EFiled: Aug 18 2025 11:22AM EDT
Transaction ID 76880699
Case No. 2024-1337-PAF

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, and SUSAN SIEGEL, Defendants, -and- ILLUMINA, INC., Nominal Defendant.	C.A. No. 2024-1337-PAF PUBLIC VERSION FILED: August 18, 2025

VERIFIED AMENDED STOCKHOLDER DERIVATIVE COMPLAINT

Plaintiff The Pavers and Road Builders Benefit Funds ("Plaintiff" or "Pavers"), by its attorneys, submits this Verified Amended 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").[1]

NATURE OF THE ACTION

1. This Complaint arises from a flagrant breach of fiduciary duty and positive law: the Illumina Board's decision to close an $8 billion re-acquisition of GRAIL that the Board knew violated both binding standstill obligations ("Standstill Obligations") under Article 7(1) of the European Union Merger Regulation ("EU Merger Regulation" or "EUMR") and U.S. antitrust law, including Section 7 of the Clayton Act.

2. Illumina manufactures and sells next-generation sequencing ("NGS") platforms. NGS is a method of DNA sequencing used in a variety of medical applications, including all multi-cancer early detection ("MCED") tests developed

[1] Additional Illumina stockholders City of Roseville General Employees Retirement System, Cleveland Bakers and Teamsters Pension Fund, and The City of Omaha Police and Firefighters Retirement System (the"Additional Stockholder Plaintiffs") have each filed complaints challenging the same transactions and occurrences as described herein, likewise seeking relief on behalf of Illumina. Pavers and the Additional Stockholder Plaintiffs have reached an agreement regarding the consolidation of their derivative actions, as well as a leadership structure for a consolidated action. The agreement regarding consolidation and leadership has been reduced to a proposed stipulated order (to which Defendants have agreed), which awaits entry by the Court following the resolution of another related Illumina stockholder action that will not be consolidated into this derivative action. As the proposed stipulated order has not been entered by the Court as of the date of this filing, this Complaint is being filed solely on behalf of Pavers, with the expectation that it will serve as the operative complaint for the consolidated derivative action.

and used in the U.S. Significantly, all MCED tests rely on Illumina's NGS platforms to generate their results.

3. In September 2015, Illumina founded a wholly-owned subsidiary, GRAIL, so-named because its goal was to reach the "Holy Grail" of cancer research—the creation of an MCED test that would purportedly identify the presence of fifty types of cancer from a single blood sample. Illumina maintained a controlling stake in GRAIL until February 2017, when Illumina spun off GRAIL to raise enough capital to move GRAIL'S MCED test from concept to clinical trials and to address antitrust concerns with Illumina's ownership of GRAIL. In connection with the spinoff, Illumina reduced its equity stake in GRAIL to 12%.

4. By September 2020, GRAIL had raised $1.9 billion through a combination of venture capital and strategic partners and was ready to file its initial public offering ("IPO") to raise additional funds. But instead of allowing GRAIL to complete a public offering, on September 20, 2020, Illumina announced that it had entered into an agreement to reacquire GRAIL for $8 billion ("GRAIL Merger" or "Merger"). In deciding to initiate the Merger, the Illumina Board planned to pivot from manufacturing and selling NGS platforms to becoming an oncology company, even though that change in focus would still require use of Illumina's NGS platform—like all other MCED tests—for its ultimate success.

5. Because Illumina had a monopoly over the MCED market as the only Company with the NGS sequencing to develop MCED tests, the U.S. Federal Trade Commission ("FTC") immediately began investigating the Merger and asserting that it violated Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

6. In addition, Illumina's customers both within and without the MCED-testing industry expressed concern about whether they would be able to continue to purchase Illumina's NGS products post-Merger on the same terms and conditions as pre-Merger, given that Illumina would be incentivized to give GRAIL preferential treatment. Recognizing that closing the Merger would violate Section 7 of the Clayton Act, on March 30, 2021, Illumina offered to make available to all for-profit U.S. oncology customers an irrevocable standardized supply contract (the "Open Offer") that "require[d] Illumina to provide its NGS platforms at the same price and with the same access to services and products that is provided to GRAIL," among other terms.[2] The FTC rejected the Open Offer, finding it insufficient to address the antitrust concerns the Merger posed.

[2] *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1045 (5th Cir. 2023).

7. In Europe, the European Commission ("EC") also moved to block the Merger, asserting that it had jurisdiction to review the Merger and imposing the Standstill Obligations that expressly barred Illumina from consummating the Merger unless it received clearance from the EC. EC Standstill Obligations serve as critical safeguards to maintain market competition during regulatory review.

8. After the EC began investigating the Merger and imposed the Standstill Obligations, the FTC dropped its request for a preliminary injunction preserving the status quo and blocking the closing of the Merger specifically because it reasonably assumed Illumina would comply with the Standstill Obligations.

9. However, despite receiving clear warnings regarding the consequences of breaching the Standstill Obligations, Illumina's officers and directors unlawfully closed the Merger on August 18, 2021 knowing they were subject to the Standstill Obligations and Section 7 of the Clayton Act, violating both EU and U.S. antitrust laws.

10. Knowing they faced heightened liability risks from closing the Merger without regulatory clearance, the Board prioritized shielding itself over protecting the Company or its stockholders.

11. Days before the closing of the Merger, legal advisors from Covington & Burling LLP ("Covington") emphasized the need to protect directors and officers from claims related to the anticipated fallout of their breaches of

fiduciary duty. The Board responded by revamping the Company's Directors and Officers ("D&O") insurance coverage, doubling from $150 million to $300 million 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, this new coverage—obtained when the Board was contemplating breaking the law by closing the Merger—cost the Company tens of millions in increased premiums.

12. Armed with these self-serving protective measures, Illumina's directors breached their fiduciary duties to the Company and its stockholders. The Board approved closing the Merger in disregard of explicit warnings from legal counsel and in knowing violation of both the EC Standstill Obligations and Section 7 of the Clayton Act. The directors compounded their misconduct by justifying their illegal actions under a pretext of "moral obligation," falsely asserting that Illumina's ownership of GRAIL would accelerate its cancer detection technology to "save lives." Defendants' rhetoric lacked any factual basis as the Fifth Circuit would later hold. Instead, those false statements masked a bad faith decision to prioritize personal and speculative interests over sound corporate governance and complying with positive law. Indeed, Defendants each knew that GRAIL could seek additional funding to fund the development of its MCED test through an IPO, if Illumina did not close the Merger. Accordingly, Defendants' stated reasons for ignoring the

Standstill Obligations, the Section 7 of the Clayton Act, and concerns of European and U.S. regulators were pretextual.

13. Closing the Merger directly exposed Illumina to additional 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 violations of the Standstill Obligations and Section 7 of the Clayton Act have inflicted a legion of other costly harms upon the Company.

14. For example, after rejecting the Open Offer, the FTC successfully sought to unwind the Merger, culminating in a divestment order that the Fifth Circuit affirmed on December 15, 2023. On December 17, 2023, Illumina finally announced that it would divest GRAIL—at a massive loss.

15. 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 and in knowing violation of Section 7 of the Clayton Act. Legal challenges by the EC and the FTC have drained Illumina's resources, forcing it to divert critical time and capital from its core operations. Moreover, the decision to close the GRAIL acquisition in violation of law 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 NGS technology.

16. 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 due to the violation of EU and US law. The Merger's terms 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.

17. Since the Merger closed, GRAIL has plummeted in value, underscoring the extraordinary harm the Board's illegal actions have inflicted on Illumina. Illumina acquired GRAIL at an $8 billion valuation, but was forced to divest it at a $2.74 billion valuation. More recent disclosures value GRAIL at just $448.3 million.

18. 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.

19. 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

20. ***The Pavers and Road Builders Benefit Funds*** ("Pavers") has been a continuous stockholder of Illumina at all times relevant to the claims asserted in this action.

B. Nominal Defendant

21. ***Illumina*** is a biotechnology company incorporated under the laws of the state of Delaware. Illumina's principal executive offices are located at 5200 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."[3]

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

C. Defendants

22. ***Francis A. deSouza*** joined Illumina in 2013.[4] He served as President from 2013 to 2016[5] and CEO from 2016 until his resignation on June 11, 2023.[6] deSouza was also a member of Illumina's Board from 2014 to June 11, 2023.[7] deSouza was instrumental to the Board's decision to close the Merger despite the Standstill Obligations and violation of Section 7 of the Clyaton Act.[8] In 2019, the year before Illumina announced the GRAIL Merger, deSouza's total compensation was $1,521,949.[9] Over the next three fiscal years, Illumina paid him approximately $52.8 million for his service as CEO,[10] 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

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

[5] *Id.*

[6] 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.

[7] 2022 Proxy at 7.

[8] ILMN-220_001094.

[9] 2022 Proxy at 58.

[10] *Id.*; *see also* Illumina, Inc., Preliminary Proxy Statement (Schedule 14A) (Apr. 7, 2023) ("2023 Proxy"), at 66, 72.

innovation and increasing stockholder value."[11] After forcing through the GRAIL Merger and resigning from Illumina, deSouza joined Moonwalk Biosciences, Inc. ("Moonwalk Biosciences") as an advisor.[12] Moonwalk Biosciences was co-founded by Alexander M. Aravanis, former Illumina Chief Technology Officer ("CTO"),[13] and funded by ARCH Ventures Partners ("ARCH"), an early investor in both GRAIL and Illumina.[14]

23. ***John W. Thompson*** served as a member of Illumina's Board of Directors from 2017 to 2023.[15] He served as Board Chairman from May 2021 to May 25, 2023, when he lost his bid for reelection.[16] He was also a member of the

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

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

[13] *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/.

[14] 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/.

[15] 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/.

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

Audit Committee.[17] Thompson approved the decision to close the Merger in violation of the Standstill Obligations and Section 7 of the Clayton Act.[18]

24. ***Frances Arnold*** has served on the Illumina Board since 2016.[19] She approved the decision to acquire GRAIL and to close the Merger in violation of the Standstill Obligations and the Clayton Act's Section 7.[20]

25. ***Caroline D. Dorsa*** has been a director of Illumina since 2017.[21] She was the Chair of the Audit Committee and remains a member of the Audit Committee.[22] Dorsa approved the decision to close the Merger in violation of the Standstill Obligations and the Clayton Act's Section 7.

26. ***Robert S. Epstein*** has served on the Illumina Board since 2012.[23] He approved the decision to acquire GRAIL and to close the Merger in violation of the Standstill Obligations and Section 7 of the Clayton Act.[24] From October 2016 to

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[17] 2022 Proxy at 14.

[18] ILMN-220_001094.

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

[20] ILMN-220_001094.

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

[22] Illumina, Inc., Definitive Proxy Statement (Schedule 14A) (Apr. 4, 2024) ("2024 Proxy"), at 13; 2023 Proxy at 12; Illumina, Inc., Definitive Proxy Statement (DEF14A) (Apr. 9, 2025) ("2025 Proxy"), at 2.

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

[24] ILMN-220_001094.

March 1, 2017, Epstein served as the Board's observer and advisor to the GRAIL Board, for which he was paid $40,000 per year.[25]

27. ***Scott Gottlieb*** has served on the Illumina Board since 2020.[26] Gottlieb approved the decision to close the Merger in violation of the Standstill Obligations and Section 7 of the Clayton Act.[27]

28. ***Gary S. Guthart*** has served on the Illumina Board since 2017[28] and is a member of the Audit Committee.[29] Guthart approved the decision to close the Merger in violation of the Standstill Obligations and Section 7 of the Clayton Act.[30]

29. ***Philip W. Schiller*** has served on the Illumina Board since 2016.[31] Schiller approved the decision to acquire GRAIL and to close the Merger, in violation of the Standstill Obligations and Section 7 of the Clayton Act.[32]

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[25] Illumina, Inc., Definitive Proxy Statement (DEF14A) (Apr. 6, 2018) ("2018 Proxy"), at 36.

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

[27] ILMN-220_001094.

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

[29] 2024 Proxy at 11.

[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.

30. ***Susan E. Siegel*** has served on the Illumina Board since 2019.[33] Siegel approved the decision to acquire GRAIL and to close the Merger in violation of the Standstill Obligations and Section 7 of the Clayton Act.[34]

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

32. deSouza is also referred to as the "Officer Defendant," and collectively with the Director Defendants, "Defendants."

D. Relevant Non-Parties

33. ***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 an MCED test designed to screen for up to 50 different cancers using Illumina's NGS technology to detect cancer 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

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

[34] ILMN-220_001094.

finalized on June 24, 2024, when GRAIL, LLC reverted to its prior form as GRAIL, Inc., a Delaware corporation.[35]

34. ***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 (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.

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

35. ***Alexander M. Aravanis*** served as Illumina's Senior Director of R&D from 2013 to 2016 before leaving to co-found GRAIL.[38] 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.[39] 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 the shares he received in connection with the Merger for substantial profits.. He subsequently left Illumina in 2023.

36. ***Charles Dadswell*** served as Illumina's General Counsel, Senior Vice President, and Secretary from 2013 to October 3, 2024.[40] Dadswell was named Interim CEO on June 11, 2023 after deSouza resigned, holding that position until

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

[39] 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.

[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.

the Board appointed Jacob Thaysen as Illumina's new CEO in September 2023.[41] Dadswell served as an advisor to Thaysen and the Board through March 31, 2025.[42] In the months leading up to the GRAIL Merger, Dadswell gave multiple presentations to the Illumina Board about the EC's and the FTC's regulatory proceedings, and he attended Audit Committee meetings where directors discussed the Board's D&O Insurance.[43]

37. ***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.[44] From January 2016 to February 2017, while he was serving as Executive Chairman of Illumina's Board, Flatley also served as Chairman of GRAIL's Board of Directors. Flatley "resigned" from GRAIL's

[41] 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.

[42] 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.

[43] *See, e.g.*, ILMN-220_000525–526; ILMN-220_000847; ILMN-220_000849; ILMN-220_000873 at -873–74.

[44] *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/.

Board in February 2017, but he continued to serve as a GRAIL Board observer "in his personal capacity."[45]

38. ***Sam A. Samad*** was Illumina's CFO and Senior Vice President from January 2017 to July 2022,[46] 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.[47]

39. ***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.[48] 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,

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[45] 2018 Proxy at 70.

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

[47] Press Release, *Joydeep Goswami Appointed Interim CFO; Sam Samad To Depart Illumina*, Illumina, Inc. (June 9, 2022), https://investor.illumina.com/news/press-release-details/2022/JOYDEEP-GOSWAMI-APPOINTED-INTERIM-CFO-SAM-SAMAD-TO-DEPART-ILLUMINA/default.aspx.

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

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.[49] Klausner went on to co-found ARCH-backed Altos Labs alongside Barron and Bishop, where Illumina board member Arnold serves as a director.[50] He also holds board positions at four other ARCH-backed companies.[51]

40. ***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.

SUBSTANTIVE ALLEGATIONS

A. Illumina Monopolizes the NGS Market

41. 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.

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

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

[51] *Dr. Richard Klausner*, LinkedIn, https://www.linkedin.com/in/drrichardklausner; *Portfolio*, ARCH Venture Partners, https://www.archventure.com/portfolio/.

42. 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] products, with a share of over 90%. Historically, Illumina has faced little competition for its NGS instruments and consumables."[52] Illumina still boasts over 90% of the U.S. market share of clinical genomics testing, and its platforms have become deeply embedded.[53]

43. 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.

44. 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.

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[52] Compl. ¶ 1, *In re IMO Illumina, Inc.*, Docket No. 9387 (F.T.C. Dec. 17, 2019).

[53] 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-genomics-market/.

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

45. As directors of a Delaware corporation, Illumina's Board is 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 is a primary public enforcer of federal antitrust law.

46. In the U.S., federal antitrust laws bar 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 for acquiring PacBio as pretextual; by a 5-0 vote, its commissioners authorized the agency to seek a TRO and preliminary injunction.[54]

47. Facing mounting pressure, the Board terminated the deal in January 2020, subjecting Illumina to a $98 million termination fee.[55] Most of

[54] Compl. ¶ 82, *In re IMO Illumina, Inc.*, Docket No. 9387 (F.T.C. Dec. 17, 2019).

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

Illumina's current directors were involved in the ill-fated PacBio deal, underscoring their familiarity with U.S. antitrust laws.

48. The EC is the primary regulator for the EU's analogous competition law. EU and EC regulations prohibit the consummation of any transaction while under EC review (previously defined as the "Standstill Obligations"). According to the EC's former Executive Vice President, Margrethe Vestagre, "the standstill obligation is a cornerstone of [the EC's] ex-ante merger control regime which aims at preventing harmful effects to competition while [the EC's] review is ongoing."[56] There is no precedent for a company ever breaching the Standstill Obligations other than Illumina.[57] If a company either negligently or intentionally breaches the Standstill Obligations, the EC can impose fines that may reach up to 10% of the company's aggregate turnover (i.e., revenues).[58]

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[56] Press Release, *Mergers: The Commission adopts a Statement of Objections in view of adopting interim measures following Illumina's early acquisition of GRAIL*, European Comm'n (Sept. 19, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4804.

[57] *See id.*; Dan Weil, *Illumina Stock Stumbles on Analysts Reaction to Grail Deal*, TheStreet (Aug. 19, 2021), https://www.thestreet.com/investing/illumina-ilmn-stock-grail-acquisition-analysts ("We could not find any precedent for an acquirer intentionally closing a deal ahead of regulatory approval.").

[58] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), art. 14(2)(a)-(b), 2004 OJ (L 24, 29).

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

49. The Board was fully aware of Illumina's dominance in the U.S. NGS market, as evidenced by the failed PacBio deal and the Company's SEC filings. Illumina was also fully aware that its monopoly status positioned the Company as an essential supplier to—and thus gatekeeper of—the related downstream market for MCED tests.

50. 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.

51. 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.

52. 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

53. 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."

54. 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.[59] This move addressed practical challenges for Illumina, including: (i) antitrust concerns due to MCED developers' reliance on Illumina's NGS testing, and (2) investor concerns about

[59] *How mission fuels risk-taking*, Masters of Scale (Aug. 19, 2021), https://mastersofscale.com/francis-desouza-how-mission-fuels-risk-taking/.

Illumina's stock price reflected the large investment required to develop the Galleri test.

55. Klausner, then Illumina's CMO, emphasized these issues in a July 14, 2015 email, stating that separating Illumina and GRAIL 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.

56. In September 2015, Illumina incorporated GRAIL in Delaware as a wholly owned subsidiary.[60] GRAIL began operations in February 2016, with Illumina retaining a controlling stake after a Series A financing round.[61] 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."

57. GRAIL raised $120 million in Series A funding in early 2016, backed by Illumina, ARCH, and 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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[60] GRAIL, Inc., Form S-1/Amended (Registration Statement) (Sept. 17, 2020), at 171, 207, 248.

[61] *Id*.

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

58. In 2017, Illumina reduced its controlling stake in GRAIL, publicly citing the "untenable" investment needed to develop GRAIL's MCED test, while internally acknowledging significant antitrust concerns. GRAIL's Series B round followed, dropping Illumina's ownership to about 12%.[62] 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."[63]

59. Illumina executives like Flatley and deSouza recognized the procompetitive benefits of Illumina's reduction in its GRAIL stake to a minority position. 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."

[62] 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 (Registration Statement) at 171 (Sept. 17, 2020).

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

60. The GRAIL team, including Aravanis, continued developing Galleri,[64] with Flatley serving as a board observer while Illumina monitored GRAIL's progress as both an investor and customer.

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

61. In May 2019, GRAIL announced that its Galleri MCED test had received "Breakthrough Device" status from the FDA.[65] In late 2019, GRAIL published data that deSouza would later claim provided the initial impetus for Illumina to consider reacquiring GRAIL.[66]

62. GRAIL's cash burn remained high. GRAIL's operating losses for 2018 and 2019 were $287 million and $255 million, respectively.[67] 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

[64] *How mission fuels risk-taking*, Masters of Scale (Aug. 19, 2021), https://mastersofscale.com/francis-desouza-how-mission-fuels-risk-taking/.

[65] Press Release, *GRAIL Announces Significant Progress with Multi-Cancer Early Detection Test Including FDA Breakthrough Device Designation*, GRAIL (May 13, 2019), https://grail.com/press-releases/grail-announces-significant-progress-with-multi-cancer-early-detection-test-including-fda-breakthrough-device-designation/.

[66] *How mission fuels risk-taking*, Masters of Scale (Aug. 19, 2021), https://mastersofscale.com/francis-desouza-how-mission-fuels-risk-taking/.

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

commercial infrastructure to support its planned product rollout.[68] In fact, Galleri was not projected to generate any revenues in 2019 or 2020.[69]

63. On May 6, 2020, GRAIL completed its $390 million Series D financing round at a valuation of $4.15 billion, with Illumina participating.[70] But its costly operations and lack of revenues led it to make initial preparations for an IPO the very next month.[71]

64. 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, including antitrust concerns that made the re-acquisition of GRAIL a violation of the Clayton Act's Section 7. On April 28, 2020, deSouza persuaded the Board to shift Illumina's business strategy to oncology screening by reacquiring GRAIL, even though the Board knew that GRAIL's Galleri, like all MCED tests, depended upon Illumina's NGS technology to work,

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[68] Paul Knight, *ILMN: Smoke, Mirrors & GRAIL: Higher Revenue, Less Transparency*, Janney (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.").

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

[70] Press Release, *GRAIL Announces $390 Million Series D Financing*, GRAIL (May 6, 2020), https://grail.com/press-releases/grail-announces-390-million-series-d-financing/.

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

and even though it directly conflicted with the Company's compliance with U.S. antitrust law due to Illumina's monopoly over the U.S. NGS market and the potential that the Merger would allow Illumina to abuse that monopoly power and extend it into the MCED market by favoring GRAIL over other MCED providers, who also depended on Illumina's NGS products. At that meeting, 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.[72] This presentation contained Illumina management's recommendation to conduct "further due diligence into GRAIL as a potential acquisition target."[73] The presentation also acknowledged Illumina's recent Series D financing round had been at a $4.15 billion valuation, but did not mention the billions GRAIL still needed to bring Galleri to market or the obvious violation of the Clayton Act's Section 7 that would occur if Illumina acquired GRAIL because GRAIL relied on Illumina's NGS technology and Illumina dominated the U.S. NGS market.[74]

65. 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,

[72] ILMN-220_000008 at -015.

[73] *Id.*

[74] ILMN-220_000014_UR at -040.

reporting to Illumina CEO deSouza.[75] Aravanis was immediately tasked with leading the effort to reacquire GRAIL as one of the deal's "cosponsors" responsible for convincing Illumina's Board of the merits of the deal and leading "negotiations" of its terms with his prior employer, GRAIL.

66. On July 31, 2020, GRAIL confidentially submitted its S-1 form for its planned IPO to the SEC.[76] 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."[77] On August 3, 2020, deSouza told Bishop that Illumina was interested in exploring a potential acquisition at a price of $6 billion.[78] GRAIL continued to pursue an IPO while these discussions progressed through August and September.[79] The Board did not authorize deSouza's communications with Bishop; much less the floated $6 billion price. Indeed, management did not even "request

[75] Press Release, *Illumina Welcomes Alex Aravanis as Chief Technology Officer and Appoints Mostafa Ronaghi to Lead Entrepreneurial Development*, Business Wire (May 4, 2020), https://www.businesswire.com/news/home/20200504005731/en/Illumina-Welcomes-Alex-Aravanis-as-Chief-Technology-Officer-and-Appoints-Mostafa-Ronaghi-to-Lead-Entrepreneurial-Development.

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

[77] *Id.*

[78] *Id*.

[79] *Id.* at 154–59.

approval to engage with [GRAIL]" until August 4—i.e., the day *after* deSouza's initial outreach.[80]

67. 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."[81] Aravanis led the meeting, outlining "key diligence areas, questions, and next steps" if the diligence review were to proceed.[82] Dadswell briefly covered "antitrust considerations," though the minutes lack any details.[83] 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."[84] deSouza did ***not*** tell the Board that he had reached out to Bishop the prior day and floated a $6 billion price.

68. The following day, the Board, with Dadswell and Samad participating, convened to discuss "follow-up questions and actions" on the "proposed [GRAIL] acquisition."[85] They also discussed a recommendation to increase "D&O Insurance"

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[80] ILMN-220_000179 at -181.

[81] *Id.*

[82] ILMN-220_000173 at -174.

[83] *Id.*

[84] ILMN-220_000179 at -223.

[85] ILMN-220_000173 at -175.

from a $120 million to a $150 million total limit, with a $30 million increase in A-Side only coverage due to "increased derivative actions with notable settlements ... (*e.g.*, McKesson, PG&E, Wells Fargo, Telsa)."[86] The cost was a $10 million retention and a $3.8 million premium.[87]

69. On August 5, GRAIL hired Morgan Stanley as financial advisor in connection with the potential Illumina deal. 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.

70. On August 25, the Board met with Dadswell, Aravanis, Goswami, Samad, and Chief Medical Officer Phillip Febbo in attendance.[88] 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."[89] 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.[90]

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[86] ILMN-220_000179 at -397–98.

[87] *Id.* at -402.

[88] ILMN-220_000405.

[89] ILMN-220_000407 at -408.

[90] *Id.*

71. After the presentation, the Board approved a resolution to authorize "executive officers" to negotiate "an acquisition of [GRAIL] with an offer value of up to $8.2 billion," considering "contingent consideration calculated on a net present value basis."[91] 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."[92] 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.[93]

72. 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 of up to $9.5 billion (with the value of any contingent consideration calculated on a net present value basis)."[94] 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.[95]

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[91] ILMN-220_000405 at -406.

[92] ILMN-220_000425.

[93] ILMN-220_000427 at -428.

[94] ILMN-220_000425 at -426.

[95] ILMN-220_000427 at -430.

73. On September 6, 2020, the Board held a telephonic meeting attended by Dadswell, Aravanis, and Samad, among others.[96] deSouza provided an update on GRAIL discussions, then management, including Aravanis, presented.[97] Notably, the presentation's section on "Key Risks That Need to be Mitigated Going Forward," does not mention any antitrust issues.[98] 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.[99] The "Key Questions" concerning the GRAIL Acquisition included, *"Are we rushing into the [GRAIL] deal?"*[100]

74. Aravanis met with the Board again on September 7, 2020 to discuss GRAIL's "responses and proposals with respect to valuation considerations and payment structures and a post-acquisition revenue share arrangement."[101]

75. On September 8, 2020, the Board convened again with deSouza, Dadswell, Goswami, and Samad attending.[102] Following an update by deSouza, the Board passed a resolution authorizing "executive officers . . . to finalize and execute

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[96] ILMN-220_000443.

[97] *Id.* at -444.

[98] ILMN-220_000445 at -447.

[99] *Id.* at -471.

[100] *Id.* at -446 (emphasis added).

[101] ILMN-220_000472.

[102] ILMN-220_000474.

a non-binding term sheet for the acquisition of GRAIL," consistent with the terms discussed.[103]

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

77. In the midst of Illumina's accelerated efforts to reach a deal with GRAIL, on September 11, 2020, the EC announced a significant change to its merger referral policy. The EC explained that it would "start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level — whether or not those authorities had the power to review the case themselves." This change would expand the number of mergers that the EC could review, as "any transaction that may be seen as raising competition issues could end up being reviewed by the EC — no matter how small the target, and even after the deal ha[d] closed."[104]

78. Accordingly, under relevant EU law, if the EC accepted a referral under this new policy, the transaction parties would not be permitted to close the subject transaction, would need to continue acting as separate entities and avoid any integration. Or else, the parties could face significant fines based up to a maximum

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[103] *Id.* at -475.

[104] *Article 22 EW Merger Referrals*, Latham & Watkins at 2 (Sept. 18, 2020), https://www.lw.com/admin/upload/SiteAttachments/LW%20Client%20briefing%20-%20Article%2022%20EU%20merger%20referrals.pdf.

of their 10% worldwide turnover. These legal risks and realities would be readily apparent and known to businesses like Illumina, their counsel, and their fiduciaries.[105]

79. On September 14, 2020, the Board met again by teleconference with Dadswell, Aravanis, Goswami, and Samad attending.[106] deSouza updated the Board on the GRAIL negotiations. Samad reviewed "updates to the valuation model as a result of the due diligence review," which had "not materially impacted [the] deal model."[107] The valuation remained "at $12.2B," in line with earlier projections.[108]

80. 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."[109] The reverse break-up fee was set at $300 million if antitrust approval was not secured within 12 months (or 15 months with an

[105] Id. at 3–4 (emphasis added).

[106] ILMN-220_000476.

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

[108] ILMN-220_000487 at -488. This presentation continued to reference a launch of Galleri in 2021 and GRAIL's valuation as of 12/30/20. *Id.* at -490, -492.

[109] *Id.* at -500.

extension).[110] At the end of the meeting, the Board passed a resolution related to financing the GRAIL acquisition.[111]

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

82. On September 20, 2020, GRAIL's Board approved the Illumina deal.

83. The next day, on September 21, 2020, Illumina announced its acquisition of the remaining 85.5% of GRAIL it did not already own. In the Company's press release announcing the Merger, it falsely stated that "[c]ombining forces with Illumina enables broader and faster adoption of GRAIL's innovative, multi-cancer early detection blood test, enhancing patient access and expanding global reach." The Merger 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.

84. 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 shall have enacted, issued, promulgated, enforced or entered any Law,

[110] *Id*.

[111] ILMN-220_000476 at -480–86.

> 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.

85. 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)).

86. 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."

87. 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."

88. 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."

89. Illumina's stock dropped 5.3% after the announcement.

G. The FTC and EC Begin to Take Actions to Block the Merger, Putting the Board on Notice that Closing the Merger Would Violate U.S. and EU Law

90. On October 9, 2020, Illumina and GRAIL notified the DOJ and the FTC of the Merger pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18A ("HSR"). The FTC took jurisdiction over the action.[112]

91. Section 7 of the Clayton Act, 15 U.S.C. § 18 prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The FTC enforces compliance with the Clayton Act by investigating proposed mergers that qualify for administrative review and, where necessary, "take[s] formal legal action to stop [a] merger, either in federal court or before an FTC administrative law judge," that the

[112] Respondents' Unopposed Mot. For Leave to Am. Answer at 2, *Illumina, Inc.*, Docket No. 9401 (F.T.C. Aug. 26, 2021), https://www.ftc.gov/system/files/documents/cases/d09401_-_respondents_unopposed_motion_for_leave_to_amend_answer_to_add_affirmative_defenses_-_public.pdf.

FTC has determined violates the Clayton Act (or other related antitrust statutes).[113] The FTC also "review[s] proposals to revise a merger in order to alleviate competitive concerns . . . ."[114]

92. The FTC immediately raised concerns that the proposed Merger violated Section 7 of the Clayton Act and rejected Illumina's proposals to cure that violation. In October 2020, Illumina and GRAIL informed the FTC that they were open to discussing a settlement that would allow them to close the Merger. During those initial discussions, in recognition of the obvious antitrust concerns raised by the Merger, Illumina conveyed to the FTC that it was open to negotiating a consent decree that, Illumina hoped, would resolve the FTC's concerns. However, the FTC refused to negotiate with Illumina or provide any counterproposal at any point, signaling its view that, if consummated, the Merger would violate U.S. antitrust law, including Section 7 of the Clayton Act, and that no resolution short of terminating the proposed Merger would meet the requirements of U.S. antitrust law.[115]

93. During its three-day meeting on November 3–5, 2020, the Board received a thirty-minute "GRAIL Update," including its first update on "the ongoing

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[113] *Merger Review*, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/merger-review.

[114] *2023 Merger Guidelines*, Fed. Trade Comm'n (2023), at n.8, https://www.justice.gov/atr/merger-guidelines/overview.

[115] Mot. for Conference at 3, *Illumina, Inc.*, Docket No. 9401 (F.T.C. July 13, 2021), https://www.ftc.gov/system/files/documents/cases/d09401_-601948_motion_for_conference_to_facilitate_settlement_-_public.pdf.

antitrust regulatory reviews taking place in the United States and expected to take place in the United Kingdom."[116] 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."[117]

94. On November 9, 2020, as expected, the FTC issued a Request for Additional Information, known as a "Second Request," and initiated a six-month investigation of the Merger.[118] As part of the investigation, Illumina and GRAIL produced millions of documents, provided narrative responses to the FTC's inquiries, and made employees available for hearings with the investigators.[119] The Second Request also "extend[ed] the waiting period and prevent[ed] the companies from completing their deal until they ha[d] 'substantially complied' with the Second Request and observed a second waiting period."[120]

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[116] ILMN-220_000529; ILMN-220_000525 at -526.

[117] ILMN-220_000529 at -587.

[118] Respondents' Unopposed Mot. For Leave to Am. Answer at 2, *Illumina, Inc.*, Docket No. 9401 (F.T.C. Aug. 26, 2021), https://www.ftc.gov/system/files/documents/cases/d09401_-_respondents_unopposed_motion_for_leave_to_amend_answer_to_add_affirmative_defenses_-_public.pdf.

[119] *Id.*

[120] *Premerger Notification and the Merger Review Process*, Fed. Trade Comm'n, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process.

95. Recognizing that the FTC was unlikely to entertain settlement on the existing Merger terms, Illumina attempted to address its potential violation of the Clayton Act as a concession to address its other customers' antitrust concerns. In this regard, Illumina's customers, "both within and without the MCED-test industry," "expressed concern about whether they would be able to continue to purchase Illumina's NGS products post-merger on the same terms and conditions as pre-merger"—given that the Merger would incentivize Illumina to offer its products to GRAIL at far more favorable terms and thereby lessen competition for GRAIL's benefit. As a result, Illumina crafted a "standardized supply contract," the "Open Offer," which "require[d] Illumina to provide its NGS platforms at the same price and with the same access to services and products that is provided to GRAIL," among other terms.[121] The Open Offer would take effect when the Merger closed, but all of Illumina's for-profit U.S. oncology customers could accept it at any time until August 18, 2027. The Open Offer would expire on August 18, 2033.

96. The Open Offer was Illumina's attempt to "fix" the harm to competition caused by the Merger and thereby reflected that Illumina had conceded the legitimacy of the FTC's concerns that the Merger, if consummated, would risk substantially lessening competition, in violation of Section 7 of the Clayton Act.

[121] *Illumina*, 88 F.4th at 1044–45.

Indeed, Illumina's antitrust counsel had previously warned that such fixes could be viewed as admissions of competition harm: "By agreeing to a fix, parties run the risk that the court might conclude they have admitted that the transaction as originally proposed would reduce competition."

97. In due course, the FTC Commissioners, in their Decision, would detail the manifest inadequacy of the Open Offer to remedy the Merger's competitive harm.

98. On February 9, 2021, the Board met via video conference for 45 minutes to discuss the Merger.[122] 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."[123] A slide from the "GRAIL Update" presentation informed the Board that the "FTC decision date on the transaction is expected to be early April."[124] It also outlined plans for GRAIL to operate as a "stand-alone division" with "G&A functions [] report[ing] to Illumina, [and] all other functions [] report[ing] into the division."[125]

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[122] ILMN-220_000615

[123] ILMN-220_000601 at -602.

[124] ILMN-220_000615 at -649.

[125] *Id.* at -649, -654.

99. By this time, the Board, particularly deSouza, 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."[126] A slide titled "Strategic Direction" emphasized "[c]losing the Grail acquisition" was "significant" to the Company's strategy."[127] 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 [sic] closing the Grail acquisition . . . ."[128]

100. 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 the regulatory agencies."[129]

101. Three days later, on February 12, 2021, Illumina provided the FTC with a copy of the then-current iteration of the Open Offer. Through the remainder of February and March, Illumina sent several iterations of the Open Offer, including in the form of a proposed consent decree, to various FTC staff and the FTC Commissioners, each with an invitation to negotiate a consent resolution to the

[126] *Id.* at -670.

[127] *Id.* at -771.

[128] *Id.* at -780.

[129] *Id.* at -797.

FTC's investigation. These tactics were a clear acknowledgement by Illumina that, if consummated in its then-current form without concessions, the Merger would violate Section 7 of the Clayton Act.

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

103. On February 27, 2021, the Board met via video teleconference with Dadswell and Samad joining.[130] The Board approved a $1 billion bond issuance and a $750 million, five-year revolving credit facility to finance the Merger.[131] 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 "[p]rovide liquidity backstop," and how the "[r]ating 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."[132] Management explained how "[b]ased 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."[133] This presentation further stated that the "$1B

[130] ILMN-220_000811.

[131] ILMN-220_000820 at -822.

[132] *Id.* at -823.

[133] *Id.* at -826.

Issuance Necessary to Maintain our Minimum Cash Balance" and would "ensure adequate liquidity."[134]

104. On March 17, 2021, the Board met via video conference to review GRAIL's regulatory status. [135] At 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."[136] Dadswell and the Company's legal counsel, 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."[137]

105. Also on March 17, 2021, Illumina and GRAIL submitted an updated version of the Open Offer to the FTC. That same month, Illumina and GRAIL met with each FTC Commissioner to discuss the Merger and the terms of the Open Offer,

[134] *Id.* at -834.

[135] ILMN-220_000847.

[136] *Id.*

[137] *Id.* at -847–48.

but the FTC again did not provide feedback on the terms that it would consider in a settlement and did not propose a counteroffer.

106. On March 26, 2021, Illumina and GRAIL sent the FTC another updated version of the Open Offer but continued to receive no feedback from the agency.[138]

107. On March 28, 2021, the Board convened via teleconference with Dadswell, Goswami, and Samad also attending.[139] 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.[140]

108. Further illustrating Defendants' knowledge that the closing of the Merger would violate Section 7 of the Clayton Act, on March 30, 2021, Illumina publicly issued the Open Offer to current and prospective oncology customers, subject to the closing of the Merger, in an attempt to give the appearance of

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[138] Mot. for Conference at 4, *Illumina, Inc.*, Docket No. 9401 (F.T.C. July 13, 2021), https://www.ftc.gov/system/files/documents/cases/d09401_-601948_motion_for_conference_to_facilitate_settlement_-_public.pdf.

[139] ILMN-220_000849.

[140] *Id.* at -849–50.

addressing that violation due to Illumina's complete monopoly over the processing of MCED tests with its NGS technology.

109. The FTC's refusal to engage with Illumina and GRAIL on their proposed settlement terms, such as the Open Offer, provided clear notice that the Merger should not proceed because it violated U.S. antitrust laws and no settlement could address Illumina's complete dominance in the U.S. NGS market, which encompassed all MCED tests that relied on that technology to develop its results.

110. In the FTC's eventual decision blocking the Merger, the Commission exposed the Open Offer as grossly inadequate to address the violation of the Clayton Act. The FTC detailed why the Open Offer's marquis price parity provision was meaningless as to GRAIL because: (i) GRAIL, as an Illumina subsidiary, would not actually pay a price for the NGS platforms; (ii) the service parity provision would be virtually impossible to enforce; and (iii) it was impossible to predict all of the ways that Illumina could otherwise favor GRAIL during the Open Offer's term.[141]

111. In addition, on March 30, 2021, the EC issued guidance on the application of its merger referral mechanism, confirming the policy change it had disclosed back in September 2020, before the Merger was announced. The EC announced that, effective immediately, it would start accepting referrals of

[141] Op. at 66–73, *Illumina, Inc.*, Docket No. 9401 (F.T.C. Mar. 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

transactions from EU national competition authorities that fell below the national merger control thresholds. These transactions needed only to affect trade between EU member states and threaten to significantly affect competition within the territory of the member state or states making the referral request.[142]

112. The EC acknowledged that this new policy was "based on the experience that such transactions were not generally likely to have a significant impact on the internal market." The EC explained that market developments in recent years had led to an increased number of potentially anticompetitive mergers that were escaping enforcement because the mergers fell beneath the member states' thresholds. The EC expressed concerns about such mergers in the pharmaceutical industry in particular:

> [I]n sectors such as pharmaceuticals and others where innovation is an important parameter of competition, there have been transactions involving innovative companies conducting research & development projects and with strong competitive potential, even if these companies have not yet finalised, let alone exploited commercially, the results of their innovation activities.[143]

113. This was a very significant development for dealmakers, as the EC's Standstill Obligations would apply whenever the EC reviewed a deal under the new policy. Indeed, under Article 22(4) of the EUMR, once the EC informs parties

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[142] *Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, 2021 O.J. (C 113), 64, 1.

[143] *Id.* at 2.

that a referral request has been made, the parties must suspend the closing of the transaction, if it has not yet occurred. The suspension obligation lifts only if and when the EC subsequently decides not to examine the transaction.[144]

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

114. As the Board should have expected, Illumina's efforts to placate the FTC failed. On March 30, 2021, the same day that Illumina issued the Open Offer and the EC began accepting a wider array of referrals, the FTC's four commissioners voted unanimously to authorize the filing of both an administrative complaint and a preliminary injunction action to block the Merger. The vote was bipartisan: two voting commissioners were Democrats and two were Republicans. The FTC's unanimous vote to initiate legal action to enjoin the Merger—notwithstanding Illumina's repeated efforts to arrive at a compromise solution—provided the Board with even more notice that closing the Merger would violate U.S. antitrust law, specifically Section 7 of the Clayton Act.

[144] *New guidance on Article 22 EUMR referrals to the European Commision*, Latham & Watkins (Mar. 30, 2021), at 4, https://www.lw.com/admin/upload/SiteAttachments/LW%20Antitrust%20Briefing_Article%2022%20EUMR%20Guidance_March%202021.pdf.

115. On March 31, 2021, the FTC filed a complaint in the United States District Court for the District of Columbia[145] seeking a temporary restraining order ("TRO") 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.[146] Illumina stipulated to the TRO, agreeing not to close the Merger "until the earlier of September 20, 2021" or the court's ruling on a preliminary injunction.[147]

116. The FTC's unanimous decision to bring these actions against Illumina should have come as no surprise to the Board due to Illumina's dominance in the NGS market.

117. Historically, vertical mergers (like the Merger) received less scrutiny than horizontal mergers (between competitors), but there had been clear signs of changing times before the Board approved the Merger.

118. In February 2021, in a "groundbreaking" decision, the Fourth Circuit affirmed a district court divestiture order for a vertical merger—the first successful

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[145] The court later granted Illumina's motion to transfer the action to the Southern District of California, where Illumina is headquartered. *See* Order, *Fed. Trade Comm'n v. Illumina, Inc.*, No. 1:21-cv-00873 (D.D.C. Apr. 20, 2021), ECF No. 58.

[146] *Fed. Trade Comm'n v. Illumina*, No. 1:21-cv-00873 (D.D.C. Mar. 31, 2021), ECF Nos. 1–3.

[147] Temporary Restraining Order, *Fed. Trade Comm'n v. Illumina*, No. 1:21-cv-00873 (D.D.C. Mar. 31, 2021), ECF No. 8.

vertical merger challenge in decades, which offered regulators a tested roadmap with which to build future vertical merger challenges.[148]

119. On March 22, 2021, President Biden nominated Lina Khan to the FTC. On June 15, 2021, the Senate confirmed her appointment across party lines in a vote of 69 to 28; the same day, President Biden named her the FTC Chairperson. Khan 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 administration. Indeed, the other two Democratic-appointed FTC Commissioners at the time of Khan's appointment had both called for increased scrutiny of vertical mergers.[149]

120. Remarkably, despite these important developments, the Board reversed its previous, reasoned approach to regulators, and instead; adopted an aggressive litigious posture. Previously, 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 compliance with antitrust laws. But this time, it chose to

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

[149] 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.

violate antitrust laws. Illumina issued a press release stating it "disagrees with, and will oppose, the [FTC]'s challenge to its previously announced acquisition of GRAIL."[150]

121. European regulators also began taking steps to block the Merger, which they maintained would violate EU competition law if consummated. 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.

122. In a public announcement, the EC explained its concerns that:

> the combined entity could restrict access to or increase prices of next generation sequencers and reagents to the detriment of GRAIL's rivals active in genomic cancer tests following the transaction. A referral of this transaction is appropriate because GRAIL's competitive significance is not reflected in its turnover, as notably evidenced by the USD 7.1 billion dollar deal value. Genomic cancer tests, having the potential to identify a wide variety of cancers in asymptomatic patients, are expected to be game-changers in the fight against cancer. It is therefore important to ensure that patients get access to this technology as quickly as possible, from as wide sources as possible, and at a fair price.
>
> In particular, the Commission found that the proposed transaction affects trade within the single market and threatens to significantly affect competition within the territory of the Member States that made

[150] Press Release, *Illumina Committed to Pursuing GRAIL Acquisiton to Accelerate Access to Breakthrough Multi-Cancer Early Detection Blood Test*, Illumina, Inc. (Mar. 30, 2021), https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=32156cec-c392-4d23-be23-66d7729892db.

> the referral request, and that a referral was appropriate because GRAIL's competitive significance is not reflected in its turnover. [151]

123. In the same public announcement, the EC stated that Illumina could not implement (i.e., close) the GRAIL Acquisition before notifying and obtaining clearance from the EC.[152] 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).

124. On April 28, 2021, Illumina filed suit in Luxembourg challenging the EC's jurisdiction over the GRAIL transaction—a tactic forshadowing the constitutional challenges Illumina would later lodge against the FTC.

125. Despite its aggressive litigation posture, however, the Board knew the Merger violated U.S. antitrust laws and that the FTC had not been appeased by its proposed remedies. The Board authorized certain Hold Separate Commitments, discussed further below, to go into effect after the Merger was finalized. The Hold Separate Commitments imposed significant costs on Illumina on top of the financial commitments that the Merger Agreement imposed on the Company. Most fundamentally, the Hold Separate Commitments indicate that Illumina expected that

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[151] European Commission Daily News 20/04/2021, *Mergers: Commission to assess proposed acquisition of GRAIL by Illumina* (Apr. 19, 2021), https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.

[152] *See id.*

one or both of the EC and/or FTC could eventually cause Illumina to divest Grail, if it closed the Merger.

126. On May 5, 2021, the Board met via teleconference.[153] 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."[154] A "GRAIL Update" presentation noted: (i) the FTC trial was set for August 9, (ii) the EU jurisdiction ruling was expected by November (if expedited), and (iii) as a warning, that without expedition, an EU "judgement [would be] unlikely before late 2022 or 2023 depending on the Court's calendar."[155]

127. 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 FTC's understanding is that Defendants cannot currently close this transaction.* As such, at this time a preliminary

[153] ILMN-220_000873.

[154] *Id.* at -873–74.

[155] 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.

> injunction is no longer needed to maintain the *status quo* pending the completion of the administrative trial on the merits.[156]

128. In a May 20, 2021 press release, the FTC explained 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 at the time of filing, "a district court order was necessary to prevent the parties from consummating their merger." Now that the EC's Standstill Obligations were in place, the FTC opted to withdraw its request for a preliminary injunction, because regulators did not expect Illumina to defy the EC and close the merger in violation of positive law. The FTC did not suspend its litigation to block the Merger, which continued before an Administrative Law Judge ("ALJ").

129. On May 26, 2021, Illumina held its annual meeting, after which Flatley ceased serving as Chairman of the Board and an Illumina director.

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

131. 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.

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[156] Pl.'s *Ex Parte* Application to Dismiss Compl., *Fed. Trade Comm'n v. Illumina, Inc.*, No. 3:21-cv-00800 (S.D. Cal. 2021), ECF No. 120.

132. On June 21, 2021, at a meeting attended by Aravanis, the Board met to discuss ongoing antitrust regulatory matters.[157] 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."[158]

133. On July 9, 2021, President Biden issued Executive Order No. 14036, affirming his administration's commitment "to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in . . . healthcare markets . . . . [T]he Chair of the FTC, and the heads of other agencies with authority to enforce the Clayton Act are encouraged to enforce the antitrust laws fairly and vigorously."[159] Executive Order No. 14036 provided the Board additional clear notice that the FTC, now led by Lina Khan, would vigorously enforce the Clayton Act against Illumina and block or unwind the Merger as a violation of U.S. antitrust law.

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[157] ILMN-220_000970.

[158] *Id.* at -972.

[159] Exec. Order No. 14,036, 3 C.F.R. 609 (2022).

134. Even though the FTC had withdrawn its request for a preliminary injunction in federal court, the agency continued to pursue its administrative enforcement action, showing no signs of a willingness to settle due to the significant violation of U.S. antitrust laws that would occur if the Merger closed.

135. On July 13, 2021, Illumina and GRAIL filed a Motion for Conference to Facilitate Settlement in the FTC action, noting that the FTC had still "not engaged" with them or "provided any counterproposal for the settlement of this case."[160]

136. FTC Complaint Counsel opposed Illumina's motion, characterizing the request for a conference to facilitate settlement as a "waste of this Court's time and an inappropriate attempt to prematurely litigate the fix" and "to gain a preview into Complaint Counsel's trial strategy." Complaint Counsel noted that Illumina and GRAIL had not provided a new settlement proposal to discuss at such a conference and had declined to meet and confer with Complaint Counsel before filing the motion. Complaint Counsel explained that it maintained the same position on the Open Offer that it had previously rejected—that the "proposal is fundamentally flawed, and [that it] cannot currently identify any amendments to the proposal or an

[160] Mot. for Conference at 5, *Illumina, Inc.*, Docket No. 9401 (F.T.C. July 13, 2021), https://www.ftc.gov/system/files/documents/cases/d09401_-601948_motion_for_conference_to_facilitate_settlement_-_public.pdf.

alternative settlement path that appears likely to remedy the substantial competitive harm resulting from the Proposed Transaction."[161]

137. FTC Complaint Counsel successfully argued that Illumina and GRAIL knew that the proposal was a non-starter with the FTC and, as such, "d[id] not seek to meaningfully engage with Complaint Counsel in front of this Court."[162] Instead, Illumina and GRAIL appeared to be seeking to "prematurely argue their case to the Court without being grounded by the submission of evidence and . . . to gain an unfair advantage by exploring Complaint Counsel's strategy as it prepare[d] for trial before the conclusion of expert discovery . . . ."[163]

138. On July 21, 2021, the ALJ denied Illumina and GRAIL's motion because "the parties [were] not presently engaged in negotiations for the purpose of settlement, and thus there are no settlement negotiations to supervise."[164]

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[161] Compl. Counsel's Memo. Opp'n Mot. for Conference at 3, *Illumina, Inc.*, Docket No. 9401 (F.T.C. July 20, 2021), https://www.ftc.gov/system/files/documents/cases/d09401_-_complaint_counsel_s_memorandum_in_opposition_to_motion_for_conference_to_facilitate_settlement_-_public.pdf

[162] *Id.* at 5.

[163] *Id.*

[164] Order at 2, *Illumina, Inc.*, Docket No. 9401 (F.T.C. July 21, 2021), https://www.ftc.gov/system/files/documents/cases/d09401_-_601986_alj_order_denying_respondents_motion_for_conference_to_facilitate_settlement_-_public.pdf.

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

139. Faced with 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.

140. On July 14, 2021, Woodruff Sawyer presented a "D&O Renewal Update."[165] The presentation highlighted management's discussions with over 30 insurers and detailed how they "[s]ecured favorable terms," including limiting a premium "increase to 5% [upon] renewal" and agreeing to "an additional 10% [increase] at the time of closing GRAIL."[166] Management also focused on creating an "alternative program structure" with enhanced "Side A coverage" and began securing "favorable Side A policy terms" "dedicated solely to GRAIL acquisition related claims."[167]

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

142. 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

[165] ILMN-220_001161.

[166] *Id.* at -162.

[167] *Id.*

Europe regarding the Merger (the "July 27, 2021 Paul Hasting Memo"). This document was withheld in its entirety as opinion work product.

143. On July 31, 2021, Audit Committee members Dorsa, Siegel, and Thompson met to discuss significantly increasing Illumina's D&O insurance coverage, anticipating that the Board would close the Merger in violation of the Standstill Obligations and without resolving the FTC's challenge.[168] 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."[169] Dadswell 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."[170] deSouza, who attended this meeting at the

[168] ILMN-220_005526.

[169] *Id.* at -526–27.

[170] *Id.* at -527.

Audit Committee's invitation, responded to questions and comments throughout these presentations.[171]

144. On August 3, 2021, the Audit Committee reconvened to approve enhanced D&O insurance.[172] deSouza again joined at the Committee's invitation. The Audit Committee explicitly discussed securing "additional Side A coverage dedicated solely to GRAIL acquisition related claims," or non-indemnifiable claims, such as violations of positive law.[173]

145. 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.[174]

146. Later that day, the Board convened a meeting.[175] Dadswell "provided an update on the ongoing antitrust regulatory actions and reviews taking place in the

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[171] *Id*.

[172] ILMN-220_001157.

[173] ILMN-220_001161 at -162.

[174] ILMN-220_001157 at -160.

[175] ILMN-220_000973.

United States and the European Union," and covering "strategies; possible next steps and timing considerations."[176] 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."[177]

147. 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.[178] 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.[179]

148. Later that day, the Board convened with the same members of management in attendance, as well as Aravanis, who also presented.[180] 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

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[176] *Id.* at -975.

[177] *Id*.

[178] ILMN-220_001168.

[179] *Id.* at -169.

[180] ILMN-220_000973 at -977.

changes relating to matters relating to Project Valor" (i.e., the Merger).[181] 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."[182] The executive session also included discussions on "Project Valor," which continued after deSouza rejoined the meeting.[183]

149. While the Board prepared to protect itself by doubling its D&O coverage, it received further warnings as to the illegality of its contemplated course of action. On August 6, 2021, FTC Chair Lina Khan publicly responded to a letter from Senator Elizabeth Warren raising concerns as to preferred methods for policing vertical mergers.[184] Khan's response detailed the new FTC Chair's positions on issues at the center of the FTC's action against Illumina. Indeed, the response reads like a direct rejection of Illumina's proposed "behavioral remedy" (i.e., the Open Offer) as insufficient to prevent the serious competitive harms that would result if the Merger were to close:

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[181] *Id.*

[182] *Id.* at -977–78.

[183] *Id.* at -979.

[184] Lina Khan, *Chair Khan Response on Behavioral Remedies*, Fed. Trade Comm'n (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

> I agree that the Commission should have no tolerance for unlawful mergers. I also share your skepticism about the efficacy of behavioral remedies. Indeed, both research and experience suggest that behavioral remedies pose significant administrability problems and have often failed to prevent the merged entity from engaging in anticompetitive tactics enabled by the transaction. … This is especially true for vertical mergers involving large firms with substantial market power at one or more levels of the supply chain. The larger the market share, the higher the risk that a vertical merger will result in a reduction of competition post-merger. For that reason, I prefer structural remedies that prevent the harmful integration of assets, or would support the Commission moving to block the merger altogether.

Given the significant objections by the FTC to the Merger, it is likely that Defendants were aware of Kahn's statements. Thus, this letter, issued less than two weeks before the Board resolved to close the Merger, provided additional notice to the Board that the FTC—one of the primary agencies tasked with enforcing U.S. antitrust laws—would find the Merger violated Section 7 of the Clayton Act, including by rejecting Illumina's "fix," the Open Offer, and would order Illumina to divest GRAIL if the Board proceeded to close the Merger.

150. On August 11, 2021, the EC suspended its investigation due to Illumina and GRAIL's failure to provide essential information.[185] In other words, Illumina's (ultimately, the Board's) decision to refuse to cooperate with the EC put Illumina in the position of facing the deadline to consummate the Merger before receiving EC

[185] Press Release, *Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction*, European Comm'n (Aug. 19, 2021), https://web.archive.org/web/20250528081429/https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

clearance. This 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. The Standstill Obligations remained in effect during the EC's suspension of its investigation.

151. On August 13, 2021, the Board met again with Dadswell, Samad, and outside advisors.[186] 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."[187]

152. 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 false pretext for the Board to use when breaking the law by closing the Merger. 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*."[188]

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

[187] *Id.* at -085.

[188] *Id*.

153. The claim that Illumina had a moral imperative to break the law and acquire GRAIL is false—and Defendants knew it. Illumina and GRAIL could have pursued any medical advancements through appropriate commercial partnerships as independent companies. Indeed, Defendants voluntarily adopted Hold Separate Commitments, meaning full integration would not occur even if the Merger closed. GRAIL also had financing alternatives, including a planned IPO, if Illumina abandoned the Merger. Most importantly, the Board knew—or should have known—that a Delaware corporation cannot violate positive law, no matter the alleged "moral imperitive." In short, Defendants' "moral imperative narrative" was factually untrue and legally untenable.

154. Defendants knew their "save lives" claim was unsupported. Galleri's acceleration to market (the basis of the "save lives" claim") had been used to justify entering into the Merger Agreement.

155. At the August 13 meeting, 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."[189]

[189] *Id*.

156. During the meeting, the Board reviewed a memorandum from Paul Hastings. Slaughter and May highlighted that, [redacted] Paul Hastings outlined [redacted][190]

157. Attorneys from Cravath discussed "the status of the FTC process and pending administrative FTC trial and likely outcome, expressing the view that . . . [redacted]" An attorney from Covington then [redacted][191]

158. Cravath's advice with respect to the Commission, which [redacted], provided the Board with [redacted]

[190] *Id.* at -085–86.

[191] *Id.* at -086.

[redacted]. Upon information and belief, the Board received additional advice regarding the Company's potential violation of U.S. antitrust laws [redacted]—including but not limited to the July 27, 2021 Paul Hasting Memo—which advice was not produced in response to Plaintiff's inspection demand under 8 Del. C. § 220. Accordingly, the full extent of legal advice provided to the Board and whether (and to what extent) the Board relied upon such advice when making the unlawful decision to close the Merger in violation of positive laws, are unknown to Plaintiff. In all events, the Director Defendants knew that the FTC believed that the Merger violated U.S. antitrust laws and abandoned its injunction request because of the Standstill Obligations imposed by the EC.

159. Of apparently greater 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."[192]

160. The following day (August 14, 2021), the Board met again to continue discussing the GRAIL Merger.[193] During the meeting, the Board and management debated "the strategy and risks of closing the transaction in advance of clearance

[192] *Id.* at -085.

[193] ILMN-220_001089.

from the European Commission, and the operation of the hold separate arrangements and the possible impact on the Grail business."[194]

161. The following day (August 15, 2021), the Board met again.[195] deSouza delivered a "Project Valor Update," summarizing "prior discussions, including the 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."[196]

162. deSouza then introduced Sebastion Vos, European Chair of Covington's government policy practice, who euphemistically cautioned the Board that [redacted]"[197] Legal counsel thus explicitly warned the Board that closing the GRAIL Merger without regulatory clearance would harm the Company and require future remediation. At no point was the Board advised that closing the Merger would not violate the Standstill Obligations.

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[194] *Id.*

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

[196] *Id.*

[197] *Id.* at -093.

163. On August 17, 2021, the Board convened again.[198] 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."[199] Samad provided an update on "the insurance program previously described and discussed with the Board." The Board resolved to close the GRAIL Merger and, relatedly, to increase the Company's D&O insurance coverage.[200]

164. Simply put, by approving the closing of the Merger, the Board ignored numerous clear warning signs and knowingly violated positive law in the EU (the Standstill Obligations) and the U.S. (Section 7 of the Clayton Act).

165. 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

[198] ILMN-220_001094.

[199] *Id*.

[200] *Id.* at -095–99.

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.

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

166. 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 a 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."

167. In justifying its decision to the market, Illumina made multiple false and misleading statements. Specifically, in its press release, Illumina claimed, at best misleadingly, that there was no "legal impediment to acquiring GRAIL in the US," even though Illumina knew that the FTC had dropped its injunction action even though the Merger would violate Section 7 of the Clayton Act because it believed Illumina "cannot implement the transaction without obtaining clearance from the European Commission." The press release further falsely stated that, "Illumina's

acquisition of GRAIL will accelerate access and adoption of this life-saving test worldwide."

168. 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."

169. 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 had dismissed its injunction in reliance on Illumina's compliance with EU Standstill Obligations—yet continued to investigate.

170. In a Form 8-K filed with the SEC on the same day, Illumina recognized that "[a]s a result of Illumina's decision to proceed with the completion of the Acquisition during the pendency of the [EC] review, *the [EC] will likely seek to*

impose a fine on Illumina pursuant to Article 14(2)(b) of the [EUMR] *of up to 10% of Illumina's consolidated annual turnover*."[201]

171. 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."

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

K. Illumina Continues to Aggressively Battle Regulators as GRAIL Bleeds Cash

1. Illumina's Aggressive Approach to FTC Trial

173. Defendants strategically closed the Merger just days before the FTC's Chief 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. Illumina approached the trial in the same aggressive posture it had taken toward the FTC (and the EC).

[201] Illumina, Inc., Form 8-K (Aug. 18, 2021), at 4 (emphasis added).

174. For example, a few weeks ahead of the trial, Illumina and GRAIL moved the ALJ to allow them to present two additional testifying experts, over the default allowance of five testifying experts.[202] It also filed no fewer than seven motions *in limine*, and following trial, multiple motions to reopen the record after stipulating that it be closed.

175. Then, just two days into the trial, on August 26, 2021, Illumina and GRAIL filed a motion for leave to amend its answer to the FTC's complaint to add four new affirmative defenses that "challenge[d] the constitutional sufficiency" of the agency tribunal and its jurisdiction. Specifically, the companies argued that the proceeding violated the Appointments Clause, the President's removal powers, the Due Process Clause, and the Equal Protection Clause.[203]

176. On September 8, 2021, while the trial was under way, Illumina modified the Open Offer, "making significant changes to existing terms and adding new ones." These changes demonstrated that Illumina's Board recognized that the

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[202] Mot. for Leave to Allow Two Additional Testifying Experts, *Illumina, Inc.*, Docket No. 9401 (F.T.C. July 26, 2020), https://web.archive.org/web/20250713070517/https://www.ftc.gov/system/files/documents/cases/d09401_-_motion_for_leave_to_allow_two_addidtional_testifying_experts_-_public.pdf

[203] Resp'ts' Unopposed Mot. for Leave to Amend Answer to Add Affirm. Defenses, *Illumina, Inc.*, Docket No. 9401 (F.T.C. Aug. 26, 2021), https://web.archive.org/web/20250713070549/https://www.ftc.gov/system/files/documents/cases/d09401_-_respondents_unopposed_motion_for_leave_to_amend_answer_to_add_affirmative_defenses_-_public.pdf

Open Offer, as it stood at the time the Merger closed, was insufficient to avoid a Clayton Act violation.

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

177. At trial, Illumina relied heavily on its claim that the Merger would accelerate Galleri's market entry and "save lives."[204] 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-

[204] 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."[205] Illumina doubled down on this rationale before the FTC, its Administrative Law Judge,[206] and ultimately the Fifth Circuit.[207]

[205] Press Release, *Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-Cancer Early-Detection Test*, Illumina, Inc. (Aug. 18, 2021), https://web.archive.org/web/20250528054544/https://investor.illumina.com/news/press-release-details/2021/Illumina-Acquires-GRAIL-to-Accelerate-Patient-Access-to-Life-Saving-Multi-Cancer-Early-Detection-Test/default.aspx; *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 belief 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.").

[206] *See* Resp'ts' Answering Brief to Compl. Counsel's Appeal Brief at 1, *Illumina, Inc*, DocketNo. 9401 (F.T.C. Nov. 3, 2022), https://web.archive.org/web/20250713070446/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 ("[T]his life-saving Transaction will accelerate the adoption of Grail's groundbreaking cancer-screening test."); *accord* Resp'ts' Answer and Defenses at 1, https://web.archive.org/web/20250713070549/https://www.ftc.gov/system/files/documents/cases/d09401_-_respondents_unopposed_motion_for_leave_to_amend_answer_to_add_affirmative_defenses_-_public.pdf("This case involves a transaction that, if consummated, will save tens of thousands of lives."); Resp'ts' Pretrial Br. at 1, https://web.archive.org/web/20250207012046/https://www.ftc.gov/system/files/documents/cases/d09401_-_602415_respondents_pretrial_brief_-_public.pdf("This case involves a vertical merger that will save thousands of lives."),.

[207] Pet'r's Br. at 3, *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. June 5, 2023) ("[The Merger] will save countless lives."), Pet'r's Br. 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.").

178. Despite its army of elite counsel, Illumina failed to present credible evidence supporting its acceleration claim.[208] The FTC found Illumina's arguments rested on "unsupported and vague assertions" from management,[209] including CMO Febbo's subjective belief that the Merger could streamline "regulatory path[s]," expedite "payers' . . . reimbursement," and improve "efficiencies."[210] Crucially, Febbo admitted Illumina had not identified any "specific areas" where it could accelerate Galleri's rollout.[211] This damning testimony revealed Illumina's justification as pretextual and false.

179. Ultimately, the Fifth Circuit upheld the FTC's findings, concluding that Illumina had failed to show that the Merger would cause "acceleration [to] actually occur, much less shown how it would be achieved."[212] The Fifth Circuit also noted that "Illumina's own financial modeling of the merger did not assume that Galleri's

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[208] *See* FTC Opinion at 78, *Illumina, Inc.*, Docket No. 9401, (F.T.C. Mar. 31, 2023), https://web.archive.org/web/20250713070451/https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf ("Of course, any claim that a transaction leads to saved lives requires a close look.").The ALJ did not have occasion to evaluate that evidence.

[209] FTC Opinion at 78, *Illumina, Inc.*, Docket No. 9401 (F.T.C. Mar. 31, 2023).

[210] FTC Opinion at 78–79, *Illumina, Inc.*, Docket No. 9401 (F.T.C. Mar. 31, 2023).

[211] Compl. Counsel's Post-Trial Reply Br. at 210, *Illumina, Inc.*, Docket No. 9401 (F.T.C. June 2, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401CCPostTrialReplyBrief.pdf.

[212] Opinion at 33, *Illumina, Inc. v. Fed. Trade Comm'n*, No. 23-60167 (5th Cir. Dec. 15, 2023).

widespread commercialization would be accelerated," nor "account for the costs that would be associated with achieving any such acceleration."[213]

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

181. Hoping to appease the EC after violating the Standstill Obligations,[214] 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.[215] It also precluded the possibility of any "life-saving" Galleri acceleration.

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[213] Opinion at 33, *Illumina, Inc. v. Fed. Trade Comm'n*, No. 23-60167 (5th Cir. Dec. 15, 2023).

[214] ILMN-220_001094 at -095.

[215] ILMN-220_001100 at -111 ("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_001100 at -112.

182. 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 steps, . . . including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with GRAIL."[216]

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

184. Under the Merger Agreement, Illumina was already obligated to pay GRAIL $35 million per month in "Continuation Payments."[217] 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."

[216] ILMN-22_001100 at -112-13.

[217] Illumina, Inc., Form 8-K (Sept. 21, 2020), at 5 ("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.").

185. 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.

186. 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."[218]

187. Illumina's costly efforts to purportedly "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.[219] The EC criticized Illumina's

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

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

Hold Separate Commitments as insufficient, stating they failed to address "*a number of serious shortcomings identified in that proposal*."[220]

188. Illumina and GRAIL's response to the EC was grossly inadequate. As a result, on October 29, 2021, the EC took the unprecedented step of adopting legally binding interim measures.[221] 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.[222]

189. 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…." [223]

190. 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).

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

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

[222] *Id.*

[223] *Id.*

- 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.

- The business interactions between the parties shall be undertaken at arm's length, in line with industry practice, hence without unduly favouring 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.[224]

191. 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.

192. 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

[224] *Id.*

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

193. On November 5, 2021, Illumina filed its first quarterly report after the Merger closed. While it acknowledged the risk of the EC "impos[ing] fines" for "noncompliance" with interim measures,[225] the Company concealed critical details about the illegal Merger closing, further highlighting the Board's bad faith.

194. Illumina noted that it was obligated to take "supportive measures to preserve GRAIL's viability, marketability, and competitiveness, including with respect to the provision of resources to GRAIL."[226] What goes unmentioned is that 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,"[227] but failed to mention that, on August 11, 2021, the EC had put its review on hold due to "the parties' failure to provide essential information for the [EC]'s assessment…."[228]

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

[226] *Id.* at 41.

[227] *Id*.

[228] Press Release, *Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction*, European Comm'n (Aug. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

195. Illumina also buried a critical "Form of Insurance Matters Agreement" as an exhibit, obliquely referring to it in the Form 10-Q as a "[m]anagement contract or corporate plan or arrangement."[229] This buried document concealed the Board's decision to shield itself from liability with new extensive indemnification protections.

196. 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."[230]

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

- "Illumina has paid for the [Directors & Officers] insurance."
- "Illumina will purchase additional insurance if needed for Acquisition-related claims."
- "Illumina will pay for their D&O insurance-related legal costs, including the costs of any litigation or arbitration needed to enforce coverage rights."
- "Illumina will provide all other cooperation to assist the D&O in insurance litigation or claims."[231]

[229] Illumina Nov. 5, 2021 Form 10-Q, at 43.

[230] *Id.* at Ex. 10.1.

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

198. 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.

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

199. On February 1, 2022, less than six months after approving the illegal Merger close and in flagrant disregard of the harm this action had inflicted on Illumina, the Board considered a new, lucrative compensation package for deSouza. At the time the Board awarded this lavish package, 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 preventing Illumina from realizing any potential synergies from the Merger.

200. The meeting minutes show that "deSouza provided an update on the business, [and] certain operational matters," followed by a discussion of his "performance goals."[232] 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 executing the illegal actions.

[232] ILMN-220_004321.

201. Nevertheless, the Board resolved to reward deSouza with a 2022 compensation package exceeding $27 million—*an extraordinary 87% increase from the previous year*.[233]

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

202. On July 13, 2022, the EU General Court rejected Illumina's challenge and upheld the EC's jurisdiction over the Merger, confirming that the Board had violated the Standstill Obligations in closing the Merger.[234] 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.

203. On September 1, 2022, the FTC's ALJ issued his Initial Decision, finding that the FTC had failed to establish a *prima facie* antitrust violation.[235] Illumina seized on this provisional ruling to claim victory. A press release quoted

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[233] ILMN-220_004321 at -023-24; ILMN-220_000601 at -609.

[234] J. of the General Ct. (Third Chamber, Extended Composition), *Illumina, Inc. v. Commission*, Case T-227/21, (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.

[235] Initial Decision, *Illumina, Inc.*., Docket No. 9401 (F.T.C. Sept. 9, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

Dadswell's misleading statement that it validated the Merger's purported life-saving-benefits—*even though the ALJ had not addressed that issue*.[236]

204. As the Board should have known, the victory was hollow and would be short-lived. 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"[237] that the full FTC could "set aside" or reverse.[238]

205. FTC's Complaint Counsel filed an appeal the next day, September 2, 2022.[239] The appeal would be decided by the same bipartisan FTC commissioners that had voted unanimously to initiate the challenge.[240] And 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

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[236] 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.

[237] 16 C.F.R. § 3.51.

[238] 16 C.F.R. § 3.54(a).

[239] 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.

[240] 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.

which it could have exercised if it had made the initial decision,"[241] 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*."[242]

206. Meanwhile, on September 6, 2022, the EC issued its Phase II investigation decision, formally prohibiting the Merger under EU law ("EC Prohibition Decision").[243]

207. Evidence known to Illumina and the Board suggests that the FTC and EC closely coordinated 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.[244] 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.[245]

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[241] FTC Opinion at 22, *Illumina Inc.*, Dockert No. 9401 (Mar. 31, 2023) (quoting 16 C.F.R. § 3.54(a)).

[242] FTC Opinion at 22, *Illumina Inc.*, Docket No. 9401 (Mar. 31, 2023) (emphasis added) (internal citation omitted).

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

[244] Opp'n to FTC's Mot. to Dismiss the Compl. at 10–11, *Fed Trade Comm'n v. Illumina, Inc.*, No. 3:21-cv-00800-CAB-BGS (S.D. Cal. May 26, 2021), ECF No. 124.

[245] *Id.* at 11.

208. With Illumina's jurisdictional appeal pending in the European Court of Justice ("ECJ"), the agencies had a shared interest in ensuring that Illumina would divest GRAIL. This incentivized ongoing collaboration to sustain pressure until one of the agencies secured a decisive outcome.

209. 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."[246]

[246] Press Release, *Mergers: Commission prohibits acquisition of GRAIL by Illumina*,

210. Illumina and the Board had ample reason to foresee that the FTC would mirror the EC's conclusion that the Merger violated antitrust laws. This result was clear from the FTC's and EC's coordination, of which the Board was well aware before resolving to close the Merger. The Board knew of the agencies' close collaboration and their nearly identical frameworks for assessing the Merger. The Board 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 comply with the Standstill Obligations, not flagrantly violate them. Thus, even if Illumina ultimately succeeded in its jurisdictional challenge against the EC, the Board should have anticipated that the FTC would still unwind the Merger because consummating it violated the Clayton Act.

211. 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 deferential "substantial evidence" standard.[247] Under this standard, the Court of Appeals would uphold the FTC's findings "so long as they [were]

European Comm'n (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

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

supported by 'such relevant evidence as a reasonable mind might accept as adequate.'"[248] The Board should have recognized that prevailing on appeal was far from certain.

212. Therefore, by the time of the EC Prohibition Decision, the Board knew or should have known 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 consciously ignored this reality despite the numerous clear warning signs described above.

213. On September 15, 2022, 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."[249] While public messaging previewed a claim that Illumina would "continue to be pragmatic in [its] ongoing evaluation of the best path forward for GRAIL,"[250] there is no evidence the Board ever considered abandoning its combative strategy.[251] The

[248] *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)).

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

[250] *Id.* at -385.

[251] ILMN-220_004738.

mounting harm from the illegal Merger and its flawed defense would soon become undeniable.

214. On October 28, 2022, 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,[252] signaling the EC's final decision was imminent. Given the FTC's active appeal of the ALJ's Initial Decision, the FTC was undoubtedly monitoring these developments.

215. The Board met again on November 1 and 2, 2022, to be briefed on the fallout from the Merger. Illumina and GRAIL had missed revenue forecasts "due to continued weakness in Galleri Revenue,"[253] such that the Company's "Core Cash Forecast" was projected to reach a "low point in FY23."[254] 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."[255]

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

216. On December 5, 2022, the EC announced restorative measures

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[252] Press Release, *Mergers: Commission renews interim measures to ensure Illumina and GRAIL continue to be kept separate following the prohibition decision*, European Comm'n (Oct. 28, 2022), https://ec.europa.eu/commission/presscorner/detail/en/mex_22_6467.

[253] ILMN-220_004756 at -762; *see also id.* at -769 ("due primarily to slower than expected ramp in Galleri sales").

[254] *Id.* at -790.

[255] *Id.*

following its prohibition of the Merger that supplanted the interim measures.[256] These included "swiftly and with sufficient certainty" separating Illumina and GRAIL to promptly restore "the pre-transaction situation."[257] 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.

217. 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.[258] By this point, the Board had been warned to expect investor activism due to its catastrophic GRAIL-related decisions.[259] Rather than address these concerns transparently, the Board used the Credit Agreement to entrench itself. Buried deep within the 156-page agreement was a "Change in Control" provision that triggered an event of default if a majority of the Board was removed or replaced within a two-year period without the

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

[257] *Id.*

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

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

incumbent Board's approval.[260] As the Board presumably knew, such "proxy puts" are notorious entrenchment mechanisms designed to "chill" proxy challenges by raising the stakes of stockholder-led Board replacements.

218. 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."

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

- "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."[261]

219. 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 that 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."[262]

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

[261] Illumina, Inc., Annual Report (Form 10-K) (Feb. 17, 2023), at 20-23 (emphasis added).

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

221. 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."[263] Using the same "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."[264] The FTC also found Illumina's attempt to contract around the harm to competition (i.e., 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.[265]

222. 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, which would apply a highly deferential "substantial evidence" standard to the FTC's robust factual record.

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[263] FTC Opinion at 2, *Illumina, Inc.*, Docket No. 9401, (F.T.C. Mar. 31, 2023).

[264] *Id.* at 47.

[265] *Id.* at 73.

223. On April 5, 2023, Illumina appealed the FTC divestment order to a United States Court of Appeals. Illumina chose the Fifth Circuit,[266] which did not have any connection to the appeal, but had some perceived favorable precedent relating to Illumina's constitutional challenge against the FTC. Illumina's forum shopping failed: the Fifth Circuit found each of Illumina's four constitutional challenges "foreclosed by Supreme Court authority."[267]

224. On May 25, 2023, Icahn-nominated Andrew Teno joined the Illumina Board. Five days later, on May 30, 2023, Teno was provided several critical 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 (collectively, the "GRAIL Documents").

225. After reviewing these confidential GRAIL Documents, Teno became "extremely concerned" about three issues: (i) the insurance agreements Defendants secured immediately before approving the closing of the GRAIL Merger, (ii) the legal advice Defendants relied on in proceeding with the transaction, and (iii) Defendants' significant risk of personal liability. Teno also highlighted a major

[266] *See* 15 U.S.C. § 45(c).

[267] *See Illumina*, 88 F.4th at 1046.

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.

226. On July 12, 2023, the EC imposed a fine of approximately €432 million[268] for Illumina's consummation of the Merger in direct defiance of the Standstill Obligation.[269] The €432 million figure amounted to 10% of Illumina's global revenue for fiscal year 2022—the maximum amount allowed under the EU Merger Regulation.[270] In its press release announcing the fine, the EC explained that its decision to impose the maximum allowable fine was influenced by Illumina's "*knowing[] and intentional[] breach[] [of] the standstill obligation*," which the EC described as an "*unprecedented and very serious infringement*."

227. On October 12, 2023, the EC ordered Illumina to unwind the GRAIL Acquisition (the "EC Divestment Decision") and adopted "restorative measures requiring Illumina to unwind its completed acquisition of GRAIL, following the Commission's decision to prohibit the transaction."[271]

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[268] Approximately $476 million based on exchange rates as of the July 12, 2023 date of the EC fine.

[269] Press Release, *Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval* (July 12, 2023), European Comm'n, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773.

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

[271] Press Release, *Commission orders Illumina to unwind its completed acquisition of GRAIL* (Oct. 12, 2023), European Comm'n, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872.

228. 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 Merger was anticompetitive.[272]

229. Illumina's legal reckoning was now unavoidable. The *fait accompli* was reflected in Illumina's announcement—just two days later, on December 17, 2023—that it would forgo its last remaining legal recourse, petitions for rehearing and rehearing *en banc* to the Fifth Circuit and for certiorari to the United States Supreme Court. Illumina effectively conceded that it had violated the Clayton Act by closing the Merger and confirmed that it would abide by the EC's and FTC's orders and divest GRAIL. In short, the EC and FTC received the complete relief that they sought.

230. 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.

231. 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.

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[272] *Illumina*, 88 F.4th at 1058-59. Although the Fifth Circuit did reverse the Commission as to the legal standard applicable to evaluating the Open Offer, this technical reversal had no practical implications because the Fifth Circuit adopted the standard advanced by FTC Commissioner Wilson in her Concurring Opinion that agreed with the Commission's ultimate judgment and remedy.

Q. EU Member States Act to Close Loophole in EC Merger Referral Guidelines

232. On September 2, 2024, the ECJ determined that the EC lacked jurisdiction over the Merger because, at the time that Illumina closed the Merger, the acquisition fell below the merger control thresholds of EC member states. As a result, the EC's decisions regarding the Merger were annulled and withdrawn. The ECJ remarked in its decision that the EU legislature could amend the Merger Regulation to add a "safeguard mechanism" allowing the EC to exercise jurisdiction over below-threshold mergers like Illumina and GRAIL's.

233. EU member states have done just that. Since Illumina and GRAIL announced the Merger, at least eight EU member states have changed their rules to allow them to "call in" mergers that do not otherwise meet their thresholds so that they can refer acquisitions like the Merger to the EC for review without jurisdictional barriers.

234. The EC acknowledged the member states' increased appetite for merger oversight in the wake of the ECJ's ruling. Then-EC Executive Vice President Margrethe Vestager stated that merger referrals in the EU now are "already more extensive than they were at the time of the Illumina/GRAIL referral."[273]

[273] Press Release, *Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions*, European Comm'n (Sept. 2, 2024), https://ec.europa.eu/commission/presscorner/detail/cs/statement_24_4525.

Vestager recognized that "[a]busive conduct and killer acquisitions" like the GRAIL Merger "are among the most critical competition challenges that we face today," and previewed that "protection against killer acquisitions is a clear and explicit objective for the next Commission."[274]

235. Thus, in conformance with the will of EU member states, Illumina's jurisdictional "victory" effectively applied only to the Merger, with that loophole closed even before the ECJ's ruling was issued.

236. Although the EC withdraw its decisions regarding the Merger, that did not undo the harm Illumina suffered from the EC's enforcement action. As discussed below, the withdrawal did not require GRAIL to return the Hold Separate Payments or void the EC Fine Credit Facility Illumina obtained to ensure liquidity if its jurisdictional challenge failed. In short, while the ECJ stripped the EC of authority over the Merger, it did not undo the Merger's damaging consequences—including Illumina's violation of Section 7 of the Clayton Act.

R. Harm to Illumina and Stockholders

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

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[274] *Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association*, European Comm'n (Sept. 5, 2024), https://ec.europa.eu/commission/presscorner/detail/en/speech_24_4582.

1. Cash Payments to GRAIL

238. 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. Illumina received no benefits from these payments. The Company was compelled to divest GRAIL at a *significant* loss, rendering these cash payments a direct economic harm.

a. *Continuation Payments*

239. 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*.[275]

b. *Hold Separate Payments*

240. In deciding to unlawfully close the Merger, the Board voluntarily subjected Illumina to the Hold Separate Commitments, which obligated the

[275] Illumina, Inc., Annual Report (Form 10-K) (Feb. 18, 2022) ("Illumina Feb. 18, 2022 10-K"), 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.").

Company to make regular payments to GRAIL until regulatory approval or definitive blockage of the Merger ("Hold Separate Payments").

241. 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.[276] These measures were subsequently renewed and adjusted on October 28, 2022.[277]

242. On October 11, 2023, after declaring the Merger prohibited, the EU replaced the Interim Measures with legally binding Transitional Measures.[278] These measures, which mirrored prior GRAIL-funding obligations, remained binding until GRAIL's divestment was finalized on June 24, 2024.

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

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

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

[278] Press Release, *Commission orders Illumina to unwind its completed acquisition of GRAIL*, European Comm'n (Oct. 11, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872.

244. Under these obligations, Illumina paid GRAIL:

- $774 million in 2021;
- $609 million in 2022;
- $464 million in 2023;[279] and
- $312 million in Q1 2024.[280]

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

c. *Disposal Funding*

245. The EC Divestment Decision obligated Illumina to secure EC approval for its plan to divest GRAIL.[281] The EC required that GRAIL be "as viable and competitive after the divestment as it was before Illumina's acquisition,"[282] 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").[283]

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

[280] Information Statement at F-43.

[281] Press Release, *Commission orders Illumina to unwind its completed acquisition of GRAIL*, European Comm'n (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.").

[282] *Id.*

[283] Illumina, Inc., Quarterly Report (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.").

246. Illumina anticipated the Viability Requirement would cost nearly $1 billion.[284] 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.

247. The EC approved Illumina's divestment plan on April 11, 2024.[285]

248. 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" outlined in Schedule 3.1(a) of the Agreement.[286] Though the Agreement itself was publicly disclosed, the Disposal Funding Schedule remains confidential.

249. 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.[287]

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

[285] Press Release, *Commission approves Illumina's plan to unwind its completed acquisition of GRAIL*, European Comm'n (Apr. 11, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1964.

[286] Illumina, Inc., Current Report (Form 8-K) (June 24, 2024), Ex. 2.1 at 10 ("Separation and Distribution Agreement").

[287] 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

250. 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.[288]

251. 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 obligated to pay.[289] GRAIL disclosed these costs as $143.6 million,[290] leaving $14.6 million in other obligations to complete the Disposal Funding payment total.

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.").

[288] GRAIL, Inc., Quarterly Report (Form 10-Q) (Aug. 13, 2024),) ("GRAIL Aug. 13, 2024 Form 10-Q"), 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.").

[289] 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).

[290] GRAIL Aug. 13, 2024 Form 10-Q, 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.").

252. 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 legal fees from the ongoing EC proceedings,[291] which Illumina has to reimburse.

253. 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 a clawback is "not probable."[292]

254. 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.[293]

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[291] 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.").

[292] GRAIL Aug. 13, 2024 Form 10-Q, 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.").

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

255. On September 9, 2024, Illumina repaid its Divestment Credit Facility debt at $761 million—*$11 million* above the principal,[294] 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

256. 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 purchasing "D&O insurance with up to $300 million coverage," at an "annual premium of up to $100 million."[295]

257. 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.[296] As the Board knew, Side A coverage directly protects directors and officers themselves, while Side B and C coverage protects the company.[297]

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

[295] ILMN-220_000973 at -978.

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

[297] *See* Axxima, *Sides A, B & C of a D&O Insurance Policy: What You Need to Know*,

258. The Board's new D&O structure entirely reallocated coverage in favor of the directors' own protection. The meeting materials proposed a "$150M Side A Only Program" paired with "Custom Side A Coverage (Limit TBD)."[298] 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."[299] The Company ultimately secured the full $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.[300]

259. 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*.

260. 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.[301] The Company successfully secured a 12-month renewal for

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(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/.

[298] ILMN-220_005647 at -652.

[299] *Id.*

[300] 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).

[301] *Id.*

$4.1 million—in line with historical premiums. However, the renewed policy did not restore the Company's Side B/C coverage, once again prioritizing expanded protection for the directors and officers over coverage for the Company.[302]

261. 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.[303] Instead, the Company spent $72.6 million for $300 million in Side A-only coverage.[304] 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.

262. 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.

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[302] *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").

[303] ILMN-220_005647 at -652.

[304] $4.32 million * 2.5 years = $10.8 million.

3. Legal and Regulatory Expenses

263. As detailed above, the Board's breaches of 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.

264. 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.[305] Separately, GRAIL disclosed *$143.6 million* in costs for the post-closing period through divestment.[306] 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*.

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[305] Illumina Feb. 18, 2022 10-K, 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.").

[306] GRAIL Aug. 13, 2024 Form 10-Q, 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.").

4. Divestment Expenses

265. Illumina incurred *$52 million* in expenses "primarily related to financial advisory, legal, regulatory and other professional services fees" directly tied to "planning" and "executing" GRAIL's divestment.[307] These costs were a direct result of the Board's decision to violate the Standstill Obligations, Section 7 of the Clayton Act, and would not have been incurred but for its breaches of fiduciary duty.

5. EC Fine and Related Expenses

266. 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 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.[308]

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

[308] Illumina, Inc., Quarterly Report (Form 10-Q) (Nov. 13, 2023),) ("Illumina Nov. 13, 2023 Form 10-Q"), 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.").

267. 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,[309] 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

268. Upon closing the Merger, certain GRAIL stockholders elected to receive contingent value rights ("CVRs")[310] under a Contingent Value Rights Agreement ("CVR Agreement").[311] As valued through a Monte Carlo simulation in connection with the Merger,[312] these CVRs accounted for $762 million, or 7.8%, of the $9.751 billion Merger consideration.[313]

269. The CVRs entitle holders to future cash payments proportional to specific GRAIL-related revenues over a 12-year period beginning at the Merger's

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[309] *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.").

[310] *Id*.

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

[312] 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 2, 2025), https://www.investopedia.com/terms/m/montecarlosimulation.asp.

[313] Illumina Nov. 5, 2021 Form 10-Q, at 18.

close. The CVRs 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.[314]

270. 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 of 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.

271. Remarkably, following GRAIL's divestment, Illumina remains the obligor for the CVRs.[315] 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."[316]

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[314] *Id.*

[315] Illumina Aug. 7, 2024 Form 10-Q, 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.").

[316] *Id.*

272. While Illumina's CVR Payments for 2023 and the first half of 2024 were under $1 million,[317] 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.[318]

273. In a scenario where Galleri receives FDA approval and wide-spread adoption during the CVR period, Illumina could face severe financial burdens untethered from its own revenue. Projections prepared ahead of GRAIL's divestiture anticipate 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].

[317] *Id.* at 17.

[318] *See* Illumina Aug. 7, 2024 Form 10-Q, at 17 ("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.").

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

7. Impairment Charges

275. 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.

276. 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 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.

277. These impairment charges were solely attributable to GRAIL. Absent the Board's decision to close the Merger in violation of positive law, including the Standstill Obligations and Section 7 of the Clayton Act, 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*

278. 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.[319] However, between the Merger's close and GRAIL's divestment, *Illumina wrote off the entire $6.091 billion in goodwill*.

279. In Q3 2022, Illumina recorded *$3.914 billion* goodwill impairment for GRAIL[320]—nearly $4 billion written off just a year after the unlawful Merger's close. Illumina directly linked the impairment to its defeats with the EC.[321] 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."[322]

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[319] 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.

[320] *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.*

[321] *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.").

[322] *Id.*

280. In Q2 2023, Illumina recorded an additional *$712 million* goodwill impairment for GRAIL, citing a "sustained decrease in the Company's stock price."[323]

281. By Q2 2024, Illumina wrote off the remaining *$1.466 billion* of GRAIL's goodwill,[324] 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.[325]

b. *IPR&D Impairment*

282. As part of the Merger, Illumina assigned a fair value of $670 million to GRAIL's in-process research and development ("IPR&D").[326]

283. 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."[327] Notably, no IPR&D impairment was recorded for core Illumina.

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[323] *Id.* at 71.

[324] Illumina Aug. 7, 2024 Form 10-Q, at 24.

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

[326] *Id.*, at 45.

[327] Illumina Nov. 13, 2023 Form 10-Q, at 24.

284. In May 2024, shortly before GRAIL's divestment, Illumina recorded an additional $420 million impairment for GRAIL's IPR&D asset.[328] Once again, no IPR&D impairment was recorded for core Illumina.

285. 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

286. 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.

287. The total purchase price of the Merger was $9.745 billion.[329] 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 GRAIL.[330] This represents a *$7 billion*, or 72%, decline in value based on Illumina's own valuations at the time of the Merger and divestment.

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[328] Illumina Aug. 7, 2024 Form 10-Q, at 24.

[329] 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.

[330] *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.").

288. 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,[331] 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

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

[331] *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.").

290. The Merger and its aftermath were closely scrutinized by the market and analysts,[332] with one labelling it "the worst in the history of diagnostics."[333] Unsurprisingly, the market reacted negatively.

291. 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

[332] *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.").

[333] 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.

292. The 80% loss in value stems directly from Defendants' misconduct. While Core Illumina delivered reliable financial performance during this time,[334] 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

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

294. As of initiation of this Action, Illumina's Board consisted of 11 directors: Defendants Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel, along with non-defendants Stephen P. MacMillan ("MacMillan"), Jacob Thaysen, Anna Richo, and Scott B. Ullem ("Demand Board"). There is no disinterested and

[334] 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").

independent majority—viz., at least six directors—capable of impartially considering a demand regarding any of the claims in the Complaint.[335]

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

295. Count I alleges that Director Defendants breached their fiduciary duties by knowingly closing the Merger in violation of the Standstill Obligations—obligations the FTC relied on when pausing its federal court challenge—and by violating Section 7 of the Clayton Act, fully aware the deal would substantially lessen competition.

296. No majority of the Demand Board can impartially consider a demand to bring a fiduciary duty claim related to the Merger. Seven (7) of its eleven (11) 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.

297. Director Defendants Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel face significant liability due to their decision to close the Merger in violation of positive laws, breaches of the duty of loyalty.

[335] Between the initiation of this Action and the filing of this Amended Complaint, MacMillan left the Board and Keith Meister joined the Board. Even if the Court considers the membership of the Board at the time of the filing of this Amended Complaint, demand is still futile because MacMillan was not on the Board at the time the Board approved closing the GRAIL Merger.

298. 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.

299. 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.

300. As evidence of its bad faith, the Board approved closing the Merger in disregard of numerous warning signs, as well as explicit warnings from legal counsel, and in knowing violation of the EU Standstill Obligations and Section 7 of the Clayton Act, 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," falsely asserting that closing the Merger would accelerate GRAIL's cancer detection technology to "save lives."

301. 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.

302. 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.

303. 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,[336] amounts material to him. As an inside director, Thaysen cannot impartially consider a demand to sue directors controlling his compensation, including Director Defendants Epstein, Gottlieb, and Siegel, who serve on the Compensation Committee.[337]

304. 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 Defendant

305. Count II alleges the Officer Defendant deSouza breached his fiduciary duties by knowingly making false statements regarding the reasons for Illumina's closing of the Merger, which the Director Defendants also knew were false. Specifically, deSouza falsely stated that Illumina had a "moral obligation," to close the Meger because it would accelerate GRAIL's cancer detection technology to "save lives."

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

[337] 2024 Proxy at 9 –10, 15.

306. 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.

307. 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.

CLAIMS FOR RELIEF

COUNT I

BREACH OF FIDUCIARY DUTY AGAINST THE DIRECTOR DEFENDANTS

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

309. Each Director 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.

310. 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 and Section 7 of the Clayton Act, while concurrently approving $300 million in D&O insurance for their own personal benefit while justifying their illegal actions under a pretext of "moral obligation," falsely asserting

that such closing would accelerate GRAIL's cancer detection technology to "save lives."

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

312. 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.

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

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

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

COUNT II
BREACH OF FIDUCIARY DUTY AGAINST THE OFFICER DEFENDANT

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

317. The 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.

318. The Officer Defendant knowingly breached his fiduciary duties by, among other things, making false statements that Illumina had a "moral obligation" to close the Merger and asserting that such closing would accelerate GRAIL's cancer detection technology to "save lives."

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

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

321. As a direct result of the Officer Defendant's breaches, Illumina suffered significant damages.

322. The Officer Defendant is liable to Illumina for his misconduct.

323. 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. Determining that this Action is a proper derivative action maintainable under the law and the demand is excused;

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

C. Finding the Officer Defendant liable for breaching his fiduciary duties owed to the Company and stockholders;

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

E. Awarding against all Defendants and in favor of Illumina the full damages sustained by the Company as a result of Defendants' breaches of fiduciary duties, including rescissory damages; and

F. Awarding against all Defendants and in favor of the Company any extraordinary equitable and injunctive relief as this Court deems necessary or appropriate;

G. Awarding to Plaintiffs all costs and disbursements of this action, including reasonable attorneys', accountants', consultants', and experts' fees, costs, and expenses; and

H. Granting any other and further relief as this Court may deem just and proper.

ANDREWS & SPRINGER LLC

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Dated: August 8, 2025

PUBLIC VERSION FILED:
August 18, 2025