
**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**
Washington, D.C. 20549

SCHEDULE 14D-9

(Amendment No. 1)

SOLICITATION/RECOMMENDATION STATEMENT PURSUANT TO
SECTION 14(d)(4) OF THE SECURITIES EXCHANGE ACT OF 1934

PREVAIL THERAPEUTICS INC.

(Name of Subject Company)

PREVAIL THERAPEUTICS INC.

(Name of Person(s) Filing Statement)

Common Stock, par value \$0.0001 per share
(Title of Class of Securities)

74140Y101
(CUSIP Number of Common Stock)

Asa Abeliovich, M.D., Ph.D.
President and Chief Executive Officer
Prevail Therapeutics Inc.
430 East 29th Street, Suite 1520
New York, New York 10016
(917) 336-9310

(Name, Address and Telephone Number of Person Authorized
to Receive Notices and Communications on Behalf of the Person(s) Filing Statement)

With copies to:

Raymond O. Gietz
Matthew J. Gilroy
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Christopher D. Comeau
Tara M. Fisher
Ropes & Gray LLP
Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199
(617) 951-7000

Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

This Amendment No. 1 (this “Amendment”) to Schedule 14D-9 amends and supplements the Schedule 14D-9 previously filed by Prevail Therapeutics Inc. (the “Company” or “Prevail”), with the U.S. Securities and Exchange Commission (the “SEC”) on December 22, 2020 (as amended or supplemented from time to time, the “Schedule 14D-9”), with respect to the tender offer by Tyto Acquisition Corporation, a Delaware corporation (“Purchaser”) and wholly-owned subsidiary of Eli Lilly and Company, an Indiana corporation (“Parent”), to purchase all of the Company’s outstanding shares of common stock, par value \$0.0001 per share (the “Shares”), pursuant to the Agreement and Plan of Merger, dated as of December 14, 2020, by and among Parent, Purchaser and the Company (as it may be amended from time to time, the “Merger Agreement”), in exchange for (i) \$22.50 per Share, net to the seller in cash, without interest and less any applicable tax withholding, plus (ii) one non-tradeable contingent value right (each a “CVR”), which represents the contractual right to receive a contingent payment of up to \$4.00 per Share, net to the seller in cash, without interest and less any applicable tax withholding, which amount (or such lesser amount as determined in accordance with the terms and conditions of the contingent value rights agreement to be entered into with a rights agent mutually agreeable to Parent and the Company) will become payable, if at all, if a specified milestone is achieved prior to December 1, 2028 upon the terms and subject to the conditions set forth in the Offer to Purchase, dated December 22, 2020 (together with any amendments or supplements thereto, the “Offer to Purchase”), and in the related Letter of Transmittal (together with any amendments or supplements thereto, the “Letter of Transmittal,” which, together with the Offer to Purchase, constitutes the “Offer”). The Offer is described in a Tender Offer Statement on Schedule TO (as amended or supplemented from time to time, the “Schedule TO”) filed by Parent and Purchaser with the SEC on December 22, 2020. The Offer to Purchase and the Letter of Transmittal have been filed as Exhibits (a)(1)(A) and (a)(1)(B) to the Schedule 14D-9, respectively, as each may be amended or supplemented from time to time.

Capitalized terms used in this Amendment but not defined herein shall have the respective meaning given to such terms in the Schedule 14D-9. The information set forth in the Schedule 14D-9 remains unchanged and is incorporated herein by reference, except that such information is hereby amended or supplemented to the extent specifically provided herein.

Item 8. Additional Information.

Item 8 of the Schedule 14D-9 is hereby amended and supplemented as follows:

The following section is added as a new section in Item 8 on p. 45 of the Schedule 14D-9.

(j) Certain Litigation.

On December 30, 2020, Lori Karson, a purported stockholder of the Company, filed a putative class action lawsuit against the Company and the members of the Company Board in the Supreme Court of the State of New York in the County of New York, captioned *Karson v. Prevail Therapeutics Inc., et al.*, Index No. 657378/2020 (the “Karson Complaint”). The Karson Complaint alleges, among other things, that the defendant members of the Company Board breached their fiduciary duties to the Company’s stockholders in connection with the Transactions by omitting certain material information regarding the Transactions from the Schedule 14D-9 filed by the Company on December 22, 2020, and by agreeing to enter into the Transactions through an allegedly inadequate process and at an allegedly unfair price. The Karson Complaint further asserts that the Company aided and abetted these alleged breaches of fiduciary duty. The Karson Complaint seeks, among other things, injunctive relief preventing the consummation of the Transactions, rescissory damages or rescission in the event of consummation of the Transactions, declaratory relief related to the alleged breaches of fiduciary duty, and certain fees and expenses.

On January 4, 2021, Stephen Bushansky, a purported stockholder of the Company, filed a complaint against the Company and the members of the Company Board in the United States District Court for the Southern District of New York, captioned *Stephen Bushansky v. Prevail Therapeutics Inc., et al.*, Case No. 1:21-cv-00040 (the “Bushansky Complaint”). The Bushansky Complaint alleges, among other things, that the defendants violated Sections 14(d), 14(e), and 20(a) of the Securities and Exchange Act of 1934 by omitting certain material facts related to the transaction from the Schedule 14D-9 filed by the Company on December 22, 2020. The Bushansky Complaint seeks, among other things, injunctive relief preventing the consummation of the Transactions, rescissory damages or rescission in the event of consummation of the Transactions, and certain fees and expenses.

The outcome of the lawsuits described above cannot be predicted with certainty. However, the Company believes that the plaintiffs' allegations are without merit. Additional complaints may be filed against the Company, the Company Board, Parent and/or Purchaser in connection with the transactions contemplated by the Merger Agreement, the Schedule TO and the Schedule 14D-9. If such additional complaints are filed, absent new or different allegations that are material, the Company will not necessarily announce such additional complaints.

The foregoing description does not purport to be complete and is qualified in its entirety by reference to the Karson Complaint and the Bushansky Complaint, copies of which are attached as Exhibit (a)(5)(C) and Exhibit (a)(5)(D) to this Schedule 14D-9, respectively, and are hereby incorporated herein by reference.

Item 9. Exhibits.

Item 9 of the Schedule 14D-9 is hereby amended and supplemented as follows:

<u>Exhibit No.</u>	<u>Description</u>
(a)(5)(C)	<u>Complaint, dated December 30, 2020 (Karson v. Prevail Therapeutics Inc., et al.)</u> .
(a)(5)(D)	<u>Complaint, dated January 4, 2021 (Stephen Bushansky v. Prevail Therapeutics Inc., et al.)</u>

SIGNATURE

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Dated: January 5, 2021

Prevail Therapeutics Inc.

By: /s/ ASA ABELIOVICH

Name: Asa Abeliovich

Title: President & Chief Executive Officer

2. The terms of the Proposed Transaction were memorialized in a December 15, 2020, filing with the Securities and Exchange Commission (“SEC”) on Form 8-K, attaching the definitive Agreement and Plan of Merger (the “Merger Agreement”). Under the terms of the Merger Agreement, Eli Lilly will commence a tender offer to acquire all outstanding shares of Prevail common stock at a price of \$22.50 per share in cash (or an aggregate of approximately \$880 million) payable at closing plus one non-tradable contingent value right (“CVR”) worth up to \$4.00 per share in cash, for a total possible consideration of up to \$26.50 per share in cash. As a result, Purchaser will merge with and into the Company, with Prevail continuing as the Surviving Corporation.

3. Thereafter, on December 22, 2020, Prevail filed a Solicitation/Recommendation Statement on Schedule 14D-9 (the “Recommendation Statement”) with the SEC in support of the Proposed Transaction.

4. The Proposed Transaction is unfair and undervalued for a number of reasons. Significantly, the Recommendation Statement describes an insufficient sales process in which the Board rushed through an inadequate “sales process” in which the only end goal was a sale to Eli Lilly.

5. Such a sales process, or lack thereof, clearly indicates that the only end-goal acceptable to the Defendants was an acquisition of Prevail by Eli Lilly.

6. In approving the Proposed Transaction, the Individual Defendants have breached their fiduciary duties of loyalty, good faith, due care and disclosure by, *inter alia*, (i) agreeing to sell Prevail without first taking steps to ensure that Plaintiff and Class members (defined below) would obtain adequate, fair and maximum consideration under the circumstances; and (ii) engineering the Proposed Transaction to benefit themselves and/or the Eli Lilly without regard for Prevail's public stockholders. Accordingly, this action seeks to enjoin the Proposed Transaction and compel the Individual Defendants to properly exercise their fiduciary duties to Prevail stockholders.

7. Next, it appears as though the Individual Defendants have entered into the Proposed Transaction to procure for themselves and senior management of the Company significant and immediate benefits with no thought to the Company's public stockholders. For instance, pursuant to the terms of the Merger Agreement, upon the consummation of the Proposed Transaction, Company Board Members and executive officers will be able to exchange all Company equity awards for the merger consideration. Moreover, certain Directors and other insiders will also be the recipients of lucrative change-in-control agreements, triggered upon the termination of their employment as a consequence of the consummation of the Proposed Transaction.

8. In further violation of their fiduciary duties, Defendants caused to be filed the materially deficient Recommendation Statement on December 22, 2020 with the SEC in an effort to solicit stockholders to tender their Prevail shares in favor of the Proposed Transaction. The Recommendation Statement is materially deficient, deprives Prevail stockholders of the information they need to make an intelligent, informed and rational decision of whether to tender their shares in favor of the Proposed Transaction, and is thus in breach of the Defendants fiduciary duties. As detailed below, the Recommendation Statement omits and/or misrepresents material information concerning, among other things: (a) the sales process and in particular certain conflicts of interest for management; (b) the financial projections for Prevail, provided by Prevail to the Company's financial advisors Centerview Partners LLC ("Centerview") for use in its financial analyses; (c) the data and inputs underlying the financial valuation analyses that purport to support the fairness opinion provided by the Company's financial advisor, Centerview.

9. Absent judicial intervention, the Proposed Transaction will be consummated, resulting in irreparable injury to Plaintiff and the Class. This action seeks to enjoin the Proposed Transaction or, in the event the Proposed Transaction is consummated, to recover damages resulting from the breaches of fiduciary duties by Defendants.

PARTIES

10. Plaintiff is a citizen of California and, at all times relevant hereto, has been an Prevail stockholder.

11. Defendant Prevail, a gene therapy company, focuses on developing and commercializing disease-modifying AAV-based gene therapies for patients with neurodegenerative diseases. Prevail is organized under the laws of Delaware and has its principal place of business at 430 East 29th Street, Suite 1520, New York, New York 10016. Shares of Prevail common stock are traded on the Nasdaq under the symbol "PRVL."

12. Defendant Francois Nader ("Nader") has been a Director of the Company at all relevant times. In addition, Nader serves as the Chairperson of the Company Board, Chairperson of the Nominating and Corporate Governance Committee, and a member of the Audit Committee.

13. Defendant Asa Abeliovich ("Abeliovich") has been a director of the Company at all relevant times.

14. Defendant Tim Adams ("Adams") has been a director of the Company at all relevant times. In addition, Adams serves as the Chairperson of the Audit Committee and a member of the Compensation Committee.

15. Defendant William H. Carson (“Carson”) has been a director of the Company at all relevant times. In addition, Carson serves as a member of the Audit and Nominating and Corporate Governance Committees.

16. Defendant Carl L. Gordon (“Gordon”) has been a director of the Company at all relevant times.

17. Defendant Ran Nussbaum (“Nussbaum”) has been a director of the Company at all relevant times. In addition, Nussbaum serves as a member of the Audit and Compensation Committees.

18. Defendant Morgan Sheng (“Sheng”) has been a director of the Company at all relevant times. In addition, Sheng serves as the Chairperson of the Compensation Committee and a member of the Nominating and Corporate Governance Committee.

19. Defendant Peter Thompson (“Thompson”) has been a director of the Company at all relevant times. In addition, Thompson serves as a member of the Nominating and Corporate Governance Committee.

20. Defendants identified in 12 – 19 are collectively referred to as the “Individual Defendants.”

21. Non-Defendant Eli Lilly discovers, develops, manufactures, and markets pharmaceutical products worldwide. Shares of Eli Lilly common stock are traded on the New York Stock Exchange under the symbol “LLY.”

JURISDICTION AND VENUE

22. This Court has personal jurisdiction over the Defendants pursuant to CPLR 301 and/or 302. This Court has personal jurisdiction over Defendants because, among other things, the Company’s stock trades on the NYSE which is headquartered in New York County. The exercise of jurisdiction by this New York Court is permissible under traditional notions of fair play and substantial justice.

23. Venue is proper in this Court pursuant to CPLR 503. Among other things, the Company's common shares trade on the Nasdaq, which is also headquartered in New York County.

CLASS ACTION ALLEGATIONS

24. Plaintiff brings this class action pursuant to CPLR Article 9 on behalf of herself and all other owners of Prevail common stock on the date of the announcement of the Proposed Transaction, and their successors and assigns (excluding Defendants, and any person, firm, trust, corporation or other entity related or affiliated with any of the Defendants)

25. This action is properly maintainable as a class action for the following reasons.

- a. The Class is so numerous that joinder of all members is impracticable. As of November 9, 2020, there were 34,246,433 shares of Prevail common stock issued and outstanding, likely owned by hundreds if not thousands of nonaffiliated Prevail public stockholders
- b. There are questions of law and fact that are common to the Class, including:
 - i. whether the Individual Defendants breached their fiduciary duties to the Class by entering into the Proposed Transaction, which is unfair to the Company's public stockholders and was entered into as a result of a flawed, inadequate and unfair process;
 - ii. whether the Proposed Transaction is unfair to the Class, in that the price is inadequate and unfair and does not reflect the fair value that could be obtained under the circumstances; and

- iii. whether the Class is entitled to injunctive relief and/or damages as a result of the wrongful conduct committed by the Defendants.
- c. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other Class members and Plaintiff has the same interests as the other Class members. Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.
- d. The prosecution of separate actions by individual Class members would create the risk of inconsistent or varying adjudications with respect to individual Class members, which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual Class members that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

26. To the extent Defendants take further steps to effectuate the Proposed Transaction, preliminary and/or final injunctive relief on behalf of the Class as a whole will be entirely appropriate because Defendants have acted, or refused to act, on grounds generally applicable and causing injury to the Class.

THE INDIVIDUAL DEFENDANTS' FIDUCIARY DUTIES

27. In any situation where the directors of a publicly traded corporation undertake a transaction that will result in either a change in corporate control or a break-up of the corporation's assets, the directors have an affirmative fiduciary obligation to act in the best interests of the company's shareholders, including the duty to obtain maximum value under the circumstances.

To diligently comply with these duties, the directors may not take any action that:

- a. adversely affects the value provided to the corporation's shareholder's;
- b. will discourage or inhibit alternative offers to purchase control of the corporation or its assets;
- c. contractually prohibits them from complying with their fiduciary duties; and/or
- d. will provide the directors, executives or other insiders with preferential treatment at the expense of, separate from, the public shareholders, and place their own pecuniary interests above those interests of the company and its shareholders.

28. In accordance with their duties of loyalty and good faith, the Individual Defendants, as directors and/or officers of Prevail, are obligated to refrain from:

- a. participating in any transaction where the directors' or officers' loyalties are divided;
- b. participating in any transaction where the directors or officers are entitled to receive personal financial benefit not equally shared by the public shareholders of the corporation; and/or
- c. unjustly enriching themselves at the expense or to the detriment of the public shareholders.

29. Plaintiff alleges herein that the Individual Defendants, separately and together, in connection with the Proposed Transaction, violated, and are violating, the fiduciary duties they owe to Plaintiff and the other public shareholders of Prevail, including their duties of loyalty, good faith, candor, and due care. As a result of the Individual Defendants' divided loyalties, Plaintiff and Class members will not receive adequate, fair or maximum value for their Prevail common stock in the Proposed Transaction.

30. As a result of these breaches of fiduciary duty, the Company's public shareholders will not receive adequate or fair value for their common stock in the Proposed Transaction.

SUBSTANTIVE ALLEGATIONS

Company Background

31. Prevail is a gene therapy company leveraging breakthroughs in human genetics with the goal of developing and commercializing disease-modifying AAV-based gene therapies for patients with neurodegenerative diseases. The Company's lead product candidate is PR001, which is in Phase I/II clinical trial for the treatment of Parkinson's disease with GBA1 mutation and neuronopathic Gaucher disease. It is also developing PR006 for the treatment of frontotemporal dementia with GRN mutation; and PR004 for the treatment of synucleinopathies.

32. The Company's most recent financial performance press release before the announcement of the Proposed Transaction indicated promise for the Company's pipeline products. For example, in a November 13, 2020 press release announcing its 2020 Q3 operational and financial results, the Company highlighted that its cash, cash equivalents and investments were \$ 114.3 million, in which the Company continues to anticipate that its cash runway will extend into the first half of 2022.

33. Speaking on the positive news, Prevail CEO Defendant Abeliovich stated, "We're pleased to be making significant progress across our pipeline as we seek to develop urgently needed disease-modifying gene therapy treatments for patients with neurodegenerative diseases... We are encouraged by the continuation of patient dosing in our Phase 1/2 PROPEL trial of PR001 for Parkinson's disease with GBA1 mutations, and we are excited to advance our PROVIDE and PROCLAIM clinical trials for Type 2 Gaucher disease and frontotemporal dementia with GRN mutations, respectively, this year."

34. On December 11, 2020, the Company announced in a Press Release that it began its PROCLAIM human trials, a substantial step in the approval process, Defendant Abeliovich commented, “Dosing the first patient in our PROCLAIM clinical trial marks an important milestone in our efforts to advance a potentially disease-modifying treatment for patients with frontotemporal dementia with *GRN* mutations Regarding current Prevail products and its pipeline.” The Press Release continued with a quote from Dr. Jonathan Rohrer, principal research fellow at the University College London Queen Square Institute of Neurology, “Frontotemporal dementia is a devastating condition, with no disease-modifying therapeutic options available. PROCLAIM is an important clinical study which could further increase our understanding of frontotemporal dementia due to mutations in the progranulin gene, and help demonstrate the potential of gene therapy to correct the underlying genetic cause of this condition, potentially slowing or stopping disease progression.”

35. Despite this upward trajectory and financial promise, the Individual Defendants have caused Prevail to enter into the Proposed Transaction for insufficient consideration.

The Flawed Sales Process

36. As detailed in the Recommendation Statement, the process deployed by the Individual Defendants was flawed and inadequate, was conducted out of the self-interest of the Individual Defendants, and was designed with only one concern in mind-to effectuate a sale of the Company to Eli Lilly.

37. First, the Registration Statement fails to provide adequate explanation as to why the Board allowed a significant portion of the merger consideration to be composed of a CVR, whose payout is not fully guaranteed.

38. In addition, while it appears that the Board created a Transaction Committee to run the sales process, the Registration Statement does not provide sufficient information regarding the specific powers of the Transaction Committee, including whether its approval was required for any potential strategic alternative to be approved by the full Board.

39. Moreover, the “Transaction Committee” created by the Board to run the process is anything but disinterested-in fact, Defendant Gordon, the chair of the Transaction Committee, will be able to cash out his current Company stock for **over three hundred million dollars** upon the consummation of the Proposed Transaction. Similarly, Defendants Abeliovich and Nussbaum, also members of the Transaction Committee, will each receive tens of millions of dollars as a result of the consummation of the Proposed Transaction, and Defendant Nader is set to receive over a half a million himself. It therefore is apparent that every single member of the Transaction Committee will receive significant monetary gains from the consummation of the Proposed Transaction, making their ability to gauge the fairness of the deal on behalf of Plaintiff and other public stockholders of Prevail highly suspect.

40. The Registration Statement is unclear as to the nature of the various nondisclosure agreements entered into by the Company on the one hand, and various interested third parties on the other, including Eli Lilly, and whether these various agreements differed from one another, and if so, in what ways.

41. It is not surprising, given this background to the overall sales process, that it was conducted in a completely inappropriate and misleading manner.

The Proposed Transaction

42. On December 15, 2020, Prevail and Eli Lilly issued a joint press release announcing the Proposed Transaction. The press release stated, in relevant part:

INDIANAPOLIS, IN and NEW YORK, NY - Eli Lilly and Company (NYSE: LLY) and Prevail Therapeutics Inc. (NASDAQ: PRVL) today announced a definitive agreement for Lilly to acquire Prevail for \$22.50 per share in cash (or an aggregate of approximately \$880 million) payable at closing plus one non-tradable contingent value right (“CVR”) worth up to \$4.00 per share in cash (or an aggregate of approximately \$160 million), for a total consideration of up to \$26.50 per share in cash (or an aggregate of approximately \$1,040 billion). The CVR is payable (subject to certain terms and conditions) upon the first regulatory approval of a product from Prevail’s pipeline as set forth in more detail below. Prevail is a biotechnology company developing potentially disease-modifying AAV9-based gene therapies for patients with neurodegenerative diseases.

The acquisition will establish a new modality for drug discovery and development at Lilly, extending Lilly’s research efforts through the creation of a gene therapy program that will be anchored by Prevail’s portfolio of clinical-stage and preclinical neuroscience assets. Prevail’s lead gene therapies in clinical development are PR001 for patients with Parkinson’s disease with *GBA1* mutations (PD-GBA) and neuronopathic Gaucher disease (nGD) and PR006 for patients with frontotemporal dementia with *GRN* mutations (FTD-GRN). Prevail’s preclinical pipeline includes PR004 for patients with specific synucleinopathies, as well as potential gene therapies for Alzheimer’s disease, Parkinson’s disease, amyotrophic lateral sclerosis (ALS), and other neurodegenerative disorders.

“Gene therapy is a promising approach with the potential to deliver transformative treatments for patients with neurodegenerative diseases such as Parkinson’s, Gaucher and dementia,” said Mark Mintun, M.D., vice president of pain and neurodegeneration research at Lilly. “The acquisition of Prevail will bring critical technology and highly skilled teams to complement our existing expertise at Lilly, as we build a new gene therapy program anchored by well-researched assets. We look forward to completing the proposed acquisition and working with Prevail to advance their groundbreaking work through clinical development.”

“Lilly is an established leader in neuroscience drug development and commercialization who shares our commitment to patients with neurodegenerative diseases, and I’m excited for Prevail to join the Lilly family,” said Asa Abeliovich, M.D., Ph.D., founder and chief executive officer of Prevail. “I’m incredibly proud of the Prevail team, who have made great progress advancing our pipeline of gene therapy programs for patients with these devastating disorders. In just over three years, Prevail has advanced two first-in-class gene therapy programs into clinical

development for PD-GBA, nGD, and FTD-GRN, established two manufacturing platforms, and developed a broad pipeline with great potential to impact patients in need of disease-modifying treatment options. With its global scale and resources, Lilly will be the ideal organization to maximize the potential of our pipeline and accelerate our ability to bring these therapies to as many patients as possible. We look forward to working together to advance our shared mission.”

Under the terms of the agreement, Lilly will commence a tender offer to acquire all outstanding shares of Prevail Therapeutics Inc. for a purchase price of \$22.50 per share in cash (or an aggregate of approximately \$880 million) payable at closing plus one non-tradeable CVR. The CVR entitles Prevail stockholders to up to an additional \$4.00 per share in cash (or an aggregate of approximately \$160 million) payable (subject to certain terms and conditions) upon the first regulatory approval for commercial sale of a Prevail product in one of the following countries: United States, Japan, United Kingdom, Germany, France, Italy or Spain. To achieve the full value of the CVR, such regulatory approval must occur by December 31, 2024. If such regulatory approval occurs after December 31, 2024, the value of the CVR will be reduced by approximately 8.3 cents per month until December 1, 2028 (at which point the CVR will expire). There can be no assurance any payments will be made with respect to the CVR. The transaction is not subject to any financing condition and is expected to close in the first quarter of 2021, subject to customary closing conditions, including receipt of required regulatory approvals and the tender of a majority of the outstanding shares of Prevail’s common stock. Following the successful closing of the tender offer, Lilly will acquire any shares of Prevail that are not tendered in the tender offer through a second-step merger at the same consideration as paid in the tender offer.

The purchase price payable at closing represents a premium of approximately 117 percent to the 60-day volume-weighted average trading price of Prevail’s common stock ended on December 14, 2020, the last trading day before the announcement of the transaction. Prevail’s Board of Directors unanimously recommends that Prevail’s stockholders tender their shares in the tender offer. Additionally, certain Prevail stockholders, beneficially owning approximately 51 percent of Prevail’s outstanding common stock, have (subject to certain terms and conditions) agreed to tender their shares in the tender offer.

Upon closing, the impact of this transaction will be reflected in Lilly’s 2021 financial results according to Generally Accepted Accounting Principles (GAAP). There will be no change required to Lilly’s 2021 financial guidance being issued today for research and development expense or non-GAAP earnings per share as a result of this transaction.

The Inadequate Merger Consideration

43. Significantly, the Company's financial prospects and opportunities for future growth establish the inadequacy of the merger consideration.

44. First, the compensation afforded under the Proposed Transaction to Company stockholders significantly undervalues the Company. The proposed valuation does not adequately reflect the intrinsic value of the Company. Moreover, the valuation does not adequately take into consideration how the Company is performing, considering key financial improvements.

45. For example, the deal consideration (without the potential CVR) is below the wall street analyst average twelve-month price target of \$23.57 for Prevail shares.

46. A December 15, 2020 Fierce Biotech article following the announcement of the Proposed Transaction commented on the motives for Eli Lilly, "The acquisition of Prevail will bring critical technology and highly skilled teams to complement our existing expertise at Lilly, as we build a new gene therapy program anchored by well-researched assets," he added. Lilly is only the latest big pharma to buy its way into gene therapy, with Roche, Novartis, Pfizer and GlaxoSmithKline among those buying into the promise of one-shot therapies for diseases that often resist conventional treatment approaches in the last few years."

47. In addition to Prevail's impressive pipeline, the Proposed Transaction represents a significant synergistic benefit to Eli Lilly, which operates in the same industry as Prevail, and will use the new portfolio, operational capabilities, and brand capital to bolster its own position in the market. The December 15, 2020 Business Insider article regarding the Proposed Transaction said, "Prevail's gene therapy programs offer a new pathway for drug discovery and development to Eli Lilly, the pharma company said. The leading programs target patients with Parkinson's disease, neuronopathic Gaucher disease, and frontotemporal dementia. Its preclinical pipeline includes therapies for Alzheimer's disease, amyotrophic lateral sclerosis, and other neurodegenerative diseases."

48. Clearly, while the deal will be beneficial to Eli Lilly it comes at great expense to Plaintiff and other public stockholders of the Company.

49. Moreover, post-closure, Prevail stockholders will be frozen out of any future benefit from their investment in Prevail's bright future.

50. It is clear from these statements and the facts set forth herein that this deal is designed to maximize benefits for the Eli Lilly at the expense of Prevail public stockholders, which clearly indicates that Prevail stockholders were not an overriding concern in the formation of the Proposed Transaction.

Preclusive Deal Mechanisms

51. The Merger Agreement contains certain provisions that unduly benefit the Eli Lilly by making an alternative transaction either prohibitively expensive or otherwise impossible. Notably, in the event of termination, the merger agreement requires Prevail to pay up to \$30 million to the Eli Lilly and/or its affiliates, if the Merger Agreement is terminated under certain circumstances. Moreover, under one circumstance, Prevail must pay this termination fee even if it consummates any competing Superior Proposal (as defined in the Merger Agreement) *within 12 months following the termination* of the Merger Agreement. The termination fee will make the Company that much more expensive to acquire for potential purchasers. The termination fee in combination with other preclusive deal protection devices will all but ensure that no competing offer will be forthcoming.

52. The Merger Agreement also contains a “Acquisition Proposal” provision that restricts Prevail from considering alternative acquisition proposals by, *inter alia*, constraining Prevail’s ability to solicit or communicate with potential acquirers or consider their proposals. Specifically, the provision prohibits the Company from directly or indirectly soliciting, initiating, proposing or inducing any alternative proposal, but permits the Board to consider an unsolicited bona fide “Acquisition Proposal” if it constitutes or is reasonably calculated to lead to a “Superior Proposal” as defined in the Merger Agreement.

53. Moreover, the Merger Agreement further reduces the possibility of a topping offer from an unsolicited purchaser. Here, the Individual Defendants agreed to provide to the Eli Lilly and/or its affiliates information in order to match any other offer, thus providing the Eli Lilly access to the unsolicited bidder’s financial information and giving Eli Lilly the ability to top the superior offer. Thus, a rival bidder is not likely to emerge with the cards stacked so much in favor of the Eli Lilly.

54. These provisions, individually and collectively, materially and improperly impede the Board’s ability to fulfill its fiduciary duties with respect to fully and fairly investigating and pursuing other reasonable and more valuable proposals and alternatives in the best interests of the Company and its public stockholders.

55. Accordingly, the Company’s true value is compromised by the consideration offered in the Proposed Transaction.

Potential Conflicts of Interest

56. The breakdown of the benefits of the deal indicate that Prevail insiders are the primary beneficiaries of the Proposed Transaction, not the Company’s public stockholders. The Board and the Company’s executive officers are conflicted because they will have secured unique benefits for themselves from the Proposed Transaction not available to Plaintiff and the public stockholders of Prevail.

57. Certain insiders stand to receive massive financial benefits as a result of the Proposed Transaction. Notably, Company insiders, including the Individual Defendants, currently own large, illiquid portions of Company stock that will be exchanged for large cash pay days upon the consummation of the Proposed Transaction, including several of the Individual Defendants receiving pay days of tens of millions of dollars, or in the case of Defendant Gordon, over three hundred million dollars.

58. Furthermore, upon the consummation of the Proposed Transaction, each outstanding Company option or equity award, will be canceled and converted into the right to receive certain consideration according to the merger agreement.

59. These payouts will be paid to Prevail insiders, as a consequence of the Proposed Transaction's consummation, as follows:

<u>Name of Executive Officer or Director</u>	<u>Number of Shares</u>	<u>Cash Value of Shares (\$)(4)</u>	<u>Number of Shares Subject to Company Stock Options</u>	<u>Cash Consideration for Company Stock Options (\$)(5)</u>	<u>Number of Shares of Company Restricted Stock</u>	<u>Cash Value of Shares of Company Restricted Stock (\$)(6)</u>	<u>Number of CVRs</u>
Directors							
Timothy Adams	—	—	49,400	490,438.68	—	—	49,400
William H. Carson, M.D.	—	—	34,000	387,260.00	—	—	34,000
Carl Gordon, Ph.D., CFA(1)	13,822,463	311,005,417.50	17,000	93,840.00	—	—	13,839,463
Francois Nader, M.D.(2)	23,747	534,307.50	182,847	3,119,010.96	—	—	206,594
Ran Nussbaum(3)	1,576,881	35,479,822.50	17,000	93,840.00	—	—	1,593,881
Morgan Sheng, M.B.B.S., Ph.D., FRS	—	—	37,000	331,440.00	—	—	37,000
Peter Thompson, M.D.(1)	—	—	17,000	93,840.00	—	—	17,000
Executive Officers							
Asa Abeliovich, M.D., Ph.D.	1,957,486	44,043,435	1,883,693	34,855,094.55	391,514	8,809,065.00	4,232,693
Yong Dai, Ph.D.	—	—	370,239	6,261,693.94	—	—	370,239
Franz Hefti, Ph.D.	—	—	388,939	7,039,221.81	—	—	388,939
Brett Kaplan, M.D.	—	—	506,569	8,156,482.09	—	—	506,569
Emily Minkow	13,000	292,500	416,749	7,303,048.21	—	—	429,749
Kira Schwartz, J.D.	—	—	100,000	582,000	—	—	100,000
Jeffrey Sevigny, M.D.	—	—	611,781	10,934,724.94	—	—	611,781

60. Finally, certain employment agreements with certain Prevail executives, entitle such executives to severance packages should their employment be terminated under certain circumstances. These ‘golden parachute’ packages are significant, and will grant each director or officer entitled to them millions of dollars, compensation not shared by Prevail common stockholders as follows:

<u>Name</u>	<u>Cash \$(1)</u>	<u>Unvested Equity \$(2)</u>	<u>Perquisites/ Benefits \$(3)</u>	<u>Total (\$)</u>
Asa Abeliovich, M.D., Ph.D.	1,174,125	19,856,351	36,000	21,066,476
Yong Dai, Ph.D.	517,050	2,418,454	24,000	2,959,504
Jeffrey Sevigny, M.D.	651,389	3,948,008	24,000	4,623,397

61. Thus, while the Proposed Transaction is not in the best interests of Prevail stockholders, it will produce lucrative benefits for the Company’s officers and directors.

The Materially Misleading and/or Incomplete Recommendation Statement

62. On December 22, 2020, the Prevail Board caused to be filed a materially misleading and incomplete Recommendation Statement with the SEC that, in violation their fiduciary duties, failed to provide the Company’s stockholders with material information and/or provides them with materially misleading information critical to the total mix of information available to the Company’s stockholders concerning the financial and procedural fairness of the Proposed Transaction.

Omissions and/or Material Misrepresentations Concerning The Process Leading to the Proposed Transaction

63. Specifically, the Recommendation Statement fails to provide material information concerning the process conducted by the Company and the events leading up to the Proposed Transaction. In particular, the Recommendation Statement fails to disclose:

- a. Why the Board allowed a significant portion of the merger consideration to be composed of a CVR, whose payout is not fully guaranteed;
- b. Sufficient information regarding the specific powers of the Transaction Committee, including whether its approval was required for any potential strategic alternative to be approved by the full Board;
- c. Why all members of the Transaction Committee were not disinterested, and in fact, will receive millions of dollars in cash upon the consummation of the Proposed Transaction; and
- d. The nature of the various nondisclosure agreements entered into by the Company on the one hand, and various interested third parties on the other, including Eli Lilly, and whether these various agreements differed from one another, and if so, in what ways.

Omissions and/or Material Misrepresentations Concerning Prevail's Financial Projections

64. The Recommendation Statement fails to provide material information concerning financial projections provided by Prevail management and relied upon by Centerview in its analyses. The Recommendation Statement discloses management-prepared financial projections for the Company which are materially misleading. The Recommendation Statement indicates that in connection with the rendering of Centerview's fairness opinion, Centerview reviewed "internal information relating to the business, operations, earnings, cash flow, assets, liabilities and prospects of the Company, including certain financial forecasts, analyses and projections relating to the Company prepared by management of the Company and furnished to Centerview by the Company for purposes of Centerview's analysis, which are referred to in this summary of Centerview's opinion as the "Forecasts," and which are collectively referred to in this summary of Centerview's opinion as the "Internal Data"."

65. Accordingly, the Recommendation Statement should have, but fails to provide, certain information in the projections that Prevail management provided to the Board and Centerview. Courts have uniformly stated that “projections ... are probably among the most highly-prized disclosures by investors. Investors can come up with their own estimates of discount rates or [] market multiples. What they cannot hope to do is replicate management’s inside view of the company’s prospects.” *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 201-203 (Del. Ch. 2007).

66. With respect to the Prevail projections the Recommendation Statement fails to provide material information concerning the financial projections prepared by Prevail management. Specifically, the Recommendation Statement fails to disclose material line items for EBIT.

67. Additionally, the Recommendation Statement provides non-GAAP financial metrics, including EBIT and Unlevered Free Cash Flow, but fails to disclose a reconciliation of all non-GAAP to GAAP metrics.

68. This information is necessary to provide Company stockholders a complete and accurate picture of the sales process and its fairness. Without this information, stockholders were not fully informed as to Defendants’ actions, including those that may have been taken in bad faith, and cannot fairly assess the process.

69. Without accurate projection data presented in the Recommendation Statement, Plaintiff and other stockholders of Prevail are unable to properly evaluate the Company’s true worth, the accuracy of Centerview’s financial analyses, or make an informed decision whether to tender their Company stock in favor of the Proposed Transaction. As such, the Board has breached their fiduciary duties by failing to include such information in the Recommendation Statement.

Omissions and/or Material Misrepresentations Concerning the Financial Analyses by Centerview

70. In the Recommendation Statement, Centerview describes its respective fairness opinion and the various valuation analyses performed to render such opinion. However, the descriptions fail to include necessary underlying data, support for conclusions, or the existence of, or basis for, underlying assumptions. Without this information, one cannot replicate the analyses, confirm the valuations or evaluate the fairness opinions.

71. With respect to the *Selected Public Company Analysis*, the Recommendation Statement fails to disclose the multiples and metrics for each selected company.

72. With respect to the *Selected Precedent Transactions Analysis*, the Recommendation Statement fails to disclose the following:

- a. The multiples and metrics for each selected precedent transaction; and
- b. The date on which each selected precedent transaction closed.

73. With respect to the *Discounted Cash Flow Analysis*, the Recommendation Statement fails to disclose the following:

- a. The specific inputs and assumptions used to calculate the discount rate range of 12.5% to 14.5%;
- b. The Company's weighted average cost of capital;
- c. The implied terminal value of the Company, as well as the basis for the assumption that "unlevered free cash flows would decline in perpetuity after December 31, 2040 at a rate of free cash flow decline of 20% year over year."

- d. Tax savings from usage of the Company's federal net operating losses of \$109 million as of December 31, 2020 and future losses, as set forth in the Forecasts; and
- e. Fully-diluted shares of the Company as of December 14, 2020

74. With regards to the *Analyst Price Target Analysis* the Recommendation Statement fails to provide the following:

- a. The individual price targets analyzed; and
- b. The source of said individual price targets analyzed

75. These disclosures are critical for stockholders to be able to make an informed decision on whether to tender their shares in favor of the Proposed Transaction.

76. Without the omitted information identified above, Prevail's public stockholders are missing critical information necessary to evaluate whether the proposed consideration truly maximizes stockholder value and serves their interests. Moreover, without the key financial information and related disclosures, Prevail's public stockholders cannot gauge the reliability of the fairness opinion and the Board's determination that the Proposed Transaction is in their best interests. As such, the Board has breached their fiduciary duties by failing to include such information in the Preliminary Stockholders.

FIRST COUNT

Claim for Breach of Fiduciary Duties

(Against the Individual Defendants)

77. Plaintiff repeats all previous allegations as if set forth in full herein.

78. The Individual Defendants have violated their fiduciary duties of care, loyalty and good faith owed to Plaintiff and the Company's public stockholders.

79. By the acts, transactions and courses of conduct alleged herein, Defendants, individually and acting as a part of a common plan, are attempting to unfairly deprive Plaintiff and other members of the Class of the true value of their investment in Prevail.

80. As demonstrated by the allegations above, the Individual Defendants failed to exercise the care required, and breached their duties of loyalty and good faith owed to the stockholders of Prevail by entering into the Proposed Transaction through a flawed and unfair process and failing to take steps to maximize the value of Prevail to its public stockholders.

81. Indeed, Defendants have accepted an offer to sell Prevail at a price that fails to reflect the true value of the Company, thus depriving stockholders of the reasonable, fair and adequate value of their shares.

82. Moreover the Individual Defendants breached their duty of due care and candor by failing to disclose to Plaintiff and the Class all material information necessary for them to make an informed decision on whether to tender their shares in favor of the Proposed Transaction.

83. The Individual Defendants dominate and control the business and corporate affairs of Prevail, and are in possession of private corporate information concerning Prevail's assets, business and future prospects. Thus, there exists an imbalance and disparity of knowledge and economic power between them and the public stockholders of Prevail which makes it inherently unfair for them to benefit their own interests to the exclusion of maximizing stockholder value.

84. By reason of the foregoing acts, practices and course of conduct, the Individual Defendants have failed to exercise due care and diligence in the exercise of their fiduciary obligations toward Plaintiff and the other members of the Class.

85. As a result of the actions of the Individual Defendants, Plaintiff and the Class will suffer irreparable injury in that they have not and will not receive their fair portion of the value of Prevail's assets and have been and will be prevented from obtaining a fair price for their common stock.

86. Unless the Individual Defendants are enjoined by the Court, they will continue to breach their fiduciary duties owed to Plaintiff and the members of the Class, all to the irreparable harm of the Class.

87. Plaintiff and the members of the Class have no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff and the Class be fully protected from the immediate and irreparable injury which Defendants' actions threaten to inflict.

SECOND COUNT

Aiding and Abetting the Board's Breaches of Fiduciary Duty

Against Defendant Prevail

88. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

89. Defendant Prevail knowingly assisted the Individual Defendants' breaches of fiduciary duty in connection with the Proposed Transaction, which, without such aid, would not have occurred.

90. As a result of this conduct, Plaintiff and the other members of the Class have been and will be damaged in that they have been and will be prevented from obtaining a fair price for their shares.

91. Plaintiff and the members of the Class have no adequate remedy at law.

WHEREFORE, Plaintiff demands injunctive relief, in its favor and in favor of the Class, and against the Defendants, as follows:

- A. Ordering that this action may be maintained as a class action and certifying Plaintiff as the Class representatives and Plaintiff's counsel as Class counsel;

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEPHEN BUSHANSKY,

Plaintiff,

v.

PREVAIL THERAPEUTICS, INC., ASA
ABELIOVICH, CARL L. GORDON,
MORGAN SHENG, FRANCOIS NADER,
RAN NUSSBAUM, TIMOTHY ADAMS,
WILLIAM H. CARSON, and PETER
THOMPSON,

Defendants.

:
:
: Case No. _____

: **COMPLAINT FOR VIOLATIONS OF**
: **THE FEDERAL SECURITIES LAWS**

: JURY TRIAL DEMANDED

Plaintiff Stephen Bushansky ("Plaintiff"), by and through his undersigned counsel, for his complaint against defendants, alleges upon personal knowledge with respect to himself, and upon information and belief based upon, *inter alia*, the investigation of counsel as to all other allegations herein, as follows:

NATURE OF THE ACTION

1. This is an action brought by Plaintiff against Prevail Therapeutics, Inc. ("Prevail" or the "Company") and the members of its Board of Directors (the "Board" or the "Individual Defendants") for their violations of Sections 14(d)(4), 14(e) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78n(d)(4), 78n(e), 78t(a), and U.S. Securities and Exchange Commission ("SEC") Rule 14d-9, 17 C.F.R. §240.14d-9(d) ("Rule 14d-9"), and to enjoin the expiration of a tender offer (the "Tender Offer") on a proposed transaction, pursuant to which Prevail will be acquired by Eli Lilly and Company ("Eli Lilly") through Eli Lilly's subsidiary Tyto Acquisition Corporation ("Purchaser") (the "Proposed Transaction").

2. On December 15, 2020, Prevail and Eli Lilly issued a joint press release announcing that they had entered into an Agreement and Plan of Merger (the “Merger Agreement”) dated December 14, 2020 to sell Prevail to Lilly. Under the terms of the Merger Agreement Eli Lilly will acquire all outstanding shares of Prevail for (i) \$22.50 per share in cash, (the “Cash Amount”), plus (ii) one non-tradeable contingent value right (each a “CVR”), which represents the contractual right to receive a contingent payment of up to \$4.00 per share in cash upon the achievement of a predefined milestone if achieved by December 1, 2028 (the “CVR Portion”), per share of Prevail common stock (the “Offer Price”). Pursuant to the Merger Agreement, Purchaser commenced the Tender Offer on December 22, 2020. The Tender Offer is scheduled to expire at one minute after 11:59 p.m. Eastern Time on January 21, 2021. The Proposed Transaction is valued at approximately \$1.04 billion.

3. On December 22, 2020, Prevail filed a Solicitation/Recommendation Statement on Schedule 14D-9 (the “Recommendation Statement”) with the SEC. The Recommendation Statement, which recommends that Prevail stockholders tender their shares in favor of the Tender Offer, omits or misrepresents material information concerning, among other things: (i) the background of the process leading to the sale of the Company; (ii) Prevail management’s financial projections relied upon by the Company’s financial advisor, Centerview Partners LLC (“Centerview”), in its financial analyses; and (iii) the data and inputs underlying the financial valuation analyses that support the fairness opinion provided by Centerview. Defendants authorized the issuance of the false and misleading Recommendation Statement in violation of Sections 14(d), 14(e) and 20(a) of the Exchange Act.

4. In short, the Proposed Transaction will unlawfully divest Prevail's public stockholders of the Company's valuable assets without fully disclosing all material information concerning the Proposed Transaction to Company stockholders. To remedy defendants' Exchange Act violations, Plaintiff seeks to enjoin the expiration of the Tender Offer unless and until such problems are remedied.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the claims asserted herein for violations of Sections 14(d)(4), 14(e) and 20(a) of the Exchange Act and SEC Rule 14d-9 promulgated thereunder pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331 (federal question jurisdiction).

6. This Court has jurisdiction over the defendants because each defendant is either a corporation that conducts business in and maintains operations within this District, or is an individual with sufficient minimum contacts with this District so as to make the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Plaintiff's claims arose in this District, where a substantial portion of the actionable conduct took place, where most of the documents are electronically stored, and where the evidence exists. Prevail is headquartered in this District and its common stock trades on the Nasdaq Global Select Market, which is headquartered in this District, rendering venue in this District appropriate.

PARTIES

8. Plaintiff is, and has been at all times relevant hereto, a continuous stockholder of Prevail.

9. Defendant Prevail is a Delaware corporation with its principal executive offices located at 430 East 29th Street, Suite 1520, New York, New York 10016. Prevail is a gene therapy company leveraging breakthroughs in human genetics with the goal of developing and commercializing disease-modifying AAV-based gene therapies for patients with neurodegenerative diseases. Prevail's common stock is traded on the Nasdaq Global Select Market under the ticker symbol "PRVL."

10. Defendant Asa Abeliovich ("Abeliovich") has been the Company's President, Chief Executive Officer ("CEO"), and a director since July 2017.

11. Defendant Carl L. Gordon ("Gordon") has been a director of the Company since August 2017.

12. Defendant Morgan Sheng ("Sheng") has been a director of the Company since November 2019.

13. Defendant Francois Nader ("Nader") has been Chairman of the Board since April 2019, and a director of the Company since May 2018.

14. Defendant Ran Nussbaum ("Nussbaum") has been a director of the Company since March 2018.

15. Defendant Timothy Adams ("Adams") has been a director of the Company since April 2019.

16. Defendant William H. Carson ("Carson") has been a director of the Company since September 2020.

17. Defendant Peter Thompson ("Thompson") has been a director of the Company since August 2017.

18. Defendants identified in paragraphs 10 to 17 are collectively referred to herein as the “Board” or the “Individual Defendants.”

OTHER RELEVANT ENTITIES

19. Eli Lilly is an Indiana corporation with its principal executive offices located at Eli Lilly Corporate Center, Indianapolis, Indiana 46285. Eli Lilly was incorporated in 1901 in Indiana to succeed to the drug manufacturing business founded in 1876 by Colonel Eli Lilly. Eli Lilly discovers, develops, manufactures and markets human pharmaceutical products. It is a Fortune 500 company with offices in 18 countries and products sold in over 100 countries.

20. Purchaser is a Delaware corporation and direct, wholly owned subsidiary of Eli Lilly.

SUBSTANTIVE ALLEGATIONS

Company Background

21. Prevail is a gene therapy company leveraging breakthroughs in human genetics with the goal of developing and commercializing disease-modifying AAV-based gene therapies for patients with neurodegenerative diseases. The Company applies a precision medicine approach to neurodegeneration by studying gene therapies in genetically defined patient populations, with an aim to increase the probability of creating disease-modifying therapies that improve patients’ lives. Prevail’s lead program is PR001 for the treatment of Parkinson’s disease with GBA1 mutation (“PD-GBA”), and neuronopathic (Type 2 or Type 3) Gaucher disease (“nGD”). The Company is focused on developing a broad pipeline of gene therapies for a range of neurodegenerative diseases, including PR006 for the treatment of frontotemporal dementia with GRN mutation (“FTD-GRN”), and PR004 for the treatment of synucleinopathies.

22. On November 13, 2020, Prevail announced its third quarter 2020 financial results and business highlights, including net loss of \$18.6 million, or \$0.55 loss per share, for the third quarter of 2020, improved from net loss of \$20.3 million, or \$0.62 loss per share, for the third quarter of 2019. Business updates included: continued patient dosing in the Phase 1/2 PROPEL clinical trial for PD-GBA; expected initiation of patient enrollment remains on track for the fourth quarter of 2020 for the Phase 1/2 PROVIDE clinical trial of PR001 for Type 2 Gaucher disease; initiation of patient enrollment on track for the fourth quarter of 2020 for the Phase 1/2 PROCLAIM clinical trial of PR006 for FTD-GRN; and U.S. Food and Drug Administration (“FDA”) granted Fast Track designation for PR001 for the treatment of nGD. Defendant Abeliovich commented on the Company’s third quarter’s results, stating,

We’re pleased to be making significant progress across our pipeline as we seek to develop urgently needed disease-modifying gene therapy treatments for patients with neurodegenerative diseases.

We are encouraged by the continuation of patient dosing in our Phase 1/2 PROPEL trial of PR001 for Parkinson’s disease with GBA1 mutations, and we are excited to advance our PROVIDE and PROCLAIM clinical trials for Type 2 Gaucher disease and frontotemporal dementia with GRN mutations, respectively, this year.

The Proposed Transaction

23. On December 15, 2020, Prevail and Eli Lilly issued a joint press release announcing the Proposed Transaction. The press release stated, in relevant part:

INDIANAPOLIS and NEW YORK, Dec. 15, 2020 — Eli Lilly and Company (NYSE: LLY) and Prevail Therapeutics Inc. (NASDAQ: PRVL) today announced a definitive agreement for Lilly to acquire Prevail for \$22.50 per share in cash (or an aggregate of approximately \$880 million) payable at closing plus one non-tradable contingent value right (“CVR”) worth up to \$4.00 per share in cash (or an aggregate of approximately \$160 million), for a total consideration of up to \$26.50 per share in cash (or an aggregate of approximately \$1.040 billion). The CVR is payable (subject to certain terms and conditions) upon the first regulatory approval of a product from Prevail’s pipeline as set forth in more detail below. Prevail is a biotechnology company developing potentially disease-modifying AAV9-based gene therapies for patients with neurodegenerative diseases.

The acquisition will establish a new modality for drug discovery and development at Lilly, extending Lilly's research efforts through the creation of a gene therapy program that will be anchored by Prevail's portfolio of clinical-stage and preclinical neuroscience assets. Prevail's lead gene therapies in clinical development are PR001 for patients with Parkinson's disease with GBA1 mutations (PD-GBA) and neuronopathic Gaucher disease (nGD) and PR006 for patients with frontotemporal dementia with GRN mutations (FTD-GRN). Prevail's preclinical pipeline includes PR004 for patients with specific synucleinopathies, as well as potential gene therapies for Alzheimer's disease, Parkinson's disease, amyotrophic lateral sclerosis (ALS), and other neurodegenerative disorders.

"Gene therapy is a promising approach with the potential to deliver transformative treatments for patients with neurodegenerative diseases such as Parkinson's, Gaucher and dementia," said Mark Mintun, M.D., vice president of pain and neurodegeneration research at Lilly. "The acquisition of Prevail will bring critical technology and highly skilled teams to complement our existing expertise at Lilly, as we build a new gene therapy program anchored by well-researched assets. We look forward to completing the proposed acquisition and working with Prevail to advance their groundbreaking work through clinical development."

"Lilly is an established leader in neuroscience drug development and commercialization who shares our commitment to patients with neurodegenerative diseases, and I'm excited for Prevail to join the Lilly family," said Asa Abeliovich, M.D., Ph.D., founder and chief executive officer of Prevail. "I'm incredibly proud of the Prevail team, who have made great progress advancing our pipeline of gene therapy programs for patients with these devastating disorders. In just over three years, Prevail has advanced two first-in-class gene therapy programs into clinical development for PD-GBA, nGD, and FTD-GRN, established two manufacturing platforms, and developed a broad pipeline with great potential to impact patients in need of disease-modifying treatment options. With its global scale and resources, Lilly will be the ideal organization to maximize the potential of our pipeline and accelerate our ability to bring these therapies to as many patients as possible. We look forward to working together to advance our shared mission."

Under the terms of the agreement, Lilly will commence a tender offer to acquire all outstanding shares of Prevail Therapeutics Inc. for a purchase price of \$22.50 per share in cash (or an aggregate of approximately \$880 million) payable at closing plus one non-tradeable CVR. The CVR entitles Prevail stockholders to up to an additional \$4.00 per share in cash (or an aggregate of approximately \$160 million) payable (subject to certain terms and conditions) upon the first regulatory approval for commercial sale of a Prevail product in one of the following countries: United States, Japan, United Kingdom, Germany, France, Italy or Spain. To achieve the full value of the CVR, such regulatory approval must occur by December 31, 2024. If such regulatory approval occurs after December 31, 2024, the value of the CVR will be reduced by approximately 8.3 cents per month until December 1, 2028 (at which point the CVR will expire). There can be no assurance any payments will be made with respect to the CVR. The transaction is not subject to any financing condition and is expected to close in the first quarter of 2021, subject to customary closing conditions, including receipt of required regulatory approvals and the tender of a majority of the outstanding shares of Prevail's common stock. Following the successful closing of the tender offer, Lilly will acquire any shares of Prevail that are not tendered in the tender offer through a second-step merger at the same consideration as paid in the tender offer.

The purchase price payable at closing represents a premium of approximately 117 percent to the 60-day volume-weighted average trading price of Prevail's common stock ended on December 14, 2020, the last trading day before the announcement of the transaction. Prevail's Board of Directors unanimously recommends that Prevail's stockholders tender their shares in the tender offer. Additionally, certain Prevail stockholders, beneficially owning approximately 51 percent of Prevail's outstanding common stock, have (subject to certain terms and conditions) agreed to tender their shares in the tender offer.

Upon closing, the impact of this transaction will be reflected in Lilly's 2021 financial results according to Generally Accepted Accounting Principles (GAAP). There will be no change required to Lilly's 2021 financial guidance being issued today for research and development expense or non-GAAP earnings per share as a result of this transaction.

For Lilly, Lazard is acting as sole financial advisor and Weil, Gotshal & Manges LLP is acting as legal counsel. For Prevail, Centerview Partners LLC is acting as sole financial advisor, Ropes & Gray LLP is acting as legal counsel, and Cooley LLP also provided legal counsel.

Prevail Therapeutics Pipeline

- PR001 is being developed as a potentially disease-modifying, single-dose AAV9-based gene therapy for patients with Parkinson's disease with GBA1 mutations (PD-GBA) and neuronopathic Gaucher disease (nGD), delivered by intra-cisterna magna injection. The PROPEL trial, a Phase 1/2 clinical trial of PR001 for the treatment of PD-GBA patients, is ongoing. The PROVIDE trial, a Phase 1/2 clinical trial of PR001 for the treatment of Type 2 Gaucher disease patients, is now recruiting. The U.S. Food and Drug Administration (FDA) has granted Fast Track Designation for PR001 for the treatment of PD-GBA and for the treatment of nGD. It has also granted Orphan Drug Designation for PR001 for the treatment of Gaucher disease, and Rare Pediatric Disease Designation for the treatment of nGD.
- PR006 is being developed as a potentially disease-modifying, single-dose AAV9-based gene therapy for patients with frontotemporal dementia with GRN mutations (FTD-GRN), also delivered by intra-cisterna magna injection. The PROCLAIM trial, a Phase 1/2 clinical trial of PR006 for the treatment of FTD-GRN patients, is currently ongoing and the first patient was dosed in December 2020. The FDA and the European Commission have granted orphan designation for PR006 for the treatment of FTD, and the FDA has granted Fast Track Designation for PR006 for FTD-GRN.

- PR004 is a gene therapy in preclinical development for patients with certain synucleinopathies. PR004 utilizes an AAV9 vector to deliver the GBA1 gene, which encodes glucocerebrosidase (GCase), and a molecule that suppresses expression of α -Synuclein.
- Prevail is developing a broad pipeline of additional AAV gene therapies for the treatment of Alzheimer's disease, ALS, Parkinson's disease, and other neurodegenerative disorders. Preclinical development of these potential therapies is currently ongoing.

Insiders' Interests in the Proposed Transaction

24. Prevail insiders are the primary beneficiaries of the Proposed Transaction, not the Company's public stockholders. The Board and the Company's executive officers are conflicted because they will have secured unique benefits for themselves from the Proposed Transaction not available to Plaintiff and the public stockholders of Prevail.

25. Company insiders stand to reap substantial financial benefits for securing the deal with Eli Lilly. For example, upon consummation of the Proposed Transaction, all outstanding Company stock options and restricted stock unit awards ("RSUs") will vest and convert into the right to receive cash payments. The following table summarizes the cash payments the Company's executive officers and directors will receive in connection with tendering their shares in the Tender Offer, as well as the vesting and conversion of their options and RSUs:

Name of Executive Officer or Director	Number of Shares	Cash Value of Shares \$(4)	Number of Shares Subject to Company Stock Options	Cash Consideration for Company Stock Options \$(5)	Number of Shares of Company Restricted Stock	Cash Value of Shares of Company Restricted Stock \$(6)	Number of CVRs
Directors							
Timothy Adams	—	—	49,400	490,438.68	—	—	49,400
William H. Carson, M.D.	—	—	34,000	387,260.00	—	—	34,000
Carl Gordon, Ph.D., CFA(1)	13,822,463	311,005,417.50	17,000	93,840.00	—	—	13,839,463
Francois Nader, M.D.(2)	23,747	534,307.50	182,847	3,119,010.96	—	—	206,594
Ran Nussbaum(3)	1,576,881	35,479,822.50	17,000	93,840.00	—	—	1,593,881
Morgan Sheng, M.B.B.S., Ph.D., FRS	—	—	37,000	331,440.00	—	—	37,000
Peter Thompson, M.D.(1)	—	—	17,000	93,840.00	—	—	17,000
Executive Officers							
Asa Abeliovich, M.D., Ph.D.	1,957,486	44,043,435	1,883,693	34,855,094.55	391,514	8,809,065.00	4,232,693
Yong Dai, Ph.D.	—	—	370,239	6,261,693.94	—	—	370,239
Franz Hefti, Ph.D.	—	—	388,939	7,039,221.81	—	—	388,939
Brett Kaplan, M.D.	—	—	506,569	8,156,482.09	—	—	506,569
Emily Minkow	13,000	292,500	416,749	7,303,048.21	—	—	429,749
Kira Schwartz, J.D.	—	—	100,000	582,000	—	—	100,000
Jeffrey Sevigny, M.D.	—	—	611,781	10,934,724.94	—	—	611,781

26. Moreover, if they are terminated in connection with the Proposed Transaction, Prevail's named executive officers are set to receive substantial cash severance payments in the form of golden parachute compensation, as set forth in the following table:

Name	Cash \$(1)	Unvested Equity \$(2)	Perquisites/ Benefits \$(3)	Total (\$)
Asa Abeliovich, M.D., Ph.D.	1,174,125	19,856,351	36,000	21,066,476
Yong Dai, Ph.D.	517,050	2,418,454	24,000	2,959,504
Jeffrey Sevigny, M.D.	651,389	3,948,008	24,000	4,623,397

The Recommendation Statement Contains Material Misstatements or Omissions

28. The defendants filed a materially incomplete and misleading Recommendation Statement with the SEC and disseminated it to Prevail's stockholders. The Recommendation Statement misrepresents or omits material information that is necessary for the Company's stockholders to make an informed decision whether to tender their shares in the Tender Offer or seek appraisal.

29. Specifically, as set forth below, the Recommendation Statement fails to provide Company stockholders with material information or provides them with materially misleading information concerning: (i) the background of the process leading to the sale of the Company; (ii) Prevail management's financial projections; and (iii) the data and inputs underlying the financial valuation analyses that support the fairness opinion provided by Centerview.

Material Omissions Concerning the Background of the Proposed Transaction

30. The Recommendation Statement fails to disclose material information concerning the background process leading to the Proposed Transaction.

31. For example, the Recommendation Statement fails to disclose the terms of the revised terms of the confidentiality agreement the Company entered into with an interested party referred to in the Recommendation Statement as “Party B.” The Recommendation Statement discloses that in December 2019, the Company’s senior management team continued discussions with various biopharmaceutical companies the Company believed would be interested in its product candidates pursuant to confidentiality agreements without a standstill provision, including, among others, Party B. Recommendation Statement at 13. Thereafter, “on November 14, 2020, Party B confirmed potential interest in an acquisition of the Company to representatives from Centerview and, on November 15, 2020, amended its existing confidentiality agreement with the Company.” *Id.* at 17. The Recommendation Statement, however, fails to disclose the specific amendments made to Party B’s confidentiality agreement and whether the revised confidentiality agreement entered into with Party B contained a standstill provision and/or “don’t-ask, don’t-waive” (“DADW”) standstill provision that is still in effect and currently precluding Party B from making a topping bid for the Company.

32. The failure to disclose the existence of a DADW provision creates the false impression that Party B could make a superior proposal for the Company. If Party B’s revised confidentiality agreement contains a DADW provision, then Party B can only make a superior proposal by (i) breaching the confidentiality agreement—since in order to make the superior proposal, it would have to ask for a waiver, either directly or indirectly; or by (ii) being released from the agreement, which if action has been done, is omitted from the Recommendation Statement.

33. This omitted material information takes on heightened importance here, because of Party B being the most-likely topping bidder for the Company based on its completion of its diligence efforts, its November 20, 2020 indication of interest for an acquisition of the Company at a price per share in the mid-\$20s and interest in a structured transaction with the Company. *See id.* at 17, 18.

34. Any reasonable Prevail stockholder would deem the fact that Party B may be precluded from making a topping bid for the Company to significantly alter the total mix of information.

35. The omission of this information renders the statements in the “Background of the Offer” section of the Recommendation Statement false and/or materially misleading in contravention of the Exchange Act.

Material Omissions Concerning Prevail Management’s Financial Projections

36. The Recommendation Statement omits material information regarding Company management’s financial projections.

37. For example, the Recommendation Statement sets forth that:

[a]t the direction of Company management, Centerview calculated, from the Forecasts, which were approved for use by the Company Board, and based on information and assumptions provided by Company management, unlevered free cash flow as set forth below, reviewed and approved by Company management for use by Centerview in connection with its financial analyses and opinion.

	2021E	2022E	2023E	2024E	2025E	2026E	2027E	2028E	2029E	2030E	2031E	2032E	2033E	2034E	2035E	2036E	2037E	2038E	2039E	2040E
(\$ in millions)																				
Earnings Before Interest and Taxes (“EBIT”)	(\$ 105)	(\$ 113)	(\$ 115)	(\$ 117)	(\$ 142)	(\$ 141)	\$ 6	\$ 384	\$ 676	\$ 855	\$ 891	\$ 893	\$ 840	\$ 734	\$ 656	\$ 695	\$ 705	\$ 601	\$ 509	\$ 436
Less:																				
Unlevered Tax Expense(1)	—	—	—	—	—	—	(1)	(81)	(142)	(180)	(187)	(188)	(176)	(154)	(138)	(146)	(148)	(126)	(107)	(92)
Less: Capital Expenditures	(1)	(1)	(1)	(1)	(1)	(1)	(4)	(11)	(17)	(20)	(21)	(20)	(19)	(17)	(16)	(16)	(16)	(14)	(12)	(11)
Plus:																				
Depreciation & Amortization	1	1	1	1	1	1	4	11	17	20	21	20	19	17	16	16	16	14	12	11
Less: Change in Net Working Capital	—	—	—	—	(1)	(3)	(22)	(46)	(41)	(24)	(4)	5	8	13	10	(1)	(1)	14	13	10
Unlevered Free Cash Flow(2)	(\$ 106)	(\$ 113)	(\$ 115)	(\$ 117)	(\$ 143)	(\$ 144)	(\$ 17)	\$ 257	\$ 493	\$ 652	\$ 700	\$ 710	\$ 671	\$ 593	\$ 529	\$ 548	\$ 555	\$ 489	\$ 415	\$ 355

(1) Assumes tax rate of 21% and excludes impact of net operating losses.

(2) “Unlevered Free Cash Flow” is EBIT less tax expense, less capital expenditures, plus depreciation and amortization, less changes in net working capital, Non-cash compensation based expense was treated as a cash expense.

Id. at 42. The Recommendation Statement, however, fails to disclose non-cash compensation over the projection period.

40. The omission of this information renders the statements in the “Certain Company Management Forecasts” section of the Recommendation Statement false and/or materially misleading in contravention of the Exchange Act.

Material Omissions Concerning Centerview’s Financial Analyses

41. The Recommendation Statement describes Centerview’s fairness opinion and the various valuation analyses performed in support of its opinion. However, the description of Centerview’s fairness opinion and analyses fails to include key inputs and assumptions underlying these analyses. Without this information, as described below, Prevail’s public stockholders are unable to fully understand these analyses and, thus, are unable to determine what weight, if any, to place on Centerview’s fairness opinion in determining whether to tender their shares in the Tender Offer or seek appraisal.

42. With respect to Centerview’s *Discounted Cash Flow Analysis*, the Recommendation Statement fails to disclose: (i) quantification of the non-cash compensation over the projection period that was treated as a cash expense; (ii) quantification of the inputs and assumptions underlying the discount rate range of 12.5% to 14.5%; (iii) quantification of the present value of the estimated costs of a \$400 million equity raise in 2022, a \$350 million equity raise in 2024, and a \$300 million equity raise in 2025; (iv) quantification of the implied terminal value of the Company; and (v) the fully diluted shares outstanding of Prevail used in the analysis.

43. With respect to Centerview's *Analyst Price Target Analysis*, the Recommendation Statement fails to disclose: (i) the individual price targets observed; and (ii) the sources thereof.

44. With respect to Centerview's *Precedent Premiums Paid Analysis*, the Recommendation Statement fails to disclose: (i) the specific transactions analyzed; and (ii) the individual premiums paid for each of the transactions analyzed.

45. The omission of this information renders the statements in the "Summary of Centerview Financial Analysis" section of the Recommendation Statement false and/or materially misleading in contravention of the Exchange Act.

46. The Individual Defendants were aware of their duty to disclose the above-referenced omitted information and acted negligently (if not deliberately) in failing to include this information in the Recommendation Statement. Absent disclosure of the foregoing material information prior to the expiration of the Tender Offer, Plaintiff and the other Prevail stockholders will be unable to make an informed decision whether to tender their shares in the Tender Offer or seek appraisal and are thus threatened with irreparable harm warranting the injunctive relief sought herein.

CLAIMS FOR RELIEF

COUNT I

Claims Against All Defendants for Violations of Section 14(d) of the Exchange Act and SEC Rule 14d-9

27. Plaintiff repeats all previous allegations as if set forth in full.

28. Defendants have caused the Recommendation Statement to be issued with the intention of soliciting Prevail stockholders to tender their shares in the Tender Offer.

29. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated thereunder require full and complete disclosure in connection with tender offers.

30. The Recommendation Statement violates Section 14(d)(4) and Rule 14d-9 because it omits material facts, including those set forth above, which omission renders the Recommendation Statement false and/or misleading.

31. Defendants knowingly or with deliberate recklessness omitted the material information identified above from the Recommendation Statement, causing certain statements therein to be materially incomplete and therefore misleading. Indeed, while defendants undoubtedly had access to and/or reviewed the omitted material information in connection with approving the Proposed Transaction, they allowed it to be omitted from the Recommendation Statement, rendering certain portions of the Recommendation Statement materially incomplete and therefore misleading.

32. The misrepresentations and omissions in the Recommendation Statement are material to Plaintiff and the other stockholders of Prevail, who will be deprived of their right to make an informed decision whether to tender their shares or seek appraisal if such misrepresentations and omissions are not corrected prior to the expiration of the Tender Offer. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that defendants' actions threaten to inflict.

COUNT II

Claims Against All Defendants for Violations of Section 14(e) of the Exchange Act

33. Plaintiff repeats all previous allegations as if set forth in full.

34. Defendants violated Section 14(e) of the Exchange Act by issuing the Recommendation Statement in which they made untrue statements of material facts or failed to state all material facts necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or engaged in deceptive or manipulative acts or practices, in connection with the Tender Offer.

35. Defendants knew that Plaintiff would rely upon their statements in the Recommendation Statement in determining whether to tender his shares pursuant to the Tender Offer or seek appraisal.

36. As a direct and proximate result of these defendants' unlawful course of conduct in violation of Section 14(e) of the Exchange Act, absent injunctive relief from the Court, Plaintiff has sustained and will continue to sustain irreparable injury by being denied the opportunity to make an informed decision in deciding whether or not to tender his shares or seek appraisal.

COUNT III

Claims Against the Individual Defendants for Violation of Section 20(a) of the Exchange Act

37. Plaintiff repeats all previous allegations as if set forth in full.

38. The Individual Defendants acted as controlling persons of Prevail within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers or directors of Prevail and participation in or awareness of the Company's operations or intimate knowledge of the false statements contained in the Recommendation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiff contends are false and misleading.

39. Each of the Individual Defendants was provided with or had unlimited access to copies of the Recommendation Statement and other statements alleged by Plaintiff to be misleading prior to or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

40. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same. The Recommendation Statement at issue contains the unanimous recommendation of each of the Individual Defendants to approve the Proposed Transaction. They were, thus, directly involved in the making of this document.

41. In addition, as the Recommendation Statement sets forth at length, and as described herein, the Individual Defendants were each involved in negotiating, reviewing, and approving the Proposed Transaction. The Recommendation Statement purports to describe the various issues and information that they reviewed and considered — descriptions which had input from the Individual Defendants.

42. By virtue of the foregoing, the Individual Defendants have violated section 20(a) of the Exchange Act.

43. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that defendants' actions threaten to inflict.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment and preliminary and permanent relief, including injunctive relief, in his favor on behalf of Prevail, and against defendants, as follows:

A. Preliminarily and permanently enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;

B. In the event defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding rescissory damages to Plaintiff;

- C. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and
D. Granting such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all claims and issues so triable.

Dated: January 4, 2021

/s/ Richard A. Acocelli

WEISLAW LLP
Richard A. Acocelli
1500 Broadway, 16th Floor
New York, New York 10036
Tel: (212) 682-3025
Fax: (212) 682-3010

Attorneys for Plaintiff