IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ILLUMINA, INC. CONSOLIDATED DERIVATIVE STOCKHOLDER LITIGATION	)))	Consol. C.A. No. 2024-1337-PAF

MEMORANDUM OPINION

Date Submitted: February 13, 2026
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Justin O. Reliford, Karen Kam, SCOTT+SCOTT ATTORNEYS AT LAW LLP, Wilmington, Delaware; Maxwell R. Huffman, SCOTT+SCOTT ATTORNEYS AT LAW LLP, San Diego, California; Donald A. Broggi, SCOTT+SCOTT ATTORNEYS AT LAW LLP, New York, New York; Joseph L. Christensen, CHRISTENSEN LAW LLC, Wilmington, Delaware; Christine M. Mackintosh, Edward M. Lilly, GRANT & EISENHOFER P.A., Wilmington, Delaware; Ned Weinberger, Brendan Sullivan, LABATON KELLER SUCHAROW LLP, Wilmington, Delaware; John Vielandi, Guillaume Buell, LABATON KELLER SUCHAROW LLP, New York, New York; Eric L. Zagar, Lauren C. Lummus, KESSLER TOPAZ MELTZER & CHECK, LLP, Radnor, Pennsylvania; Jeremy Friedman, David Tejtel, David Rosenfeld, FRIEDMAN OSTER & TEJTEL PLLC, Bedford Hills, New York; Peter B. Andrews, Craig J. Springer, David M. Sborz, Jacob D. Jeifa, ANDREWS & SPRINGER LLC, Wilmington, Delaware; Christina D. Saler, COHEN MILSTEIN SELLERS & TOLL PLLC, Philadelphia, Pennsylvania; Christopher Lometti, Amy Miller, Richard A. Speirs, COHEN MILSTEIN SELLERS & TOLL PLLC, New York, New York; *Attorneys for Lead Plaintiffs for the Consolidated Derivative Action.*

A. Thompson Bayliss, Eric A. Veres, Michael T. Manuel, ABRAMS & BAYLISS LLP, Wilmington, Delaware; William Savitt, Jonathan M. Moses, Lauren M. Kofke, Adabelle U. Ekechukwu, Emily R. Barreca, Valeria Flores, WACHTELL, LIPTON, ROSEN & KATZ, New York, New York; *Attorneys for Defendants Francis deSouza, John W. Thompson, Frances Arnold, Caroline Dorsa, Robert Epstein, Scott Gottlieb, Gary Guthart, Philip Schiller, and Susan Siegel*.

Peter J. Walsh, Jr., Michael A. Pittinger, Justin T. Hymes, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Kevin J. Orsini, Brittany L. Sukiennik, CRAVATH, SWAINE & MOORE LLP, New York, New York; *Attorneys for Nominal Defendant Illumina, Inc.*

FIORAVANTI, Vice Chancellor

In this stockholder derivative action, plaintiffs allege that officers and directors of Illumina, Inc. breached their fiduciary duties by causing the company to consummate a merger in violation of European Union merger regulations and United States antitrust laws. Plaintiffs allege that the defendants caused Illumina to violate positive law, giving rise to personal liability under *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 30, 2011). The plaintiffs assert that demand would have been futile because a majority of Illumina's directors face a substantial likelihood of personal liability as to the underlying claim.

The defendants have moved to dismiss the operative complaint under Court of Chancery Rule 23.1 for failure to plead demand futility and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The defendants' motion to dismiss is granted because demand on the Illumina board of directors is not excused.

I. BACKGROUND

The facts are drawn from the allegations of the verified amended complaint (the "Amended Complaint"), the documents integral thereto, and documents of which the court may take judicial notice. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004).[1]

[1] Further, "[t]he court may take judicial notice of facts publicly available in filings with the SEC." *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1167 n.3 (Del. Ch. 2002).

A. Illumina and GRAIL

Nominal Defendant Illumina, Inc. ("Illumina" or the "Company") is a Delaware corporation.[2] Its common stock is publicly traded on the Nasdaq Global Select Market under the ticker symbol "ILMN."[3] Illumina is a biotechnology company and the leading global supplier of next-generation sequencing ("NGS") platforms for genetic and genomic analysis, which include NGS instruments, consumables, and ancillary services.[4] NGS is a method of DNA sequencing used in a variety of medical applications, including multi-cancer early detection ("MCED") tests.[5] All MCED tests rely on Illumina's NGS platforms to generate their results.

Citations to the docket in this action are in the form of "Dkt. [#]." The operative complaint in this action is the Verified Amended Stockholder Derivative Complaint filed in *The Pavers and Road Builders Benefit Funds v. deSouza*, C.A. No. 2024-1337-PAF on August 8, 2025 (Dkt. 21), which will be cited as "Am. Compl." Citations to exhibits attached to Affidavits of M. Manuel at Dkt. 24 and Dkt. 33 are cited as "Defs.' Ex. [#]." Before filing this action, Plaintiff Pavers and Road Builders Benefit Funds ("Pavers") pursued and received books and records pursuant to 8 *Del. C.* § 220. The Amended Complaint cites many of those documents. The parties do not contest that under the incorporation by reference doctrine, the court may consider those documents and Defendants' exhibits in support of the Motion to determine whether the Amended Complaint has accurately referenced their contents in support of its claims and in pleading demand futility. *Reiter v. Fairbank*, 2016 WL 6081823, at *5–6 (Del. Ch. Oct. 18, 2016).

[2] The defendants include the individuals on Illumina's Board of Directors (the "Board") as of the merger's closing on August 18, 2021: John W. Thompson, Francis deSouza, Frances Arnold, Caroline D. Dorsa, Robert S. Epstein, Scott Gottlieb, Gary S. Guthart, Philip W. Schiller, and Susan E. Siegel (collectively, the "Director Defendants," collectively with Illumina, the "Defendants").

[3] Am. Compl. ¶ 21.

[4] *Id*.

[5] *Id*. ¶ 2.

In 2013, Illumina acquired a business specializing in non-invasive prenatal tests using Illumina's NGS technology.[6] After the acquisition, the prenatal test unexpectedly detected cancer signals. Seeking to build on that discovery, Illumina formed GRAIL, Inc. ("GRAIL") in 2015 as a wholly owned subsidiary to focus on creating a MCED test, which it named Galleri.[7] To raise the necessary capital to pursue Galleri, Illumina spun off GRAIL in 2017, which reduced Illumina's equity stake to 12%.[8]

B. GRAIL Contemplates an IPO and Illumina Considers Reacquiring GRAIL

In May 2019, GRAIL's Galleri MCED test received "Breakthrough Device" status from the FDA.[9] In May 2020, GRAIL completed a $390 million Series D financing, reflecting a valuation of $4.15 billion. One month later, GRAIL began taking early steps toward an initial public offering ("IPO").[10]

1. Illumina approaches GRAIL

While GRAIL was pursuing an IPO, Illumina embarked on a reacquisition of GRAIL. On July 31, 2020, GRAIL confidentially submitted its Form S-1 to the

[6] *Id.* ¶ 53.

[7] *Id.* ¶¶ 54, 56.

[8] *Id.* ¶ 58.

[9] *Id.* ¶ 61.

[10] *Id.* ¶ 63.

Securities and Exchange Commission ("SEC") for its contemplated IPO.[11] Later the same day, Illumina's CEO, Francis deSouza, met with GRAIL's CEO, Hans Bishop, expressing Illumina's desire to explore a potential acquisition of GRAIL.[12] After deSouza's initial outreach, Illumina and GRAIL moved quickly.

On August 4, deSouza and Illumina management "request[ed] approval [from the Board] to engage with GRAIL."[13] The Board convened to discuss GRAIL and received presentations concerning key diligence areas, along with antitrust considerations.[14] The Board and management met again the next day to discuss "follow-up questions and actions" on the "proposed [GRAIL] acquisition."[15] The Board also discussed increasing D&O insurance from a $120 million to a $150 million total limit, with the $30 million increase in "A-Side only coverage due to 'increased derivative actions with notable settlements,'" for a total cost of $10 million retention and a $3.8 million premium.[16]

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[11] *Id*. ¶ 66.

[12] *Id*.

[13] *Id*.

[14] *Id*. ¶ 67.

[15] *Id*. ¶ 68.

[16] *Id*. "Side A coverage is used to protect the [directors and officers] for defense costs, settlement amounts or judgments when the company does not or is unable to indemnify them" whereas "[s]ide B coverage, or company reimbursement coverage, is used to reimburse the company when it indemnifies the [directors and officers.]" Agostino A. Zammiello, *An Overview of D&O Insurance and Its Applicability in Bankruptcies*, Am. Bankr. Inst. J., June 2025, at 26 (2025).

On August 11, the two companies signed a non-disclosure agreement.[17] Through August and into early September, the Board continued to meet and discuss possible proposals and counterproposals to reacquire GRAIL.[18]

On September 14, five days after GRAIL registered its IPO with the SEC, Illumina's Board met to receive an update on the merger negotiations and hurdles to closing a transaction with GRAIL. Illumina's chief financial officer, Sam Samad, "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," would include a reverse break-up fee of $300 million, and would have a twelve month outside date, with a 3-month possible extension.[19] At the end of the meeting, the Board passed a resolution "related to financing the GRAIL acquisition."[20]

On September 20, Illumina and GRAIL executed the merger agreement, providing for Illumina to acquire the remaining 85.5% of GRAIL equity that it did not already own.[21] The merger valued GRAIL at $8.3 billion, plus contingent payments.

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[17] Am. Compl. ¶ 69.

[18] *Id*. ¶¶ 70–72, 75.

[19] *Id*. ¶ 79–80 (citation modified).

[20] *Id*. ¶ 80.

[21] *Id*. ¶¶ 82–83; Defs.' Ex. 35 (the "Merger Agreement").

The merger was conditioned on receiving regulatory approvals and no governmental authority blocking the merger:

> No Order. No Governmental Authority[22] shall have enacted, issued, promulgated, enforced or entered any Law, whether temporary, preliminary or permanent (collectively, a "Restraint"), which is then in effect and has the effect of enjoining, restraining, prohibiting or otherwise preventing the consummation of the Transactions.
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> Regulatory Approvals. (i) Any waiting period (and any extension thereof) applicable to the consummation of the Mergers under the HSR Act shall have expired or been terminated and (ii) any approval or waiting period with respect to those jurisdictions set forth in Section 8.01(d) of the Company Disclosure Letter shall have been obtained or terminated or shall have expired.[23]

The parties could waive the closing conditions in writing. The parties agreed to use reasonable best efforts to obtain all necessary actions, nonactions, and consents from Governmental Authorities. The parties also agreed that "reasonable best efforts" included offering and agreeing to undertake certain "Permitted Restrictions" to obtain pre-merger clearance in the U.S., UK, and Germany. "Reasonable best efforts" did not include divestment, holding separate

[22] "Governmental Authority" is defined as any federal, national, foreign, supranational, state, provincial, county, local or other government, governmental, regulatory or administrative authority, agency, instrumentality or commission or any court, tribunal, or judicial or arbitral body of competent jurisdiction. Merger Agreement § 1.01.

[23] *Id*. § 8.01(c), (d).

commitments, or any limitation on the ability of Illumina or its subsidiaries to acquire, hold, or exercise rights of ownership of GRAIL stock.[24]

The Merger Agreement specified that either Illumina or GRAIL could terminate the Merger Agreement if the closing conditions were not met by September 20, 2021 (the "Outside Date").[25] Either party could unilaterally extend the Outside Date to 11:59 p.m., Eastern Time on December 20, 2021, to obtain regulatory approvals if all other closing conditions were met, except those pertaining to regulatory approvals and restraints in Section 8.01(c) and (d).[26] Additionally, either Illumina or GRAIL could terminate the Merger Agreement if any Restraint in Section 8.01(c) became final and non-appealable, except that "an Initial Enforcement Order made by the Competition and Markets Authority pursuant to Section 72(2) of the UK Enterprise Act 2002 is not considered a Restraint for the purposes of" Section 9.01(b)(ii).[27] If regulatory approvals were not obtained, or could not be obtained due to certain regulatory restraints, Illumina would pay GRAIL a $300,000,000 regulatory break-fee.[28]

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[24] *Id*. § 7.07.

[25] *Id*. § 9.01(b).

[26] *Id*. § 9.01(b)(i).

[27] *Id*. § 9.01(b)(ii).

[28] *Id*. § 9.03(a).

C. Antitrust Review

1. Initial FTC review

On October 9, 2020, Illumina and GRAIL notified the United States Department of Justice and the Federal Trade Commission ("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 and quickly raised concerns that the proposed merger violated Section 7 of the Clayton Act,[29] which prohibits mergers 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."[30]

The FTC took a hardline stance against the merger. In October 2020, Illumina and GRAIL informed the FTC that they were open to reaching a settlement that would permit the parties to close the merger; the FTC refused to negotiate. Illumina also offered during early meetings with the FTC to negotiate a consent decree; the FTC again refused to negotiate.[31]

The Board met from November 3–5. During those meetings, it received a thirty-minute update on GRAIL and the merger, which included the first update on

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[29] 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53. Section 7 of the Clayton Act is found at 15 U.S.C. § 18.

[30] Am. Compl. ¶ 91.

[31] *Id*. ¶ 92.

the ongoing antitrust regulatory reviews that were taking place in the United States and expected in the United Kingdom. Management opined that only the United States and United Kingdom had jurisdiction to challenge the merger; therefore, the process would likely begin in mid-November.[32]

On November 9, the FTC made a "Request for Additional Information," colloquially known as a "Second Request," and initiated its investigation of the merger.[33] The investigation took six months, with Illumina and GRAIL producing millions of documents, providing narrative responses to FTC inquiries, and making employees available for hearings with the FTC.[34] The Second Request extended the HSR waiting period and prevented Illumina and GRAIL from closing the merger until they had "substantially complied" with the Second Request, and observed a second waiting period.[35]

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[32] *Id*. ¶ 93.

[33] *Id*. ¶ 94. The Second Request is an "extensive subpoena seeking both documents and data," and compliance with a Second Request "significantly expands both the scope and length of the agencies' merger review process and imposes considerable burdens on merging parties." Olivier N. Antoine et al., King & Spalding, *The Department of Justice Announces "Targeted" and "Expedited" Merger Investigations* (July 27, 2026), https://www.kslaw.com/insights/articles/the-department-of-justice-announces-targeted%E2%80%9D-and-expedited%E2%80%9D-merger-investigations; *see* Gordon Schnell, *The "Pull and Trigger": A simple way to side-step the dreaded HSR Second Request*, 9 Andrews Antitrust Litigation Reporter 6 (Dec. 2001) ("From a regulatory standpoint, next to an actual lawsuit brought by the government to block the proposed transaction, there is nothing more worrisome to merging parties than the mighty second request.").

[34] Am. Compl. ¶ 94.

[35] *Id*.

At a February 9 Board meeting, Illumina's General Counsel, Charles Dadswell, and Illumina's outside 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 review taking place in the United States."[36] The Board was told that the FTC's decision on the merger was expected in early April 2021. The Board discussed integration planning for the merger—a "critical issue for the near future"—and received a presentation outlining a plan to operate GRAIL as a stand-alone division.[37]

To address FTC and customer concerns over the continued ability of Illumina's current customers to "purchase Illumina's NGS products post-merger on the same terms and conditions as pre-merger,"[38] Illumina crafted an "Open Offer." The Open Offer was a "standardized supply contract," which "require[d] Illumina to provide its NGS platforms at the same price and with the same access to services and products that it provided to GRAIL."[39] Throughout February and March, Illumina shared iterations of the Open Offer with the FTC and met with the FTC Commissioners. Illumina also shared a form of a proposed consent decree and

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[36] *Id*.

[37] *Id*. ¶¶ 98, 100.

[38] *Id*. ¶ 95; Defs.' Ex. 32 (*In re Illumina, Inc. & GRAIL, Inc.*, No. 9401, ¶ 878 (F.T.C. Sep. 9, 2022) (initial decision of F.T.C. Chief Administrative Law Judge D. Michael Chappell) (hereinafter the "ALJ Initial Decision")).

[39] Am. Compl. ¶ 95.

offered to negotiate a consent resolution.[40] The FTC did not engage in negotiations with Illumina, nor did the FTC provide feedback on the terms of the Open Offer or make a counteroffer.[41]

On March 30, 2021, Illumina published the Open Offer on its website, making it available to all for-profit U.S. oncology customers who purchase NGS products for developing or commercializing oncology tests.[42] The Open Offer was drafted to take effect immediately after the closing. It was to expire on August 18, 2033, and would be held open for any of Illumina's for-profit U.S. oncology customers to accept at any time until August 18, 2027.[43]

2. EC antitrust developments

Illumina's regulatory review was not limited to U.S. authorities. Article 22 of the European Union Merger Regulations ("EUMR") allows EU member states to request the European Commission ("EC") examine mergers that affect trade between

[40] *Id*. ¶ 101.

[41] *Id*. ¶¶ 105–06. The FTC Commissioners ultimately described the deficiencies that they identified in the Open Offer, specifically that "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 NGA 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." Am. Compl. ¶ 110 (citing *In re Illumina, Inc. & GRAIL, Inc.*, No. 9401, at 66–73 (F.T.C. Mar. 31, 2023) (hereinafter the "Opinion of the Commission")).

[42] ALJ Initial Decision at 876–77; *see* Am. Compl. ¶ 108.

[43] Am. Compl. ¶ 95.

member states and threaten to significantly affect competition within the requesting member state.[44] In September 2020, the EC previewed amendments to its merger referral policy, which could alter the antitrust regulatory landscape for the merger. The amendments, in a departure from prior practice, enabled the EC to "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."[45]

The EC contacted Illumina via email in late February 2021 to propose a call, which took place on March 4.[46] In mid-March, the Board met to review GRAIL's regulatory status, including the ongoing FTC review and potential EC review following a referral from the French competition authority.[47]

On March 31, 2021, the day after the Open Offer went live on Illumina's website, the EC issued "[g]uidance on the application of the referral mechanism set

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[44] Jay Mondrall, *EU Commission Launches Major Merger Control Reform*, Kluwer Competition Law Blog (Apr. 1, 2021), https://legalblogs.wolterskluwer.com/competition-blog/eu-commission-launches-major-merger-control-reform/.

[45] Am. Compl. ¶ 77 (citing *Article 22 EW Merger Referrals*, Latham & Watkins at 2 (Sep. 18, 2020), https://www.lw.com/admin/upload/SiteAttachments/LW Client briefing - Article 22 EU merger referrals.pdf).

[46] *Id*. ¶ 102.

[47] *Id*. ¶ 104. Attorneys from Cravath, Swaine & Moore, LLP ("Cravath") presented on the timing of the possible reviews. *Id*. The Board met again on March 28, 2021, and received another regulatory update, this time from Dadswell. *Id*. ¶ 107.

out in Article 22 of the EUMR to certain categories of cases."[48] The March 31 guidance confirmed the adoption of policy changes that the EC had initially previewed in September 2020.[49] The guidance explained that the EC would, effective immediately, begin accepting referrals from EU member states for business combinations which "affect trade between [m]ember [s]tates; and [] threaten to significantly affect competition within the territory of the [m]ember [s]tates or [s]tates making the request" including those states which would "not have initial jurisdiction over the case."[50]

This guidance departed from the EU's historical "practice of discouraging referral requests under Article 22 from [m]ember [s]tates that did not have original jurisdiction over the transaction at stake . . . [because] such transactions were not generally likely to have a significant impact on the internal market."[51] The EC described the basis for the change:

> In recent years, however, market developments have resulted in a gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of

[48] European Commission Communication from the Commission, C 113/1, Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases (Mar. 31, 2021), eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0331(01) ("EC March 31, 2021 Guidance") at 1.

[49] Am. Compl. ¶ 111.

[50] EC March 31, 2021 Guidance ¶¶ 11, 13.

[51] *Id*. ¶ 8.

> concentration. These developments appear particularly significant in . . . sectors such as pharmaceuticals and others where innovation is an important parameter of competition, [and] there have been transactions involving innovative companies conducting research & development projects with strong competitive potential, even if these companies have not yet finalised, let alone exploited commercially, the results of their innovation activities.[52]

The guidance also explained that the suspension obligation, more colloquially known as the "standstill obligation," set out in Article 7 of the EUMR[53] imposes restrictions on closing a transaction if that transaction "has not been implemented on the date on which the [EC] informs the undertakings concerned that a referral request

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[52] *Id*. ¶ 9.

[53] Article 7 of the EUMR provides, in pertinent part:

> 1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).
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> . . . .
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> 3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. . . .
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> 4. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(1), (2) or (3) or on a presumption pursuant to Article 10(6).
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> . . . .

has been made."[54] The suspension obligations expire when the EC decides to not examine a transaction.[55] The changes signaled a major change in EC policy.[56]

3. The FTC sues Illumina to block the merger and the EC accepts referral of the merger

On the same day the Open Offer went live and the EC announced its acceptance of a wider array of referrals, the FTC Commissioners voted unanimously to authorize the filing of both an administrative complaint and a preliminary injunction action to block the merger.[57] Illumina issued a press release the same day stating, "Illumina . . . disagrees with, and will oppose, the [FTC]'s challenge to its previously announced acquisition of GRAIL. . . . Illumina will pursue its right to proceed with the transaction, the impact of which would accelerate the adoption of a breakthrough multi-cancer early detection blood test."[58] The next day, the FTC filed a complaint in the United States District Court for the District of Columbia seeking a temporary restraining order to prevent the merger from closing.[59] Illumina

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[54] EC March 31, 2021 Guidance ¶ 31.

[55] *Id*.

[56] Mondrall, *supra* note 44.

[57] Am. Compl. ¶ 114.

[58] Press Release, Illumina, Inc., Illumina Committed to Pursuing GRAIL Acquisition to Accelerate Access to Breakthrough Multi-Cancer Early Detection Blood Test (Mar. 30, 2021), https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=25956); *see* Am. Compl. ¶ 120.

[59] Am. Compl. ¶ 115. The action was later transferred to the Southern District of California, where Illumina is headquartered, upon Illumina's motion to transfer. *Id*. ¶ 115 n.145.

stipulated to the temporary restraining order and agreed to not close the merger until the earlier of September 20, 2021, or the court's ruling on a preliminary injunction.[60]

On April 19, the EC launched a preliminary investigation under Article 7(l) of the EUMR, which automatically triggered standstill obligations, barring Illumina from closing the merger without EC clearance.[61] The next day, the EC announced that it had accepted requests from Belgium, France, Greece, Iceland, the Netherlands, and Norway to assess the merger.[62] The announcing press release acknowledged that "[t]he proposed acquisition does not reach the notification thresholds set out in the [EUMR], and it was not notified in any Member State."[63] Nevertheless, relying on the recently adopted guidance, the EC explained that referral was appropriate because:

> [T]he 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.[64]

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[60] Temporary Restraining Order, *Fed. Trade Comm'n v. Illumina*, No. 1:21-cv-00873 (D.D.C. Mar. 31, 2021) Dkt. No. 8; Am. Compl. ¶ 115.

[61] Am. Compl. ¶ 121.

[62] Defs.' Ex. 9 (European Commission, Daily News, Mergers: Commission to assess proposed acquisition of GRAIL by Illumina, European Commission (Apr. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846 (hereinafter the "EC April 20, 2021 Press Release")); *see* Am. Compl. ¶ 122.

[63] Am. Compl. ¶ 122; EC April 20, 2021 Press Release.

[64] Am. Compl. ¶ 122; EC April 20, 2021 Press Release.

The press release also stated that Illumina could not close the merger without notifying and obtaining clearance from the EC. Nine days later, Illumina filed suit in the General Court of the European Commission in Luxembourg challenging the EC's jurisdiction over the merger.[65]

On May 5, the Board met, discussed timing of the various antitrust regulatory actions, and approved hold separate commitments which would go into effect upon closing of the merger.[66] Later in May, the FTC withdrew its request for a preliminary injunction, stating that, based on the EC standstill, and the FTC's "assumption that [Illumina and GRAIL] will abide by the laws of all jurisdictions in which they operate—the FTC's understanding is that [Illumina and GRAIL] cannot currently close this transaction."[67] The FTC withdrew the application for a preliminary injunction action without prejudice on June 1, but continued efforts to block the merger before an Administrative Law Judge ("ALJ").[68] Illumina continued to

[65] Am. Compl. ¶ 124.

[66] *Id*. ¶¶ 125–26.

[67] Pl.'s Ex Parte Application to Dismiss Compl., *Fed. Trade Comm'n v. Illumina, Inc.*, No. 3:21-cv-00800 (S.D. Cal. 2021), Dkt. No. 120; Am. Compl. ¶ 127.

[68] Am. Compl. ¶¶ 128, 130, 134. The court granted the motion to dismiss and closed the case. Clerk's Judgment, *Fed. Trade Comm'n v. Illumina, Inc*., No. 3:21-cv-00800 (S.D. Cal. 2021), Dkt. No. 127.

negotiate with the FTC, including filing a Motion for Conference to Facilitate Settlement, which the FTC opposed.[69]

The EC also continued its investigation, and on July 22, 2021, initiated "Phase II" of its investigation.[70] The EC then suspended its investigation because Illumina and GRAIL did not provide "essential information."[71] The suspension did not alter the standstill, which remained in effect.[72]

4. Illumina and GRAIL close the merger despite standstill obligations in the EU

Throughout late July and into August, the Board met several times and heard from various legal advisors on issues related to the closing, especially regarding the antitrust review ongoing in the U.S. and EU.[73]

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[69] Mot. for Conference at 5, *In re Illumina, Inc. & GRAIL, Inc.*, No. 9401 (F.T.C. July 13, 2021); Compl. Counsel's Memo. Opp'n Mot. for Conference at 3, *In re Illumina, Inc. & GRAIL, Inc.*, No. 9401 (F.T.C. July 20, 2021); Am. Compl. ¶¶136–37. The motion was denied by the ALJ because "the parties [were] not presently engaged in negotiations for the purposes of settlement, and thus there are no settlement negotiations to supervise." Order at 2, *In re Illumina, Inc. & GRAIL, Inc.*, No. 9401 (F.T.C. July 21, 2021); Am. Compl. ¶ 138.

[70] Am. Compl. ¶ 141.

[71] *Id*. ¶ 150.

[72] *Id*.

[73] In the months preceding the closing, the Board expanded Illumina's Directors and Officers ("D&O") insurance coverage. On July 14, 2021, insurance brokerage Woodruff Sawyer presented to the Board on D&O insurance renewal. According to the presentation, Illumina management was interested in enhanced Side A coverage which would be dedicated to the merger. *Id*. ¶ 140. The Audit Committee approved the D&O insurance renewal on August 3, and the Board approved Illumina's purchase of $300 million of D&O

On July 27, 2021, the Board met and received legal advice from Paul Hastings LLP ("Paul Hastings") on merger antitrust reviews in the U.S. and EU.[74] The Board met again on August 3 and received an update on the ongoing antitrust reviews from Dadswell, the Company's General Counsel.[75] Dadswell also discussed "strategies; possible next steps and timing considerations."[76] The Board met again on August 13 and received an update on the merger in an "informational meeting" designed for the Board to hear from Illumina management and legal advisors.[77] At the meeting, "deSouza outlined the importance of [the merger] 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."[78] deSouza recommended actions to "put the Corporation in the best position

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insurance coverage, at an annual premium of up to $100 million. *Id*. ¶¶ 143, 148; Defs.' Ex. 29 (Minutes of the meeting of the Audit Committee of the Board, dated August 4, 2021); Defs.' Ex. 27 (Minutes of the meeting of the Audit Committee of the Board, dated August 3, 2021).

[74] Am. Compl. ¶ 142.

[75] *Id*. ¶ 146.

[76] *Id*.; Defs.' Ex. 22 (Minutes of the meeting of the Board, dated August 3, 2021).

[77] Am. Compl. ¶ 151 (citation modified).

[78] *Id*. ¶ 152; Defs.' Ex. 23 (Minutes of the meeting of the Board, dated August 13, 2021).

to acquire Grail, including to close the transaction without final approval from the [EC], because waiting for approval would risk termination of the transaction."[79]

The Board also heard from its legal advisers. According to the meeting minutes, attorneys from Slaughter and May advised that "it was not possible [for the EC process] to be completed" before Grail could unilaterally terminate the Merger Agreement after December 20, 2021.[80] Attorneys from Paul Hastings also outlined "potential fines that could be imposed by the European Commission for closing without final clearance from the competition authorities, which could be as much as 10% of [Illumina's] annual revenues," and "potential mitigation factors, including the avoidance of a significant reverse breakup fee if Illumina was not able to close the transaction prior to December 20, 2021."[81] Attorneys from Cravath discussed "the status of the FTC process and pending administrative FTC trial and likely outcome, expressing the view that . . . [Illumina] was not likely to prevail before the FTC," but was likely to prevail on appeal to a United States Court of Appeals. And an attorney from Covington & Burling LLP ("Covington") "advised the Board regarding potential for stockholder litigation," outlining possible claims and outcomes. An attorney from Monckton Chambers expressed his view that Illumina

[79] Am. Compl. ¶ 155; Defs.' Ex. 23.

[80] Am. Compl. ¶ 156; Defs.' Ex. 23.

[81] Am. Compl. ¶ 156; Defs.' Ex. 23.

had strong arguments supporting its position that the EC did not have jurisdiction to review the merger, and that Illumina had a valid basis to seek to annul the EC's decision to accept jurisdiction. The attorney from Slaughter and May concurred with Monckton Chambers' presentation. The Board also heard from Woodruff Sawyer regarding the existing and proposed D&O insurance towers.

The next day, the Board met again and further discussed the closing and "debated 'the strategy and risks of closing the transaction in advance of clearance from the [EC], and the operation of the hold separate arrangements and the possible impact on the Grail business.'"[82]

On August 15, the Board met again and heard from management and additional legal advisers. deSouza provided an update on the merger and reiterated "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."[83] The European Chair of Covington's government policy practice informed the Board that

[82] Am. Compl. ¶ 160; Defs.' Ex. 24 (Minutes of the meeting of the Board, dated August 14, 2021).

[83] Am. Compl. ¶ 161; Defs.' Ex. 25 (Minutes of the meeting of the Board, dated August 15, 2021).

"closing the merger without EC approval would have 'implications with the [EC] competition authority, but that should be able to be repaired over time.'"[84]

At an August 17 Board meeting, deSouza confirmed management's recommendation to proceed with the closing, and Samad provided an update on the D&O insurance revisions. The Board resolved to close the merger and to increase the D&O insurance coverage.[85]

The Board closed the merger while the EC's standstill obligation was still in place, before Illumina's litigation in the EU was resolved, and prior to the Outside Date of September 20, 2021, and automatic extension of December 20, 2021. After closing, "GRAIL . . . remain[ed] a separate and independent unit, pending ongoing regulatory and legal review."[86] The closing included various hold separate commitments approved by the Board, including holding GRAIL separate after the closing, disallowing any involvement from Illumina management into GRAIL's operations, and fully funding GRAIL's day-to-day operations (collectively, the "Hold Separate Commitments").[87] The Hold Separate Commitments obligated

[84] Am. Compl. ¶ 162; Defs.' Ex. 25.

[85] Am. Compl. ¶ 163; Defs.' Ex. 30. The Director Defendants were each in attendance at the meeting and authorized the closing and increased D&O insurance coverage. Defs.' Ex. 30.

[86] Am. Compl. ¶ 181 n.215; Defs.' Ex. 31 (Illumina, Inc. Press Release, Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-Cancer Early-Detection Test, Illumina, Inc. (Aug. 18, 2021)).

[87] *See* Am. Compl. ¶ 181.

Illumina to fund GRAIL's R&D and to maintain GRAIL's viability as a separate, go-forward entity.[88] These financial commitments required by the Hold Separate Commitments ultimately exceeded those agreed to in the Merger Agreement and, ultimately, cost Illumina $3.09 billion from closing through the ultimate divestment of GRAIL.[89]

In a press release announcing the closing, Illumina disclosed that "[r]egulators in the EU are reviewing the transaction, but a decision is projected after the deal expires. . . . [T]he [C]ompany believes that the European Commission does not have jurisdiction to review the merger . . . [and] [b]y holding GRAIL separate while proceedings are ongoing, Illumina is positioned to abide by whatever final decision is reached in these legal processes."[90] Illumina also stated, "[t]here is no legal impediment to acquiring GRAIL in the US. Illumina is committed to working through the ongoing FTC administrative process, and as always, will abide by whatever outcome is ultimately reached in the US courts."[91] The press release cited the "deal . . . sav[ing] lives" as the primary reason for the closing, additionally stating that Illumina felt "a moral obligation to have the deal decided by a thoughtful and full review by the EU regulators and the US courts [which] can only be done if

[88] *See id*. ¶¶ 182–86.

[89] *Id*. ¶ 185.

[90] Defs.' Ex. 31.

[91] *Id*.; *see* Am. Compl. ¶ 167.

Illumina acquires GRAIL now. Otherwise, the [C]ompany is locked into a situation where the deal terms will expire before there is a chance for full review."[92]

The "life saving" narrative was also espoused in analyst calls after the closing and in Illumina's Form 8-K filed on August 18, which stated that "[a]s a result of Ilumina's decision to proceed with the [closing] 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."[93]

D. Regulatory Review and Proceedings Continue

1. EC Review

On August 20, 2021, the EC launched an investigation into the closing in contravention of the then purportedly in effect standstill[94] and on September 21, the

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[92] Defs.' Ex. 31.

[93] Illumina, Inc., Current Report (Form 8-K) (Aug. 18, 2021), at 4.

[94] Am. Compl. ¶ 171. Trial commenced in the U.S. before the ALJ on August 28, 2021. The ALJ ruled in favor of the merger on September 1, 2022, rejecting the FTC's position "that the merger was likely to cause a substantial lessening of competition in the market for the research, development, and commercialization of MCED tests." *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1045 (5th Cir. 2023). The FTC complaint counsel appealed the ALJ's decision to the FTC Commissioners, who, after oral argument, reversed the ALJ's decision. *Id.* Upon the FTC's *de novo* review, the FTC found that "the merger was likely to substantially lessen competition in the market for the research, development, and commercialization of MCED tests" and the FTC ordered Illumina to divest GRAIL. *Id*. at 1045–46 (citation modified). Illumina appealed the FTC's decision to the United States Court of Appeals for the Fifth Circuit, and, on December 15, 2023, the Fifth Circuit ordered the case remanded and the FTC's decision vacated "[b]ecause the [FTC] applied an erroneous legal standard at the rebuttal stage of its analysis." *Id*. at 1044.

EC issued a statement of objections (the "Statement of Objections").[95] The EC press release explained the standstill, stating "[u]nder the [EUMR], companies should not implement concentrations that are subject to the Commission's review unless and until they have been notified and cleared by the Commission."[96] In the Statement of Objections, the EC expressed the "preliminary view that, by closing their deal, Illumina and GRAIL breached the *standstill* obligation and that interim measures to restore or maintain effective competition are appropriate in this case."[97] The Statement of Objections provided Illumina with an opportunity to respond. It indicated that, after a hearing, the EC would determine whether interim measures were appropriate, and that such interim measures could be binding, with failure to comply with the interim measures possibly resulting in fines.[98]

On October 28, after hearing from Illumina and GRAIL, the EC adopted binding interim measures:

- 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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[95] European Commission Press Release IP/21/4804, Mergers: The Commission adopts a Statement of Objections in view of adopting interim measures following Illumina's early acquisition of GRAIL (Sep. 20, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4804.

[96] *Id*.

[97] *Id*.

[98] *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.[99]

(collectively, the "Interim Measures").[100] The Interim Measures were monitored by a "Monitoring Trustee" to be approved by the EC, with failure to comply resulting in a penalty payment of up to 5% of Illumina's average daily turnover and/or fines of up to 10% of Illumina's annual worldwide turnover.[101]

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[99] European Commission Press Release IP/21/5661, Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL (Oct. 28, 2021), https://ec.europa.eu/commission/presscorner/detail/it/ip_21_5661.

[100] On January 4, 2023, Illumina entered a credit agreement in order to fund GRAIL operations, which contained a proxy put, whereby an event of default would be declared if a majority of the Board was removed or replaced within a two-year period without the incumbent Board's approval. Am. Compl. ¶ 217.

[101] European Commission Press Release IP/21/5661, *supra* note 99; European Commission Press Release IP/21/4322, Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction (Aug. 19, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

On July 13, 2022, the EU General Court upheld the EC's jurisdiction over the merger, which confirmed the EC's interpretation that Illumina had violated the standstill when it closed the merger.[102] Illumina appealed that decision. Shortly thereafter, on September 6, the EC issued its "Phase II" investigation decision, which formally prohibited the merger under EU law.[103]

In late October, the EC renewed and expanded the interim measures and required Illumina to prepare for a divestment order.[104] At the end of the year, on December 5, the EC announced restorative measures that supplanted the interim measures, which required, in part, that Illumina "swiftly and with sufficient certainty" separate Illumina and GRAIL to "the pre-transaction situation."[105]

On July 12, 2023, the EC imposed a fine of approximately €432 million, equating to approximately 10% of Illumina's global revenue for fiscal year 2022.[106]

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[102] Am. Compl. ¶ 202 (citing J. of the General Ct. (Third Chamber, Extended Composition), *Illumina, Inc. v. European Comm'n*, Case T-227/21 (July 13, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021TJ0227)).

[103] *Id.* ¶ 206 (citing European Commission Press Release IP/22/5364, Mergers: Commission prohibits acquisition of GRAIL by Illumina (Sep. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364). It is alleged by Plaintiffs that the "FTC and EC closely coordinated throughout their investigations" and that Illumina and the Board were aware of such coordination. *Id*. ¶ 207.

[104] *Id*. ¶ 214.

[105] *Id*. ¶ 216.

[106] *Id*. ¶ 226.

Then, three months later, the EC ordered Illumina to unwind the merger.[107] Illumina provided a divestment plan to the EC, as then required by the EC, and obtained EC approval on April 11, 2024, and completed its divestment of GRAIL on June 24, 2024, through an IPO, whereby Illumina retained a 14.5% stake in GRAIL.[108]

E. The European Court of Justice Sides with Illumina on Appeal

On September 3, 2024, the European Court of Justice ("ECJ") sided with Illumina on its appeal of the EU General Court's decision and found that "the EC lacked jurisdiction over the Merger because, [when the closing occurred,] 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."[109] The ECJ Judgment also required the EC to pay the costs incurred by Illumina and GRAIL in the appeal proceedings.[110] On September 9, the EC issued a decision annulling and withdrawing all decisions related to the merger, including the imposition of the fine, and described the withdrawal as taking place *ex tunc*.[111]

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[107] *Id*. ¶ 227.

[108] *Id*. ¶ 231.

[109] Am. Compl.¶ 232; Judgment of September 3, 2024, *Illumina & GRAIL v. European Comm'n*, Cases C-611/22 and C-625/22, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022CJ0611 (the "ECJ Judgment").

[110] ECJ Judgment.

[111] Defs.' Ex. 36 at 6 (Decision of the European Commission, dated September 6, 2024) (annulling and withdrawing the EC decisions related to the merger, including the fine); Defs.' Ex. 41 (Application of the European Commission, dated September 13, 2024) (describing the EC's withdrawal of its decisions *ex tunc*).

1. U.S. Antitrust Review

In the U.S., trial in the FTC's action commenced before the ALJ on August 28, 2021. The ALJ ruled in favor of the merger on September 1, 2022, rejecting the FTC's position "that the merger was likely to cause a substantial lessening of competition in the market for the research, development, and commercialization of MCED tests." *Illumina, Inc. v. Fed. Trade Comm'n*, 88 F.4th 1036, 1045 (5th Cir. 2023). FTC complaint counsel appealed the ALJ's decision to the FTC Commissioners, who, after oral argument, reversed the ALJ's decision. *Id*. Upon *de novo* review, the FTC Commissioners found that "the merger was likely to substantially lessen competition in the market for the research, development, and commercialization of MCED tests" and ordered Illumina to divest GRAIL. *Id*. at 1045–46 (citation modified).

Illumina appealed the FTC's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit vacated the FTC Commissioner Decision, concluding that it had relied on an improper standard to find that the Open Letter did not sufficiently restore competition.[112] The Court remanded the case for reconsideration under the proper standard.[113]

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[112] Am. Compl. ¶ 223. Although the Fifth Circuit vacated and remanded the Opinion of the Commission, the Court rejected Illumina's four constitutional challenges and concluded that there was substantial evidence to support many of the FTC's factual findings. *Illumina*, 88 F.4th at 1046–62.

[113] *Illumina*, 88 F.4th at 1062.

F. Procedural History

On October 17, 2023, Icahn Partners L.P. filed the first stockholder action in this court, alleging that certain Illumina directors and officers breached their fiduciary duties in connection with the merger.[114] Four other stockholder actions followed.[115] The other actions were styled solely as derivative complaints, leaving the Icahn Action as the only one purporting to assert a direct claim in addition to derivative claims.

On March 27, 2025, parties to the four remaining stockholder actions submitted a joint proposed order seeking to consolidate the three derivative actions and the derivative claims in the Icahn Action, but to permit the direct claims in the Icahn Action to proceed separately.[116] Plaintiffs agreed to designate the complaint in the Pavers Action as the operative complaint. The parties further agreed that "[a]ll papers and documents filed and served to date in each of the [d]erivative [a]ctions

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[114] *Icahn Partners LP, et al. v. DeSouza, et al.*, C.A. No. 2023-1045-PAF (the "Icahn Action"). Icahn's suit prompted Pavers and other stockholders to pursue books and records demands. Pavers filed an action in this court to enforce its inspection rights under 8 *Del. C.* § 220. *See The Pavers & Road Builders Benefit Funds v. Illumina, Inc.*, C.A. No. 2024-0136-PAF (the "*Pavers* 220 Action").

[115] *The City of Omaha Police and Firefighters Retirement System v. DeSouza, et al.*, C.A. No. 2024-0172-PAF (the "Omaha Police Action"); *City of Roseville General Employees Retirement System, et al. v. DeSouza et al.*, C.A. No. 2024-0398-PAF (the "Roseville Action"); *The Pavers and Road Builders Benefit Funds v. DeSouza et al.*, C.A. No. 2024-1337-PAF (the "Pavers Action"). A fifth complaint was filed in *DiNapoli v. Thompson, et al.*, C.A. No. 2024-0864-PAF (the "DiNapoli Action"). On March 14, the DiNapoli Action was voluntarily dismissed.

[116] Dkt. 7.

are deemed a part of the record."[117] On August 8, 2025, Pavers filed an Amended Complaint in the Pavers Action.[118] The Amended Complaint alleges two claims: one for breach of fiduciary duty against the Director Defendants and one for breach of fiduciary duty against deSouza.[119] Plaintiffs allege the exculpation provision in Illumina's certificate of incorporation cannot protect Defendants from monetary liability because their misconduct involved knowing violations of law, breaches of the duty of loyalty, and bad faith conduct.[120]

Shortly after Plaintiffs filed the Amended Complaint, the parties to the Icahn Action reached a settlement binding only the Icahn parties.[121] A settlement hearing in the Icahn Action is scheduled for November 2, 2026.

II. ANALYSIS

Defendants have moved to dismiss the Amended Complaint under Court of Chancery Rule 23.1 for failure to plead demand futility and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The analysis begins and ends with the "gating question of demand futility." *Conte v. Greenberg*, 2024 WL 413430, at *5 (Del. Ch. Feb. 2, 2024), *aff'd*, 338 A.3d 1289 (Del. 2025).

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[117] *Id*.

[118] Dkt. 21. The court entered an order formally consolidating the derivative actions on October 29, 2026. Dkt. 49.

[119] Am. Compl. ¶¶ 308–23.

[120] *Id*. ¶¶ 312, 319.

[121] Icahn Action Dkts. 111–112.

A. 23.1 – Demand Futility

"A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). All of the claims asserted in the Amended Complaint allege harm suffered by Illumina itself, and recovery for that harm would flow to Illumina. "Thus, the claims belong to [Illumina], and the decision of whether to pursue the claims presumptively lies with the Board." *Feuer v. Zuckerberg*, 2021 WL 4552160, at *3 (Del. Ch. Oct. 5, 2021).

A stockholder seeking to divest the directors of their authority to control a litigation asset and bring a derivative action on behalf of the corporation must either make a demand on the company's board of directors or show that demand would be futile. Ct. Ch. R. 23.1; *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988); *Lenois v. Lawal*, 2017 WL 5289611, at *9 (Del. Ch. Nov. 7, 2017). To plead demand futility, the complaint must allege "particularized factual statements that are essential to the claim." *Brehm*, 746 A.2d at 254.

1. The Demand Board was set on December 23, 2024

"The demand analysis is conducted as to the board in place at the time that the claims at issue were 'validly in litigation.'" *In re Plug Power Inc. S'holder Deriv. Litig.*, 2025 WL 1277166, at *7 (Del. Ch. May 2, 2025) (quoting *Braddock v.*

Zimmerman, 906 A.2d 776, 786 (Del. 2006)). "This rule protects representative plaintiffs by preventing defendants from recomposing a board after a derivative claim is filed to strengthen Rule 23.1 arguments." *Id*. "The goal of a demand futility analysis is to determine 'whether the board that would be addressing the demand can impartially consider its merits without being influenced by improper considerations.'" *In re Fitbit, Inc. S'holder Deriv. Litig.*, 2018 WL 6587159, at *11 (Del. Ch. Dec. 14, 2018) (quoting *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). Only those events known to the demand board on the date the demand board is set should be considered when determining demand futility. *Lebanon Cty. Emps.' Ret. Fund v. Collis*, 311 A.3d 773, 801–02 (Del. 2023); *In re LendingClub Corp. Deriv. Litig.*, 2019 WL 5678578, at *15 (Del. Ch. Oct. 31, 2019).

The operative Amended Complaint alleges that the demand board comprised Defendants Arnold, Dorsa, Epstein, Gottlieb, Guthart, Schiller, and Siegel, and non-parties Stephen P. MacMillan, Jacob Thaysen, Anna Richo, and Scott B. Ullem (the "Demand Board").[122] Richo joined the Board in May 2024.[123]

The parties agree on the composition of the Demand Board but disagree as to what the Demand Board should be deemed to have known, and thus what the court

[122] Am. Compl. ¶ 294. The original Paver's complaint names the same Demand Board. *See* Dkt. 1 ¶ 245. deSouza resigned from the Board on June 11, 2023, and Thompson lost his bid for reelection in 2023. Am. Compl. ¶¶ 22–23.

[123] Illumina Inc., Current Report (Form 8-K) (May 16, 2024).

may consider, as of the operative time to consider whether demand is futile. Defendants argue that the court should consider the information available to the Demand Board identified in the Amended Complaint at the time the Pavers Action was first filed on December 23, 2024. Plaintiffs argue that the court should disregard all events that postdate the filing of the Omaha Police Action in February 2024. In other words, Plaintiffs urge the court to restrict its demand inquiry to information possessed by a board that pre-dated and was different from the Demand Board.

Plaintiffs did not preserve their argument. *See Plug Power*, 2025 WL 1277166, at *8 (finding that plaintiffs did not preserve an argument that the demand board should be split for various claims when the parties did not so allege in their amended complaint which added the third claim). Instead, Plaintiffs pleaded demand futility based upon the Board in place when Pavers filed the original Pavers Action, not when Omaha Police filed the Omaha Police Action. When Plaintiffs in the various actions agreed that the Complaint was the operative complaint, the Plaintiffs could have taken the position in the Amended Complaint that the demand board was set when the first of the consolidated actions was filed, but Plaintiffs did not do so.[124] Defendants relied on Plaintiffs' designated pleading to advance their arguments in support of dismissal. The Demand Board is set as of the date the Pavers

[124] *See In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 112 (Del. Ch. 2009) (plaintiffs naming the demand board as of the first filed action in the consolidated complaint).

action was filed and the court will not ignore the information that those directors possessed at that time.

2. Demand was not futile

When considering whether demand is futile, this court employs the "universal test" enumerated in *United Food & Commercial Workers Union & Participating Food Indus. Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021). The Delaware courts ask, on a director by director basis:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
>
> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

Zuckerberg, 262 A.3d at 1059. "If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile." *Id*.

The Demand Board comprised eleven members. To excuse demand, Plaintiffs must plead particularized facts supporting a reasonable inference that at

least six directors were incapable of impartially considering a demand.[125] *See id*. Plaintiffs allege that a majority of the Demand Board face a substantial likelihood of liability by voting to authorize closing the merger.[126]

"Where, as here, a plaintiff's basis for arguing demand futility centers on a substantial likelihood of liability resulting from the derivative claims at issue, the demand analysis effectively folds into an analysis of the strength of the underlying claims as to the Demand Board members." *Plug Power*, 2025 WL 1277166, at *9; *accord Ritchie v. Baker*, 2025 WL 2048014, at *8 (Del. Ch. July 22, 2025). Plaintiffs focus their argument on the seven Director Defendants named in the Amended Complaint. Plaintiffs must plead particularized facts to give rise to a reasonable inference that six of the seven Director Defendants—constituting a majority of the Demand Board—face a substantial likelihood of liability.

The Amended Complaint alleges the Director Defendants caused the Company to violate positive law, resulting in a substantial likelihood of liability on Plaintiffs' breach of fiduciary duty claim against each of the Director Defendants. Plaintiffs also bring a claim against deSouza, which they allege is closely intertwined factually with Count I.

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[125] Plaintiffs do not argue that any member of the Demand Board received a material personal benefit or lacked independence from someone who received a material benefit from the misconduct alleged in the Amended Complaint.

[126] Am. Compl. ¶¶ 296–97.

To survive dismissal, Plaintiffs are required to plead particularized facts which make it reasonably conceivable that at least six of the eleven members of the Demand Board face a substantial likelihood of liability under *Massey*. *See L.A. City Emps.' Ret. Sys. v. Sanford*, 352 A.3d 276, 327 (Del. Ch. 2026); *Brewer v. Turner*, 2025 WL 2769895, at *9 (Del. Ch. Sep. 29, 2025); *see also Brewer v. Turner*, 2025 WL 3048942, at *3–7 (Del. Ch. Oct. 30, 2025) (denying application to certify interlocutory appeal), *appeal refused*, 351 A.3d 496 (Del. 2025) (TABLE).

On a motion to dismiss under Rule 12(b)(6), the court must "accept all well-pleaded factual allegations in the complaint as true, accept even vague allegations in the complaint as well-pleaded if they provide the defendant notice of the claim, [and] draw all reasonable inferences in favor of the plaintiff." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011). The court will grant a Rule 12(b)(6) motion if the "plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." *Id*.

3. The Director Defendants do not face a substantial likelihood of liability on the breach of fiduciary duty claim (the *Massey* claim)

Directors owe the corporation and its stockholders the fiduciary duties of care and loyalty. *Dohmen v. Goodman*, 234 A.3d 1161, 1168 (Del. 2020). Within the duty of loyalty is the duty of good faith. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). Although the duty of loyalty is often implicated when a director receives an

improper financial benefit due to a conflict of interest, that is not the only basis for a loyalty claim. *See id*. ("[T]he fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest.").

Under *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), and its progeny, directors may be held personally liable for harms to the corporation resulting from a failure to exercise a duty of oversight. *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019); *Stone*, 911 A.2d at 370; *see Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) ("[T]he [*Caremark*] opinion articulates a standard for liability for failures of oversight that requires a showing that the directors breached their duty of loyalty by failing to attend to their duties in good faith. Put otherwise, the decision premises liability on a showing that the directors were conscious of the fact that they were not doing their jobs.") (citation modified)). Directors fall short of this duty when they "(a) utterly fail[] to implement any reporting or information systems or controls; *or* (b) having implemented such a system or controls, consciously fail[] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Stone*, 911 A.2d at 370. "Only 'a sustained or systematic failure of the board to exercise oversight . . . will establish the lack of good faith that is a necessary condition to [*Caremark*] liability." *Clem v. Skinner*, 2024 WL 668523, at *7 (Del. Ch. Feb. 19, 2024) (quoting *Caremark*, 698 A.2d at 971).

In *Massey*, stockholder plaintiffs alleged that the Massey directors had breached their fiduciary duties by entering into a merger agreement that did not provide adequate value for derivative claims arising from a coal mine explosion which killed 29 workers. The company "had pled guilty to criminal charges, had suffered other serious judgments and settlements as a result of violations of law, had been caught trying to hide violations of law and suppress material evidence, and had miners suffer death and serious injuries at its facilities. . . . [Despite all of this,] Massey continued to think it knew better than those charged with enforcing the law, and in fact, often argued with the law itself [in order to avoid potential patter of violation status]." *Massey*, 2011 WL 2176479, at *20; *see id*. at *20 n.146. The court considered Massey's recidivist record as evidence that the plaintiffs had adequately alleged a *Caremark* claim—"when a company has a 'record' as a recidivist, its directors and officers cannot take comfort in the appearance of compliance." *Id*. at *21.

Massey "represents 'an extreme version' of the scenarios contemplated in *Caremark*, premised on the notion that 'Delaware law does not charter lawbreakers.'" *Ritchie*, 2025 WL 2048014, at *13 (quoting *In re TransUnion Deriv. S'holder Litig.*, 324 A.3d 869, 885 (Del. Ch. 2024), then *Massey*, 2011 WL 2176479, at *20). "Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware

corporations only pursue 'lawful business' by 'lawful acts.'" *Massey*, 2011 WL 2176479, at *20. "Where 'a fiduciary acts with the intent to violate positive law,' she runs afoul of this proscription and violates the duty of loyalty.'" *Collis*, 311 A.3d at 795; *see also Desimone v. Barrows*, 924 A.2d 908, 934 (Del. 2007) ("Although directors have wide authority to take lawful action on behalf of the corporation, they have no authority knowingly to cause the corporation to become a rogue, exposing the corporation to penalties from criminal and civil regulators."); *Guttman*, 823 A.2d at 506 n.34 ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey."); *Metro Commc'n Corp. BVI v. Advanced MobileComm Techs., Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004) ("Under Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity.").

To state a claim for breach of fiduciary duty under a *Massey* theory[127], a plaintiff must allege "that directors and officers purposely caused the corporation to break the law in pursuit of greater profits." *TransUnion*, 324 A.3d at 886; *accord Ritchie*, 2025 WL 2048014, at * 13; *see In re Fox Corp. Deriv. Litig.*, 2024 WL

[127] The Delaware Supreme Court has emphasized that use of the phrase "*Massey* Theory" or "*Massey* Claim" is "not intend[ed] to suggest that . . . *Massey* . . . established a freestanding claim independent of *Caremark*." *Collis*, 311 A.3d at 780 n.17; *see TransUnion*, 324 A.3d at 885 ("*Massey* did not create a separate claim untethered from those explored in *Caremark* and *Stone*.").

5233229, at *9 (Del. Ch. Dec. 27, 2024) ("'[A] fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.'" (quoting *Massey*, 2011 WL 2176479, at *20)). Thus, the plaintiff must show three elements: (1) that the corporation broke the law, (2) that the directors and officers purposely caused the corporation to do so, and (3) that it was done in the pursuit of greater profits. *See TransUnion*, 324 A.3d at 886.

Plaintiffs allege that the closing violated the standstill, a positive law, and Section 7 of the Clayton Act, and that the Board did so with the knowledge that they were violating both jurisdictions' laws.[128] Defendants conceive of the closing quite differently. Defendants argue that the Board's decision to close the merger does not give rise to liability under *Massey* because the Board believed its conduct was lawful and took the legal risk that its position might not be upheld. Defendants argue that Plaintiffs have failed to plead that Illumina violated positive law, and even assuming Plaintiffs have sufficiently alleged a violation, have failed to allege with particularity that the Director Defendants acted in bad faith by doing so.[129]

[128] Pls.' Answering Br. 31–46.

[129] Defs.' Op. Br. at 32–33.

a. Illumina did not knowingly and intentionally violate any law.

Plaintiffs allege two jurisdictions' laws were violated, the EU and the U.S. The court addresses the two alleged violations of positive law separately.

i. No violation of EU Law

Defendants argue that the Director Defendants did not violate EU law by closing the merger in contravention of the then in place standstill because the EC did not have jurisdiction to impose the standstill in the first instance. The ECJ Judgment confirmed the EC's lack of jurisdiction and annulled any referrals that ultimately gave rise to the standstill. The fine was rendered a nullity and all EC decisions regarding the merger, including the fine, were withdrawn by the EC shortly after the ECJ Judgment. Plaintiffs argue that the court should not consider events which post-date the closing when determining whether the standstill was a positive law and, if so, whether it was violated. Defendants disagree and argue that even if the court were not to consider the ECJ Judgment, the closing was a legal risk rather than a violation of positive law.[130]

The predicate to a "violation of law" is that the law applies to the alleged violator—one cannot violate a law which does not apply to oneself. While the court

[130] Because the court finds that the Director Defendants did not violate the standstill because the referrals were annulled, the court need not reach Defendants' "legal risk" argument.

acknowledges that the content of the ECJ Judgment was not available to the Board at the time it made the decision to proceed with the closing, Plaintiffs are incorrect that the court may not consider that the ECJ Judgment annulled the referrals and thereby annulled the subsequent examination of the transaction which led to the EC's jurisdictionally improper activation of the standstill.[131] Indeed, Plaintiffs' argument misunderstands the nature of a breach of fiduciary duty claim under *Caremark* and *Massey*.

Caremark and *Massey* claims function in principle as indemnification claims by the company against the offending fiduciaries. *See, e.g.*, *South v. Baker*, 62 A.3d 1, 25 (Del. Ch. 2012) (describing plaintiffs' *Caremark* claim as a "tag-along indemnification action grounded primarily on still-developing harms"); *Massey*, 2011 WL 2176479, at *27 ("[T]he plaintiffs, as fiduciaries for other Massey stockholders, [should] be reluctant to prosecute the Derivative Claims they claim are so valuable until the direct claims against Massey are resolved. . . . . Thus, the Derivative Claims should follow, rather than precede, the resolution of the key direct suits and regulatory proceedings."); *Firefighters' Pension Sys. of City of Kansas City v. Found. Bldg. Materials, Inc.*, 318 A.3d 1105, 1182–83 (Del. Ch. 2024) ("[A] stockholder plaintiff cannot assert a *Massey* claim preemptively, whenever a

[131] *See* ECJ Judgment at 45.

plaintiff believes that a corporation is violating the law and that its directors may be knowingly causing the violation," instead, the court will "typically . . . require a prior adjudication that the statute or regulation was violated, the payment of a fine or penalty, or a settlement."); *accord Sanford*, 352 A.3d at 309 n.182 (observing that derivative suits are viewed as a "form of indemnification—a claim that ripens when the loss triggering the indemnification obligation has been established" (citation modified)).

Plaintiffs hang their hat on violations of both U.S. antitrust law and EU competition laws. Plaintiffs present no final determination from a U.S. court that Illumina violated the Clayton Act. On the EU side, Plaintiffs ask this court to not consider the ECJ Judgment when considering whether the board violated positive law. But the ECJ Judgment did not change the law; instead, the ECJ held that the EC never had jurisdiction to accept the referrals. Therefore, the EC did not have jurisdiction at the time of the closing to issue the standstill, so there was no valid positive law by which the Company was required to abide.

Plaintiffs argue that were this court to conclude that the closing did not violate positive law it would be "directly contrary to this [c]ourt's prior express holding on the issue" in a bench ruling in the *Pavers* 220 Action.[132] In the *Pavers* 220 Action,

[132] Pls.' Answering Br. 31.

the court stated, "the standstill[] was a positive law that the board knowingly appears to have violated[;] . . . [t]herefore, under our case law, the board's closing the merger may be misconduct, even if the EU ultimately determines that it lacked jurisdiction." *Pavers & Rd. Builders Benefit Funds v. Illumina, Inc.*, C.A. No. 2024-0136-PAF, at 16:15–17:20 (Del. Ch. July 16, 2024) (TRANSCRIPT).[133]

In making this observation, the court drew an analogy to *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209 (Del. 2018).[134] *Eagle Force* involved a contract dispute. In the contract, the parties consented to personal jurisdiction in Delaware. While the case proceeded to trial, this court entered a status quo order. The defendant violated that order, and this court held the defendant in contempt. Ultimately, this court concluded that the agreements were not enforceable contracts and, therefore, the court lacked personal jurisdiction over the defendant. The defendant then challenged the contempt orders, claiming they were invalid due to the lack of jurisdiction over the defendant.

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[133] The court's observation in the Pavers 220 Action was based on the information then before it on an expedited timeline in a summary proceeding. The preliminary observations expressed in that action do not bind the court in the subsequent plenary action. The court considers a Section 220 proceeding under the "credible basis test" because "a Section 220 proceeding 'is not the time for a merits assessment of Plaintiffs' potential claims against [the corporation's] fiduciaries.'" *AmerisourceBergen Corp. v. Lebanon Cty. Emps.' Ret. Fund*, 243 A.3d 417, 437 (Del. 2020) (quoting *In re Facebook, Inc. Section 220 Litig.*, 2019 WL 2320842, at *2 (Del. Ch. May 30, 2019)).

[134] *Pavers*, C.A. No. 2014-0136-PAF, at 17–19.

Our Supreme Court disagreed, holding that "when a Delaware court issues a status quo order pending its adjudication of questions concerning its own jurisdiction, it may punish violations of those orders with contempt and for sanctions, no matter whether it ultimately finds that it lacked [personal] jurisdiction." *Eagle Force*, 187 A.3d at 1241–42.

Plaintiffs argue that the standstill (and their subsequent annulment) should be treated like the *Eagle Force* "status quo protections [which] were violated while jurisdictional challenges were pending. . . . [T]he [s]tandstill warrants equal dignity with the *Eagle Force* order."[135]

Eagle Force is inapposite because the ECJ took a different approach than *Eagle Force*. The ECJ, applying European law, annulled the actions taken by the EC because the EC lacked jurisdiction to take the actions in the first place.[136] Thus, there was no enforceable fine amounting to a debatable corporate trauma that could serve as the foundation for a *Massey* claim.

The EC is not a court and the violation of an EC order is not violation of a court order.[137] The EC is a regulator, and its actions are subject to judicial review

[135] Pls.' Answering Br. at 34–35.

[136] Defs.' Opening Br. at 35.

[137] *See* Defs.' Ex. 43 (*Role of the European Commission*, European Commission (Oct. 2, 2025, 12:36 PM), https://commission.europa.eu/about/role_en) ("The European Commission is the executive branch of the [EU].").

by the EU courts.[138] The ECJ did not treat the EC's order in a manner similar to the manner in which our Supreme Court treated the orders for contempt in *Eagle Force*; instead, the ECJ annulled the referral which triggered the statutory regime initiating the standstill and found that the EC had no jurisdiction to review the merger.[139] An ECJ order annulling a judgment has retroactive effect.[140]

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[138] *See* EUMR Art. 21(2) (EC decisions are "subject to review by the Court of Justice.").

[139] Defendants also point the court to the EC's decision to "immediately withdr[a]w all of its decisions concerning the merger because it 'did not have jurisdiction to adopt them' and they lacked 'legal basis.'" Defs.' Reply Br. at 16 (quoting Defs.' Ex. 39 (European Commission, Daily News, Commission withdraws several decisions in the Illumina/GRAIL case (Sep. 6, 2024), https://ec.europa.eu/commission/presscorner/detail/en/mex_24_4586), and then Defs.' Ex. 40 (Lewis Crofts and Nicholas Hirst, *EU to Withdraw Follow-Up Decisions Against Illumina, Grail*, MLEX (Sep. 3, 2024), https://www.mlex.com/mlex/articles/2087741/eu-to-withdraw-follow-up-decisions-against-illumina-grail), and citing Defs.' Ex. 36 (European Commission, *Commission decision withdrawing decisions in cases M.10188 – Illumina / GRAIL (Article 6(1)(c) decision and prohibition decision under Article 8(3)); M.10483 – Illumina / GRAIL (Article 14 procedure); M. 10493 – Illumina / GRAIL (interim measures under Article 8(5)(a)); M.10938 – Illumina / GRAIL (interim measures under Article 8(5)(c)); M.10939 – Illumina / GRAIL (restorative measures under Article 8(4)(a))* (Sep. 6, 2024), https://ec.europa.eu/competition/mergers/cases1/202440/M_10188_10279986_7167_3.pdf)). The Defendants also point to the EC's ultimate withdrawal of its decision to impose the fine. Defs.' Reply Br. at 16. Plaintiffs argue that it would be improper for the court to consider the EC's actions after the ECJ Judgment in a manner which "rests on a defense-friendly inference." Pls.' Answering Br. at 38. The court need not consider the EC's decisions after the ECJ Judgment at all to reach its conclusion. While the ECJ Judgment does not explicitly state that the standstill was improperly enforced against Illumina and GRAIL, the ECJ Judgment clearly and unequivocally annuls the EC's decision to accept the request of certain EU member states. The acceptance of the referral requests was the predicate to the standstill taking effect, and, if the acceptance of the referral requests was annulled, the actions which relied on that referral could not have legally occurred.

[140] *See Asteris v. Commission of the European Communities*, European Court Reports 1998 Page 02181, ¶¶ 32–33 (Apr. 26, 1988).

Additionally, at base, the ECJ found that the EC had exceeded its statutory jurisdiction and imposed improper restrictions on a merger over which it never had the authority to review. In contrast, *Eagle Force* considered the validity of a court enforcing a status quo order issued by that court when the court did not have personal jurisdiction over the defendant. "Personal jurisdiction" was not the issue before the ECJ. The litigation in the EU was not premised on the EC lacking personal jurisdiction over Illumina or GRAIL, instead, the contention was that the EC lacked the statutory authorization under the EUMR to authorize referral of the merger as a concentration.[141]

Plaintiffs assert that, by accepting Defendants' position this court "endorse[s] an unworkable framework for decision making [because] Delaware fiduciaries should not be at liberty to pick and choose what regulatory directives or judicial orders their companies follow."[142] And that "[t]he later outcome of jurisdictional challenges should not justify knowing violations of positive law."[143] The fatal flaw of this argument assumes that the law in question was applicable to Illumina and GRAIL at the time the alleged violation occurred, which is not the case here. The court is not through this decision creating a framework by which Delaware

[141] *See* ECJ Judgment ¶ 121.

[142] Pls.' Answering Br. at 39.

[143] *Id*.

fiduciaries may choose which laws to follow, or even choose not to follow laws which they think a legislative body should change. It is also not creating a rule that a later outcome of a jurisdictional challenge justifies knowing violations of positive law. But on these facts, taken in the light most favorable to Plaintiffs, the law was never applicable to Illumina and GRAIL, and so Illumina and GRAIL could not have violated it.

Kandell v. Niv, 2017 WL 4334149 (Del. Ch. Sep. 29, 2017), does not suggest a different result. There, FXCM, Inc., a foreign exchange broker, was alleged to have engaged in a business model premised upon violation of a federal regulation. Specifically, the corporation's traders are alleged to have promised customers that the corporation would limit foreign exchange trading losses in violation of 17 C.F.R. § 5.16 ("Regulation 5.16"). As a result of a "flash crash" in early 2015, FXCM customers sustained losses of over $200 million, leaving the company with the inability to collect on the accounts due to its policy and putting the company potentially in breach of regulatory capital requirements.

The events were "catastrophic," and subjected the company to investigations and potential fines and penalties. The court held that the complaint stated a claim against the directors for breach of the duty of loyalty under *Massey*. The court observed that Regulation 5.16 "clearly prohibits touting loss limitations to clients," leading the court to "find that the Company did precisely that." *Id*. at *18. The court

emphasized, however, that it did so based upon the "unusual facts" of that case, where the corporation's business model was allegedly reliant upon a "clear violation of a federal regulation." *Id*.

Here, unlike in *Kandell*, enforcement of the EU regulation against Illumina was based upon a new, untested interpretation. *Kandell* indicated that a situation similar to what Illumina faced would not give rise to liability under *Massey*:

> With regard to a more complex and nuanced law that did not threaten a key source of FXCM's profits, or a more ambiguous Company policy, the Defendants would undoubtedly be right that something more would need to be pled to invoke scienter . . . . It would be a perverse incentive indeed were directors held liable because a regulator adopted a legal interpretation at odds with a rationally compliant, if ultimately unavailing, position adopted by the corporation.

Id. at *17. Of course, Illumina ultimately prevailed in the EU.[144] Plaintiffs have not pleaded a violation of EU law.

ii. No violation of U.S. Law

Plaintiffs argue that the closing violated US antitrust laws, specifically Section 7 of the Clayton Act. Plaintiffs proffer Illumina and GRAIL's negotiations with the

[144] In *Kandell*, after the complaint had been filed, but before the motion to dismiss had been decided, FXCM and the Commodities Futures Trading Commission ("CFTC") entered into a consent order that imposed monetary sanctions, permanent injunctive and other equitable relief for alleged violations of CFTC regulations, including Section 5.16. The plaintiff had moved to supplement the complaint to include allegations from the consent order. The court discussed, but did not rely on those subsequent allegations in deciding the motion to dismiss, but having denied the motion to dismiss, it allowed the plaintiff to file an amended complaint thereafter.

FTC, the Open Offer, and Illumina's ultimate divestment of GRAIL as evidence that the closing violated the Clayton Act and that the Board violated the law knowingly. Defendants argue that there was no legal bar to closing in the United States and that Plaintiffs have identified none; therefore, there was no violation of positive law. The court agrees with Defendants.

Plaintiffs have identified no legal bar to closing in the U.S. Plaintiffs acknowledge that the HSR waiting periods had expired, and they concede that no U.S. court order barred closing.[145] To salvage their *Massey* theory, however, Plaintiffs argue that "the FTC did not want the merger to close and was relying on the assumption that Illumina would respect the [s]tandstill" when it withdrew its injunction application after the EC invoked the standstill.[146] But knowing that the FTC did not want the merger to close is a far cry from the FTC maintaining a court order restricting Illumina and GRAIL's ability to close. The FTC voluntarily withdrew the injunction application,[147] and it imposed no fine.

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[145] Am. Compl. ¶¶ 127–28; *see* Defs.' Ex. 45 (*Premerger Notification and the Merger Review Process*, F.T.C. (Oct. 2, 2025 12:40 PM), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process) (FTC published "Premerger Notification and the Merger Review Process" explaining "[u]nless the agency takes some action that results in a court order stopping the merger, the parties can close their deal at the end of the waiting period.").

[146] Pls.' Answering Br. 41.

[147] Am. Compl. ¶ 127.

Plaintiffs next argue that closing the merger violated the Clayton Act regardless of whether there was any legal impediment in place or final ruling that the merger was illegal. No court has made a final ruling that the merger violated the Clayton Act. The ALJ found that it did not, the FTC Commissioners, on appeal from the ALJ, found that it did, and the Fifth Circuit, on appeal from the FTC Commissioners, reversed and held the FTC Commissioners applied the incorrect legal standard when finding that the merger violated the Clayton Act.[148] Before the FTC Commissioners heard the case on remand, Illumina divested GRAIL.[149] Thus, there was no final determination that Illumina had violated the Clayton Act.

Plaintiffs have not established a knowing violation of law that resulted in a corporate trauma—the prerequisite for a *Massey* claim. *See Ritchie*, 2025 WL 2048014, at *9 ("The notion that the corporation should recover for [a supposed] 'harm'—when the alleged misconduct at issue has not resulted in civil or criminal fines or penalties, and the Securities Class Action resolved in exchange for a $14 million payment funded entirely by [insurance] carriers—defies common sense.").

Collis does not counsel otherwise. In *Collis*, the Delaware Supreme Court reversed the Court of Chancery's dismissal of the plaintiffs' *Caremark* and *Massey* claims based on a post-complaint decision from a West Virginia federal court

[148] *Id*. ¶ 228 n. 272.

[149] *See id*. ¶ 231.

because the trial court improperly relied on the factual findings of another court. 311 A.3d at 797. The Supreme Court rejected defendants' suggestion that the "absence of an admission of liability or warning from a regulator or third-party expert absolves them of liability." *Id*. at 803. Important to the Supreme Court's decision was the trial court's conclusion "that the particularized allegations of the complaint and incorporated documents gave rise to a reasonable inference that at least half of the directors in office when the complaint was filed faced a substantial likelihood of liability on the plaintiffs' derivative claims," but then determined that the post-complaint West Virginia decision made the plaintiffs' claims untenable. *Id*. at 801–02.

Included in those particularized allegations were a myriad of allegations regarding AmerisourceBergen's participation in the opioid crisis, its lack of controls to prevent improper sales, and various "investigations, . . . subpoenas, [and] lawsuits" asserting that the Company's anti-diversion control systems were inadequate. *Id*. at 803. The Supreme Court held that "based on the plethora of investigations, reports, subpoenas, and lawsuits, and the reforms agreed to in the 2021 Settlement, [] the defendants were aware of the Company's compliance deficiencies." *Id*. No such plethora of red flags exists here, and the only legal avenue to assert that the merger violated the Clayton Act has since been closed and is unappealable.

This court declines Plaintiffs' invitation to expand this court's jurisdiction by having this court adjudicate the Clayton Act in order to find liability under a *Massey* theory. Therefore, the court finds that Plaintiffs have failed to plead that the closing violated U.S. law.

Plaintiffs have also not pleaded particularized facts to create a reasonable inference of bad faith conduct. Pleading bad faith for a *Massey* claim requires particularized allegations that "the corporate fiduciaries intentionally decided to cause the corporation to violate the law." *Ont. Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 2023 WL 3093500, at *32 (Del. Ch. Apr. 26, 2023). "[A] plaintiff can plead bad faith [] by alleging facts which support an inference that the defendant acted with scienter, meaning they had actual or constructive knowledge that their conduct was legally improper." *IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne*, 301 A.3d 596, 622 (Del. Ch. 2023) (citation modified). Because there was no violation of positive law—the predicate to a knowing violation—the Amended Complaint does not plead facts to infer bad faith on the part of the Director Defendants.

This case does not present a sustained or systematic failure of board oversight. Nor is this a case where the corporation is alleged to have engaged in a pattern of criminal activity, widespread fraud, or an ongoing pattern of statutory or regulatory violations endangering public health and safety in pursuit of profits. The Illumina

board received extensive legal advice from multiple law firms as to the potential risks of closing the transaction.[150] The Board minutes cited by Plaintiffs throughout the Amended Complaint show that the Board remained informed of the legal antitrust risk and evolving landscape, and operated under the understanding, largely based on presentations by their various legal counsel, that the EU did not have jurisdiction to invoke the standstill.[151] *See Melb. Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *12 (Del. Ch. Aug. 1, 2016) (finding no substantial likelihood of liability under either of plaintiffs' *Caremark* or *Massey* theories because "the Complaint indicates that the Board, at all times, was under the impression that its conduct did *not* violate applicable antitrust laws . . . [and] [p]laintiff, therefore, fails to allege that the Board acted in bad faith where it concluded that Qualcomm's business practices were legal, appealed the regulatory findings and penalties, and publicly proclaimed the Company's innocence.").

[150] Illumina received legal advice from Cravath, Slaughter and May, Paul Hastings, Monckton Chambers, and Covington on closing the merger and the applicable regulatory landscape.

[151] *See* Am. Compl. ¶¶ 155–57 (citing Defs.' Ex. 23 (Minutes of the meeting of the Board, dated August 13, 2021)); Defs.' Ex. 23 (deSouza "noted that the Corporation had been advised by counsel that there was no barrier in the U.S. antitrust process that prohibited closing the merger with Grail." An attorney at Monckton Chambers also confirmed his opinion that "the Corporation had a valid basis for seeking to annul the decision to accept jurisdiction . . . [and] opined that the Corporation had strong arguments, but also noted that the EU court favors the EC agencies, making the outcome uncertain."); *see also* Defs.' Ex. 25 (Minutes of the meeting of the Board, dated August 15, 2021) (Covington provided advice that Illumina's jurisdiction lawsuit against the EC would "have implications with the [EC] competition authority, but that should be able to be repaired over time.").

Plaintiffs point to no legal advice to the directors indicating that closing the transaction would be a clear violation of positive law. *Cf. Brewer*, 2025 WL 2769895, at *12 (sustaining *Caremark* claim where the complaint alleged the former general counsel "had advised management that Regions' overdraft policy did not comply with federal regulation").

To the contrary, the allegations of the Amended Complaint and documents incorporated by reference show that the board was informed of the legal risks of closing and made an informed decision to do so. But that is not all. In closing the transaction, the Board also ensured that the corporation would continue litigating its jurisdictional challenge in the EU, oppose the FTC's regulatory action, and would hold GRAIL separate so as to comply with any ultimate EU or U.S. regulatory decision. In short, this is not the stuff of a board's bad faith decision to knowingly violate positive law to generate corporate profits.

The court's illustrative paradigms in *Walton* provide a helpful means of analyzing this case:

- In one hypothetical scenario, the lawyers say: "Although there is some room for doubt and hence some risk that our regulator may disagree, we believe the company is complying with its legal obligations and will remain in compliance if you make the business decision to pursue this project."

- In the other hypothetical scenario, the lawyers say: "The company is not currently in compliance with its legal obligations and faces the risk of enforcement action, and if you make the business decision to pursue this project, the company is likely to

> remain out of compliance and to continue to face the risk of an enforcement action. But the regulators are so understaffed and overworked that the likelihood of an enforcement action is quite low, and we can probably settle anything that comes at minimal cost and with no admission of wrongdoing."
>
> In the former case, the directors can make a business judgment to pursue the project. In the latter case, the decision to pursue the project would constitute a conscious decision to violate the law, the business judgment rule would not apply, and the directors would be acting in bad faith.

2023 WL 3093500, at *34.

This case falls within the former, not the latter hypothetical. The decision to close the merger was an exercise in business judgment in the face of uncertain regulatory risk in both the U.S. and EU and the possible termination of the transaction before the regulatory dispute could be resolved. It does not reflect a board's blatant violation of a clear regulatory prohibition in pursuit of greater profits. Plaintiffs have failed to show a substantial likelihood of liability under *Massey* against any Defendants, including deSouza.[152] Therefore, demand was not futile and both of Plaintiffs' claims must be dismissed under Rule 23.1.

[152] Plaintiffs assert a claim against deSouza for breaching his fiduciary duty as an officer and assert that demand is futile because "[p]ursuing Count II would expose the Director Defendants . . . to increased personal liability on Count I." Am. Compl. ¶ 306. Because the Director Defendants do not face a substantial likelihood of liability on Count I, demand is also not futile as to Count II. *See, e.g.*, *Walton*, 2023 WL 3093500, at *51.

III. CONCLUSION

The Amended Complaint does not plead particularized allegations to support a reasonable inference that a majority of the Board faced a substantial likelihood of liability so as to excuse demand. Defendants' motion to dismiss is granted under Rule 23.1, and the Amended Complaint is dismissed with prejudice.