious entrenchment mechanism designed to "chill" proxy challenges by raising the stakes of stockholder-led Board replacements.

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[226] *Id.*

[227] Illumina, Inc., Form 8-K (Jan. 4, 2023).

[228] *See* ILMN-220_005381, at -394.

[229] Illumina, Inc., Form 8-K (Jan. 4, 2023), Ex. 10.1 at 5, 77.

176. On February 17, 2023, in its Annual Report, Illumina was forced to disclose extensive harm to the Company caused directly by closing the Merger, including:

- "Adverse decisions by the EU and/or U.S. courts, the European Commission, the [FTC] and/or other governmental or regulatory authorities and/or other adverse consequences resulting from our decision to proceed with the completion of the acquisition, could result in significant financial penalties, operational restrictions, increased costs or loss of revenues, implicate our existing contractual arrangements or require us to divest all or a portion of the assets or equity interests of GRAIL on terms that are materially worse than the terms on which we acquired GRAIL, any or all of which, individually or in the aggregate, could have a material adverse effect on our business, financial condition and results of operation.

- "We are subject to various uncertainties and restrictions while the Acquisition remains subject to ongoing regulatory and legal review and proceedings related thereto, including the New Interim Measures Order, that could adversely affect our business, financial condition and results of operations.

- "We currently are prohibited from integrating GRAIL's business, and if such integration is ultimately permitted, we may not be able to integrate GRAIL's business successfully or manage the combined business effectively. Many of the anticipated synergies and other benefits of acquiring GRAIL *may not* be realized or *may not* be realized within the expected time frame.

- "The market price of our common stock may decline as a result of the Acquisition and the final outcomes of the regulatory and judicial reviews thereof."[230]

[230] Illumina, Inc., Annual Report (Form 10-K), at 20-23.

177. On March 13, 2023, Carl Icahn released the first of several open letters to Illumina stockholders. He began by stating, "$50 billion of value has been wiped from the company's market capitalization since August 2021 [*i.e.*, the Merger's illegal closing]. This value destruction is a direct result of a series of ill-advised (and frankly inexplicable) actions taken by the board of directors of our company in connection with the acquisition of GRAIL." Icahn criticized the Board's "reckless decision to close the GRAIL deal over the objections of European regulators," warning it exposed Illumina to "staggering … risks," including becoming "a forced seller in a deteriorating market of an asset the company acquired at an exorbitant price." He then nominated three directors, who he asserted would "bring a badly needed dose of sanity to Illumina's boardroom."[231]

178. On March 31, 2023, the FTC reversed the ALJ Initial Decision and ordered Illumina to divest Grail. This 98-page Opinion exhaustively analyzed the evidence, including extensive testimony from Illumina and GRAIL executives.

179. Reflecting earlier EC findings, the FTC concluded that the Merger "may substantially lessen competition in the relevant United States market for the research, development, and commercialization of MCED tests."[232] Using the same

[231] Carl C. Icahn, *Open letter to Shareholders of Illumina, Inc.* (Mar. 13, 2023), https://carlicahn.com/open-letter-to-shareholders-of-illumina-inc/

[232] FTC Opinion at 2.

"Ability and Incentive" framework as the EC, the FTC determined: "Illumina has the ability, as a dominant provider of NGS, to hamper the R&D and commercialization efforts of GRAIL's rivals' products," and "the Acquisition will increase Illumina's incentive to do so."[233] The FTC also found Illumina's attempt to contract around the harm to competition (the "Open Offer") inadequate:

> The Open Offer would not restore the pre-Acquisition level of competition. … [I]t does not eliminate Illumina's ability to favor GRAIL and harm GRAIL's rivals, and it does not fundamentally alter Illumina's incentives to do so. The Open Offer does not replicate the cooperation Illumina would have been incentivized to provide to third-party MCED test developers absent the Acquisition, and it would not replace the competitive intensity that existed before the Acquisition."[234]

180. After mirroring the EC's findings on competition, the FTC unsurprisingly adopted the same remedy: *divestment*. Unlike the EC proceedings, Illumina could not credibly contest the FTC's jurisdiction. Its only remaining option was an appeal to the United States Court of Appeals applying a highly deferential "substantial evidence" standard to the FTC's robust factual record.

181. On April 5, 2023, Illumina appealed the FTC divestment order to the United States Court of Appeals for the Fifth Circuit.

182. On May 25, 2023, Icahn-nominated Andrew Teno joined the Illumina Board. Five days later, on May 30, 2023, Teno was provided several critical

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[233] *Id.* at 47.

[234] *Id.* at 73.

documents concerning the Merger, including a July 15, 2021 PowerPoint and an August 1, 2021 memo from Paul Hastings, along with PowerPoint presentations on D&O insurance spanning 2021, 2022, and 2023 ("GRAIL Documents").

183. After reviewing these confidential GRAIL Documents, Teno became "extremely concerned" about three issues: (i) the insurance agreements secured by Defendants immediately before approving the closing of the GRAIL Merger, (ii) the legal advice Defendants relied on to proceed with the transaction, and (iii) the significant risk of personal liability for Defendants. Teno also highlighted a major red flag: the same directors and Illumina counsel who greenlit the Merger were now leading efforts to unwind it and managing the Company's dealings with the EC.

184. On December 15, 2023, the Fifth Circuit largely affirmed the FTC's decision, "finding that there was substantial evidence supporting the Commission's ruling that the deal was anticompetitive."

185. Just two days later, on December 17, 2023, Illumina announced that it would not appeal that ruling to the U.S. Supreme Court but instead would abide by the EC's and FTC's orders and divest Grail.

186. As Illumina's appeal challenging the EC's jurisdiction over the Merger was still pending at that time, Illumina was required to obtain EC approval of its divestment plan, which it obtained on April 11, 2024.

187. On June 24, 2024, Illumina completed its divestment of Grail. Unable to find a willing buyer, Illumina divested GRAIL through an IPO, while retaining its pre-Merger 14.5% stake in Grail.

Q. Harm to Illumina and Stockholders

188. The Defendants' breaches of fiduciary duty in connection with the Merger have inflicted billions of dollars in damages to Illumina and its stockholders, including but not limited to the following categories:

1. Cash Payments to GRAIL

189. The Defendants' actions in connection with the Merger, including unlawfully closing the Merger and stubbornly opposing regulators both pre- and post-closing based on a false premise of "saving lives", forced Illumina to make over $3.3 billion in payments to GRAIL from December 20, 2020, until its divestment was finalized in 2024. These payments yielded no recovery for Illumina. The Company was compelled to divest GRAIL at a *significant* loss, rendering these cash payments a direct economic harm.

a. *Continuation Payments*

190. Under Section 9.04 of the Merger Agreement, Illumina was required to make monthly Continuation Payments to GRAIL from December 20, 2020, until the

Merger was either closed or terminated. By the time the Merger closed, Illumina had made Continuation Payments totaling *$280 million*.[235]

b. *Hold Separate Payments*

191. In deciding to unlawfully close the Merger, the Board voluntarily subjected Illumina to the Hold Separate Commitments, which obligated the Company to make regular payments to GRAIL until regulatory approval or definitive blockage of the Merger ("Hold Separate Payments").

192. These Hold Separate Payments were later supplemented and/or replaced by funding requirements imposed through the EC's Interim Measures, which became legally binding on October 29, 2021.[236] These measures were subsequently renewed and adjusted on October 28, 2022.[237]

193. On October 11, 2023, after declaring the Merger prohibited, the EU replaced the Interim Measures with legally binding Transitional Measures.[238] These

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[235] Illumina, Inc., Annual Report (Form 10-K) (Feb. 18, 2022), at 68 ("We made Continuation Payments to GRAIL totaling $245 million and $35 million in 2021 and 2020, respectively, which were recorded as selling, general and administrative expense.").

[236] Press Release, *Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL*, European Commission (Oct. 28, 2021), https://ec.europa.eu/commission/presscorner/detail/it/ip_21_5661.

[237] Press Release, *Mergers: Commission renews interim measures to ensure Illumina and GRAIL continue to be kept separate following the prohibition decision*, European Commission (Oct. 27, 2022), https://ec.europa.eu/commission/presscorner/detail/en/mex_22_6467.

[238] Press Release, *Commission orders Illumina to unwind its completed acquisition of GRAIL*, European Commission (Oct. 11, 2023),

measures, which mirrored prior GRAIL-funding obligations, remained binding until GRAIL's divestment was finalized on June 24, 2024.

194. Collectively, the Hold Separate Commitments, EC Interim Measures, and EC Transitional Measures required Illumina to fund GRAIL from the Merger's close through its divestment—a span of nearly three years.

195. Under these obligations, Illumina paid GRAIL the following:

- $774 million in 2021;
- $609 million in 2022;
- $464 million in 2023;[239] and
- $312 million in Q1 2024.[240]

In total, Illumina was compelled to pay *at least $2.159 billion* through Hold Separate Payments and related obligations.

c. *Disposal Funding*

196. In compliance with the EC Divestment Decision, Illumina was obligated to secure EC approval for its plan to divest GRAIL.[241] The EC required

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872

[239] GRAIL, LLC, Current Report (Form 8-K) (June 3, 2024), Ex. 99.1 at F-8 ("Information Statement").

[240] Information Statement at F-43.

[241] Press Release, *Commission orders Illumina to unwind its completed acquisition of GRAIL*, European Commission (Oct. 11, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872 ("Illumina has to submit a concrete divestment plan for the disposal of GRAIL, which must be approved by the Commission.").

that GRAIL be "as viable and competitive after the divestment as it was before Illumina's acquisition,"[242] with a specific mandate that GRAIL have "sufficient funds to cover at least 2.5 years of operations based on its latest long-range plan" ("Viability Requirement").[243]

197. Illumina anticipated the Viability Requirement would cost nearly $1 billion.[244] This was exacerbated by the fact that GRAIL could adjust its "long-range plan[s]" as needed in preparation for divestment, knowing that Illumina would be responsible for funding whatever revised plans GRAIL submitted.

198. The EC approved Illumina's divestment plan on April 11, 2024.[245]

199. To fulfill the Viability Requirement, Illumina adhered to the provisions outlined in Section 3.1 of the Separation and Distribution Agreement with GRAIL. This section required Illumina to contribute a cash amount ("Illumina Contribution Amount") to GRAIL, calculated as the "Disposal Funding"

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[242] *Id.*

[243] Illumina, Inc., Form 10-Q (May 3, 2024), at 38 ("The EC Divestment Decision requires us to ensure that GRAIL has access to sufficient funds to cover at least 2.5 years of operations according to its latest long-range plan.").

[244] *Id.* ("We expect the amount of such funding will be approximately $1 billion, which includes cash from GRAIL's balance sheet.").

[245] Press Release, *Commission orders Illumina to unwind its completed acquisition of GRAIL*, European Commission (Oct. 11, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1964.

outlined in Schedule 3.1(a) of the Agreement.[246] Though the Agreement itself was publicly disclosed, the Disposal Funding Schedule remains confidential.

200. Illumina disclosed that the amount necessary to sustain GRAIL's operations for 2.5 years was $974 million. After accounting for GRAIL's existing cash, Illumina contributed $774 million to satisfy the Viability Requirement.[247]

201. While Illumina referred to this payment as the Disposal Funding (as defined in the Separation and Distribution Agreement), the 2.5-year Viability Requirement is not set forth in that agreement, while the Disposal Funding Schedule remains undisclosed. GRAIL revealed Illumina paid *$932.2 million* in Disposal Funding—*$158.2 million more* than Illumina reported.[248]

202. This $158.2 million discrepancy is due to GRAIL's legal and professional costs related to Illumina's FTC and EC challenges, which Illumina was

[246] Illumina, Inc., Current Report (Form 8-K) (June 21, 2024), Ex. 2.1 at 10 ("Separation and Distribution Agreement").

[247] Illumina, Inc., Current Report (Form 8-K/A) (June 27, 2024), Ex. 99.1 at Note C (describing "the one-time cash contribution, or Disposal Funding, provided by Illumina to GRAIL in accordance with the Separation and Distribution Agreement). The $774 million contribution amount was calculated such that the funds contributed by Illumina, together with GRAIL's cash and cash equivalents as of March 31, 2024, aggregate to the Disposal Funding amount of $974 million.").

[248] GRAIL, Inc., Quarterly Report (Form 10-Q) (Aug. 13, 2024), at 25 ("In connection with the Spin-Off, Illumina provided the Company with disposal funding in the amount of $932.3 million in accordance with the Separation and Distribution Agreement, subject to a clawback feature."); *id*. at 28 ("On June 21, 2024, in connection with the Spin-Off, we received a cash contribution of $932.3 million from Illumina.").

obligated to pay.[249] GRAIL disclosed these costs as $143.6 million,[250] leaving $14.6 million in other obligations to complete the Disposal Funding payment total.

203. While the entire Disposal Funding payment represents economic harm resulting from the Board's breaches of fiduciary duty, that harm continues beyond the payment itself. For instance, GRAIL anticipates additional reimbursable legal fees from the ongoing EC proceedings,[251] which Illumina has to reimburse.

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[249] Information Statement at 58 ("[T]he risks and costs related to the [FTC and EC] proceedings, including the costs associated with our intervention in the proceedings and all other legal costs, are fundamentally borne by Illumina and not by us."); *id*. at 102 (same).

[250] GRAIL, Inc., Quarterly Report (Form 10-Q) (Aug. 13, 2024), at 28 ("In connection with the Spin-Off, we incurred $21.9 million of legal and professional fees in the six month period ended June 30, 2024 related to the 2021 acquisition of GRAIL by Illumina, and corresponding antitrust litigation, including compliance with the hold separate arrangements imposed by the European Commission, and divestiture of GRAIL from Illumina through the Spin-Off.… In addition, from 2021 to 2023, we spent $121.7 million on legal and professional service fees related to the antitrust litigation and compliance with the hold separate order and transaction costs related to Illumina's acquisition of GRAIL and the Spin-Off.").

[251] Information Statement at 58 ("[F]ollowing the Spin-Off we may become or remain party to certain related administrative and litigation proceedings. For example, as certain provisions of the EC Divestment Decision will continue to apply to GRAIL after the Spin-Off, we expect to continue to have separate limited interactions with the European Commission. GRAIL is also expected to remain involved as a separate party from Illumina in a number of ongoing court proceedings, such as ongoing procedures regarding our separate appeal of the European Commission's assertion of jurisdiction…. We may also be a party or otherwise involved in new litigation proceedings regarding the acquisition.").

204. Although the Disposal funding is subject to a 15-month Restricted Period for potential clawback (*e.g.*, if GRAIL pays dividends or repurchases shares), GRAIL has disclosed that such clawback is "not probable."[252]

205. Given the scale of Illumina's Disposal Funding obligation, Illumina secured a $750 million loan on June 18, 2024, titled "Divestment Credit Facility," to fund cash into GRAIL's balance sheet in connection with the divestment. [253]

206. On September 9, 2024, Illumina repaid its Divestment Credit Facility debt at $761 million—*$11 million* above the principal,[254] further harming the Company. Additional harm resulted in an increased cost of capital associated with the Divestment Credit Facility.

2. Insurance Premiums and Related Harms

207. In connection with its decision to close the Merger in direct violation of the Standstill Obligations, the Board directed the Company to purchase additional D&O insurance explicitly designed to shield the Defendants from the consequences of their illegal actions. Just before close, the Board resolved to authorize the

[252] GRAIL, Inc., Quarterly Report (Form 10-Q) (Aug. 13, 2024), at 25 ("In connection with the Spin-Off, Illumina provided the Company with disposal funding in the amount of $932.3 million in accordance with the Separation and Distribution Agreement, subject to a clawback feature.… As of June 30, 2024, no contingency liability was recorded as the contingency loss is not probable.")

[253] Illumina, Inc., Form 8-K (June 17, 2024), at Item 1.01.

[254] Illumina, Inc., Form 8-K, at Item 1.02 (Sept. 9, 2024).

purchase of "D&O insurance with up to $300 million coverage," at an "annual premium of up to $100 million."[255]

208. At that time, Illumina's expiring D&O policy provided $100 million in side A/B/C coverage, supplemented by $50 million in side A-only coverage, for an annual premium of $3.76 million.[256] As the Board knew, Side A coverage directly protects directors and officers themselves, while Side B and C coverage protects the company.[257]

209. However, the Board's new D&O structure entirely reallocated coverage in favor of its own protection. The meeting materials proposed a "$150M Side A Only Program" paired with "Custom Side A Coverage (Limit TBD)."[258] In other words, the proposal eliminated Side B/C coverage, which benefits the Company. The Board was fully briefed on the impact of this restructuring; the approved recommendation explicitly noted that the new policy "[r]emoves $100M of corporate balance sheet protection."[259] The Company ultimately secured the full

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[255] ILMN-220_000977 at -978.

[256] ILMN-220_005647 at -652. Plaintiff obtained a fully unredacted version of these materials through its Section 220 action.

[257] *See* Axxima, *Sides A, B & C of a D&O Insurance Policy: What You Need to Know*, (side A covers "Financial losses experienced by D&Os," side B covers "Financial losses incurred by an organization indemnifying a D&O," and side C covers "Liabilities incurred by an organization sued alongside D&Os"), https://www.axxima.ca/blog/sides-a-b-c-of-a-do-insurance-policy-what-you-need-to-know/.

[258] ILMN-220_005647 at -652.

[259] *Id.*

$300 million in Board-approved coverage through an 18-month $150 million Side A-only policy, supplemented by a 30-month Custom Side A-only policy.[260]

210. These tailored policies came at a steep price: while the previous 12-month D&O policy cost *less than $4 million*, the *new policies cost $72.6 million*.

211. In January 2023, the Board reviewed the renewal of the non-custom side A-only policy, aiming to restore alignment with the pre-Merger premiums.[261] The Company successfully secured a 12-month renewal for $4.1 million—in line with historical premiums. However, the renewed policy failed to restore the Company's Side B/C coverage, once again prioritizing expanded protection for the directors and officers over coverage for the Company.[262]

212. The Board's decision to restructure the D&O policies resulted in dramatically increased premiums. Before the Merger, the "Expiring Program Structure" could have been renewed for 12 months at a total cost of $4.32 million, including coverage for GRAIL.[263] Instead, the Company spent

[260] ILMN-220_004982 at -5007 (the custom policy is listed as a "36-month term" but the listed term period indicates a 30-month term, which would place it as expiring concurrently with the proposed Side A only renewal).

[261] *Id.*

[262] *See* ILMN-220_004968 at -975 (January 31, 2023 minutes, Board resolving "that the Corporation purchase D&O insurance with $150 million Side A coverage, to be provided as reflected in the Meeting Materials, at a 13-month premium of up to $4.4 million with no retention").

[263] ILMN-220_005647 at -652.

$72.6 million for $300 million in Side A-only coverage.[264] When combined with the 2023 renewal, the total cost for 2.5 years of coverage reached $76.7 million—*$65.9 million more than the estimated $10.8 million cost* of maintaining the pre-Merger program for the same period. This conservative estimate excludes potential further costs through GRAIL's divestment.

213. The elimination of Side B/C coverage caused further harm to the Company. Claims that would have been covered under Side B/C coverage during this period required the Company to self-insure, increasing financial exposure.

3. Legal and Regulatory Expenses

214. As detailed above, the Board's breaches in fiduciary duties in connection with the Merger directly led to the Company becoming embroiled in protracted legal battles with the FTC and EC. These actions caused the Company to incur substantial legal and professional fees over several years.

215. While Illumina has not disclosed the total legal and regulatory expenses incurred, it is reasonably inferred that these amount to hundreds of millions of dollars. For instance, Illumina disclosed *$156 million* in Merger-related costs incurred prior to the Merger's closing.[265] Separately, GRAIL disclosed

[264] $4.32 million * 2.5 years = $10.8 million.

[265] Illumina, Inc., Annual Report (Form 10-K) (Feb. 18, 2022), at 68 ("The transaction costs associated with the acquisition of GRAIL, excluding any Continuation Payments paid to GRAIL prior to the close of the acquisition, consisted primarily of legal, regulatory and financial advisory fees of approximately $156 million.").

$143.6 million in costs for the post-closing period through divestment.[266] Considering Illumina's central role in leading the response to the FTC and EC challenges, its legal and professional expenses during this period *were likely far in excess of GRAIL's*.

4. Divestment Expenses

216. Illumina incurred *$52 million* in expenses "primarily related to financial advisory, legal, regulatory and other professional services fees" directly associated with "planning" and "executing" GRAIL's divestment.[267] These costs were a direct consequence of the Board's decision to violate positive law and would not have been incurred absent the Board's breaches of fiduciary duty.

5. EC Fine and Related Expenses

217. For the Board's violation of the Standstill Obligations, the EC imposed a record fine of €432 million on Illumina. Although that fine was ultimately set aside on jurisdictional grounds, its imposition compelled the Company to prepare

[266] GRAIL, Inc., Quarterly Report (Form 10-Q) (Aug. 13, 2024), at 28 ("[I]n connection with the Spin-Off, we incurred $21.9 million of legal and professional fees in the six month period ended June 30, 2024 related to the 2021 acquisition of GRAIL by Illumina, and corresponding antitrust litigation, including compliance with the hold separate arrangements imposed by the European Commission, and divestiture of GRAIL from Illumina through the Spin-Off. … In addition, from 2021 to 2023, we spent $121.7 million on legal and professional service fees related to the antitrust litigation and compliance with the hold separate order and transaction costs related to Illumina's acquisition of GRAIL and the Spin-Off.").

[267] Illumina, Inc., Quarterly Report (Form 10-Q) (Aug. 7, 2024), at 13.

for the contingency of paying the fine, including accrued interest. Accordingly, Illumina secured a $750 million credit facility ("EC Fine Credit Facility") to ensure sufficient liquidity in the event its jurisdictional challenge was unsuccessful.[268]

218. The EC Fine Credit Facility imposed significant costs on the Company, including all cash payments made under the credit facility, the expenses associated with guarantees issued by Illumina in October 2023, [269] and the broader financial harm stemming from an increased cost of capital. These damages were a direct result of the Board's decision to illegally close the Merger.

6. CVR Obligations

219. Upon closing the Merger, certain GRAIL stockholders elected to receive contingent value rights ("CVRs")[270] under a Contingent Value Rights Agreement ("CVR Agreement").[271] As valued through a Monte Carlo

[268] Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 13, 2023), at 36 ("On January 4, 2023, we obtained a new Credit Facility, which provides us with a $750 million senior unsecured five year revolving credit facility, including a $40 million sublimit for swingline borrowings and a $50 million sublimit for letters of credit. … As of October 1, 2023, there were no borrowings outstanding under the Credit Facility; however, we may draw upon the facility in the future to manage cash flow or for other corporate purposes, including in connection with the payment of the €432 million European Commission fine.").

[269] *Id.* ("We provided guarantees in October 2023 to satisfy the obligation in lieu of cash payment while we appeal the European Commission's jurisdictional decision and fine decision.").

[270] *Id*.

[271] Illumina, Inc., Current Report (Form 8-K) (Aug. 18, 2021), at Ex. 4.1.

simulation in connection with the Merger,[272] these CVRs accounted for $762 million, or 7.8%, of the $9.751 billion Merger consideration.[273]

220. The CVRs entitle holders to future cash payments proportional to specific GRAIL-related revenues over a 12-year period beginning at the Merger's close. The CVR include a 2.5% payment on the first $1 billion of annual revenue and a 9% payment on annual revenue exceeding $1 billion each year.[274]

221. Illumina's obligations under the CVR Agreement stem directly from the Board's decision to close the Merger. The CVRs require Illumina to pay a portion of GRAIL's revenues as its owner. However, by closing the Merger in violation of the Standstill Obligations, Illumina was compelled to keep GRAIL entirely separate, including by prohibiting the sharing confidential information under the Hold Separate Commitments and the EC's Interim Measures. Consequently, Illumina, while owning GRAIL (pre-divestment), was obligated to make CVR payments based on revenues it could not forecast.

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[272] A Monte Carlo simulation is a model used to predict the probability of a variety of outcomes when the potential for random variables is present. Will Kenton, *Monte Carlo Simulation: What It Is, How It Works, History, 4 Key Steps*, Investopedia (June 27, 2024), https://www.investopedia.com/terms/m/montecarlosimulation.asp.

[273] Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 5, 2021), at 18.

[274] *Id.*

222. Remarkably, following Grail's divestment, Illumina remains the obligor for the CVRs.[275] The divestiture has placed Illumina in a precarious position with respect to the CVRs, as acknowledged in recent disclosures: "Since we no longer own GRAIL, it may be more difficult for us to estimate these future liabilities. We also may have difficulty complying with our obligations in respect of the CVRs if we are unable to obtain timely and accurate information from GRAIL."[276]

223. While Illumina's CVR Payments for 2023 and the first half of 2024 were under $1 million,[277] the 12-year CVR term extends these obligations through August 2033. Going forward, with access limited to publicly available information about GRAIL's operations, Illumina is effectively unable to predict, value, or adequately prepare for these contingent liabilities.[278]

224. In a scenario where Galleri receives FDA approval and wide-spread adoption during the CVR period, Illumina could face severe financial burdens

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[275] Illumina, Inc., Quarterly Report (Form 10-Q) (Aug. 7, 2024), at 43 ("Following the Spin-Off, we remain the obligor on the CVRs and, accordingly, continue to be required to record in our financial statements the estimated future liabilities associated with the CVRs.").

[276] *Id*.

[277] *Id.* at 17.

[278] *See* Illumina, Quarterly Report (Form 10-Q), at 17 (Aug. 7, 2024) ("Estimates and assumptions used in the Monte Carlo simulation include forecasted revenues for GRAIL, a revenue risk premium, a revenue volatility estimate, an operational leverage ratio and a counterparty credit spread. These unobservable inputs represent a Level 3 measurement because they are supported by little or no market activity and reflect our own assumptions in measuring fair value.").

untethered from its own revenue. Projections prepared ahead of GRAIL's divestiture anticipate[279] CVR payments increasing exponentially: [redacted] in 2025, [redacted] in 2026, and [redacted] in 2027, peaking at [redacted] in 2032, for total payments exceeding [redacted]. Even if Galleri's approval is delayed by two years, Illumina would still face [redacted] and [redacted] in payments for 2025 and 2026, respectively, increasing to [redacted] in 2032, with cumulative payments surpassing [redacted].

225. These substantial contingent liabilities reflect a direct and ongoing harm to Illumina, stemming from the Board's decisions to unlawfully close the Merger and subsequently fail to transfer the CVR obligations during the divesture.

7. Impairment Charges

226. Between the Merger's close and the divestment of GRAIL, Illumina recorded billions of dollars in impairment charges to its GRAIL reporting unit. These charges reflected a significant reduction in the value Illumina had attributed to GRAIL at the time of the Merger.

227. While asset values naturally fluctuate, the billions in impairment recognized by Illumina were not the result of routine market dynamics. Instead, they stemmed directly from the harm caused by the Board's actions surrounding the Merger. This included unlawfully closing the Merger and engaging in protracted

[279] ILMN-220_005191 at -257.

and detrimental regulatory battles. Compounding the harm, the Board subjected Illumina and GRAIL to restrictive conditions, preventing either company from realizing any potential synergies and further damaging GRAIL's value, all to the harm of the Company.

228. These impairment charges were solely attributable to GRAIL. Absent the Board's decision to close the Merger in violation of positive law, Illumina would not have incurred them. Collectively, they amount to 68% of the Merger's total purchase price, underscoring the substantial financial harm inflicted on Illumina by the Board's actions.

a. *Goodwill Impairment*

229. As part of the Merger, Illumina allocated $6.091 billion of adjusted fair value to GRAIL's goodwill, representing 62% of $9.745 billion total purchase price.[280] However, between the Merger's close and GRAIL's divestment, *Illumina wrote off the entire $6.091 billion in goodwill*.

230. In Q3 2022, Illumina recorded *$3.914 billion* goodwill impairment for GRAIL[281]—nearly $4 billion written off just a year after the unlawful Merger's

[280] Illumina, Inc., Annual Report (Form 10-K) (Feb. 16, 2024), at 69-70. The $9.745 billion total purchase price included $1.149 billion for Illumina's previously held investment in GRAIL. *Id*. at 69.

[281] *Id.* at 72. GRAIL was reported as a separate reporting unit within Illumina. No goodwill impairment was recorded for Core Illumina at that time. *Id.*

close. Illumina directly linked the impairment to its defeats with the EC.[282] Illumina partially attributed the impairment to "the negative impact of current capital market conditions and a higher discount rate selected for the fair value calculation of the GRAIL reporting unit."[283]

231. In Q2 2023, Illumina recorded an additional *$712 million* goodwill impairment for GRAIL, citing a "sustained decrease in the Company's stock price."[284]

232. By Q2 2024, Illumina wrote off the remaining *$1.466 billion* of GRAIL's goodwill,[285] reducing GRAIL's fair value estimate to just $580 million—less than 6% of the $9.745 billion fair value ascribed to GRAIL in the Merger.[286]

b. *IPR&D Impairment*

233. As part of the Merger, Illumina assigned a fair value of $670 million to GRAIL's in-process research and development ("IPR&D").[287]

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[282] *Id.* ("On July 13, 2022, the EU General Court ruled that the European Commission has jurisdiction under the EU Merger Regulation to review our acquisition of GRAIL. Additionally, on September 6, 2022, the European Commission issued its decision prohibiting the acquisition.… These decisions, along with a continued and significant decrease in the Company's stock price and market capitalization, required us to perform an interim goodwill and intangible asset impairment test in Q3 2022.").

[283] *Id.*

[284] *Id.* at 71.

[285] Illumina, Inc., Quarterly Report (Form 10-Q) (Aug. 7, 2024), at 24.

[286] Illumina, Inc., Annual Report (Form 10-K) (Feb. 18, 2022), at 66 (identifying the "total purchase price" as $9,745,000,000).

[287] Illumina, Inc., Annual Report (Form 10-K) (Feb. 18, 2022), at 45.

234. In Q3 2023, Illumina recorded a $109 million impairment charge for GRAIL's IPR&D, citing "a decrease in projected cash flows and a higher discount rate selected for the fair value calculation of the GRAIL IPR&D asset."[288] Notably, no IPR&D impairment was recorded for core Illumina.

235. In May 2024, shortly before GRAIL's divestment, Illumina recorded an additional $420 million impairment for GRAIL's IPR&D asset.[289] Once again, no IPR&D impairment was recorded for core Illumina.

236. Together, these two IPR&D impairment charges account for 79% of the $670 million fair value initially attributed to GRAIL's IPR&D.

8. Lost Asset Value

237. Further evidence of the harm to Illumina caused by the Board's breaches of fiduciary duty in connection the Merger is the stark disparity between the price Illumina paid to acquire GRAIL versus the price realized upon divestment.

238. The total purchase price of the Merger was $9.745 billion.[290] Following GRAIL's divestment, Illumina initially recorded the value of its retained 14.5% stake in GRAIL at $397 million, implying a total valuation of $2.74 billion for

[288] Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 13, 2023), at 24.

[289] Illumina, Inc., Quarterly Report (Form 10-Q) (Aug. 7, 2024), at 24.

[290] Illumina, Inc., Annual Report (Form 10-K) (Feb. 16, 2024), at 69-70. The $9.745 billion total purchase price included $1.149 billion for Illumina's previously held investment in Grail. *Id*. at 69.

GRAIL.[291] This represents a *$7 billion*, or 72%, decline in value based on Illumina's own valuations at the time of the Merger and divestment.

239. More recent disclosures reveal that even the initial post-divestment valuation was inflated. As of September 29, 2024, Illumina reduced the recorded value of its GRAIL stake by $332 million,[292] implying a total valuation for GRAIL of just $448.3 million. In other words, just a few months after the forced divesture, Illumina's valuation of GRAIL had plummeted 95.4% from the $9.745 billion purchase price in 2021.

9. Share Price Destruction

240. The Board's breaches of fiduciary duty in connection with the Merger are strikingly reflected in the sharp decline of Illumina's stock price.

[291] *See* Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 6, 2024), at 15 ("The increase in our marketable equity securities relates to the investment we retained in GRAIL subsequent to the Spin-Off, which was initially recorded as $397 million, representing 14.5% of GRAIL's net assets disposed of at Spin-Off.").

[292] *Id*. ("We recorded an unrealized loss of $332 million in YTD 2024, subsequent to the Spin-Off, based on the fair value of our investment in GRAIL as of September 29, 2024.")

241. The Merger and its aftermath were closely scrutinized by the market and analysts,[293] with one labelling it "the worst in the history of diagnostics."[294] Unsurprisingly, the market reacted negatively.

242. On August 17, 2021, the day before the Merger closed was announced, Illumina's stock closed at $508.65 per share, just off its all-time high closing price ($510.54) set the preceding day. The Board's shocking decision ushered in a rapid decline. By June 24, 2024, the day of the divestment was finalized, Illumina's stock opened at $106.42—a staggering 80% decline in value between the Merger's close and GRAIL divestment. Illumina has never recovered from these losses. Its current

[293] *E.g.*, Zacks Report, Illumina, Inc. (Mar. 15, 2023), at 3 ("Regulatory Complications Surrounding GRAIL Acquisition Persist: … [T]he [EC]'s ongoing regulatory investigation into the acquisition has required both Illumina and GRAIL to be held and operated as distinct and separate entities for an interim period. Per the third-quarter 2022 earnings call, Illumina and GRAIL are prohibited from sharing confidential business information during this time unless legally required. Further, the company is dedicated to working through the continuing FTC … administrative process and will follow any decision the U.S. courts reach. Other than the uncertainty surrounding the Grail integration, these regulatory complications are raising the legal expenses for Illumina, thereby building pressure on the bottom line. In the third quarter, Illumina incurred a huge goodwill impairment charge related to ... GRAIL leading to immense bottom-line pressure."); Zacks Report, Illumina, Inc. (Mar. 12, 2024), at 5 ("Throughout the course of the two-year long battle [with the EC and FTC], Illumina incurred significant financial penalties, operational restrictions and increased costs as a result of the adverse decisions from governmental or regulatory authorities. We worry if the potential imposition of conditions could also lead to more loss of revenues for the company, including unfavorable outcomes on its business, financial condition and results of operations.").

[294] Vince Condarcuri, *Illumina (NASDAQ:ILMN) to Face Significant Loss from Grail Spin-Off*, TipRanks (June 18, 2024), https://www.tipranks.com/news/illumina-nasdaqilmn-to-face-significant-loss-from-grail-spin-off.

trailing 52-week average is just $126.13, representing the destruction of over *$80 billion* in market capitalization from Defendants' fiduciary breaches.

243. The 80% loss in value stems directly from the Defendants' misconduct. While Core Illumina delivered reliable financial performance during this time,[295] the Board's fiduciary breaches inflicted billions of dollars in damages on Illumina and GRAIL, causing the collapse in stockholder value.

DEMAND ON THE BOARD IS FUTILE

244. Plaintiff has not made a pre-suit demand on the Board to assert the claims in this Complaint because such a demand would be futile and is therefore excused as a matter of law.

245. As of the filing of this suit, Illumina's Board consists of eleven directors: Director Defendants Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel, along with non-defendants Stephen P. MacMillan, Jacob Thaysen, Anna Richo, and Scott B. Ullem ("Demand Board"). There is no disinterested and independent majority—viz., at least six directors—capable of impartially considering a demand regarding any of the claims in the Complaint.

[295] ILMN-220_005191 at -238 (board materials quoting investor sentiment: "High cash-generative [genomics leader] turned to cutting-edge unprofitable business that needs investment…we come back to why we should be thinking long-term this transaction is so very important to ILMN"); *id*. at -245 (executive summary to Board: "Divesting GRAIL also has the potential to unlock value, given the significant potential stand-alone value of the Core ILMN business").

A. Demand Is Futile for Count I Concerning Breaches of Fiduciary Duty Claims Against the Director Defendants

246. Count I alleges that the Director Defendants breached their fiduciary duties to Illumina and its stockholders by closing the Merger in knowing violation of the Standstill Obligations, despite knowing the FTC only withdrew its federal court action to stay the closing because the Standstill Obligations was in place.

247. No majority of the Demand Board can impartially consider a demand to bring a fiduciary duty claim related to the Merger. Seven of its eleven members face a substantial likelihood of liability for their role in closing the Merger. They cannot be expected to impartially investigate or bring claims against themselves.

248. Directors Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel face significant liability due to their decision to close the Merger in violation of positive law, a breach of the duty of loyalty.

249. Under Article III of Illumina's Amended and Restated Certificate of Incorporation, the Company is required "to engage in lawful act[s]" and Delaware law prohibits fiduciaries from operating a corporation illegally, even for profit.

250. Delaware law allows stockholders to bring derivative claims against fiduciaries who knowingly cause the corporation to take illegal actions that result in harm. A knowing violation of law cannot be exculpated pursuant to

8 *Del. C.* § 102(b)(7). A breach of loyalty claim against directors for such conduct exposes those directors to substantial liability, rendering demand futile.

251. As evidence of its bad faith, the Board approved closing the Merger in disregard of explicit warnings from legal counsel about regulatory risks and in knowing violation of the EU Standstill Obligations, while approving $300 million in D&O insurance for its own personal benefit. The Board then compounded its misconduct by justifying its illegal actions under a pretext of "moral obligation," asserting that accelerating GRAIL's cancer detection technology would "save lives."

252. Seven Director Defendants—Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel—remain on the Demand Board and thus are unable to disinterestedly assess a demand to sue themselves or other directors/officers.

253. The allegations in Count I mirror the claims against each current Director Defendant. It is against the interest of the Director Defendants to pursue litigation against themselves or other individuals involved in the same conduct.

254. Additionally, non-defendant Thaysen, Illumina's current CEO since September 25, 2023, has a direct financial interest in the outcome, including a $1 million base salary, bonuses, and equity grants,[296] amounts material to him. As an inside director, Thaysen cannot impartially consider a demand to sue directors

[296] Illumina, Inc., Current Report (Form 8-K) (Sept. 5, 2023), at Exhibit 10.1.

controlling his compensation, including Defendants Epstein, Gottlieb, and Siegel, who serve on the Compensation Committee.[297]

255. Therefore, demand is excused as futile for Count I.

B. Demand Is Futile for Count II Concerning Breaches of Fiduciary Duty Claims Against the Officer Defendants

256. Count II alleges breaches of fiduciary duty by the Officer Defendants for knowingly advocating that Illumina violate positive law by closing the Merger in breach of the Standstill Obligations.

257. The facts and legal arguments underlying Count I also support Count II. Pursuing Count II would expose the Director Defendants—Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel—to increased personal liability on Count I. As a result, they cannot impartially consider Count II, rendering demand futile.

258. Demand is equally futile for Thaysen, a Demand Board member and non-defendant, as he lacks the impartiality to assess a demand for Count I.

[297] Illumina, Inc., 2024 Proxy Statement (Apr. 4, 2024), at 9-10, 15.

CLAIMS FOR RELIEF

COUNT I

BREACH OF FIDUCIARY DUTY AGAINST THE DIRECTOR DEFENDANTS

259. Plaintiff incorporates and realleges all prior allegations as if fully set forth herein.

260. Each Director Defendants owed fiduciary duties to Illumina and its stockholders, including the highest obligations of good faith, fair dealing, loyalty, and due care in managing the Company's affairs.

261. The Director Defendants knowingly breached their fiduciary duties by causing Illumina to violate positive law, voting to close the Merger in breach of the EC's Standstill Obligations despite knowing the FTC withdrew its federal action due to the standstill, approving $300 million in D&O insurance for their own personal benefit while justifying their illegal actions under a pretext of "moral obligation," asserting that accelerating GRAIL's cancer detection technology would "save lives," and persisting in futile battles with the FTC and EC.

262. The Director Defendants' actions were not made in good faith or under prudent business judgment to protect the Company's interests.

263. The Director Defendants are not entitled to exculpation from monetary liability under 8 *Del. C.* §102(b)(7) or Illumina's Charter because their misconduct

involved knowing violations of law and breaches of the duties of loyalty and good faith.

264. As a direct result of the Director Defendants' breaches, Illumina has suffered significant damages.

265. The Director Defendants are liable to Illumina for their misconduct.

266. Plaintiff, on behalf of Illumina, has no adequate remedy at law.

COUNT II
BREACH OF FIDUCIARY DUTY
AGAINST THE OFFICER DEFENDANTS

267. Plaintiff incorporates and realleges all prior allegations as if fully set forth herein.

268. Each Officer Defendant owed fiduciary duties to Illumina and its stockholders, including the highest obligations of good faith, fair dealing, loyalty, and due care in managing the Company's affairs.

269. The Officer Defendants knowingly breached their fiduciary duties by advocating for and causing the Illumina Board to violate positive law, to close the Merger in breach of the Standstill Obligations despite knowing the FTC withdrew its federal action due to that Standstill Obligations, for $300 million in D&O insurance for their own personal benefit while justifying their illegal actions under a pretext of "moral obligation," asserting that accelerating GRAIL's cancer detection technology would "save lives," and persisting in futile battles with the FTC and EC.

270. The Officer Defendants' actions were not made in a good faith or in exercise of prudent business judgment to protect the Company's interests.

271. The Officer Defendants are not entitled to exculpation from monetary liability pursuant to 8 *Del. C.* § 102(b)(7) or Illumina's Charter because their misconduct involved knowing violations of law and breaches of the duties of loyalty and good faith.

272. As a direct result of the Officer Defendants' breaches, Illumina suffered significant damages.

273. The Officer Defendants are liable to Illumina for their misconduct.

274. Plaintiff, on behalf of Illumina, has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of Illumina, requests judgment as follows:

A. Finding the Director Defendants liable for breaching their fiduciary duties owed to the Company and stockholders;

B. Finding the Officer Defendants liable for breaching their fiduciary duties owed to the Company and stockholders;

C. Finding that demand on the Demand Board is excused as futile;

D. Adopting corporate governance reforms to ensure compliance with legal and ethical standards;

E. Awarding Illumina the number of damages sustained as a result of the Director Defendants and Officer Defendants' breaches of fiduciary duties; and

F. Awarding such other and further relief as this Court may deem just and proper.

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