No. 25-940

IN THE

Supreme Court of the United States

MONIB ZIRVI,

Petitioner,

v.

AKIN GUMP STRAUSS HAUER & FELD, LLP, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

PETITION FOR REHEARING

Pursuant to Rule 44.2 of the Rules of this Court, Petitioner respectfully seeks rehearing of the Court's order denying the petition for a writ of certiorari.

This petition presents a narrow record-integrity problem. Petitioner's legal-malpractice claim was dismissed with prejudice after the courts concluded that he had not adequately shown attorney-client relationship, reasonable reliance, or duty. But ECF 107-7 – the exhibit most probative of those issues – was a more than 1,600-page record of attorney communications that was tendered to the District Court, served on opposing counsel, repeatedly cited, and treated as consequential. The Third Circuit then affirmed without actually reviewing ECF 107-7, and post-certiorari proceedings have revealed that the exhibit was not preserved in a stable, reviewable record posture.

Petitioner does not ask this Court to decide a sealing dispute, determine privilege, or resolve whether an attorney-client relationship existed. He seeks only rehearing, vacatur, and remand so the lower courts may regularize or reconstruct the record if necessary and reconsider the dismissal on a complete, reviewable record.

Recent developments support the petition's legal theory. After the petition was filed, the District of New Jersey ordered public access to ECF 107 and attachments on April 15, 2026, then resealed them on April 17 when Thermo Fisher stated the composite exhibit contained roughly 1,600 pages of attorney communications. App. 64a-70a. The Clerk's Office later reported not having the

USB with the exhibit. *Christakos v. Boyadjis*, 090214 (N.J. Jan. 20, 2026), also shows why invited reliance by Akin Gump and Cornell's counsel, as noted in the Affidavit of Merit, should have been considered.

The Appendix contains the relevant post-certiorari record materials: Petitioner's restoration memorandum (App. 1a-7a); the November 14, 2023 filing letter and ECF 107 materials relying on Exhibit 7 (App. 8a-53a); representative communications from the sealed record (App. 54a-63a); the April 15, 2026 access order (App. 64a-66a); Thermo Fisher's April 16 letter and the April 17 resealing order (App. 67a-70a); and the April 24/27 extension materials (App. 71a-73a).

1. Intervening circumstances of substantial effect

After the filing of the certiorari petition, the District of New Jersey entered two post-judgment orders in *Zirvi v. Illumina, Inc.*, No. 2:23-cv-01997 (MCA) (JSA), that materially sharpen the fairness and vehicle concerns already presented.

First, on April 15, 2026, the magistrate judge granted Petitioner's post-judgment motion to restore public access to ECF 107 and its attachments, including ECF 107-7. The court held that "[n]o sealing order appears on the docket as to ECF 107 and its attachments, including ECF 107-7," terminated any temporary sealing or restricted-access designation, directed the Clerk to restore public access, and required any party seeking continued restriction to make the particularized showing required by D.N.J. Local Civil Rule 5.3. App. 64a-66a.

Second, on April 17, 2026, after Thermo Fisher represented that the exhibit spans approximately 1,600 pages and includes numerous communications involving counsel that may be privileged or otherwise protected, the magistrate judge temporarily sealed ECF 153 and vacated the April 15 order pending further review. App. 67a-70a. Those post-certiorari orders confirm that the exhibit was consequential enough to generate immediate litigation over access, privilege, resealing, redaction, and extension practice. App. 64a-73a.

2. The new orders expose a record-integrity and due-process problem

The petition already presented two related concerns: first, that the lower courts applied an improper accrual-and-preclusion framework by cutting off claims that arose after the initial complaint, although *Morgan* holds that "res judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint," 648 F.3d at 177-78; and second, that the courts resolved the attorney-client-relationship issue against Petitioner at the pleading stage without a stable record containing the documentary material most probative of relationship, reliance, and duty.

The April 2026 orders reinforce both concerns. On April 15, the district court found no docketed sealing order as to ECF 107 and its attachments. Two days later, after defendants stressed the attorney-centered nature and volume of the exhibit, the same court temporarily restricted access pending redaction review. App. 64a-70a. That sequence undermines any assumption that Exhibit 7 was governed by a settled, formally adjudicated sealing regime.

The common law presumes a right "to inspect and copy public records and documents, including judicial records and documents," *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978), and documents submitted to influence judicial action bear the ordinary attributes of judicial records. See *In re Petrie Retail, Inc.*, 304 F.3d 223, 229-30 (2d Cir. 2002). Once Exhibit 7 was tendered as part of the sanctions response and invoked to affect adjudication, its status should have been regularized for judicial review.

The November 14, 2023 filing letter makes the point concrete. Counsel did not describe Exhibit 7 as a courtesy copy. Counsel informed the district court by e-filed letter that ECF 107 was being filed, Exhibit 7 contained more than 1,600 pages of email correspondence, the exhibit had been sealed in an abundance of caution, and Petitioner requested that the response and exhibits be accepted as filed and that Exhibit 7 be deemed filed under seal until further order. App. 8a-9a.

The strongest framing is therefore procedural fairness and record integrity, not blame assignment. Once the district court was expressly notified on the docket that Exhibit 7 was being tendered as part of the sanctions response, had been served on opposing counsel, and was being presented as filed under seal, final dismissal and affirmance should not have proceeded as though the most probative relationship evidence were absent or immaterial without first regularizing its status for ordinary judicial review.

A litigant should not lose a state-law malpractice claim with prejudice on the theory that relationship and reliance were insufficiently shown while the very body of communications most probative of those issues was submitted, repeatedly invoked, treated by all sides as consequential, and left in procedural limbo.

3. The chronology shows Exhibit 7 was central, not hypothetical or collateral

The record chronology confirms that Exhibit 7 was not newly invented after judgment. On October 2, 2023, Plaintiff stated that "[o]ver 300 emails, containing 1600 pages, were exchanged" between Dr. Zirvi and Matthew Pearson. On November 14, 2023, when Plaintiff filed the sanctions opposition as ECF 107, counsel simultaneously informed the district court that Exhibit 7 consisted of "over 1600 pages of email correspondence," requested that the response and exhibits be deemed accepted as filed, and asked that Exhibit 7 be deemed filed under seal until further order. ECF 107 then relied on "Defendant Attorney Emails, Exhibit 7" as factual support for the attorney-relationship theory. App. 8a-9a, 32a.

The same exhibit remained central after judgment. The May 10, 2024 reconsideration motion cited "ECF No. 107, Matthew Pearson Emails, page 192 and 193" in support of the aligned-interests and representation theory. In the Third Circuit, the January 27, 2025 opening brief stated that the relationship evidence included "exchanging hundreds of emails" and cited ECF 107-7, noting that it was "[n]ot included in Joint Appendix due to being over 1600 pages in length." The motion to seal Volume III likewise referred to materials previously sealed as part of the larger composite exhibit ECF 107-7.

The Rule 28(j) filings continued to rely on that record. The September 2, 2025 letter cited ECF 107-7 at 192-93 for the statement, “As my attorney, this communication is protected by Attorney-Client Privilege,” and the September 5, 2025 clarification letter again identified A-595 and ECF 107-7 as record materials that should have been confronted before judgment was allowed to stand.

The April 2026 orders now give that chronology Rule 44.2 significance. The exhibit was repeatedly identified, cited, quoted from, and carried through district-court, reconsideration, appellate, Rule 28(j), and post-judgment proceedings. Yet the malpractice claim was dismissed with prejudice and affirmed while the communications most probative of representation, reliance, duty, concealment, and accrual were never maintained in a stable, reviewable record posture. App. 64a-73a.

The Master Timeline, App. F, illustrates the causal theory supported by the existing record. Dr. Zirvi’s pleadings and exhibits were not merely filed in court; they were transmitted to regulators, acknowledged by the EU Commission during the Illumina/GRAIL investigation, and followed by regulatory action, SEC-related scrutiny, divestiture pressure, and leadership turnover. The timeline does not ask this Court to adjudicate causation. It shows why the 1,600-page attorney-communication exhibit was central to relationship, reliance, duty, materiality, and prejudice, and why dismissal with prejudice and affirmance on an incomplete or unstable record require rehearing, vacatur, and limited remand.

4. The missing USB confirms a preservation problem, not merely a sealing dispute

The later confirmation that the Clerk's Office does not possess the USB containing Exhibit 7 sharpens the problem. The issue is not only whether the exhibit was sealed, temporarily restricted, or omitted from the Joint Appendix. The issue is whether a tendered, served, cited, and consequential exhibit was ever preserved by the court in a form available for ordinary judicial review.

This is not a request to supplement the record with new evidence. It is a request to determine whether evidence already tendered, cited, and treated as part of the case was lost, omitted, or never transmitted in a reviewable form.

The Federal Rules confirm why that preservation failure matters. Rule 10(e) permits correction of omitted or misstated record material, Rule 11 governs record transmission, and Rule 60 permits district-court reconsideration for extraordinary defects. But those rules are safeguards, not substitutes for appellate review after affirmance on an incomplete record. The omitted material was not peripheral; Petitioner identified it as the evidence most probative of attorney-client relationship, invited reliance, and duty.

Rules 10(e), 11, and 60 are therefore not alternative remedies; they are proof that the ordinary process failed. None cures an appellate affirmance already entered on an incomplete record. The remedy must come from the Court whose denial left that affirmance in place: rehearing, vacatur, and remand for limited record-integrity proceedings.

If Exhibit 7 was not before the Third Circuit, affirmance was premature. If it was deemed part of the record, the failure to preserve and transmit it deprived Petitioner of meaningful appellate review. Either way, the lower courts extinguished a state-law malpractice claim without review of the exhibit that established the same.

The essential Rule 44.2 point is that final judgment cannot constitutionally rest on the supposed absence of proof where the proof was tendered to the court, served on the parties, repeatedly invoked, and then not preserved by the judicial system in a form available for adjudication. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

5. The sanctions posture and settlement do not cure the record defect

Respondents may argue that ECF 107-7 was filed with sanctions motions later withdrawn after settlement with other parties. That does not cure the defect. Whatever its origin, the exhibit was repeatedly invoked to support attorney relationship and reliance, including on reconsideration, appeal, and Rule 28(j). The malpractice claim against Akin Gump, Pearson, and Verrecchio was not adjudicated by that settlement. App. 68a, 72a.

Nor was the sanctions posture collateral in a way that made the exhibit legally irrelevant. Rule 11 proceedings can remain consequential even after dismissal because sanctions issues are collateral to the merits. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). Here, the exhibit's significance became still greater because the same attorney communications were later invoked to support relationship, reliance, duty, concealment, and accrual.

That matters constitutionally because due process protects a litigant's ability to use established adjudicatory procedures to vindicate a state-law claim, *Logan*, 455 U.S. at 429-30, and requires notice and an opportunity to be heard "appropriate to the nature of the case," *Mullane*, 339 U.S. at 313. The malpractice claim against Akin Gump, Pearson, and Verrecchio was finally extinguished while the exhibit most probative of representation, reliance, and duty was submitted, cited, treated as consequential, and never fairly regularized for judicial consideration.

6. New Jersey duty law shows why the exhibit mattered

The intervening record developments are especially important because New Jersey law treats attorney duty, invited reliance, and implied attorney-client relationship as fact-sensitive questions. *Christakos* adopted Section 51 of the Restatement (Third) of the Law Governing Lawyers as the governing standard for when an attorney owes a duty of care to a non-client. Under that standard, duty may arise when "the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies." Restatement § 51(2).

Petrillo v. Bachenberg, 139 N.J. 472, 483-84 (1995), and Banco Popular N. Am. v. Gandi, 184 N.J. 161, 181 (2005), likewise recognize duties to non-clients where attorneys know or should know that specific non-clients will rely on their representations. *Banco Popular* identifies invitation to rely and reliance as the “linchpins” of third-party attorney liability.

Attorney-client relationships may also arise by implication from conduct, consultation, and the exchange of confidential information. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317-20 (7th Cir. 1978); *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693-94 (Minn. 1980); Restatement § 14. The communications in Exhibit 7 bear directly on those questions, including representative communications captioned “Privileged and Confidential” and “Confidential” to Akin Gump attorneys. App. 54a-57a. That is why the record-integrity problem affects the reliability of the pleading-stage disposition itself, not merely the weight of evidence.

7. Rehearing and a limited GVR are appropriate

Rule 44.2 permits rehearing based on “intervening circumstances of a substantial or controlling effect” or “other substantial grounds not previously presented.” The April 15 and April 17, 2026 orders, together with the later confirmation that the Clerk’s Office does not possess the USB containing Exhibit 7, satisfy that standard. App. 64a-70a.

The requested disposition fits ordinary GVR practice. Under *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), a GVR is appropriate where intervening developments reveal a reasonable probability that the judgment rests on a premise the lower court might reject, and reconsideration may affect the outcome. The Court recently used that rehearing-to-GVR mechanism in *Oklahoma v. United States*, No. 23-402, 145 S. Ct. 2836 (2025).[1]

These developments arose or were confirmed after the petition was filed. They directly concern the documentary record implicated by the petition's existing arguments. They materially reinforce the case for review by showing that the communications most probative of representation, invited reliance, and duty were central to the case yet not preserved in a stable and reviewable posture when the malpractice claim was dismissed with prejudice and affirmed.

The April 2026 orders and missing-USB confirmation do not address the merits of the malpractice claim, but they suggest the claim may have been dismissed before key evidence was considered by the Third Circuit. This warrants vacatur and remand to determine whether the courts reviewed the malpractice claim without the exhibit central to issues of relationship, reliance, duty, concealment, and accrual.

The need for remand is sharpened because the Third Circuit itself recognized that Petitioner alleged an implied attorney-client relationship and that counsel told him

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1. This Court also has repeatedly used Rule 44.2 rehearing to vacate a prior denial of certiorari and enter a limited GVR where a post-denial development shows that the lower-court judgment may rest on a premise requiring reconsideration. See, e.g., *Oklahoma*, No. 23-402, 145 S. Ct. 2836; *Kent Recycling Servs., LLC v. U.S. Army Corps of Eng'rs,* No. 14-493, 578 U.S. 1019 (2016); *Liberty Univ. v. Geithner*, No. 11-438, 568 U.S. 1022 (2012); *Gonzalez-Longoria v. United States,* 138 S. Ct. 2668 (2018); *Abdirahman v. United States*, 139 S. Ct. 38 (2018).

they "represented his interests," yet affirmed without ensuring that the record containing the alleged attorney communications was preserved and reviewable.

The constitutional defect is visible from the courts' own words. The district court dismissed because "Zirvi's Complaint fails to plead the existence of an attorney-client relationship" or facts supporting his belief that the Attorney Defendants represented him. On reconsideration, the court held that the claim was barred and that Petitioner had "failed to state a claim under the 12(b)(6) standard." The Third Circuit then stated that it "need not review the District Court's dismissal under Rule 12(b)(6)," held that "the res judicata factors apply," and found no "injustice" from denial of amendment. Those conclusions should not stand without remand if the documentary record most probative of attorney-client relationship, reliance, duty, concealment, and accrual was tendered, served, cited, and then not preserved in a form available for adjudication.

CONCLUSION

This case raises a clear issue: Can a court dismiss a legal-malpractice claim due to lack of attorney-client relationship when the main evidence of that relationship was used by all parties but not properly preserved for judicial review?

That question implicates *Morgan*'s rule against precluding later-accruing claims, *Nixon*'s recognition of the common-law presumption of access to judicial records, *Logan* and *Mullane*'s due-process requirements, *Cooter & Gell* and *Willy*'s recognition that sanctions proceedings remain consequential collateral matters, and the non-client-duty principles recognized in *Christakos*, *Petrillo*, *Banco Popular*, *Westinghouse*, *Togstad*, and Restatement §§ 14 and 51.

The Court's decision must, at a minimum decide this critical issue. The ruling should ensure that final judgment does not rely on an unreviewed record issue. Rehearing should be granted, vacating the denial of certiorari and remanding for proceedings to determine if ECF 107-7 was preserved and reviewed before the malpractice claim was dismissed. This aligns with the limited reconsideration allowed by *Lawrence* and demonstrated by *Oklahoma*.

Respectfully submitted,

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RULE 44.2 CERTIFICATE OF GOOD FAITH

Pursuant to Rule 44.2, counsel certifies that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 44.2, namely intervening circumstances of substantial or controlling effect and other substantial grounds not previously presented.

Respectfully submitted,

JOSEPH D. GARRITY
Counsel of Record

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF LAW IN THE UNITED STATES DISTRICT COURT IN THE DISTRICT OF NEW JERSEY, FILED APRIL 13, 2026

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MONIB ZIRVI, M.D., Ph.D.,

Plaintiff,

v.

ILLUMINA, INC., THERMO FISHER SCIENTIFIC, AKIN GUMP STRAUSS HAUER & FELD LLP, LATHAM & WATKINS, RIP FINST, SEAN BOYLE, MATTHEW A. PEARSON, ANGELA VERRECCHIO, ROGER CHIN, and DOUGLAS LUMISH,

Defendants.

Civil Action No. 2:23-cv-01997 (MCA)(JSA)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF POST-JUDGMENT MOTION TO RESTORE PUBLIC ACCESS TO ECF 107 AND ITS ATTACHMENTS, TO TERMINATE ANY TEMPORARY SEALING DESIGNATION, OR, IN THE ALTERNATIVE, TO REQUIRE NARROWLY TAILORED REDACTIONS

Motion Return Date:
May 18, 2026

I. INTRODUCTION

ECF 107 is a judicial filing submitted in response to pending sanctions motions and is therefore a judicial record subject to a strong presumption of public access. The docket reflects that Exhibit 7 was filed under seal as a temporary, feasibility-based measure taken "in an abundance of caution," with later Rule 5.3 treatment to be supplied "as required." No separate motion to seal ECF 107 appears on the docket, and no sealing order with Rule 5.3 findings appears to have been entered as to ECF 107 or ECF 107-7. Continued blanket nonpublic treatment therefore lacks the particularized basis required for ongoing restriction of access.

II. FACTUAL BACKGROUND

On November 14, 2023, Plaintiff filed ECF 107, a response to Rule 11 sanctions motions, together with multiple exhibits. The docket entry for ECF 107 expressly advised counsel that, pursuant to Local Civil Rule 5.3(c)(2), a single consolidated motion to seal was required within 14 days following the completed briefing of the materials sought to be sealed, or within 14 days following the date on which the last such materials were filed under temporary seal, unless otherwise directed by the Court.

The accompanying November 14, 2023 filing letter explained that Exhibit 7 consisted of more than 1,600 pages of email correspondence and that, because it had become impracticable to determine immediately what portions should and should not be sealed, Plaintiff sealed the entire exhibit "in an abundance of caution" and would address the sealing request in a subsequent filing "as required." The letter then requested that the Court deem Exhibit 7 sealed until further order of the Court.

The docket entries provided to Plaintiff show no subsequent Rule 5.3 motion to seal ECF 107 or Exhibit 7, and no court order appears on the docket entering the findings required for continued sealing of ECF 107 or ECF 107-7. By contrast, where the Court did adjudicate sealing issues elsewhere in this case, the docket reflects an actual motion-to-seal proceeding and a corresponding order. The absence of such an order as to ECF 107 confirms that the present posture is, at most, a lingering temporary restriction that was never perfected through the required Rule 5.3 process.

III. LEGAL STANDARD

The Third Circuit recognizes a strong common-law presumption of public access to judicial records. Any departure from public access requires a clearly defined and serious injury supported by specific, on-the-record findings, and any restriction must be narrowly tailored. Local Civil Rule 5.3 similarly requires a particularized showing identifying the interests to be protected, the injury from disclosure, and why less restrictive alternatives, including redaction, are inadequate.

IV. ARGUMENT

A. No sealing order appears on the docket as to ECF 107 or ECF 107-7, and the temporary sealing posture was never perfected through the required Rule 5.3 motion practice.

The record before the Court shows that ECF 107 was accompanied by a clerk's Rule 5.3 notice directing the filing of a consolidated motion to seal within 14 days. That notice is not a judicial sealing order. Nor does the docket provided to Plaintiff reflect any later order making the findings required for continued sealing of ECF 107 or Exhibit 7. Because the contemplated Rule 5.3 process does not appear to have occurred, continued blanket restriction of access should not persist indefinitely.

B. ECF 107 is a judicial record filed in connection with sanctions briefing, so the presumption of public access is strong.

ECF 107 was filed for use in connection with sanctions motions and to influence judicial decision-making. Materials filed for that purpose are judicial records to which the public-access presumption applies with substantial force. Administrative convenience or uncertainty at the time of filing may explain a temporary initial restriction, but those considerations do not justify indefinite wholesale sealing once the required procedural steps were never completed.

C. If any limited portions of ECF 107 or its attachments remain properly protectable, the appropriate remedy is targeted redaction rather than blanket continued sealing.

This Motion does not ask the Court to disregard legitimate privacy or privilege concerns. To the contrary, if any discrete passages warrant protection, the proper remedy is specific, line-by-line redaction supported by the particularized showing required by Rule 5.3. What is not justified is ongoing, blanket nonpublic treatment of an entire judicial filing and its attachments where no perfected sealing motion and no sealing order with findings appear on the docket.

D. The fact that this request is brought post-judgment does not revive the expired Rule 5.3 deadline for the original sealing request.

The lapse of the original Rule 5.3 deadline does not automatically restart merely because this request is brought post-judgment. Opposing parties may, of course, oppose this present motion under the ordinary motion schedule. But they do not obtain an automatic do-over of the original 14-day sealing deadline. At most, if the Court deems further input appropriate, it may require any party seeking continued restriction to make that showing now, in a narrowly tailored submission, within a short court-set period.

V. RELIEF REQUESTED

Plaintiff respectfully requests that the Court enter an Order: (1) finding that no sealing order appears on the docket as to ECF 107 and its attachments, including ECF 107-7; (2) terminating any temporary sealing or restricted-access designation applied to those materials; (3) directing the Clerk to restore public access to ECF 107 and its attachments; or, alternatively, (4) requiring any party seeking continued restriction to file, within 14 days, a narrowly tailored submission identifying specific proposed redactions and making the particularized showing required by Local Civil Rule 5.3.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion.

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Dated: April 13, 2026 By: /s/ Amar A. Agrawal
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APPENDIX B — COMBINED VERIFIED RESPONSE BRIEF, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED APRIL 13, 2026

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November 14, 2023

VIA E-FILING
Honorable Madeline Cox Arleo, U.S.D.J.
Honorable Jessica S. Allen, U.S.M.J.
U.S. District Court for the District of New Jersey
Martin Luther King Jr. Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07102

Re: Monib Zirvi, M.D., Ph.D. v. Illumina, Inc. et al.

Civil Action No.: 23-1997-MCA/JSA

Your Honor Judge Allen,

This letter is regarding the filing of the enclosed copy of Plaintiff's Combined Verified Response Brief (EFC No. 107) in Opposition to Illumina (ECF No. 99) and Thermo Fisher Scientific's (ECF No. 104) Motion for Rule 11 Sanctions. After several attempts to review Exhibit 7 to determine if any of the Exhibit would fall under the spirit of the Court's ruling regarding the sealing of certain communications a decision was made to seal the exhibit which has been provided to Opposing Counsels on this day.

Unfortunately, the size of Exhibit 7, over 1600 pages of email correspondence, delayed the ultimate filing until early this morning after it became apparent it would be impossible to determine what should be sealed and what should not be sealed, given prior rulings. In an abundance of caution, we decided to seal the entire Exhibit 7, and address the request to seal in a subsequent filing as required.

We respectfully request that the Court receive Plaintiff's Combined Verified Response Brief (EFC No. 107) in Opposition to Illumina (ECF No. 99) and Thermo Fisher Scientific's (ECF No. 104) Motion for Rule 11 Sanctions as timely filed and that the Court finds that Exhibit 7 be sealed until further Order of the Court. Alternatively, should the Court require further briefing on the issue, Plaintiff requests leave to file the same.

WHEREFORE, Plaintiff specifically requests the Response and Exhibits be deemed accepted by the Court as filed and that Exhibit 7 be deemed filed under seal until further order of the Court.

Sincerely,

/s/ Joseph D. Garrity
Joseph D. Garrity, Esq.
For The Firm

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Case No.: 2:23-CV-01997-MCA-JSA

MONIB ZIRVI, M.D., Ph.D.

Plaintiff,

v.

ILLUMINA, INC., THERMO FISHER SCIENTIFIC, AKIN GUMP STRAUSS HAUER & FELD LLP, LATHAM & WATKINS, RIP FINST, SEAN BOYLE, MATTHEW A. PEARSON, ANGELA VERRECCHIO, ROGER CHIN, and DOUGLAS LUMISH

Defendants.

COMBINED VERIFIED RESPONSE BRIEF IN OPPOSITION TO ILLUMINA AND THERMO FISHER SCIENTIFIC'S MOTIONS FOR RULE 11 SANCTIONS

[TABLES IN ORIGINAL OMITTED]

INTRODUCTION

COMES NOW, Dr. Zirvi and Counsel and files this verified joint response[1] to Illumina's Motion for Sanctions ECF 99 and Thermo Fisher and Rip Finst Motion for Sanction ECF 104 and as grounds therefore would state the following.

BACKGROUND INFORMATION

The history and issues involved in this case present a myriad of complex procedural and legal issues. The facts range over nearly three decades. Dr. Zirvi has always been left in the dark and forced to search for answers that were always at the fingertips of the Defendants.[2] Each time Dr. Zirvi, through his own efforts, received a piece of information, it changed the who, what, when, and where of his claims until a clearer picture of his claims and damages came into view.

Dr. Zirvi's odyssey began in 2015, when he was informed for the first time of the Cornell v. Illumina[3]

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1. Counsel for Dr. Zirvi verifies the content and the exhibits filed herewith as true and accurate facts and research relied upon in filing the above styled lawsuit under penalty of perjury and to the best of his knowledge.

2. In Cornell Univ. et al v. Illumina (1:10-cv-00433) USDC, D. Delaware – filed on May 10, 2010, **hereinafter referred to as Cornell v. Illumina**, the parties entered a Stipulated Protective Order on March 21, 2011. Dr. Ziriv was denied access to any production that took place in the litigation.

3. The Cornell parties included Cornell University, Cornell Research Foundation, Inc., Life Technologies Corporation, and Applied Biosystems, LLC.

patent infringement case. He was a co-inventor of some of patents at issue in that case. He was told, and justifiably believed, he was a protected party in that litigation having interests that were aligned with the named Plaintiffs Cornell University, Cornell Research Foundation, Inc., Life Technologies Corporation and Applied Biosystems, LLC. Dr. Zirvi became a team player for the Plaintiffs for the next two years and the hopes to protect his royalty stream he had received as an inventor while attending Cornell University.

In early 2017, Dr. Zirvi independently discovered that his inventive Zipcode technology was referenced in Illumina products software code. He immediately brought this matter to the attention of the lawyers purporting to be representing his interest in the Cornell v. Illumina case only to be rebuffed. Dr. Zirvi requested to file an affidavit in the Cornell v. Illumina case but was told that it was too late to insert the matter into that patent case and that he could bring a separate trade secret case. The patent case was settled in April 2017 on undisclosed terms which resulted in Dr. Zirvi receiving no royalties. Dr. Zirvi brought a separate trade secret case. He also continued to request documents from various government agencies under the Freedom of Information Act, 5 U.S.C. 552.

Concurrently with the trade secret case, Cornell was attempting to set aside the April 2017 settlement agreement after Dr. Zirvi and others pointed out a concealed effort by Thermo Fisher who had acquired Life Technologies Corporation, and Applied Biosystems, LLC and Illumina. Thermo Fisher and Illumina were resolving their differences in this case and another, as part of a lunch of new joint ventures together. Ultimately, Cornell was forced to arbitrate with Thermo Fisher under a 2010 agreement regarding terms of joint litigation. The arbitration led to yet another undisclosed settlement agreement long after the SDNY trade secret case was underway. Dr. Zivi's belief that a second undisclosed settlement agreement was reached was supported by an undescribed sudden royalty payment in 2019 and letter by a 2021 affidavit filed by Amy McCourt described further herein below.

Only after gathering all the information described herein and described further in the Plaintiff's response to the Motion to Dismiss did the undersigned and Dr. Zirvi carefully consider the claims brought in this lawsuit.

For the most part Illumina and Thermo Fisher state in their Motions for Sanctions that Plaintiff had "involvement" in three prior lawsuits. By using the broad term "involvement" the statement is technically correct. However, the statement has little to no bearing on a right for sanctions in this case. Indeed, it is the Plaintiff's "involvement" in the prior cases that forms the basis of many of the claims asserted in the Present Lawsuit.

Specifically, Illumina and Thermo Fisher cite three prior cases as a basis for sanctions. The cases, Dr. Zirvi's involvement, and there relevance are described herein:

1. Cornell Univ. v. Illumina (1:10-cv-00433) USDC, D. Delaware - May 10, 2010.

Dr. Monib Zirvi was not "a party" to the Cornell Univ. v. Illumina litigation. Nevertheless, it was known to all the parties that the co-inventors had a clear financial and reputational interest in the outcome of the litigation. Indeed, the Cornell Plaintiffs advised the co-inventors that their interests were aligned thereby protecting the co-inventors' interests, including Dr. Zirvi.[5]

The financial interest was ongoing through royalty payments to the co-inventors based on patents that incorporated their inventive efforts.[6] The reputational interest came from being named inventor on patents that were widely recognized as great advancements in the field of DNA analysis.[7]

The Present case describes a complete failure on the part of the lawyers to protect the interests of the co-inventors which included Dr. Monib Zirvi.[8] The failure was

5. See ECF 17-1.

6. See ECF 101 and 101-1.

7. See, Exhibit 1, Meet 2019 NIHF Inductee David Walt!, National Inventors Hall of Fame® (NIHF) at https://www.invent.org/blog/inventors/new-inductee-class- David-Walt. (NIHF inducted Illumina founder David Walt in 2019 for revolutionary technology that allows thousands of genes to be analyzed simultaneously, believed to be ZipCode Technology.)

8. See ECF 1-14 Affidavit of Merit of Jeff Oster, J.D., Ph.D., regarding the Legal Malpractice claims.

driven by the two corporate entities, Illumina and Thermo Fisher, allegedly on opposite sides of the litigation, but secretly working together to damage the Plaintiff, and commit fraud on the US Courts.[9]

2. Zirvi v. Flatley (1:18-cv-07003) U.S.D.C., Southern New York - August 2, 2018.

In *Zirvi v. Flatley*, the co-inventors brought a claim for the theft of trade secrets acting on the advice received by Rip Finst and Roger Chin given during the Cornell litigation, as alleged in the Present Complaint.[10] The SDNY case focused on the nucleus of fact that Defendants violated trade secrets disclosed by the co-inventors in 1994 to Stephen Fodor while he was on an NCI panel reviewing a confidential grant submitted by the Barany Laboratory to the National Cancer Institute of the NIH.[11] It was alleged in that SDNY Litigation that Mr. Fodor "used two of his willing employees at Affymetrix as front men, Defendants Mark Chee and Jian Bing Fan to file the patent applications instead."[12] It was alleged in that SDNY Litigation that "[a] few months later, in May 1995, Dr. Francis Barany explained, in strictest academic confidence, to Dr. David R. Walt of Tufts University, his team's proprietary discovery and use of 'Zip Code

9. See ECF 1-4.

10. See the Present Complaint at paragraphs ¶¶ 41 -44. See also, fn 4, herein.

11. See ECF 63-2, Complaint in SDNY case ¶¶ 16 – 22.

12. Id.

chemistry', primers, and probes, for the encoding and decoding of DNA."[13] Moreover, the SDNY Complaint states that "Defendant Walt attempted to achieve accurate results without the misappropriation of these trade secrets but when, in 1998, he lost patience with his failures, he formed the company, Illumina Inc., as a front to steal, by filing fraudulent patent applications and by other means, the intellectual property of others….".[14] Subsequently, in 2001, Illumina tried to incorporate 16 of the identical Zirvi-Barany Zipcode sequences[15] in a withdrawn patent application that is cited in multiple issued Illumina patents as the means to decode their Zipcode arrays.[16] None of the Illumina patents listed in the Complaint would be viable as patents without the use of Zipcode sequences to decode random bead arrays, i.e. DMAP files to identify locations of Zipcodes. All claims in the SDNY litigation arise out of the alleged theft of the trade secrets and not the incorporation of the Zipcodes into any specific Illumina patents.[17] Dr. Zirvi was seeking answers through document requests from several governmental agencies, especially the NIH, to determine which, if any, tax funded public grants awarded to Illumina contained Zipcode technology which matured into Illumina patents.

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13. See ECF 63-2, Complaint in SDNY case ¶ 23 - 24.

14. Id.

15. USPTO App. No.: US20030096239A1

16. All patents believed to be at issue are listed in Present Complaint at ¶ 45 a. – zz.

17. See ECF 63-2, Complaint in SDNY case ¶ 12, 25, 34, 65, 67, and 161.

The SDNY litigation was dismissed with prejudice because every count of the lawsuit was predicated on proving trade secrets were stolen in 1994 by Fodor, in 1995 by Walt, and by Illumina after its formation in 1998. The Court found that the clock had expired on the co-inventors' claims regarding trade secrets.[18]

3. ZIRVI v. US NIH (3:20-cv-07648) USDC, New Jersey - June 23, 2020.

Between April 2017 and ***, Dr. Monib Zirvi requested information from United States Patent and Trademark Office ("USPTO"), the National Institutes of Health ("NIH"), the National Cancer Institute ("NCI"), the National Institute of Standards and Technology ("NIST"), and the National Human Genome Research Institute ("NHGRI").[19] After receiving some redacted documents and being denied other documents altogether, Dr. Zirvi filed this lawsuit on June 23, 2020.[20] Notably, Illumina was not a party to the litigation but chose to intervene for the sole purpose of continuing the non-disclosure of information related to the Present Lawsuit.[21] Likewise, Thermo Fisher, though not a party, submitted an affidavit to keep more information from being disclosed.

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18. See Zirvi v. Flatley Case 1:18-cv-07003-JGK Document 173.

19. Case 3:20-cv-07648-ZNQ-DEA Document 1. The case is referred to herein after as the NIH Litigation.

20. Id.

21. Id.

The NIH Litigation was resolved on April 28, 2022, by a Court Order[22] that found the following.

> The following facts are uncontested unless otherwise noted. Plaintiff is a scientist and medical specialist. (See Compl., ECF No. 1.) Defendant Illumina is a biotechnology company. (Id. ¶ 9.) **Plaintiff believes that Illumina is a "monopolist" in the DNA array market**. (Id. ¶¶ 910.) DNA arrays are tools that can detect changes in DNA. (Id.) Plaintiff seeks documents from the Agency Defendants concerning 'efforts by Illumina to improperly maintain its monopoly power.' (Id. ¶ 10.)

Nothing in the Court's finding supports that the NIH Litigation has any preclusive effect on the Present Lawsuit. In fact, the opposite is true. The lawsuit resulted in Dr. Zirvi receiving more evidence to support his claims and more evidence that Illumina and Thermo Fisher want to continue to suppress key facts related to the Present Lawsuit. The Court in the NIH Litigation addressed Dr. Zirvi's request to separate agencies individually as indicated by the indented paragraphs below.

A. The NCI of the NIH Request

Pertinent language from the NIH Litigation Final Order:

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22. NIH Litigation ECF No., 47 and 48.

> On May 17, 2017, Plaintiff filed a FOIA request with the NCI, seeking certain Illumina grant applications and progress reports. (Id. ¶ 3.) On June 14, 2017, the NCI produced 187 pages of responsive material. (Id. ¶ 4.) The NCI informed Plaintiff that it **redacted in part 53 pages and withheld 7 pages** pursuant to FOIA Exemption (b)(4). (Agency Defs.' SUMF ¶¶ 30-31.)….The NCI consulted with Illumina prior to making this exemption determination. (Id. ¶ 28.)….Illumina later determined that NCI could release additional materials that were excluded during the June 2017 FOIA response. (Agency Defs.' SUMF ¶¶ 32-34.)….Illumina contends that the challenged sections in the **NCI Grant reveal technical details** about Illumina's "assay development and optimization process **and proprietary information about array design features**."[23] (Illumina SUMF ¶ 8.)….

Illumina continues to suppress the exact information that Dr. Zirvi believes, in good faith, will support the Present Lawsuit's Count I. Specifically that Dr. Zirvi should be named as an inventor on Illumina patents where the array design features include his inventive contribution of ZipCode technology. This is information that has been withheld from him even as of the date of this filing. Defendants should not be rewarded for concealing

23. This information is precisely the information demonstrating that Zipcodes are being used throughout their patents and products.

the information needed to plead in the above-styled matter more specifically.

B. The NHGRI of the NIH Request

Pertinent language from the NIH Litigation Final Order continues:

> On May 17, 2017, Plaintiff submitted a FOIA request to NHGRI, which, like NCI, is an institute in the NIH. (Id. ¶ 11.) The request sought Illumina grant applications and progress reports that were submitted to the NHGRI. (Id.) In response, NHGRI released two partially redacted records: (1) Grant No. 1U54HG002753-01 (the "NHGRI Grant Application") and (2) Progress Report 5U54HG002753-02. (Id. ¶ 12.) NHGRI redacted the information based in part on FOIA Exemption (b)(4). (Agency Defs.' SUMF ¶ 53.) NHGRI consulted with Illumina prior to making the exemption determination. (Id. ¶ 50.) **Illumina determined that some of the previously exempted materials could be released during this litigation**. (Id. ¶ 52.)…. Plaintiff challenges three redactions in the NHGRI Grant Application. (See Agency Defs.' Ltr. at 2.) **Illumina claims that the challenged sections reveal "details about Illumina's optimization and control process,"** which are not public information. (Illumina SUMF ¶ 14.)….

Just as above, Dr. Zirvi believes, in good faith, this information will support the Present Lawsuit's Count I that Dr. Zirvi should be named as an inventor on the Illumina patents that were used within the grant application or resulted from the NIH funded grant. Illumina tries to convince this Court that Dr. Zirvi lost this lawsuit but as seen in the Court's order withheld documents were produced because of this litigation. The produced document, a less redacted version of Grant No. 1U54HG002753-01, confirmed Dr. Zirvi's belief that the large arrays protected by many of Illumina's patents did utilize the ZipCode technology for which Dr. Zirvi deserves compensation and due credit. Roger Chin, Rip Finst and the other Defendants had previously advised that the Illumina large array patents did not contain Dr. Zirvi inventor contributions.

C. The USPTO Request

Again, pertinent language from the NIH Litigation Final Order continues:

> On May 23, 2018, Plaintiff submitted a FOIA request to the USPTO. (Id. ¶ 17.) Plaintiff sought documents filed during an inter partes review ("IPR") proceeding before the Patent and Trademark Appeals Board ("PTAB"). (Id.) That IPR stemmed from a dispute between Cornell University and Illumina. (Id. ¶ 19.) Plaintiff specifically requested PTAB Exhibit 2052, which is a settlement agreement between Cornell, Thermo Fischer Scientific,

> and Illumina ("the Settlement Agreement" or "Exhibit 2052"). (Id.)….The USPTO withheld Exhibit 2052 in full pursuant to "Exemptions (b)(4) and (b)(5) of the FOIA." (Ex. B to Boston Decl., ECF No. 32-4.)….

Of all the documents that Illumina continues to fight to keep secret, the settlement agreement (or possibly multiple agreements) entered to settle the Cornell Litigation exemplifies the difference in the claims made in the Present Lawsuit that were never a part of the SDNY Litigation. The nucleus of operative fact in the Present Lawsuit is not the theft of a trade secret, rather it is the failure to compensate and recognize Dr. Zirvi as an inventor in Illumina's patents where necessary and the failure to properly compensate Dr. Zirvi adequately in the settlement of the Cornell Litigation.

The sequence of events simplified regarding the claims in the Present Lawsuit are:

1. Dr. Zirvi believed his interests were being protected in the Cornell Litigation by Thermo Fisher and the lawyers that professed to be doing the same. Plaintiff only became aware of the Cornell Litigation in February 2015.

2. Dr. Zirvi would work with the lawyers hired by Thermo Fisher over the next two years extensively to protect his interest in the Cornell Litigation.

3. Dr. Zirvi was never advised by lawyers of key facts that related to his interest, including but not limited to:

a. Prior agreements between P.E. Applied Biosystems and Illumina.

b. Agreements made during the Cornell Litigation between Thermo Fisher and Illumina.

c. Agreements made after the Cornell Litigation between Thermo Fisher and Illumina.

4. The key facts created a conflict of interests between, on the one hand, the co-inventors and on the other hand Thermo Fisher and the lawyers Dr. Zirvi was led to believe were protecting his best interests in the Cornell Litigation.

5. The undisclosed conflict of interest was in place in January through April of 2017 when Dr. Zirvi and other co-inventors raised the newly discovered evidence of the ZipCode technology being wrongfully used by Illumina in its patents with the lawyers purportedly representing the co-inventor's best interest.

6. The lawyers advised that nothing could be done in the Cornell Litigation regarding this issue and that it could be pursued separately in a trade secret case.

7. In April of 2017 the Cornell Litigation was settled without Dr. Zirvi or the Co-inventors being advised. The only information known regarding the settlement of the Cornell Litigation was that the inventors would receive no royalties from the settlement agreement.

8. Dr. Zirvi and other co-inventors advised Cornell of peculiar facts all occurring around the time of the settlement of the Cornell Litigation, including the newly discovered evidence of ZipCode technology being wrongfully used by Illumina – even as Illumina disingenuously claimed to not be using Zipcode technology. On June 21, 2017, Cornell moved to vacate the settlement agreement based upon their own additional evidence of fraud and collusion between Thermo Fisher and Illumina during the Cornell Litigation.

9. On or before January 11, 2018, Illumina introduces low-cost DNA sequencer named iSeq 100, which upon information and belief was done in partnership with rival Thermo Fisher.[24]

10. On or before January 11, 2018, Illumina introduces "Ampliseq for Illumina", in partnership with rival Thermo Fisher, a product line that uses intellectual property developed in Dr. Barany's laboratory and patented by Cornell.

11. On January 19, 2018, the Court ordered Cornell and Thermo Fisher to arbitration over Cornell's attempt to vacate the settlement agreement based on a pre-litigation agreement between Cornell and P.E. Biosystems Technologies (now, a wholly owned subsidiary of Thermo Fisher). Dr. Zirvi was not a party, and unaware of, a pre-litigation agreement. Dr. Zirvi was not advised of any of the proceedings regarding the arbitration nor any

24. See, Exhibit 2.

negotiations between the parties related to the Cornell Litigation.

12. On August 3, 2018, all the co-inventors file the SDNY case regarding trade secret theft of the ZipCode technology that originated in the mid-1990s. Every count in the SDNY case relies on liability being established arising from the trade secret theft.

13. Thermo Fisher and Illumina are now working together to defeat a claim of liability based on trade secret theft from the mid-1990s being brought in a case in 2018. Ultimately a second amended complaint, filed on February 8, 2019, in the SDNY case gets dismissed under the theory of "storm warnings" that put a trade secret claim beyond the time within which to bring a claim. Thermo Fisher put forth this argument jointly with Illumina even though counsel hired by Thermo Fisher in the Cornell Litigation advised the co-inventors that the trade secret claim should be pursued in a separate case. The co-inventors unsuccessfully pursued the trade secret case through appeal and a writ of certiorari.

14. In February of 2019, Dr. Zirvi received an unusually high royalty payment from Cornell. The details of the unusually high royalty payment were not provided. Dr. Zirvi now believes the royalty payment resulted in whatever agreement came out of the arbitration that resulted from the Court Order in the Cornell Litigation. Dr. Zirvi has never seen, nor been advised, of the terms of an agreement in 2019.

15. Dr. Zirvi bases his belief that the payment resulted from the arbitration on the fact that the April 2017 Settlement resulted in no payment to Dr. Zirvi. Then Cornell moved to set aside the settlement agreement, the Court ordered arbitration and an unexplained payment showed up several months later.

16. Dr. Zirvi continued his quest for information regarding the Settlement Agreement (or agreements) and the genesis of Illumina's patents regarding DNA arrays and sequencing. Dr. Zirvi made several FOIA requests in 2017 and 2019. As a result, he received heavily redacted information, and at times was refused information all together. The redactions and refusals were the result of the agencies consulting with Illumina and Thermo Fisher regarding the release of documents.

17. Consequently, on June 23, 2020, Dr. Zirvi filed a lawsuit to remove redactions and receive documents that were outright denied. He received more documents, including a less redacted grant application that indicated Illumina incorporated ZipCode technology throughout its product line. Illumina publicly claims it has several methods of coding and decoding their random bead arrays, but the grant application indicates the bead arrays are coded and decoded by the inventive process of Dr. Zirvi and the Barany laboratory. As such, Dr. Zirvi should be a named inventory on many of Illumina's patents regardless of any claim related to trade secret theft.

18. Dr. Zirvi specifically requested from the USPTO, PTAB Exhibit 2052, which is a settlement agreement

between Cornell, Thermo Fischer Scientific, and Illumina. ("the Settlement Agreement" or "Exhibit 2052")

19. On April 28, 2022, the NIH Litigation Judge upheld Illumina's right to block the release of the Settlement Agreement under a FOIA request based on the **affidavit of Amy McCourt** the Director of Intellectual Property & Commercial Litigation at Illumina who declared the Settlement Agreement included "(1) the scope of the releases, **licenses and covenants granted under the agreement**; (2) the parties' confidentiality obligations; (3) **the terms under which the licenses**, covenants and other obligations granted under the agreement **may be transferred to other parties**; (4) the term of the agreement; and (5) the allocation of expenses among the parties." (McCourt Decl. ¶ 40, ECF No. 31-3.).

20. This new information contained in the Amy McCourt affidavit dated February 1, 2021,[25] was unknown to Dr. Zirvi throughout the SDNY Litigation. The information is central to the claims in the Present Litigation and exemplifies further the difference in the nucleus of fact in the Present Lawsuit verses the SDNY case.

21. The SDNY case initiated on the advice of the very lawyers who would ultimately help craft the Settlement Agreement that settled the Cornell Litigation. If the Settlement Agreement of the Cornell Litigation resulted in releases, licenses, and covenants, unknown to Dr. Zirvi it may very well have authorized Illumina's inclusion of

25. ECF 78-4, Amy McCourt Affidavit.

the ZipCode technology in Illumina's patents. However, the Settlement Agreement could not give away Dr. Zirvi's right to be compensated for, and recognized as an inventor, in the Illumina patents containing his inventive contribution. Dr. Zirvi's interest were never protected as agreed during the Cornell Litigation, and a finder of fact could easily determine that his interest was subverted, and he was damaged because of collusion between Illumina, Thermo Fisher and the lawyers purporting to represent Dr. Zirvi's interest in the Cornell Litigation.

22. Evidence that the secret relationship between Illumina and Thermo Fisher (including their affiliates) extended beyond and before "Ampliseq for Illumina" was announced in January 2018, is provided at the end of a San Diego Tribune Article, February 21, 2018.[26] Joydeep Goswami who worked for Life Technologies from 2008 – 2013 (which was purchased by Thermo Fisher in 2013-2014), and continued at Thermo Fisher until 2019 was instrumental in the "Ampliseq for Illumina" collaboration (ECF 1 -Exhibit 1, 2) says:

> "Over the course of the last year or so we worked with Illumina to find a way to get the product available to Illumina customers, Goswami said. Moreover, the collaboration began before and goes beyond the Ion AmpliSeq deal.
>
> "Thermo Fisher is a very large company, and we have not only NGS, but several other technologies," he said. "So we continue to

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26. See Exhibit 3 attached hereto.

> engage and collaborate on a very regular basis. A lot of this is confidential, but we do a fair bit of working together. And that will continue."

Tellingly, a year after Joydeep Goswami makes this announcement on behalf of ThermoFisher, he joins Illumina in 2019 and is currently both Chief Strategy and Corporate Development Officer, and Chief Financial Officer. (See Joydeep Goswami LinkedIn **Exhibit** 4).

23. The belief that Illumina and Thermo Fisher orchestrated a Settlement Agreement to further their own business interest is supported by other information found after the SDNY Litigation. On March 3, 2020, after the SDNY Litigation, in an SEC filing SCHEDULE TO-C (Rule 14d-100), Tender Offer Statement under Section 14(d)(1) or (13)(e)(1) of the Securities Exchange Act of 1934, Exhibit 99.3 Marc Casper, CEO of Thermo Fisher during an interview stated:

Yes. The two large relationships with other industry participants are Illumina and DiaSorin, and Thermo Fisher has meaningful relationships with both companies. As you know, we have a collaboration in our AmpliSeq capabilities in next gen sequencing with Illumina, good relationships from that lens, and DiaSorin has been a longterm partner with our PCT assay and excellent relationships there. ***Worked together for many years in the past*** **and actually just renewed for the next decade in terms of the** ***relationships*****. So, two great partners to work with for us going forward, so it's very exciting.**[27]

27. See, Exhibit 5

This statement by Thermo Fisher's CEO in March 2020, that they "worked together for many years" – in conjunction with the words "renewed for the next decade" implies that the secret relationship between Thermo Fisher (including their affiliates) and Illumina began 5 to 10 years before the statement of 2020, i.e., sometime between 2010 and 2015. This is in line with the allegations contained in the Present Lawsuit that Thermo Fisher and Illumina were working together during the Cornell v. Illumina Litigation which undermined Dr. Zirvi's interest in that litigation. The new information compiled by the Plaintiff after the Zirvi v. Flatley case, upon information and belief, evidence cooperation between Illumina and ThermoFisher in the Cornelll Litigation even before the Markman Hearing on February 22, 2016, and most likely before Dr. Zirvi's deposition on July 11, 2015, as well as before even the start of the Markman process of January 2015, calling into question the validity of the entire Cornell v. Illumina case.

24. The belief that Illumina and Thermo Fisher orchestrated a Settlement Agreement to further their own business interest is also supported by other information found after the SDNY Litigation. On Feb. 11, 2021, in a transcript of the Q4 2020 earnings conference call hosted by Illumina, Inc Francis DeSouza, CEO of Illumina during an interview stated:

> "… the recent collaboration between Weill Cornell Medicine and New York-Presbyterian Hospital, in partnership with the New York

> Genome Center, will use Illumina technology for clinical WGS…"[28]

Tellingly, this is the only time that Cornell is mentioned in an SEC statement by Illumina. To the best of our knowledge, the Cornell v. Illumina lawsuit is never mentioned, because upon information and belief both Illumina and Thermo Fisher had secret alliances that would limit liability independent of the outcome of the litigation.

I. ILLUMINA AND THERMO FISHER *et al.* ARE NOT ENTITLED TO AN AWARD OF SANCTIONS, PURSUANT TO RULE 11

A. The Standard for Awarding Sanctions.

In the Third Circuit, "the legal standard to be applied when evaluating conduct allegedly violative of Rule 11 is reasonableness under the circumstances." *Ford Motor Co. v. Summit Motor Prods., Inc.* 930 F.2d 277, 289 (3d Cir. 1991). The imposition of sanctions is not reasonable if the party accused of violating Rule 11 acted with "an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well-grounded in fact and law." *Bathazar v. Atl. City Med. Ctr.*, 279 F. Supp. 2d 574, 593 (D.N.J. 2003) quoting *Ford Motor Co.*, Supra. 930 F.2d 277, 289. In this case the circumstances that the Court should consider is the efforts by both Illumina and Thermo Fisher to keep information from the Dr. Zirvi

28. See Exhibit 6

during litigation, and throughout Freedom of Information Act requests where both Illumina and Thermo Fisher would deny information requested.

B. The Diligent Investigation.

Dr. Zirvi and his Undersigned Attorneys made every effort to investigate the claims upon which the Present Lawsuit was filed. Plaintiff and Counsel have had to cobble together facts from bits and pieces of evidence gathered over a period of years despite the concerted efforts of Illumina, Thermo Fisher and the other Defendants to keep all evidence from Dr. Zirvi and Counsel.

Dr. Zirvi and Counsel reviewed thousands of pages of emails, (See Defendant Attorney Emails, **Exhibit 7** as just a sample of reviewed communications), numerous patents, PowerPoint presentations, Patent applications, file wrappers, and NIH grants and FOIA correspondences.

This also involved getting evidence to support the claim of correction of inventorship by obtaining a copy of emails (See, **Exhibit** 8) showing collaboration sent to Bill (J. William) Efcavitch in 1999 detailing the techniques used to create and optimize sets of Zipcodes used for a collaborative effort to commercialize Universal ZipCode Arrays with PE Applied Biosystems. The discovery of a SEC filing by Illumina which showed that J. William Efcavitch of PE Applied Biosystems and Mark Chee of Illumina were both members of the Joint Steering Committee used to collaborate to commercialize Universal ZipCode Arrays by Illumina were essential elements of the correction of inventorship claims brought in this litigation. The analysis of the evidence was carried out by Dr. Zirvi and Counsel over several months leading up to the filing of the Present Lawsuit.

In Illumina's SEC filing (Exhibit 9), it states in Section 5.2:[29]

> "5.2. Membership. The Joint Steering Committee will be comprised of 3 employees from Illumina and 3 employees from PEB, appointed at the sole discretion of the respective Parties. Substitute employees may be appointed at any time. The Joint Steering Committee will be chaired in the first year by a senior representative from PEB, and thereafter on a rotating annual basis, by a senior representative from Illumina or PEB. The initial composition of the Joint Steering Committee will be as follows:
>
> For Illumina: John R. Stuelpnagel
> Mark S. Chee
> Richard J. Pytelewski
>
> For PEB: J. William Efcavitch
> Dawn E. Madden
> Elaine J. Heron"

29. See, Exhibit 9, Illumina's SEC FORM S-1, REGISTRATION STATEMENT, filed on April 3, 2000, at https://www.sec.gov/Archives/edgar/data/1110803/0001012870-00-001863.txt

C. This is Not a Patently Unmeritorious Case.

The impositions of sanctions under Fed. R. Civ. P. 11 are relegated to rare "exceptional circumstance where a claim or motion is patently unmeritous or frivolous." *Ford Motor Co.*, Supra. 930 F.2d 27aa7, 289 quoting *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1998). Rule 11 provides that attorneys may be sanctioned if they, among other things, fail to make a reasonable inquiry into the legal legitimacy of a pleading. *Fed. R. Civ. P. 11(b)(2)* & *(c)*. A district court must determine whether the attorney's conduct was objectively reasonable under the circumstances. *Simmerman v. Corino, 27 F.3d 58, 62 (3d Cir. 1994)* (vacating sanctions against attorney).

D. The Correction of Inventorship is a Valid Claim.

"The purpose of section 256 was to provide a remedy for a bona fide mistake in inventorship." *Stark v. Advanced Magnetics, Inc.*, 29 F.3d 1570 (Fed. Cir. 1994). From that general proposition, this court determined that diligence is not a requirement to correct inventorship under section 256. *Stark v. Advanced Magnetics, Inc.*, 119 F.3d 1551, 1576-77 (Fed. Cir. 1997). It is well-settled that Section 256 does not limit the time during which inventorship can be corrected. *Advanced Cardiovascular Systems, Inc. v. SciMed Life Systems, Inc.*, 988 F.2d 1157, 1162, 26 USPQ2d 1038, 1042 (Fed. Cir. 1993) ("Since the defense of patent invalidity based on incorrect inventorship can be raised at any time, correction of inventorship should be similarly available at any time.") Moreover, "a delay of more than six years after the omitted inventor knew or should have known of the issuance of the patent will produce a rebuttable presumption of laches." *Id.* at 1163.

Dr. Zirvi discovered the Zipcode technology in the DMAP software in 2017. Dr. Zirvi didn't discover that Illumina most likely incorporated the Zipcode technology in most of its patents until he received an unredacted grant application from the NIH in 2021. Cases have found factors like poverty precluded filing even sooner than three years, eleven months. *Vaupel Textilmaschinen KG v. Meccanica Euro Italia SPA*, 944 F.2d 870 (1991). Other cases have found delays to overcome where "*unclean hands*" prevented plaintiff from learning about the patent applications. *Yeda v. Imclone Systems Inc.*, 443 F. Supp. 2d 570, 630 (2006); See also, *Stark v. Advanced Magnetics Inc.*, 119 F.3d 1551, 1556 (1997). Dr. Zirvi has never been given an opportunity to show why there was a delay in discovering he contributed to the Illumina patents to meet his burden of proof. *Pannu v. lolab Corp.*, 155 F.3d 1344 (1998). Moreover, Illumina won't incur damages any differently than if the action had been brought sooner, despite laches not applying. *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1032-33 (1992). Again, "a delay of more than six years after the [plaintiff] knew or should have known of the issuance of the patent will produce a rebuttable presumption of laches." *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.* [*16] , 988 F.2d 1157, 1163 (Fed. Cir. 1993). Dr. Zirvi claims it cannot be found to be frivolous where he has not had the opportunity to rebut any presumption of laches. Moreover, each of the patents will have to be examined to determine if the rebuttable presumption even applies. This has not been argued by Illumina.

In this case, Dr. Zirvi and Counsel reviewed many cases involving Correction of Inventorship under 35 U.S.C. § 256. One such case was filed On March 17, 2022, by Illumina with a Count I: Declaratory Judgment to Correct Inventorship and Ownership under 35 U.S.C. § 256. *Illumina, Inc. v. Guardant Health, Inc.*, Civil Action 22-334-GBW-CJB (D. Del. Jan. 31, 2023). In that case Illumina alleges that the inventorship of the 35 patents should be corrected under 35 U.S.C. § 256 ("Section 256"), such that Eltoukhy and/or Steemers should be added as co-inventors on the 35 patents, and that Illumina should be recognized as at least a co-owner of those patents (in light of the fact that Eltoukhy and Steemers would have then been obligated to assign their patent rights to Illumina) (the "inventorship claim"). (D.I. 1 at ¶¶ 98-102). Illumina's pleading was dismissed in the above referenced case regarding Count I. However the Court specifically held "[b]ecause it is not clear to the Court that allowing the opportunity to amend would be a futile act, because this is the first time the Court has found any of Illumina's claims to be deficiently pleaded, and because leave to amend should be given freely "when justice so requires[,]" *Fed.R.Civ.P.* 15(a)(2), the Court recommends that dismissal be without prejudice and that Illumina be given leave to file an amended complaint addressing the deficiencies outlined above." *Id.* at 36. Illumina seems to be casting stones from a glass house requesting sanctions given the outcome of *Illumina, Inc. v. Guardant Health, Inc.*, decided this year on January 31, 2023.

E. Even if the Case is Dismissed Sanctions Should not be Automatic.

Imposition of Rule 11 sanctions is neither automatic nor routine. *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277 (3d Cir. 2010) ("It 'must *not be used as an automatic penalty* against an attorney or party advocating the losing side of a dispute….'")(citation omitted) (emphasis added); *Morristown Daily Record, Inc. v. Graphic Commc'n Union, Local 8N, 832 F.2d 31, 32 n.1 (3d Cir. 1987)* ("Rule 11 is *not to be used routinely* when the parties disagree about the correct resolution of a matter in litigation.") (emphasis added). Even if Dr. Zirvi loses on the Motions to Dismiss sanction should not be given for that alone.

F. Sanctions are not Intended to Chill Vigorous Advocacy.

"Rule 11 was not intended to chill innovative theories and vigorous advocacy…." *Carney-Dunphy v. Title Co., Civ. No. 07-3972, 2009 U.S. Dist. LEXIS 55418, at *31 (D.N.J. June 30, 2009)* (Simandle, J.) (quoting *Fox v. Acadia State Bank, 937 F.2d 1566, 1569 (11th Cir. 1991))*. Thus, a court considering sanctions under Rule 11 must be cautious not to discourage responsible but creative advocacy even if the case is not the strongest on the merits. *Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir. 1993)(even "weak" cases may not be "frivolous or completely unreasonable"). In this case we have complicated issues involving legal malpractice, two corporate entities that were in litigation against each other working together ever since, and Dr. Zirvi and Counsel left without discovery ever provided trying to piece together what happened as best ands as thoroughly as possible. Yet somehow Illumina and Thermo Fisher think Rule 11 sanctions are warranted. They are not.

G. A Sanction Award is Discretionary and Should Not be Granted.

Imposition of sanctions for a Rule 11 violation is discretionary rather than mandatory. *Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 146 n.28 (3d Cir. 2009)* (citation omitted). Even in exceptional circumstances, the court may, but is not required to impose sanctions. *Bensalem Twp. v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1314 (3d Cir. 1994)*. In his case, given the inequities of Defendants withholding information, professing to be acting in the best interest of Dr. Zirvi during the Cornell v. Illumina Litigation, and the obvious economic superiority of the Defendants, the Court should deny the requested sanctions on consideration of these facts.

H. Similar Facts in Two cases Do Not Warrant Sanctions.

Plaintiff Zirvi's contemporary claims, while rooted in historical facts, are differentiated by new evidence and interpretations. Outcomes of earlier litigations, specifically the 2006 Patent Litigation (not involving Illumina) and the Cornell v. Illumina Litigation (Dr. Zirvi was not a Plaintiff), do not conclusively bar Zirvi's present claims, as legal determinations are context-specific and not automatically transferable across different judicial venues. In fact, the New Jersey state law legal malpractice claims directed to the Defendant Attorneys only fully ripened when potential trade secret damages were lost after all appeals were exhausted. Had the trade secret case been successful in the SDNY Litigation Dr. Zirvi would have suffered no damage even though the legal malpractice claim had merit where the Defendant Attorney's failed to protect Dr. Zirvi's interest. Moreover, in New Jersey an affidavit of merit is required to avoid frivolous claims. An affidavit of merit was provided in this case.

I. There Was no Malicious Intent.

The application of sanctions is a significant judicial action that demands unequivocal evidence of malicious intent. The primary function of sanctions is to deter improper conduct, not to punish legitimate legal pursuits.

> In considering whether a complaint was supported by fact and law "to the best of the signer's knowledge, information, and belief," a court must make some assessment of the signer's credibility. Issues involving credibility are normally considered factual matters. See *Fed. Rule Civ. Proc.* 52; see also *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952). The considerations involved in the Rule 11 context are similar to those involved in determining negligence, which is generally reviewed deferentially. See *Mars Steel Corp. v.*

> *Continental Bank N. A.*, supra, at 932; see also 9 C. *Wright A. Miller, Federal Practice and Procedure* § 2590 (1971); *McAllister v. United States*, 348 U.S. 19, 20-22 (1954) (holding that the District Court's findings of negligence were not clearly erroneous).
>
> *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990).

The current litigation against the Defendant Attorneys introduces specific allegations absent from the SDNY Litigation. These claims underscore a broad conspiracy by the defendants to circumvent justice using a combination of a secret alliance which led them to conceal relevant documents from *Cornell v Illumina*, to jointly induce a fraudulent settlement, to unite against Cornell's Rule 60(b)(6) motion, and again for a FOIA case for unredacted documents and now in "joint" motions for sanctions. These overt acts, including actions after the SDNY Litigation offer a different nucleus of facts than the SDNY Litigation. The Court held that "[t]he issues involved in plaintiff's prior actions compared to the instant action concern[ed] different factual predicates and, therefore, the instant action [was] not barred by the doctrine of res judicata." *Martinez v. JRL Food Corp.*, 2021 N.Y. Slip Op. 02992 (1st Dept. May 11, 2021)(one of the complicated issues before the Court is which law to apply regarding the doctrine of res judicata). Given the complicated nature of the claims and support regarding their validity there can be no finding of malicious intent.

Moreover, the statute of limitations for legal malpractice in New Jersey is six years and the earliest the claim could have started to run was the second settlement agreement in the Cornell litigation. The payment received related to the undisclosed second litigation was in 2019 making the statute of limitations some time in 2025, long after the filing of the Present Litigation. Again, thee could be no malicious intent given the timeliness of the claim for legal malpractice.

Likewise, the conspiracy claim included the acts of the Defendant Attorneys and therefore would run from the same 2019. In fact, as argued in response to the Motions to Dismiss filed by both Illumina and Thermo Fisher the second undisclosed settlement agreement in the Cornell Litigation set an amount from which Dr. Zirvi alleges that he was paid far less in royalties than he was entitled to receive. The far less was the product of Illumina, Thermo Fisher, and the Defendants Attorney's working to settle the matter with the goal of clearing the way for Thermo Fisher and Illumina to work together and trampling the rights of Dr. Zirvi to be properly compensated and recognized for his contribution to the field of DNA array decoding. The can be no malicious claim based on the timely filing of the conspiracy claim. Dr. Zirvi's allegations of an attorney-client relationship with Defendant Attorneys are supported by their conduct rather than formal agreements. The court should determine whether the professional relationship "may be implied from the conduct of the parties." *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317-18 (7th Cir. 1978);

see, *Connelly v. Frohling, Hudak & McCarthy, P.C.*, N.J. App. Div., September 9, 2010 (unpublished)(Plaintiffs establish an attorney-client relationship in the absence of an executed retainer agreement.) In this case, during the Cornell Litigation the Defendant Attorneys clearly acted towards Dr. Zirvi as his counsel, preparing him for deposition, arguing in support of infringement on a patent he is a named inventor of, providing legal advice regarding claims including the ill-fated trade secret advice, and negotiating a settlement agreement that directly impacted Dr. Zirvi financially. Simply stated, when it comes to attorney-client relationships, **actions speak louder than words**.

The claims regarding the attorney-client relationship are not as implausible as Thermo Fisher suggests. Zirvi details specific interactions that support the existence of such a relationship, independent of a formal engagement agreement. For example, Rip Finst and Sean Boyle both filed a technically erroneous Motion for Reargument on January 24, 2017, in the Cornell Litigation and were acting in the place of Matthew Pearson (who was representing Plaintiff Zirvi's interests in that case.) Furthermore, Rip Finst in an email forwarded to Dr. Zirvi at 10:17 AM on February 17, 2017, said that he would present a PowerPoint personally prepared by him with his legal analysis of the Cornell Litigation. The email stated:

> "As time permits, we should also discuss the attached slide deck. There's an interplay between some of the issues reflected in Roger's deck and what's reflected in mine.
>
> Rip"

Both Rip Finst and Roger Chin gave their presentation to Dr. Zirvi and a few others less than an hour later via WebEx (See also ECF 1-6)

Surprisingly, the title of the presentation was "2017 02 17 slides re prosec & spec statements." In the presentation, Rip Finst made it appear as if he had done a deep analysis of the Prosecution history and Specification statements in ALL the patents in suit as well the other patents not in the suit. The PowerPoint was created by Rip Finst at 10:11 AM according to the file meta data. Yet, the presentation by Rip Finst and Roger Chin was meant to put an end to a 7-year-old litigation that was scheduled to go to trial in 4 months. (See Exhibits 10 Rip Finst Email February 17, 2017; Exhibit 11 PowerPoint Presentation title page; Exhibit 12 Power Point Presentation, Exhibit 13 meta data for PowerPoint created by Rip Finst.)

The characterization of the SDNY litigation as a "wild goose chase[30]" is contested. Zirvi maintains that the litigation was pursued in good faith and the unsuccessful outcome of one case does not invalidate the pursuit of subsequent, differentiated claims. For example, Illumina itself in the previously cited supra *Illumina v Guardant Health* pursued a similar trade secret litigation beyond the statute of limitations and successfully overcame a motion to dismiss due to fraudulent concealment arguments that were at the heart of the SDNY litigation. The legal malpractice claims consist of a failure to advise Dr. Zirvi

30. ECF No. 82-1 (Motion to Dismiss); 104-1 (Motion for Sanctions).

of a conflict of interest and a failure to advise Dr. Zirvi's interest were no longer being protected by the Defendant Attorneys because Thermo Fisher's interest was now aligned with Illumina's interest.

Furthermore, Illumina accused Rip Finst of being akin to a rogue employee when it was convenient for their arguments for overcoming a Rule 60(b)(6) motion by Cornell but in reality, Illumina was working with Rip Finst to terminate all litigation with Thermo Fisher. In that case, there were no protestations by Thermo Fisher or Rip Finst and no motions for sanctions deeming that argument Illumina made regarding Rip Finst was "frivolous, vexatious, or litigious." Likewise, during the 7-year course of *Cornell v Illumina,* Illumina filed 4 IPRs against Barany Lab patents involved in the *Cornell v Illumina* litigation, as well as 2 *ex partes* against Barany Lab patents not in this litigation. Upon information and belief, this was followed by multiple *ex partes* against Barany Lab patents not in the *Cornell v Illumina* case shortly after the April 2017 fraudulently induced settlement. There was no argument that Illumina was engaged in "frivolous, vexatious, or litigious."

NONE of Illumina's continued attempts to attack the Barany Lab patents were successful in eliminating even a single claim of any of the Barany Lab patents. These legal tactics, upon information and belief, increased costs in the royalty reporting to Dr. Zirvi, which in turn further reduced royalties received from the Barany Lab patents.

Dr. Zirvi's Present Lawsuit involves allegations of misconduct surrounding the April 2017 settlement agreement, and a second settlement agreement in the Cornell Litigation for which payment was received in 2019 and other actions which accrued after the SDNY Litigation and within the New Jersey limitations period. The statute of limitations argument presented by Thermo Fisher is refuted on the basis that the ripeness of claims related to Defendant Attorneys actions only accrued post-SDNY litigation, thereby falling within the permissible time frame for legal action.

Despite notices and warnings of potential sanctions from Thermo Fisher, such advisories do not inherently render the present claims frivolous. The decision by Zirvi's counsel to proceed was made in good faith, based on an in-depth legal analysis and extensive pre-litigation investigation. Furthermore, the Defendant Attorneys allegedly engaged in legal malpractice as detailed in the Affidavit of Merit by Jeff Oster, JD, PhD. See ECF 1-14. The plaintiff is a joint client whose interests were not protected by the Defendant Attorneys. Matthew Pearson had agreed and promised to protect the interests of Dr. Zirvi in Cornell v Illumina because "interests were aligned." (See ECF 17-1). For nearly 2 years, emails were exchanged including Matthew Pearson in preparation for the trial in Cornell v Illumina. (See Exhibit 7).

Rip Finst had been involved with the Cornell v Illumina since its filing in 2010. He was aware of Dr. Zirvi's interests at all times during that case. Rip Finst suddenly announced that the legal team was being changed to Roger Chin and Douglas Lumish of Latham & Watkins in January 2017 and these attorneys stepped into Matthew Pearson's shoes in the litigation. This led to the fraudulently induced settlement in April of 2017, of the Cornell Litigation with no net royalties to inventors over the vociferous protests of Dr. Zirvi and a second settlement agreement in 2019 where Dr. Zirvi received far less than he was entitled to receive on terms of an agreement that were never disclosed to him.

In Delaware (and similarly in New Jersey), clients' rights are upheld by courts. Dr. Zirvi should be able to have access to all settlement agreements in the Cornell Litigation because he was told his status was that of a joint client. See, *Kalisman, et al. v. Friedman, et al.*, C.A. No. 8447-VCL, 2013 WL 1668205 (Del. Ch. Apr. 17, 2013) (The Court explained that a joint client "has a right of equal access to the materials he seeks… communications with a common interest between joint counsel and other joint clients…in light of his status as a joint client of the subpoenaed law firms." When former co-clients become adverse and "sue one another, the default rule is that all communications made in the course of the joint representation are discoverable.") Yet all information from the Cornell Litigation has been withheld from Dr. Zirvi. See, *In re Sutton*, 1996 WL 659002, at *5 (Del. Super. Aug. 30, 1996) (describing Delaware Rule of Evidence 502(b)(5) as "providing that where an attorney jointly represents two clients who later become adversarial parties in litigation, one party cannot assert attorney-client privilege to avoid disclosure of communications which were made during the joint representation."); Restatement (Third) of the Law Governing Lawyers § 75(2) (Am. Law. Inst. 2022) ("Unless the co-clients have agreed otherwise, a communication [that otherwise would be subject to attorney-client privilege] is not privileged as between the co-clients in a subsequent adverse proceeding between them."). Clearly, these communications would reveal even more evidence of collusion and a conspiracy between Illumina, Thermo Fisher, and the Defendant Attorneys. For example, Matthew Pearson and Angela Verrecchio of Akin Gump were informed of Dr. Zirvi's request to the NIH for an investigation in May 2018 and yet appears to have done nothing to inform the court in the Cornell Litigation of attempts by Dr. Zirvi to uncover alleged fraud and obstruction of justice. (See Exhibit 14) Upon information and belief, Defendants were aware of the NIH investigation which led to Jay Flatley unprecedented onetime donation of millions of dollars of equipment, reagents, and supplies to the NIH (See ECF 101, Exhibit 1).

Illumina and ThermoFisher are both multi-billion-dollar corporations which as alleged in the complaint have secretly conspired to undermine, Dr. Zirvi's individual rights to compensation and recognition obtained from Universal ZipCode Arrays and ZipCode sequences derived from Plaintiff's inventive contributions. The giant corporations unit in motions for sanctions against the very same individual inventor they stripped of all royalties in the first settlement of the Cornell Litigation and grossly underpaid in a 2019 second settlement with the aid of the Defendant Attorneys. Even more unsettling than the loss of royalties is an undisclosed settlement agreement is in the files of the US Patent office and Amy McCourt described as containing licenses and releases. Dr. Zirvi and Counsel have a good faith belief that the terms of the settlement relate to Dr. Zirvi's contribution to the Zipcode technology. Dr. Zirvi and Counsel also believe that the Motions for Sanctions were designed to make sure the settlement agreements are never seen.

B. SANCTION OF THE PLAINTIFF IS INAPPROPRIATE; INSTEAD, IT IS THE MOVING DEFENDANTS WHO DESERVE TO BE SANCTIONED

As the Federal Court of Appeals for the Second Circuit aptly warned, "defendants who live in glass pleadings ought not to throw Rule 11 stones." *Associated Indem. Corp. v. Fairchild Indus., Inc., 961 F.2d 32, 36 (2d Cir. 1992)*. The court in *Thompson v. United Transportation Union, 167 F. Supp. 2d 1254 (D. Kan. 2001)*, echoed similar sentiments: "Suffice it to say that defendant and its counsel would be better served by reexamining their own litigation tactics rather than condemning plaintiff's counsel for her litigation tactics." *Id. at 1260*. Plaintiffs are loathe to continue an eye for an eye litigation strategy initiated by Defendant Illumina. However, *Fed. R. Civ. P. 11(c)(1)(A)* permits the court, "[i]f warranted," to "award to the party prevailing on the motion the reasonable expenses and attorneys' fees incurred in presenting or opposing the motion." An attorney may be sanctioned for filing a frivolous sanction motion. *Robinson v. City of San Bernardino Police Dep't, 992 F. Supp. 1198, 1208 (C.D. Cal. 1998)*. As the Advisory Committee on the 1993 amendments to *Fed. R. Civ. P. 11* noted:

> As under former Rule 11, the *filing of a motion for sanctions is itself subject to the*

> *requirements of the rule and can lead to sanctions*. However, service *of a cross motion under Rule 11 should rarely be needed* since under the revision the court may award to the person who prevails on a motion under Rule 11 - whether the movant or the target of the motion - reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion. (Emphasis added).

As the Third Circuit cautioned in Morristown Daily Record, "[b]ecause the issues in this case are close, we consider the company's invocation of Rule 11 to border on the abusive. We caution litigants that Rule 11 is not to be used routinely when the parties disagree about the correct resolution of a matter in litigation. Rule 11 is instead reserved for only exceptional circumstances." 832 F.2d at 32 n.1 (emphasis added). Cf. Prudential, 278 F.3d at 190 (affirming sanctions under 28 U.S.C. § 1927 against attorney who himself filed two identical sanctions motions).

Further, no cross motion for sanctions is required under Rule 11. Patelco Credit Union v. Sahni, 262 F.3d 897, 913 (9th Cir. 2001); Fed. R. Civ. P. 11 Notes of Advisory Committee on 1993 amendments. Stark v. Advanced Magnetics, 119 F.3d 1551, 1554 (Fed. Cir. 1997). There should be no doubt that Dr. Zirvi and Counsel engaged in a deep analysis of the facts available and applied the available facts to the law to determine the Present Litigation was viable. Dr. Zirvi and Counsel always understood that the facts and law were not black or white and this was no ordinary set of circumstances. However, Dr. Zirvi and Counsel would like the Court to take special notice of the fact that the Cornell v. Illumina Litigation was settled not once but twice and Dr. Zirvi, who was to receive payment under the litigation was never consulted or has he ever seen the settlement agreements.

In further support that the Court consider sanctioning the Defendants Dr. Zirvi and Counsel call to the Court's attention the following frivolous points raised by both:

> 1. The Defendants want Dr. Zirvi and Counsel sanctioned for getting some inventors' names wrong. Any mistake in naming the inventors was simply that, a mistake. This supports amendment of the Complaint not Sanctions under Rule 11.
>
> 2. Illumina makes much ado about sending Notice letters to the inventors, through the legal department at Illumina. The statute requires that notice be provided to named inventors who are not a party to the Present Lawsuit. There is no basis for this being grounds for a sanction.
>
> 3. Illumina and Thermo Fisher claim that the conspiracy is not plead with enough specificity. Both Illumina and Thermo Fisher have withheld information and at times, blocked Dr. Zirvi from getting information and now each would like to use that fact to dismiss Dr. Zirvi's claims and sanction him and Counsel. It is inappropriate to request sanctions for failure to investigate facts that you actively conceal from the Plaintiff.

II. CONCLUSION

In conclusion, the request for sanctions in the form of attorneys' fees and costs is challenged as unjustified.

Dr. Zirvi's claims are not barred by the doctrine of res judicata where the parties, predict acts, and causes of action are different than a prior litigation and could not have possible been brought prior to the Present Lawsuit.

Dr. Zirvi's claims are grounded in fact and law, thus the request for sanctions is in itself frivolous. The Court should reject Illumina's motion for sanctions, because there is ample good cause to include Dr. Zirvi as an inventor on Illumina's issued patents and that any delay in the matter was caused by Illumina's active concealments that continues to this day Freedom of Information Act even going as far to conspire with Thermo Fisher and Defendant Attorneys to keep secret a Settlement Agreement that Dr. Zirvi should have been a party to that may have authorized the inclusion of Dr. Zirvi's contribution to Illumina's patents containing Zipcode technology. Certainly, Dr. Zirvi and the undersigned counsel did everything reasonable to research the facts and law of the claims in the Present Lawsuit, including without limitation looking at a lawsuit filed by Illumina making similar claims where Illumina requested inventors to be added to patents long after they had issued. In that case Illumina was granted leave to amend its Complaint "because this is the first time the Court has found any of Illumina's claims to be deficiently pleaded, and because leave to amend should be given freely "when justice so requires[,]" Fed.R.Civ.P. 15(a)(2), " *Illumina, Inc. v. Guardant Health, Inc.*, Civil Action 22-334-GBW-CJB, 36 (D. Del. Jan. 31, 2023) because this is the first time the Court has found any of Illumina's claims to be deficiently pleaded, and because leave to amend should be given freely "when justice so requires[,]" Fed.R.Civ.P. 15(a)(2). Yet, Illumina would have this Court dismiss Dr. Zirvi case with prejudice and award sanctions under Rule 11. Dr. Zirvi again states that Sanctions should be denied and if the Court so requires, Dr. Zirvi be granted leave to amend the Complaint to plead any claim pleading defects more specifically.

Likewise, Thermo Fisher and the Defendant Attorneys joining in their Motion rely on convincing the Court that the Present Claims are for the theft of trade secrets in the mid-1990s. The claims asserted in the present action are related to acts that begin in 2017 and carry into the present. Thermo Fisher's failure to protect Dr. Zirvi from Illumina began with a plan to instead work with Illumina to dominate the DNA array and sequencing market and cut Dr. Zirvi out of any compensation or recognition related to his contribution. It continues with joint efforts to suppress information and threaten sanctions to continue the coverup.

If the Court should agree that some claims need amending, then Dr. Zirvi requests the same and the Court should summarily deny Sanctions.

However, Dr. Zirvi would like the Court to consider that requesting sanctions in light of the very liberal standard to amend a pleading that has never been amended prior is sanctionable in and of itself. Should the Court agree, Dr. Zirvi request an Order granting its fees and costs to Dr. Zirvi and Counsel. Further, the Court should consider if Illuimina's Motion is nothing more than retaliation for Dr. Zirvi's assistance in FTC and EU Commission investigations involving Illumina and serious antitrust concerns as a "monopolist." The Court should also consider Dr. Zirvi's status as an SEC Whistleblower under Dodd-Frank and the chilling effect these Motions for Sanctions have on future whistleblower activity. (ECF 101, Exhibit 1)

Appendix B

Subject Privileged and Confidential

From Monib Zirvi <matzirvi@yahoo.com>

To: <mpearson@akingump.com>

Date Oct 31, 2015 at 12:39 PM

Dear Matthew,

As my attorney, this communication is protected due to Attorney-Client Priviledge. I just want to let you know that I agree with Francis wholeheartedly that the plagiarized zipcode sequences in the Illumina are a critical piece of evidence to show to a Jury to demonstrate a deliberate and willful intent to circumvent existing patents by filing almost identical patents by the defendant. This is a repeated offense by Illumina as they have already been shown to have done this before. I understand that the application never issued, but it shows how underhanded they are in terms of paying rightful royalties that other companies have paid during the period I question.

Please discuss this with Francis after having read the document that was prepared.

Sincerely yours,

Dr. Monib Zirvi, MD/PhD
Cornell University Medical College

Sent from my iPhone

Appendix B

Subject Priviledged and Confidential

From Monib Zirvi <matzirvi@yahoo.com>

To: <mpearson@akingump.com>

Date Oct 31, 2015 at 12:41 PM

Dear Matthew,

As my attorney, this communication is protected due to Attorney-Client Priviledge. I just want to let you know that I agree with Francis wholeheartedly that the plagiarized zipcode sequences in the Illumina patent application are a critical piece of evidence to show to a Jury to demonstrate a deliberate and willful intent to circumvent existing patents by filing almost identical patents by the defendant. This is a repeated offense by Illumina as they have already been shown to have done this before. I understand that the application never issued, but it shows how underhanded they are in terms of trying to avoid paying rightful royalties that other companies have paid during the period in question.

Please discuss this with Francis after having read the document that was prepared.

Sincerely yours,

Dr. Monib Zirvi, MD/PhD
Cornell University Medical College

Sent from my iPhone

Appendix B

Subject Confidential

From Monib Zirvi <matzirvi@yahoo.com>

To: <mpearson@akingump.com>, <averrecchio@AKINGUMP.com>, <delderkin@akingump.com>

Date May 14, 2018 at 10:11 AM

The inventors of patent application WO 97/31256 would like to let you know that Cornell appears to have filed the initial paperwork for an appeal to the Federal Circuit (18-1902) on its suit against Illumina. The inventors have also informed the NIH of Illumina's plagiarism and scientific misconduct of its cofounders including Mark Chee, Jian Bing Fan and Kevin Gunderson. [REDACTED]

Monib Zirvi

Sent from my iPhone

Begin forwarded message:

From: [REDACTED]
Date: May 7, 2018 at 8:25:49 AM EDT
To: "Noni.Byrnes@NIH.gov" <Noni.Byrnes@NIH.gov>, "berkleyd@od.nih.gov" <berkleyd@od.nih.gov>, "Francis.Collins@NIH.gov" <Francis.Collins@NIH.gov>, "Michael.Lauer@NIH.gov"

<Michael.Lauer@NIH.gov>,
"MonaLisa.Lynch@NIH.gov"
<MonaLisa.Lynch@NIH.gov>,
"rhiannon.mastrocola@nih.gov"
<rhiannon.mastrocola@nih.gov>,
"maureyk@otd.nci.nih.gov"
<maureyk@otd.nci.nih.gov>,
"Richard.Nakamura@NIH.gov"
"Norman.Sharpless@NIH.gov"
<Norman.Sharpless@NIH.gov>,
"patricia.valdez@nih.gov"
<patricia.valdez@nih.gov>
Cc: [REDACTED] "Monib Zirvi"
<matzirvi@yahoo.com>,
[REDACTED]
Subject: Formal request to investigate possible scientific misconduct by Illumina

May 7, 2018

Dr. Noni Byrnes
Acting Director
Center for Scientific Review
National Institutes of Health
6701 Rockledge Drive MSC 7768
Bethesda MD 20892-7768
(Noni.Byrnes@NIH.gov)

Dear Dr. Byrnes:

We write in accordance with whistleblower guidelines of the NIH to formally request an investigation into possible scientific misconduct by Illumina Incorporated (Illumina) that ultimately resulted in their receipt of nearly $28 million in government funding between 1999 and 2007 (Exhibit A). The undersigned were co-inventors of “universal zip-code arrays,” as well as coupled ligase detection and polymerase chain reactions (PCR-LDR, LDR-PCR and PCR-PCR), which enable SNP and methylation microarrays along with targeted next-generation resequencing (NGS) for diagnosis of cancer and genetic diseases. As outlined below and in some of the attached documents, our intellectual property [“University IP”] was initially revealed in a Program Project Grant application to the NCI submitted and reviewed in the first half of 1994; it was further protected by patent application WO97/31256 submitted on February 9, 1996 and additional patent filings [Exhibit B, list of relevant patents issued to Cornell University, the University of Minnesota, and Louisiana State University]. We contend that the confidentiality of the University IP was first breached during the scientific review process, subsequent to which scientists associated with Illumina unethically represented this IP as their own in grant applications to the NIH and in patent applications to the USPTO. We are also convinced that much of Illumina’s past, current, and foreseeable commercial success builds directly upon the University IP. Should your NIH investigation support and corroborate our assertions of pervasive and repeated fraud, we would hope that Illumina fully reimburses the US government for awarded monies (Exhibit A), and that some of what is recovered would be redistributed to the inventors as well as the Universities with which they are associated.

Appendix B

As already stated, the University IP was presented first in our 1994 Program Project application, one of the reviewers of which was Dr. Stephen Fodor, then CTO of Affymetrix. We suspect that Dr. Fodor transmitted the confidential information to other employees at Affymetrix, and we conveyed our concerns about this to the NCI in November of 1994 (Exhibit C, a letter to the late Dr. James Jacobson). These employees, in particular Dr. Mark Chee, Dr. Jian- Bing Fan, and Dr. Kevin Gunderson, then tried to repatent our IP both before and after they started Illumina in 1998 [see Exhibit D for a comprehensive timeline and additional information]. Conspicuously, Fodor was removed as an inventor of an August 1994 patent application, although he was an inventor on an earlier version. A 2000 patent application by Gunderson and Chee plagiarizes (and reports in the identical order!) sixteen 24-mer DNA zip-code sequences that were designed by the University team and shared by us with our private sector partner, PE Biosystems, in 1999. It is unclear how Gunderson and Chee gained access to these sequences, but it may be relevant that Illumina and PE Biosystems had a Joint Development Agreement (JDA), starting in 1999 and subsequently amended in 2001 (see Exhibit E). Neither Cornell nor the co-inventors were privy to the amended JDA (we learned of its entire contents only last year), and Cornell never authorized Illumina to use our specific sequences, nor our IP in general. We have evidence that Illumina failed with seven other approaches to decode random beads in wells – their invention – and achieved successful decoding only by adopting a "zip-code" platform – our invention. Subsequently, and as part of a systematic effort to conceal the true sources of innovation in their research and products, Illumina went to considerable lengths to devise new vocabulary equivalent to our evocative “zipcode” formulation.

It should be noted a lawsuit was filed in 2010 by Cornell University vs. Illumina (Case 1:10-cv-00433- LPS-MPT). Starting in February 2018, two of us (F.B. and M.Z.) reached out to several NIH personnel [Dr. Patricia Valdez, Ms. Rhiannon Mastrocola, Ms. Karen Maurey, and Dr. Dale Berkley; they are all cc’d on this letter] with details of those concerns of ours that are relevant to the policies and mission of the NIH.

Working independently from the lawsuit, the inventors have discovered through review of the scientific literature of Illumina’s patent application history, and of Illumina’s grant applications [obtained through Freedom of Information Act (FOIA) requests; further information contained in Exhibit D], that Illumina inappropriately claimed the inventors’ IP as its own and leveraged that to obtain funds from the federal government (Exhibit A). Despite a high degree of redaction (by Illumina) of their NIH grant applications (in some cases, entire pages are missing!), it is manifestly clear that the seminal innovations set forth were directly derived from the University IP on “universal zip-code arrays” and LDR-PCR, and related technologies. We can only speculate that the redacted sections might include even further evidence for scientific misconduct by Illumina. For this reason, we implore your office to take steps to protect the integrity of the original (i.e., un-redacted) documents.

Appendix B

To close, we submit this whistleblower request not just for our own interests, but also because of our concern for the sanctity and integrity of the NIH grant review process. We are prepared to assist your thorough investigation by clarifying and/or amplifying on any of the points made in this letter or in the attached Exhibits. In so doing, we hope that scientists and inventors of the future should never be affected by anything similar. Thank you for the efforts of all of you at NIH who seek to further the health of our society and advance biomedical science through your programs and policies.

Sincerely yours,

[REDACTED]

Dr. Monib Zirvi
Formerly, MD/PhD student,
Department of Microbiology and Immunology,
Weill Cornell Medicine
(matzirvi@yahoo.com)

cc: (in alphabetical order)

Dr. Dale Berkley, Office of the General Counsel, NIH Branch
(berkleyd@od.nih.gov)
Dr. Francis Collins, Director, National Institutes of Health
(Francis.Collins@NIH.gov)
Dr. Michael Lauer, Deputy Director for Extramural Research, National Institutes of Health
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Ms. MonaLisa Lynch, Deputy Ethics Counselor, Center for Scientific Review (MonaLisa.Lynch@NIH.gov)
Ms. Rhiannon Mastrocola, Supervisory Auditor, NIH Office of Management Assessment (rhiannon.mastrocola@nih.gov)
Ms. Karen Maurey, Director, Technology Transfer Center, National Cancer Institute (maureyk@otd.nci.nih.gov)
Dr. Richard Nakamura, Director Emeritus, Center for Scientific Review (Richard.Nakamura@NIH.gov)
Dr. Norman Sharpless, Director, National Cancer Institute (Norman.Sharpless@NIH.gov)
Dr. Patricia Valdez, NIH Extramural Research Integrity Officer (patricia.valdez@nih.gov)

Enclosures:

Exhibit A: NIH funding to Illumina on grant applications, awarded between 1999 and 2007, to support research that was based on University intellectual property. These mostly multi-year grants were funded primarily by SBIR-STTR (R43/44) and Research Centers (U54) mechanisms; they were reviewed by Special Emphasis panels and supported by ten different institutes of the NIH.

Exhibit B: List of University patents ("University IP") co-invented by the undersigned from Cornell University, the University of Minnesota, and Louisiana State University

Exhibit C: Letter to Dr. James Jacobson, November 11, 1994, that initially raised concerns of a breach of confidentiality related to the Spring 1994 review of a Program Project Grant application to the NCI Exhibit D: Summary and timeline of grant applications, inventions, and publications from Cornell University, the University of Minnesota, and Louisiana State University ("University IP") and attempts by Illumina employees to copy them.

Exhibit E: Un-redacted copies of the Joint Development Agreement (JDA) from November 11, 1999, and the First Amendment to the JDA from March 27, 2001 between Illumina and PE-Biosystems, obtained through a FOIA request to the SEC. Areas in brackets, or within rectangular shapes, sometimes indicated with ***, were redacted at Illumina's request in the original publicly available SEC documents. Highlighting indicates key paragraphs of interest to the Universities and may assist the NIH in its investigation.

[REDACTED]

NIH_Letter_Universities_vs_Illumina_0…

ExhibitA_Illumina_Grants_1999_2007.xlsx

Exhibits_B_C_D_E_Universities_vs_Illu…

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY, FILED APRIL 15, 2026

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 2:23-cv-01997
(MCA)(JSA)

MONIB ZIRVI, M.D., Ph.D.,

Plaintiff,

v.

ILLUMINA, INC., THERMO FISHER SCIENTIFIC, AKIN GUMP STRAUSS HAUER & FELD LLP, LATHAM & WATKINS, RIP FINST, SEAN BOYLE, MATTHEW A. PEARSON, ANGELA VERRECCHIO, ROGER CHIN, AND DOUGLAS LUMISH,

Defendants.

ORDER

THIS MATTER having come before the Court on Plaintiff's Post-Judgment Motion to Restore Public Access to ECF 107 and Its Attachments, to Terminate Any Temporary Sealing Designation, or, in the Alternative, to Require Narrowly Tailored Redactions; and the Court having considered the parties' submissions; and for good cause shown;

IT IS on this 15th day of April, 2026, ORDERED that:

• Plaintiff's Motion is GRANTED.

• No sealing order appears on the docket as to ECF 107 and its attachments, including ECF 107-7.

• Any temporary sealing or restricted-access designation applied to ECF 107 and its attachments is TERMINATED.

• The Clerk shall restore public access to ECF 107 and its attachments.

• In the alternative, to the extent any party seeks continued restriction of any discrete material, that party shall, within 14 days of this Order, file a narrowly tailored submission identifying specific proposed redactions and making the particularized showing required by D.N.J. L. Civ. R. 5.3.

• Plaintiff may file a response within 7 days after any such submission.

• Absent a sufficient showing supporting limited continued restriction, the Clerk shall maintain ECF 107 and its attachments on the public docket without further restriction, except for any specific redactions expressly approved by the Court.

SO ORDERED.

s/Jessica S. Allen
Hon. Jessica S. Allen, U.S.M.J.

APPENDIX D — LETTER TO THE HONORABLE JESSICA S. ALLEN, UNITED STATES MAGISTRATE JUDGE FOR THE DISTRICT OF NEW JERSEY, FROM LIZA M. WALSH, FILED APRIL 17, 2026

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WALSH.LAW

April 16, 2026

VIA ECF
Hon. Jessica S. Allen, U.S.M.J.
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Re: *Zirvi v. Illumina, Inc., et. al.*
Civil Action No. 23-cv-01997 (MCA)(JSA)

Dear Judge Allen:

This firm, along with Shapiro Arato Bach LLP, represents Defendant Thermo Fisher Scientific ("Thermo

Fisher") in the above-referenced matter. We write to respectfully request continued sealing of all materials subject to this Court's April 15, 2026 Order, while Thermo Fisher takes advantage of the 14-day grace period afforded by the Court to review the subject materials and propose appropriate redactions. *See* ECF 152.*

By way of background, this case has been dormant for quite some time. The Court dismissed all claims against Thermo Fisher in early 2024 and approved a settlement barring any appeal against Thermo Fisher in October 2024. Some eighteen months later, on April 13, 2026, without any explanation or prior notice to Thermo Fisher, Plaintiff Monib Zirvi ("Zirvi") filed a motion to unseal an exhibit from the earlier proceedings. *See* ECF 151. That exhibit is a composite exhibit, comprised of diverse materials that span a total of approximately 1600 pages. Among those 1600 hundred pages are numerous communications involving counsel, which may well be privileged or otherwise protected from disclosure.

By Order dated April 15, 2026, and before Thermo Fisher had submitted any response to Zirvi's request for unsealing, this Court restored public access to the exhibit and granted all defendants, including Thermo Fisher, an opportunity to identify "specific proposed redactions," supported by an appropriate "particularized showing as required by D.N.J. L. Civ. R. 53." *See* ECF 152. The Court provided Defendants with a 14-day period in which to do so.

Earlier today, Zirvi filed the 1600-page exhibit in its entirety on the public docket. *See* ECF 153. That filing has the effect of rendering all materials public before Defendants have had an opportunity to propose appropriate redactions. Such publicity seems to defeat the purpose of giving the Defendants time to propose redactions. Moreover, there seems to be no urgency to the unsealing, since Zirvi waited approximately 18 months to request it and has identified no present or pressing need for immediate disclosure.

Accordingly, Thermo Fisher respectfully requests that the Court issue an Order sealing the subject materials, including Zirvi's submission of earlier today (ECF 153), pending completion of Thermo Fisher's 14-day review.

If Your Honor approves, we respectfully request that Your Honor "So Order" this letter and have it filed on the docket. As always, we thank the Court for its attention to this matter and are available should Your Honor or Your Honor's staff require anything further.

Respectfully submitted,

/s/Liza M. Walsh
Liza M. Walsh

SO ORDERED this __, day of _____, 2026:

Hon. Jessica S. Allen, U.S.M.J.

cc: All Counsel of Record (via ECF)

***In light of the foregoing, the Clerk of the Court is directed to temporarily seal ECF No. 153. Further, the Order entered on 4/15/26 (ECF No. 152) is hereby vacated.**

s/Jessica S. Allen
Hon. Jessica S. Allen, U.S.M.J.

Dated: April 17, 2026

APPENDIX E — LETTER TO THE HONORABLE JESSICA S. ALLEN, UNITED STATES MAGISTRATE JUDGE FOR THE DISTRICT OF NEW JERSEY, FROM LIZA M. WALSH, FILED APRIL 24, 2026

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April 24, 2026

<u>**VIA ECF**</u>
Hon. Jessica S. Allen, U.S.M.J.
U.S. District Court for the District of New Jersey
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Re: *Zirvi v. Illumina, Inc., et. al.*
Civil Action No. 23-cv-01997 (MCA)(JSA)

Dear Judge Allen:

This firm, along with Shapiro Arato Bach LLP, represents Defendant Thermo Fisher Scientific ("Thermo

Fisher") in the above-referenced matter. We write on behalf of Thermo Fisher to respectfully request a 20-day extension to the deadline for Thermo Fisher to file a motion to seal and propose appropriate redactions to the materials enumerated in the Court's April 15 and 17, 2026 Orders (D.E. 152, 155). The current deadline is April 29, 2026, and this request, if granted, would extend the deadline to Thursday, May 21, 2026. Counsel for Thermo Fisher sought Plaintiff's consent, however as of the filing of this letter has not received a response.

This extension is requested to allow Thermo Fisher additional time to review and redact its confidential information from the document filed under seal (D.E. 107-7), and to coordinate and confer with counsel for Plaintiff regarding the proposed sealing. As the Court is aware from Thermo Fisher's recent submission (D.E. 154), the document at issue is a voluminous, composite exhibit, comprised of diverse materials that span a total of approximately 1,600 pages, which includes numerous communications involving counsel.

We note that the document in question has been under seal since it was originally filed by Plaintiff in November 2023. As such, we do not believe Plaintiff will be prejudiced by the brief delay. We also note that Plaintiff filed the document in question in opposition to a sanctions motion that was subsequently withdrawn without a ruling as part of the settlement reached between the parties (*see* D.E. 137).

If Your Honor approves, we respectfully request that Your Honor "So Order" this letter and have it filed on the docket. As always, we thank the Court for its attention to this matter and are available should Your Honor or Your Honor's staff require anything further.

Respectfully submitted,

/s/Liza M. Walsh
Liza M. Walsh

SO ORDERED this 27th, day of April, 2026:

/s/ Jessica S. Allen
Hon. Jessica S. Allen, U.S.M.J.

APPENDIX F — TIMELINE SUMMARY OF RECORD MATERIALS

Master Causation Timeline: Zirvi / Cornell Evidence, EU Regulatory Notice, and Illumina Consequences

Record-summary timeline; visual aid only; not independent evidence or a final adjudication of legal causation.

Evidence / Litigation / Submissions	
Cornell v. Illumina filed (D. Del.)	2010
Valerie Cross Dorn and Matthew Pearson contact Dr. Zirvi about Cornell v. Illumina; offer guidance and Akin Gump assistance with subpoenas / logistics (Ex. 153)	Feb 24-25, 2015
Matthew Pearson follows up about earlier conversation regarding Cornell litigation (Ex. 153)	May 13, 2015
After Cornell settlement, Dr. Zirvi discovers Illumina's unusual FOIA request for its own NIH grants (Ex. 101-1)	2017
FTC informed of alleged scientific misconduct, fraud, collusion, and obstruction concerns (Ex. 101-1)	May 17, 2018

Zirvi v. Flatley filed and Illumina / Flatley served (Ex. 101-1)................................	Aug 2018
NIH releases emails showing Jay Flatley arranged Illumina's NIH donation; information shared with regulators (Ex. 101-1)	Nov 12, 2020
"Illumina Antitrust" materials and supporting evidence emailed to EU Commission............................	Mar 11, 2021
Filed Complaint and Exhibits sent to EU Commission merger team	Apr 30, 2021 Jul 23, 2021 Aug 2021 Sep 6, 2022
Zirvi v. Illumina et al. filed in D.N.J.	Apr 8, 2023
SEC complaint / whistleblower submissions sent with litigation materials and exhibits (Ex. 101-1)..........	Apr 11 / Aug 30, 2023
Affidavit filed in D.N.J. explaining FOIA / litigation efforts were intended in part to assist antitrust regulators (Ex. 101-1)................................	Oct 16,2023

District court orders restore, then temporarily reseal, ECF 107 and Exhibit 7 / ECF 153; highlights record-integrity significance (Rule 44.2)...............................	Apr 15-17, 2026
Rule 44.2 rehearing petition argues missing / unstable record concealed the most probative attorney-communication evidence........	2026

Regulatory / Corporate Consequences	
Aug 30, 2021..	EU Commission confirms in-depth Illumina / GRAIL investigation and requests confidentiality designations for Zirvi submissions
Jul 23, 2021 ...	Illumina closes GRAIL despite active EU review / standstill issue
Aug 2021........	European Commission prohibits Illumina / GRAIL transaction
Sep 6, 2022....	Restorative-measures process and rights-of-defense implications underscore Commission use of submitted materials

Appendix F

Apr 8, 2023....	SEC receives complaint materials alleging disclosure and antitrust concerns
Apr 11 / Aug 30, 2023 .	Major Illumina leadership turnover: John W. Thompson voted off board chair role; Francis A. deSouza resigns; Alex Aravanis and Craig Febbo depart
Oct 16, 2023...	EU fines Illumina €432 million for *implementing the merger before approval*
Apr 15-17, 2026	Illumina completes *GRAIL* divestiture / spin-off
2026	Continuing board refresh: Frances Arnold, Robert Epstein, and Gary Guthart announce Illumina board retirements

Evidence/ Litigation	Submission / Notice
EU Action	SEC / Regulatory
Leadership Change	Divestiture
Record Integrity	

Key Causation Takeaways

1. The documents were not merely filed in court; they were transmitted to regulators, including the EU Commission.

2. The EU Commission acknowledged and processed those submissions during the Illumina / GRAIL investigation, creating a documented notice chain.

3. Regulatory action, divestiture, SEC-related scrutiny, and leadership turnover followed, supporting a circumstantial causation narrative.