Supreme Court of California
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Case No. ________
6th Civil No. H044087
Santa Clara Superior Court No. 1-15-CV-278055

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Anthony Evangelista, et al.,
Plaintiffs and Respondents,

v.

Robert W. Duggan, et al.,
Defendants and Respondents;

Sean J. Griffith,
Intervenor and Appellant.

After a Decision by the Court of Appeal,
Sixth Appellate District (No. H044087)

Appeal from Judgment of the Santa Clara Superior Court
Honorable Peter H. Kirwan

PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals and trial court err by approving the zero-dollar disclosure settlement of a class action challenging the merger of a California-based Delaware corporation without applying the standards adopted by the Delaware Court of Chancery in *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016)?

2. Did the settlement comply with the *Trulia* standard, or any other specific standard of approval that may be adopted by this Court?

II. WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the Court of Appeals chose to "make no comment" on an important question of law upon which uniformity of decision is critical: "best practices in disclosure-only settlements [and] whether Delaware standards should apply to these cases in California courts." Slip Op. 39 (attached hereto as Exhibit A).

This case is an example of "deal litigation," commonplace class-action lawsuits brought by stockholders purporting to challenge corporate mergers, but almost invariably agreeing to settle for no money to stockholders, but substantial fees for the attorneys. The Court of Appeals opinion (the "Opinion") affirmed the trial court's approval of a zero-dollar class-action settlement that released class claims in exchange for Defendants' agreement to add supplemental disclosures to a proxy statement. For over a decade, similar settlements occurred following the announcement of almost every large merger, earning the moniker of the "merger tax." *See Trulia*, 129 A.3d at 896 n.36.

Between 2005 and 2016, the willingness of trial courts to approve disclosure settlements and grant plaintiffs' fees "caused deal litigation to explode in the United States beyond the realm of reason." *Id.* at 894.

Courts across the country have responded to this explosion of lawsuits by adopting heightened standards of approval or new tests specifically for merger-tax settlements. *See, e.g.*, *Trulia*, 129 A.3d at 898–899; *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016) (adopting *Trulia* standard); *Griffith v. Quality Dist., Inc.*, -- So. 3d --, 2018 WL 3403537, at *6 (Fla. 2DCA 2018) (same); *see also Gordon v. Verizon Commc'ns, Inc.*, 148 A.D.3d 146, 157–58 (N.Y. App. 1st Dep't. 2017) (declining to adopt *Trulia*, but adding two specific factors to test applicable to disclosure settlements). Notably, these decisions did not replace the general standards for settlement approval, but rather applied a "standard more tailored to disclosure settlements" consistent with existing law. *Griffith*, *supra*, 2018 WL 3403537, at *6 n.7.

Since 2016, class plaintiffs have adapted to these decisions by taking their cases to jurisdictions where they can expect the least scrutiny with the greatest opportunity for fees. *See* Section V.A.1 below. The Opinion's affirmance of a fee and expense award exceeding $500,000 will be enticing to merger-tax plaintiffs and their counsel. Review of the Opinion is necessary to prevent a resurgence of meritless mergers-and-acquisitions litigation in California by establishing a more rigorous test for approval of disclosure settlements.

A decision from this Court will also secure uniformity of decision across California's trial courts. Class action settlements generally take place in a non-

adversarial context with what are effectively *ex parte* submissions to the court. *See Laffitte v. Robert Half Internat'l Inc.*, 1 Cal. 5th 480, 510 (Cal. 2016) (Liu, J., concurring) (noting that objectors to class action settlements are rare). California trial courts tend to approve unopposed settlements without considering whether to apply more rigorous tests, as did the trial court here before the Objector-Appellant Griffith appeared. *See* Section V.A.2 below. In unopposed settlements, plaintiffs often (as in this case) comfort a trial court with older Delaware authority favoring their settlements without revealing that Delaware now considers these bargains to be the "historically trodden but suboptimal path" for resolving deal litigation. *Trulia*, 129 A.3d at 898. Even in this case, the same trial court, *after approving this settlement*, formally adopted *Trulia* as persuasive authority and relied upon it to reject at least two subsequent disclosure settlements. *See* Section V.A.2 below.

Whether a settlement succeeds or fails should not depend on the history of objector appearances in a given superior court. The Opinion, however, eschews comment on "best practices in disclosure-only settlements . . . ." Slip Op. 39. Consequently, class plaintiffs remain able to cherry-pick the non-California authority that they present in unopposed motions to trial courts. This Court's words, however, cannot be similarly ignored. *See* Section V.A.3 below.

A decision requiring that trial courts adopt *Trulia*'s three-prong test or another specific standard of approval will also promote uniformity of decision on frequently recurring issues in disclosure settlements, including the materiality of supplemental disclosures used as consideration. Several of the supplemental

disclosures that the Court of Appeals affirmed as material are virtually identical to disclosures rejected by other courts as immaterial, while the investigation of claims conducted by Plaintiffs falls short of that rejected in *Trulia*. *See* Section V.B below. The Opinion effectively leaves California corporations, and particularly Delaware-incorporated corporations, subject to differing disclosure and settlement regimes, depending on where a merger-tax plaintiff files a lawsuit. *Id.* For instance, future California merger participants must struggle with whether the individual multiples used in a banker's comparable-transactions analysis are immaterial (if the merger is challenged in Wilmington) or required (if the merger is challenged in Santa Clara). *Id.*

This Court may deter future strike suits by deciding, along with the United States Court of Appeals for the Seventh Circuit, the appellate courts of Florida and New York, and the Delaware Court of Chancery, to adopt more stringent tests for recurrent disclosure settlements, and then remanding the case to the trial court. Alternatively, it could address the questions of materiality, adequacy of investigation, and the scope of a settlement release as a matter of law as part of this appeal. However, as the highest court in this state, it may also promote uniformity of decision between California and Delaware by certifying questions of law to the Delaware Supreme Court. *See* Section V.B.3 below. Because Plaintiffs agree that Delaware law controls the question of materiality in cases such as this involving a Delaware-incorporated entity, the question of whether the disclosures at issue are material under Delaware law is an ideal candidate for certification.

Whatever means this Court uses to address the problem of merger-tax settlements, this case is the proper vehicle. To the best of appellant's knowledge, the Opinion is the first decision to reach this Court that directly addresses a post-*Trulia* disclosure settlement. Unsurprisingly, class plaintiffs rarely appeal the rejection of a class settlement, preferring to move on to the next case rather than risk an adverse appellate decision. Meanwhile, the Court of Appeals opinion will discourage future objectors, reducing the likelihood that this Court will have the opportunity to consider future petitions. *See* Section V.C below.

Because the trial court failed to apply the correct standard of law, it erred in approving the settlement below. *See* Section V.B.2 below. Similarly, the court of appeals erred in applying the wrong standard of review. *See* Section V.A.4 below.

This case addresses important and recurring questions of law upon which uniformity of standards is critical in the trial courts. Petitioner thus urges this Court to grant review.

III. PRELIMINARY STATEMENT

Attorneys with the non-profit Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") bring Objector Sean J. Griffith's petition. CCAF's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won hundreds of millions of dollars for class members. *See, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients*

Out of the Deal, N.Y. Times, Aug. 13, 2013, at A12 (calling CCAF attorney Theodore H. Frank "the leading critic of abusive class action settlements"); Caleb Hannan, *This Lawyer Is Making It Less Profitable to Sue When Companies Merge*, BloombergBusinessWeek, Aug. 2, 2017; *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising CCAF's work). Objector Griffith is a law professor who has written extensively on the issues raised in this appeal. *E.g.,* Dan Awrey, Blanaid Clarke, and Sean J. Griffith, *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 Yale J. Reg. 1 (2018). This petition is brought in good faith both to vindicate Griffith's interests as a prejudiced class member and to protect class members in this and future class actions against unfair and abusive settlements and overreaching fee requests.

IV. STATEMENT OF THE CASE

The Court of Appeal's opinion correctly sets forth the facts of the case. Slip Op. 1–17.

A. Plaintiffs file suit after Pharmacyclics announces a deal.

Pharmacyclics, Inc., is a California-based biopharmaceutical company incorporated in Delaware. Slip Op. 1. In March 2015, Pharmacyclics announced it had entered into a merger agreement with AbbVie, Inc. where AbbVie would acquire Pharmacyclics for $261.25 per share under a tender offer. *Id.* at 1–2. Shortly afterward, four separate plaintiffs filed class actions against Pharmacyclics, its board of directors, and AbbVie (collectively "Defendants");

the trial court later consolidated the actions. *Id.* at 2. These suits each alleged the Pharmacyclics board of directors, aided and abetted by Pharmacyclics and AbbVie, breached their fiduciary duties in connection with the acquisition of Pharmacyclics by AbbVie, including allegations that the deal price was too low. *Id.* at 2–3.

Several weeks after announcing the merger agreement, AbbVie commenced the tender offer; at the same time, Pharmacyclics filed with the U.S. Securities and Exchange Commission (S.E.C.) a "Solicitation and Recommendation Statement on Schedule 14D-9" (the Recommendation Statement). *Id* at 2–3. The tender offer was set to expire on April 17, 2015. *Id.* at 3.

B. The parties agree to a Disclosure Settlement and the transaction closes.

Following receipt of the Recommendation Statement, Plaintiffs' counsel negotiated with Defendants' attorneys to obtain additional information; Defendants voluntarily produced confidential documents relevant to the acquisition, "including the minutes of the meetings of the Pharmacyclics Board and financial presentations from the Board's financial advisors." *Id.* at 3.

After negotiations, Defendants agreed to make supplemental disclosures before the close of the tender offer. *Id.* at 3. These disclosures included additional information regarding: (i) Pharmacyclics' financial projections; and (ii) the valuation analyses conducted by the financial advisors used by Pharmacyclics to provide financial analyses and projections in support of the

Recommendation Statement. *Id.* at 3–4. The parties signed a memorandum of understanding (MOU), which included Defendants' agreement to provide the supplemental disclosures and AbbVie's agreement that the acquisition would not be completed until at least one week after the public filing of the supplemental disclosures. In mid-April 2015, Defendants issued the supplemental disclosures. *Id.* at 4. AbbVie extended the expiration date of the tender offer three times, resulting in the tender offer finally expiring on May 22, 2015. *Id.* Approximately 87 percent of Pharmacyclics' outstanding shares were validly tendered into the transaction. *Id.*

C. Plaintiffs present the settlement to the trial court as consistent with Delaware law.

After the acquisition completed, in May 2015, Plaintiffs' counsel took the depositions of two Pharmacyclics' financial advisors. *Id.* at 4. The parties executed a Stipulation of Settlement in January 2016. *Id.* In exchange for the Supplemental Disclosures, Plaintiffs agreed to a release of claims against Defendants, including claims arising under foreign or federal law and "unknown claims." *Id.* at 4–5.

On the same day that the parties executed the Stipulation of Settlement, the Delaware Court of Chancery issued the *Trulia* decision, strictly limiting the ability of class-action plaintiffs to secure disclosure settlements in Delaware. The Court of Chancery did not mince words: Even where plaintiffs secured "plainly material" supplemental disclosures, disclosure settlements would now

be the "suboptimal path" to resolve deal litigation in Delaware. *Trulia*, 129 A.3d at 898.

In February 2016, the trial court granted Plaintiffs' unopposed motion for preliminary approval of the settlement and entry of an order for notice. *Id.* at 6. In April 2016, the trial court issued an amended order preliminarily approving the settlement and providing for a corrected notice. *Id.* The Parties did not disclose *Trulia* to the trial court.

Plaintiffs subsequently filed a motion seeking final approval of the class action settlement and an award of attorneys' fees and expenses. *Id.* at 6. Plaintiffs sought, and Defendants agreed to pay, attorneys fees in the amount of $725,000, subject to court approval. *Id.* In seeking final approval of the settlement, Plaintiffs conceded that because Pharmacyclics was incorporated in Delaware, "Delaware substantive law [governed] Plaintiffs' claims. *See* Cal. Corp. Code §2116 . . . ." *Id.* at 7 n.5 (alteration in original). Plaintiff went further, relying on older caselaw to assert that "Delaware Courts have regularly reaffirmed the well-established proposition that enhanced and supplemental disclosures provide 'substantial . . . benefit to members of the class.'" CT 55, *quoting In re Talley Indus., Inc. S'holders Litig.*, 1998 Del. Ch. LEXIS 53, at *46 (Del. Ch. Apr. 13, 1998). Again, nothing in the record or the Opinion reflects any discussion of the *Trulia* opinion.

D. The trial court approves the Settlement.

Sean J. Griffith, a Pharmacyclics stockholder during the relevant period, filed an objection to the approval of the settlement and Plaintiffs' requested fee award. Slip. Op. 9. The objection contended that the proposed settlement traded immaterial supplemental disclosures for an overly broad release of claims, resulting in an unfair, unreasonable, and inadequate settlement of the shareholders' class action claims under both California and Delaware law. *Id.* Relying primarily on *Trulia*, Griffith asked the trial court to subject this disclosure-only settlement to greater scrutiny and reject the trade of "immaterial disclosures" for an "overbroad release[]." *Id.* He further argued that the attorneys' fees sought were excessive, both relative to the amount of time and effort expended by Plaintiffs' counsel, and to the amount awarded under California and Delaware caselaw. *Id.* at 10.

Plaintiffs responded to the objection, submitting a declaration from Matthew R. Morris, an economic damages and valuation expert retained by Plaintiffs (the "Morris Declaration"). *Id.* at 11. Morris asserted that the Supplemental Disclosures "represented a substantial benefit" to stockholders in evaluating the transaction and proposed consideration. *Id.*

The trial court held the fairness hearing in July 2016. *Id.* at 13. At the hearing, Plaintiffs stated that they determined that they could not "make a case for [the tender offer] being outside the range of fairness. . . ." *Id.*

Shortly after the fairness hearing, the trial court approved the settlement. *Id.* at 15. The court found that the Supplemental Disclosures represented

material information that "allowed [shareholders] to make an informed decision whether to tender their shares in the Acquisition or seek statutory appraisal of their shares." *Id.* The court further held that, "[w]hile the information in the supplemental disclosures did not ultimately change or modify the valuations set forth in the [Recommendation Statement], the Court is satisfied that it provided material information going directly to each Class member's ability to assess the value of the Company and the future of its sole marketed product [. . . .]" *Id.* Although there was no evidence the Recommendation Statement was "misleading," "this additional information was important in assisting the shareholders in deciding how to vote in this particular case involving a pharmaceutical company with one marketed product." *Id.* The trial court further held there was sufficient investigation and analysis of Plaintiffs' claims to find there was "no viable claim for monetary damages." *Id.*

The trial court awarded Plaintiffs' counsel $509,158.62, consisting of $486,205 in fees and $22,953.62 in costs. *Id.* at 16. This amount represented a multiplier of two to the original lodestar of $243,102.50, or over $1030 per hour for the 470.70 hours of claimed attorney time. *Id.* In assessing the fee request, the trial court reiterated that "the Supplemental Disclosures did not remedy any misleading or inaccurate information in the [Recommendation Statement] and did not change the analyses, but simply provided additional information which helped inform the shareholders prior to the vote." *Id.* (second alteration in original).

E. Griffith appeals and the Court of Appeals affirms.

After receiving the trial court's order, the parties stipulated that Griffith could file a complaint in intervention for the purposes of appeal; the trial court accepted the stipulation; and Griffith filed his complaint in September 2016. *Id.* at 16. In October 2016, the trial court entered judgment approving the settlement and overruling all objections, and Griffith timely noticed his appeal of the judgment. *Id.* at 16–17.

On February 15, 2020, the Court of Appeals affirmed the trial court's approval of the settlement and attorneys' fee award. While largely hewing to the trial court's reasoning—particularly its reliance on the Morris Declaration—the Court of Appeals explicitly "[made] no comment regarding best practices in disclosure-only settlements or whether Delaware standards should apply to these cases in California courts." *Id.* at 39. Additionally, the Court of Appeals rejected Griffith's request to supplement the record by taking judicial notice of the Recommendation Statement, holding that although all parties referenced the Recommendation Statement in pleadings filed with the trial court, "the trial court did not take judicial notice of the Recommendation Statement or otherwise receive it into evidence." *Id.* at 17.

Petitioner Griffith did not file a petition for rehearing with the Court of Appeal.

V. ARGUMENT

This case addresses an important, recurring issue: what test should California courts apply to zero-dollar disclosure settlements of merger

litigation? *See* Section V.A below. By adopting or crafting a specific test for disclosure settlements, as other courts have done, this Court will also encourage uniformity of decision on issues that commonly arise in disclosure settlements, such as the materiality of supplemental disclosures, adequacy of investigation, and the scope of an appropriate release.[1] *See* Section V.B below. Opportunities for the Court to address this issue will be rare: Most settlements receive approval without adversarial review and thus are never appealed. *See* Section V.C below.

A. Review will provide uniformity of decision on the important legal question of the appropriate test for disclosure settlements.

The appropriate legal test for disclosure settlements remains a persistent problem across the country: Although merger-tax plaintiffs have largely left Delaware, they have migrated to other jurisdictions in order to preserve their fees. *See* Section V.A.1 below. Whether California courts apply enhanced scrutiny to a disclosure settlement is largely a factor of whether an objector has appeared in a given jurisdiction. *See* Section V.A.2 below. Because this Court has not yet spoken, class plaintiffs offer outdated Delaware authority to trial courts, confident that objectors will not appear to correct the record. *See* Section V.A.3 below. This Court's review is critical to ensure that all California

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1 The *Trulia* standard has proven effective in deterring merger-tax litigation, and Griffith in this Petition urges this Court to adopt it in California. The Court might also follow New York in adopting new and more stringent tests for disclosure settlements. *See Gordon*, 148 A.D.3d at 157–58. Either solution would promote uniformity of decision pursuant to California Rule of Court 8.500(b)(1).

courts must apply the same scrutiny to disclosure settlements—and that class plaintiffs' attorneys must inform trial courts of those rules even in non-adversarial hearings.

1. By adopting *Trulia*, this Court will resolve an important question of law to the benefit of California-based corporations and their shareholders.

Deal litigation—the almost inevitable stockholder lawsuits that follow the announcement of nearly all major mergers—remains a significant problem for California-based corporations, whether they are incorporated in Delaware (as was Pharmacyclics) or California. In 2018, the latest year for which statistics are available, over 83 percent of large mergers were subject to stockholder challenge. *See* Matthew D. Cain, *et al.*, *Mootness Fees*, 72 Vanderbilt L. Rev. 1777, 1787 (2019) ("Cain, *Mootness Fees*"). Left uncorrected, the approval of a settlement leading to a generous half-million-dollar fee award will burden California courts as they become an attractive hunting ground for rent-seeking plaintiffs' attorneys.

i. The persistent problem of deal litigation.

In the decade between 2005 and 2014, the percentage of large transactions that drew at least one lawsuit ballooned from 39.3 percent to 94.9 percent. *Trulia*, 129 A.3d at 894. This explosion of deal litigation was due to judicial willingness to "approve disclosure settlements of marginal value and to routinely grant broad releases to defendants and six-figure fees to plaintiffs'

counsel in the process." *Id.* Almost every deal case settled, as here, for supplemental disclosures rather than monetary consideration:

> It is all too common for a plaintiff to identify and obtain supplemental disclosure of a laundry list of minutiae in a financial advisor's board presentation that does not appear in the summary of the advisor's analysis in the proxy materials—summaries that commonly run ten or more single-spaced pages in the first instance. Given that the newly added pieces of information were, by definition, missing from the original proxy, it is not difficult for an advocate to make a superficially persuasive argument that it is better for stockholders to have more information rather than less.

Id. "[F]ar too often such litigation serves no useful purpose for stockholders" but "serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent." *Id.* at 892–93.

To stem this tide of wasteful litigation, the Delaware Court of Chancery adopted a new test for disclosure settlements. Such bargains would be met with "continuing disfavor" unless:

> the supplemental disclosures address a ***plainly material*** misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.

Id. at 898 (emphasis added). The "plainly material" standard did not change the substantive law relating to materiality: A disclosure remains material only if "from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alter[s] the 'total mix' of information made available.'" *Id.* at 899, *quoting Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994). Rather, the court announced a new standard of approval: "Plainly material" means that "it should not be a close call that the supplemental information is material as that term is defined under Delaware law." *Trulia*, 129 A.3d at 898.

The *Trulia* standard uses the same test for approval of disclosure settlements that applies to motions for preliminary injunctions enjoining mergers. *See, e.g.*, *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1192 (Del. Ch. 2007) (enjoining transaction pending disclosure of omitted material information). This is a high bar: Approval of a disclosure settlement is a declaration that, absent the supplemental disclosures, a court would have halted a transaction worth hundreds of millions, if not billions, of dollars.

ii. Attorneys respond to *Trulia* by forum shopping.

The history of merger-tax litigation demonstrates the strong effect that legal incentives have on the behavior of stockholder plaintiffs and their counsel. Class plaintiffs take into account the prevailing legal rules when filing their cases.

By the time Plaintiffs filed their cases in Santa Clara, the writing was already on the wall for disclosure settlements in Delaware. In 2013, then-

Chancellor Strine rejected a disclosure settlement presented by the Plaintiff's firm in this action, stating that he could not "glean from these submissions how these disclosures were of any utility." *In re Transatlantic Holdings Inc. S'holders Litig.*, 2013 WL 1191738, at *2 (Del. Ch. Mar. 8, 2013). By 2014, scholars had nicknamed disclosure settlements the "transaction tax." *See* Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55 (2014). A few months after Plaintiffs filed in California, Delaware courts rejected a series of disclosure settlements. *See Trulia*, 129 A.3d at 895–96 n.35 (listing cases). Plaintiffs had good reason to file in California rather than Delaware.

Trulia accelerated this trend, as stockholder plaintiffs and their counsel withdrew from jurisdictions that required trial courts to apply heightened scrutiny to disclosure settlements. In 2017, the number of merger-related cases in federal courts doubled, increasing in every federal circuit except the Seventh Circuit, which had already adopted *Trulia*'s new test. *See* NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year* Review at 6, 11 (Jan. 29, 2018);[2] *Walgreen*, 832 F.3d at 725–26. By 2018, merger-tax plaintiffs had almost entirely withdrawn from Delaware, choosing to challenge deals in other states or federal courts. *See* Cain, *Mootness Fees* at 1787 (stating that of deals challenged in 2018, 18 percent drew lawsuits in states outside

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[2] Available at https://www.nera.com/content/dam/nera/publications/2018/PUB_Year_End_Trends_Report_0118_final.pdf.

Delaware and 92 percent were challenged in federal court, but only 5 percent in Delaware). Put simply, merger-tax plaintiffs flee from scrutiny.

Thus, the degree of scrutiny that trial courts give to disclosure settlements, along with the fees awarded, presents an important question of law that will either attract or discourage repetitive strike suits. The Court of Appeals, however, declined to address "best practices in disclosure-only settlements or whether Delaware standards should apply to these cases in California courts." Slip Op. 39. The Opinion will be a beacon to merger-tax plaintiffs and their counsel. Review is necessary to extinguish it.

2. An appropriate standard of approval will ensure uniformity of decision between California trial courts.

Lacking clear guidance, California trial courts have applied different standards to disclosure settlements. Unless the Opinion is reversed, this varied treatment will likely persist.

As the Opinion prompts merger-tax plaintiffs return to California, litigants will gravitate to trial courts that conduct less scrutiny of disclosure cases. Before considering this case, the trial court below approved at least two unopposed post-*Trulia* settlements without considering more recent Delaware law, just as it preliminarily approved the settlement below on an unopposed motion. *See* Slip. Op. 6; CT 119 (listing cases). Litigants lacking a motive to present forthrightly the problem of disclosure settlements to a trial court will,

as in this case, remain silent when seeking settlement approval and a payment of fees.

Jurisdictions, or even individual judges, who encounter objectors may reach different results. This is true even though Delaware and California law provide that a court may approve a class-action settlement only after finding it is fair, adequate, and reasonable. *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1800-01 (1996); *Trulia*, 129 A.3d at 887. Both Delaware and California law also focus settlement approval on whether the "get," or consideration for class members is reasonable for the "give," or release of class member claims. *Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 129 (Cal. App. 1st 2008); *Trulia*, 129 A.3d at 891. Again, the trial court below is illustrative: After hearing the objection in this case, it adopted *Trulia* as persuasive authority and relied upon the decision to deny preliminary or final approval to at least three subsequent disclosure settlements. *See Drulias v. 1st Century Bancshares, Inc.*, 30 Cal.App.5th 696, 701 (Cal. App. 6th 2018) (describing trial court's denial of disclosure-based settlement because supplemental disclosures were not "plainly material"); David Furbush, *Delaware's Restrictive* Trulia *Standard Gains Traction in California* (Oct. 10, 2017) (discussing cases).[3]

An adversarial hearing or the previous appearance of an objector may prompt closer review of a disclosure settlement. However, "class objectors are too rare to be generally relied upon to monitor class counsel." *Laffitte v. Robert*

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[3] *Available at* https://www.jdsupra.com/legalnews/delaware-s-restrictive-trulia-standard-51868/.

Half Internat'l Inc., 1 Cal. 5th 480, 510 (Cal. 2016) (Liu, J., concurring). In most settlements, no objector will appear, and few (if any) California trial courts appoint "class guardians" or "devil's advocates" to provide adversarial review. *Cf. id.* at pp. 578–79 (recommending the appointment of class guardians in fee hearings); *accord Trulia*, *supra*, 129 A.3d at pp. 898–99 (discussing the appointment of *amicus curiae* to assist in evaluating the alleged benefits of supplemental disclosures). And if class plaintiffs achieve unfavorable results in one superior court, they will simply move on to the next.

3. Review will ensure that plaintiffs must provide trial courts with relevant authority.

A merger-tax plaintiffs' ability to forum shop is a function of the non-adversarial nature of most settlement hearings. The California Rules of Professional Conduct only require disclosure of directly adverse legal authority "in the controlling jurisdiction." Cal. R. Prof. Conduct 3.3(a)(2). Thus, stockholder plaintiffs can, as Plaintiffs did here, assure trial courts that their settlements are consistent with Delaware law without disclosing that these deals are now disfavored. *See Trulia*, 129 A.3d at 898.

A decision from this Court will sever stockholder plaintiffs' ability to take advantage of non-adversarial proceedings. Whether this Court adopts the *Trulia* standard, or crafts its own test as New York has done, its words will be binding. Class plaintiffs may stay silent about *Trulia*, but they omit this Court's words at their peril.

4. Review will ensure that appellate courts apply the correct standard of review.

Griffith argued that the materiality of the disclosures was a question of law. Court of Appeals Op. Br. 42–55. "Ordinarily the issue of materiality is a mixed question of law and fact, involving the application of a legal standard to a particular set of facts. However, if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." *Ins. Underwriters Clearing House v. Natomas Co.*, 184 Cal.App.3d 1520, 1526-1527 (1986) (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)). Questions of law were reviewed *de novo*. *In re Charlisse C.*, 45 Cal.4th 145, 159 (2008) (cited by Court of Appeals Op. Br. 10–11). The Court of Appeals, however, held that the trial court did not "abuse[] its discretion" based on "substantial evidence," *i.e.*, the Morris declaration. Slip. Op. 33. The Court of Appeals did not undertake the required *de novo* review of whether the disclosures were material. A decision from this Court will confirm that California appellate courts correctly review materiality of disclosure-only settlements.

B. Review will provide uniformity of decision on the important legal questions regarding the application of an enhanced standard of approval.

Whether this Court adopts *Trulia*'s three-part test or enhances the existing test when applied to disclosure settlements, a decision will provide clarity on issues that regularly arise in deal litigation, such as the materiality of supplemental disclosures, the appropriate scope of a release, and the degree of investigation necessary to secure a settlement. Uniformity will assist dealmakers

in determining what they must include in proxy statements, and deter the migration of stockholder plaintiffs to California courts.

1. Uniformity is crucial for dealmakers and trial courts.

Merger participants, who must circulate proxy statements to stockholders across the world, need consistent and predictable answers on questions of materiality. As Plaintiffs recognized, the substantive question of materiality is a matter of Delaware law because Pharmacyclics is incorporated in Delaware. *See* Slip Op. 7 n. 5. In their attempts to comply with the law, dealmakers should feel confident that the same disclosure will be considered similarly whether a plaintiff brings suit in Los Angeles, Silicon Valley, or Wilmington, Delaware. On the other hand, merger-tax plaintiffs can be expected to exploit differences between jurisdictions, both within California and between this State and its sisters, in pursuit of easily approved settlements and generous fees.

2. The settlement below would not withstand a more rigorous standard.

The Opinion undermined this uniformity when it affirmed the approval of a settlement that would have foundered before a court that applied *de novo* review of *Trulia's* more rigorous standard of approval. Plaintiffs pursued a typical merger-tax case: They filed multiple lawsuits shortly after the announcement of a merger, obtained expedited discovery without any pre-MOU motion practice, obtained supplemental disclosures instead of a monetary

recovery, and presented the settlement to the court for approval long after the merger was complete. *Compare* Slip Op. 2–6 *with Trulia*, 129 A.3d at 891–95. Plaintiffs secured settlement approval after obtaining disclosures that are immaterial under Delaware law in exchange for a release that would not pass muster following *Trulia* and without the investigation required of similar settlements.

i. The Supplemental Disclosures were not material as a matter of law.

The Court of Appeals' discussion of the challenges facing trial courts when they evaluate supplemental disclosures turns *Trulia* on its head. As the Opinion notes, the Delaware Court of Chancery worried that non-adversarial procedures force a trial court to "become a forensic examiner of proxy materials" whereas "in a litigated action, the ***defendants***, 'armed with the help of their financial advisors, would be quick to contextualize the omission [in a proxy statement] and point out why the missing details are immaterial [. . . .]'" Slip Op. 27–28 (quoting *Trulia*, 129 A.3d at 894) (alterations and emphasis added). The Court of Appeals found the trial court mitigated this difficulty by considering the Morris Declaration—***Plaintiffs'*** expert report offered on reply in further support of the settlement. Slip Op. 28.

This reliance on one-sided authority and a limited record resulted in legal conclusions explicitly rejected in other jurisdictions. Griffith will discuss each disclosure more thoroughly before this Court, as he did before the Court of Appeals (although the Court of Appeals failed to provide the required *de novo*

review of materiality, *see* Section V.A.4 above). The supplemental disclosures related to the Precedent Transaction Analyses performed by Pharmacyclics' bankers were inadequate and immaterial.

For over a decade, controlling authority law has held that a "fair summary" of a banker's work on such analyses is all that is required to be disclosed. *Trulia*, 129 A.3d at 900 (citing cases). In contrast, the Morris Declaration averred that:

> [T]he advisors' method of presentation pertaining to their Precedent Transaction Analyses, wherein they did not include ***individual peer multiples or detailed benchmarking*** information "obscured important information and trends, remedied by the Supplemental Disclosures," which showed that the financial advisors selected valuation multiples towards the low end of the range as opposed to the higher end, and did not evidence the upward trend in multiples for transactions in the biopharmaceutical industry.

Slip Op. 12 (emphasis added). Neither the Morris Declaration nor the Opinion, however, suggests that the Registration Statement omitted the precedent transactions utilized by each banker or a summary of the next-twelve-month or 2-year forward revenue multiples for the transactions as a whole.

Multiple courts have rejected the Morris Declaration's determination, finding such summaries sufficient and that individual transaction multiples are immaterial to stockholders, particularly where the relevant values are publicly available.[4] *See, e.g.*, *Bushansky v. Remy Int'l, Inc.*, 262 F.Supp.3d 742, 752 (S.D.

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[4] Neither the Opinion nor the Morris Declaration contends that these values were not public. Independent review of the Registration Statement

Ind. 2017) (denying approval of settlement despite plaintiff's expert declaration). Individual transaction multiples have long been considered "more akin to what is needed to make 'an independent determination of fair value' than they are to a 'fair summary.'" *In re OPENLANE, Inc. S'holders Litig.*, 2011 WL 4599662, at *14 (Del. Ch. Sept. 30, 2011) (holding that including details of "all the underlying transactions analyzed would likely inundate the reader"). Similarly, the *Trulia* court found a proxy to be sufficient if it listed the date, target, and acquirer for each precedent company transaction and aggregate multiples for the set. *See Trulia*, 129 A.3d at 904. The Morris Declaration does not (and cannot) dispute that these were provided.

The Opinion's approval of the less-rigorous standard applied to this settlement—based on a single expert report, without independent review of the Registration Statement—creates a problem for dealmakers acquiring California-based corporations. In order to comply with the law, they must look not only to the law of the state of incorporation, but to every unpublished opinion of a California appellate or trial court. Merger-tax plaintiffs, meanwhile, can be expected to capitalize on the lack of uniform standards by filing their lawsuits in this State.

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might have shed light on that question. The Court of Appeals found, however, that such a review was unnecessary under California's current legal regime. *See* Slip. Op. 30–31.

ii. The released claims were broader than ***Trulia*** permits.

The Court of Appeals' analysis is inconsistent with an enhanced standard of settlement approval similar to *Trulia*. The broad release of claims in this case would independently doom the settlement: Among other things, the definition of "unknown claims" criticized in *Trulia* is almost identical to that contained in the release here. *Compare* Slip Op. 5 n.4 *with id.* at 36 n.20.

In affirming the settlement, the Court of Appeals weighed the purported benefits of the settlement against the breadth of the release, concluding that the trial court did so by implication. *See* Slip Op. 33, 38–39. This is consistent with the general process of settlement approval in both California and Delaware. *Compare id.* at 23 (trial court must "ensure the class received sufficient consideration in exchange for the release of claims" (citing *Kullar*, 168 Cal.App.4th at 130)) *with Trulia*, 129 A.3d at 891 (trial court must balance "give" and "get"). Without changing the general rule for settlements, however, Delaware now subjects disclosure settlements to a specific, conjunctive three-part test: They must provide "plainly material disclosures" ***and*** contain a "narrowly circumscribed" release ***and*** follow a sufficient investigation of the released claims. *Trulia*, 129 A.3d at 898. Thus, this settlement would be inconsistent with an enhanced standard of approval similar to *Trulia*.

iii. Plaintiffs' investigation is inadequate under ***Trulia.***

Finally, Plaintiffs' investigation is insufficient to support even a narrow release of claims in this action, and certainly in a post-*Trulia* jurisdiction. The

Opinion's attempt to distinguish Plaintiffs' efforts actually demonstrates that Plaintiffs performed ***less*** adversarial work than was criticized in *Trulia* or *Sauer-Danfoss*.

The record reflects little difference between the document discovery conducted in this action and other merger-tax cases critical of disclosure settlements. Plaintiffs here waited for Pharmacyclics to issue its Registration Statement, then received documents from Defendants that included "the minutes of the meetings of the Pharmacyclics Board and financial presentations from the Board's financial advisors." Slip Op. 37. These are among "the standard categories of documents that defendants routinely produce to facilitate a disclosure-only settlement. . . ." *Id.* at 35, *citing In re Sauer-Danfoss Inc. S'holders Litig.* 65 A.3d 1116, 1121 (Del. Ch. 2011); *accord Trulia*, 129 A.3d at 893 (describing production limited to "less than 3,000 pages of documents"). Defendants produced the same documents here, and for the same purpose. Slip Op. 37.

The deposition record in this action, on the other hand, falls short of *Trulia*. Plaintiffs never conducted ***any*** depositions of a named defendant, took ***no*** depositions before entering into a memorandum of understanding, and deposed two of Pharmacyclics' bankers in "confirmatory" discovery.[5] *See* Slip

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[5] "'Confirmatory discovery' is discovery taken after an agreement-in-principle has been reached" and "rarely leads to a renunciation of the propose settlement" but instead "engenders activity more reflective of 'going through the motions.'" Slip Op. 34 n.19, *quoting Trulia*, 129 A.3d at 887 n. 24 (other citations omitted).

Op. 4. By comparison, even the *Trulia* plaintiffs conducted two depositions during the adversarial phase of litigation, including a deposition of a defendant, following up with a third deposition in confirmatory discovery. *See* Slip Op. 34, 36. Again, in jurisdictions that adopt an enhanced standard of settlement approval, this failure should be independently fatal to the settlement.

While the first issue on appeal asks this Court to consider whether an enhanced standard of settlement approval is warranted, the second issue considers whether this settlement would comply with an enhanced standard. For the reasons set forth above, it would not.

3. This Court may promote uniformity of decision through remand or certification of a question of law.

The Court has multiple tools at its disposal to address his case. If it requires trial courts to undertake more rigorous review of disclosure settlements, remand to the trial court would permit reconsideration under a new standard. As the Court of Appeals noted, the trial court only considered *Trulia* "under the construct of California law" as it existed at the time. Slip Op. 23.

However, this Court may invoke an option not available to the lower courts: It may certify questions of law directly to the Delaware Supreme Court. *See* Del. Const. Art. IV, §11(8) (permitting certification of questions of law from, *inter alia*, "the highest appellate court of any other state"). Neither the trial court nor the Court of Appeals possessed the authority to certify such questions.

This procedure would be particularly appropriate for questions relating to the materiality of the supplemental disclosures. Only questions of law may be certified, and this Court's Delaware counterpart has shown caution in addressing questions of materiality, often described as mixed questions of law and fact. *See, e.g.*, *Espinoza v. Dimon*, 124 A.3d 33, 35 (Del. 2015) (expressing reluctance to address a "contextual" analysis regarding materiality certified by a federal trial court). Here, however, the Court of Appeals opinion has cabined the facts relevant to a materiality analysis. The Delaware Supreme Court need only consider the opinions in this action and the Morris Declaration in order to determine whether the supplemental disclosures were material as a matter of law. *Cf. In re MONY Grp. Inc. S'holder Litig.*, 852 A.2d 9, 28 (Del. Ch. 2016) (holding supplemental information relating to a selected transaction analysis to be "immaterial, as a matter of law").

Whether this Court remands the question to the trial court or certifies a question to its counterpart in Delaware, the result will encourage uniformity on issues surrounding disclosure settlements. This will provide greater certainty to dealmakers and deter opportunistic, meritless settlements.

C. This case presents the best opportunity to address the problem of disclosure settlements.

If, on the other hand, California's response to the systemic problem of disclosure settlements is not decided in this case, the opportunity to address this issue may not arise again soon. Objections to class action settlements are rare. *See Laffitte*, 1 Cal. 5th at 510 (Liu, J., concurring). An objector's appeal is even

less common. Objector is aware of no previous application to this Court concerning a disclosure settlement.[6] Meanwhile, the decisions of the Court of Appeals and trial court will further discourage objectors from appearing to challenge meritless objections. Settlements approved on a non-adversarial basis will not be appealed or submitted to this Court.

VI. CONCLUSION

The Court of Appeals declined to address "best practices in disclosure-only settlements. . . ." Slip Op. 39. This Court should not. Deal litigation presents a vexing problem for California corporations, as it does for corporations across the country. The prevalence of merger-tax lawsuits does not result from statute, but from the judicially-created rules applied to disclosure settlements. Stockholder plaintiffs react to these rules by seeking out the jurisdictions that apply the least scrutiny to their lawsuits. Review is therefore necessary to ensure that California courts discourage an inefficient, sue-on-every-deal strategy by requiring a unified, rigorous standard of settlement approval in trial courts across the state.

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[6] In a search of this Court's electronic docket, counsel for Objector could find no petition for review arising from earlier unreported cases concerning disclosure settlements. Although this Court denied a petition for review in *Drulias v. 1st Century Bancshares*, as the Court of Appeals noted, that case "concern[ed] the enforceability in California of a forum selection bylaw" and did "not address the propriety of disclosure-only settlements. . . ." Slip Op. 39.

Dated: March 25, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CALIFORNIA RULE OF COURT 8.504

I, Theodore H. Frank, appellate counsel to Sean J. Griffith, certify that the foregoing brief complies with the length limits permitted by California Rule of Court 8.504(d)(1). The petition contains 7,222 words including footnotes, excluding the portions exempted by Rule 8.504(d)(3), based on the word count of the word processing system used to prepare the brief. The brief's type size and type face comply with Rule 8.204(b).

Executed on March 25, 2020.

/s/ Theodore H. Frank
Theodore H. Frank

CERTIFICATE OF SERVICE

I, Theodore H. Frank, hereby affirm that I am over the age of eighteen years and not a party to the case. My business address is 1629 K Street NW, Suite 300, Washington, DC 20006.

On March 25, 2020, I caused to be served true copies of the foregoing Petition for Review on the following by filing the document through the Court's electronic filing system, "TrueFiling":

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On March 25, 2020, I further caused a true copy of the above-referenced document to be sent by first-class U.S. Mail, postage prepaid to the following:

Clerk of Court
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191 North First Street
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I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on March 25, 2020, in Houston, TX.

/s/Theodore H. Frank
Theodore H. Frank

EXHIBIT A

Filed 2/14/20 Evangelista v. Duggan CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ANTHONY EVANGELISTA et al., Plaintiffs and Respondents, v. ROBERT W. DUGGAN et al., Defendants and Respondents; SEAN J. GRIFFITH, Intervenor and Appellant.	H044087 (Santa Clara County Super. Ct. No. 2015-1-CV-278055)

Appellant Sean J. Griffith appeals from a judgment granting final approval to the settlement of a shareholder class action lawsuit arising from the acquisition of Pharmacyclics, Inc., by AbbVie, Inc. and its subsidiaries. Griffith contends the trial court abused its discretion by approving the settlement and awarding attorneys' fees to the attorneys representing the plaintiff shareholders. We are unpersuaded by these contentions and, consequently, we affirm the judgment.

I. Factual and Procedural Background

A. Acquisition of Pharmacyclics, Inc., by AbbVie, Inc.

Pharmacyclics, Inc., (Pharmacyclics) is a biopharmaceutical company, incorporated in Delaware, with principle offices in Sunnyvale, California. Its main product is IMBRUVICA, a blood cancer drug. In March 2015, Pharmacyclics announced

that its board of directors had agreed to sell the company to AbbVie, Inc., Oxford Amherst Corporation, a direct wholly owned subsidiary of AbbVie, Inc., and Oxford Amherst LLC, a direct wholly owned subsidiary of AbbVie, Inc. (collectively AbbVie), having entered into a merger agreement, pursuant to which AbbVie would commence a tender offer and acquire Pharmacyclics for $261.25 per share. Pharmacyclics announced the merger agreement in early March 2015.

Following the announcement, four separate plaintiffs, Anthony Evangelista, Lawrence Treppel, Qiang Wang, and Kurt Wallach (Plaintiffs), and their attorneys conducted a pre-suit investigation of Pharmacyclics, AbbVie, the tender offer, and the proposed acquisition. Based on the investigation, Plaintiffs each filed a class action lawsuit against Pharmacyclics, its board of directors, and AbbVie (collectively Defendants)[1]; the trial court later consolidated the actions. These suits each alleged the Pharmacyclics' board of directors, aided and abetted by Pharmacyclics and AbbVie, breached their fiduciary duties in connection with the acquisition of Pharmacyclics by AbbVie.

Several weeks after announcing the merger agreement, AbbVie commenced the tender offer; at the same time, Pharmacyclics filed with the U.S. Securities and Exchange Commission (S.E.C.) a "Solicitation and Recommendation Statement on Schedule 14D-9" (the Recommendation Statement), which, according to Plaintiffs, "included information concerning the background of the Acquisition, the process leading to the

[1] The record on appeal includes only one of the four complaints, that filed by Treppel in Santa Clara County Superior Court Case No. 2015-1-CV-278088, naming only the individual members of the Pharmacyclics' board of directors as defendants. A deputy clerk of the trial court certified that she was unable to locate the complaints in two of the other actions, Case Nos. 2015-1-CV-278215 (filed by Wang) and 2015-1-CV-278260 (filed by Wallach). The complaint filed by Evangelista is not part of the record on appeal, and is not referenced in the clerk's certificate of documents she was not able to locate. Other pleadings in the record, notably the stipulation of settlement signed by Plaintiffs and Defendants in January 2016, suggest the complaints not included in the record named Pharmacyclics and AbbVie as defendants.

agreement to sell Pharmacyclics to AbbVie, and the financial analyses performed by the Company's financial advisors in support of their fairness opinion."[2] The tender offer was set to expire on April 17, 2015.

Upon receipt of the Recommendation Statement, Plaintiffs' counsel reviewed the statement with independent financial experts and identified areas that they believed warranted further investigation. Plaintiffs' counsel engaged in negotiations with Defendants' attorneys to obtain additional information; Defendants' voluntarily produced confidential documents relevant to the acquisition, "including the minutes of the meetings of the Pharmacyclics Board and financial presentations from the Board's financial advisors." Plaintiffs' counsel reviewed these additional documents and consulted with a retained financial expert, determining that the offer price was in the "range of reasonableness," such that it would be difficult to obtain monetary benefits after the tender offer closed. Counsel thus concluded that the best possible result for the shareholders was to obtain additional information that would aid in making a fully informed decision on the tender offer.

Plaintiffs' counsel demanded additional disclosures from Defendants, commencing negotiations between the attorneys for both sides, which resulted in Defendants agreeing to make supplemental disclosures before the close of the tender offer. The supplemental disclosures were to include previously omitted information regarding: (i) Pharmacyclics' financial projections; and (ii) the valuation analyses conducted by Centerview Partners LLC (Centerview), and J.P. Morgan Securities LLC (J.P. Morgan), the financial advisors used by Defendants to provide financial analyses

[2] The trial court did not take judicial notice of the Recommendation Statement, or otherwise admit the Recommendation Statement into evidence. For reasons discussed in section II(A), *post*, we will deny Griffith's request to take judicial notice of the Recommendation Statement. Thus, our description of the content of the Recommendation Statement comes from pleadings provided to the trial court, contained in the record provided on appeal.

and projections in support of the Recommendation Statement. The parties signed a memorandum of understanding (MOU), which included Defendants' agreement to provide the supplemental disclosures, as well as AbbVie's agreement that the acquisition would not be completed until at least one week after the public filing of the supplemental disclosures. In mid-April 2015, Defendants issued the supplemental disclosures, using the same S.E.C. Schedule 14D-9 that was used for the Recommendation Statement (Supplemental Disclosures); AbbVie extended the expiration date of the tender offer first to May 1, 2015, and then two additional times, resulting in the tender offer finally expiring on May 22, 2015. Approximately 87 percent of Pharmacyclics' outstanding shares were validly tendered into the transaction. After completion of the acquisition in May 2015, Plaintiffs' counsel took the depositions of two individuals, one from Centerview and one from J.P. Morgan, each of whom had knowledge of the acquisition, to confirm the fairness of the settlement.

Following additional discussions to finalize the settlement, the parties executed a Stipulation of Settlement in January 2016, setting forth the terms and conditions of the settlement, subject to approval by the trial court. In exchange for the Supplemental Disclosures, Plaintiffs agreed to the following releases: "4.1 Upon the Effective Date, Plaintiffs and each of the Class Members shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged

all Released Claims[3] (including Unknown Claims[4]) against the Released Persons. [¶] 4.2 Upon the Effective Date, each of the Released Persons shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged Plaintiffs, each and all of the Class Members, and counsel to the Plaintiffs from all claims, demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, fees, expenses, costs, matters and issues of any kind or nature whatsoever, whether known or unknown, contingent or absolute, suspected or unsuspected, disclosed or undisclosed, hidden or concealed, matured or unmatured, based upon or arising out of the institution, prosecution, assertion, settlement or resolution of the Actions or the Released Claims. By operation of the entry of the Judgment, upon the Effective Date, the Released Persons shall be deemed to have waived any and all rights and benefits which they now have, or in the future may have with respect to the claims released by this ¶4.2 by virtue of the provisions of §1542 of the

[3] " 'Released Claims' " includes "all known and Unknown Claims," against any " 'Released Person,' " that "have been, could have been, or in the future can or might be asserted" in the lawsuits or in any other proceeding by or on behalf of the Plaintiffs or any member of the class, "whether arising under state, federal, foreign, statutory, common law or regulatory law (including, but not limited to, the federal securities laws and any state disclosure law)" that relate to, connect to, are based upon, "or otherwise concern in any manner, directly or indirectly": 1) the claims and allegations in the lawsuits; 2) the acquisition and any agreements or transactions related thereto; 3) any compensation or consideration made to any released person connected with the acquisition; 4) any disclosures or alleged failure to disclose related to the acquisition; and 5) "any alleged aiding and abetting of the foregoing . . . ." The release does not waive the rights of Plaintiffs or any class members to enforce the terms of the stipulation or "any properly perfected claims for appraisal . . . ."

[4] " 'Unknown Claims' " are "any claim, cause of action, damage or harm with respect to the Released Claims which any of the Plaintiffs and/or Class Members do not know or suspect to exist at the time of the release of the Released Persons which, if known by him, her or it, might have affected his, her or its settlement with and release of the Released Persons, or might have affected his, her or its decision not to object to this Settlement." Included in the definition is a waiver of California Civil Code section 1542, as well as an acknowledgement "that the foregoing waiver was separately bargained for and a material element of the Settlement of which this release is a part."

California Civil Code and any other similar law or provision which section provides as follows: [¶] A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR. [¶] Provided, however, that such release shall not affect any claims to enforce the terms of the Stipulation or the Settlement." In addition to providing the Supplemental Disclosures, Defendants agreed to pay Plaintiffs' attorneys' fees, in the amount of $725,000, subject to court approval.

In February 2016, the trial court issued an order approving Plaintiffs' unopposed motion for preliminary approval of the settlement and entry of an order for notice. The proposed Notice of Settlement of Class Action attached as an exhibit to the Stipulation of Settlement specified nine areas of additional information purportedly included in the Supplemental Disclosures, a copy of which was also attached to the Stipulation of Settlement. In April 2016, the trial court issued an amended order preliminarily approving the settlement and providing for notice, as well as an amended notice of settlement, specifying only three areas of additional information included in the Supplemental Disclosures: the financial projections of Pharmacyclics for calendar years 2015-2028, and how those projections were calculated; the fairness opinion of Centerview, "including its Selected Comparable Public Company Analysis, Selected Precedent Transactions Analysis, and Discounted Cash Flow Analysis"; and, the fairness opinion of J.P. Morgan, "including its Public Trading Analysis Implied Equity for Pharmacyclics, Selected Transaction Analysis, and Discounted Cash Flow Analysis."

B. Plaintiffs' Motion for Final Approval of Settlement

Plaintiffs subsequently filed a motion seeking final approval of the class action settlement and award of attorneys' fees and expenses. With the motion, Plaintiffs provided declarations from David T. Wissbroecker and Stephen J. Oddo, each a partner

with one of the law firms representing Plaintiffs. Citing to California and Delaware legal authority,[5] Plaintiffs argued the settlement provided them "what they otherwise believe they could have obtained, at great risk and uncertainty, through continued litigation of their claims: the disclosure of previously withheld material information to Pharmacyclics' shareholders to allow them to make a fully-informed decision on whether to tender their shares for the $261.25 in the Tender Offer and/or seek appraisal of their shares." Plaintiffs further contended the agreed-upon amount of attorneys' fees Defendants would pay to Plaintiffs' counsel, negotiated at arm's length after the parties signed the MOU, reflected, "in part, the Settling Parties' experience as to what is an appropriate fee under the circumstances of the Action, including the result achieved and fee awards in similar cases."

In his supporting declaration, Wissbroecker attested to the history of the action, as incorporated into our recitation of the facts, *ante*. He indicated that, at the time Plaintiffs' filed their motion for approval of the settlement, they had received one class member objection, from Howard McPherson; Griffith had not yet filed his objection. With references to Delaware law, Wissbroecker provided the trial court a detailed analysis of why he believed litigation and settlement thereof benefitted the shareholders of Pharmacyclics. He contended Plaintiffs' counsel's pursuit of the matter resulted in the Defendants providing "previously omitted, material information" to the shareholders in advance of them making a decision regarding the tender offer. This included information regarding Pharmacyclics' true value and future prospects, particularly information generated by the company's management, which Wissbroecker described as "highly-prized" by investors under Delaware law. The information "allowed the Company's

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[5] In the motion for final approval of the settlement, Plaintiffs indicated they cited to Delaware law because Pharmacyclics was incorporated in Delaware, such that "Delaware substantive law [governed] Plaintiffs' claims. *See* Cal. Corp. Code §2116 . . . ."

shareholders to assess the reliability of the summary financial projections disclosed in the Recommendation Statement, formulate a view on Pharmacyclics' true value (including the value of IMBRUVICA) and its future prospects, and make an informed decision on whether to accept the $261.25 per share offer and tender their shares to AbbVie or attempt to continue the Company as a stand-alone company and participate in the Company's future business." The Supplemental Disclosures also provided shareholders with "previously undisclosed, key assumptions that Centerview and J.P. Morgan used in their valuation analyses," the provision of which "allowed the Company's shareholders to accept or reject Centerview's and J.P. Morgan's analyses and fairness opinions, formulate their independent view on the Company's value and prospects, and make an informed decision on whether to accept" the tender offer.

Wissbroecker declared that Plaintiffs' counsel "actively prosecuted" the actions, by investigating the tender offer, preparing the initial complaints, conducting negotiations with Defendants' counsel for additional discovery, reviewing and analyzing the documents provided by Defendants following those negotiations, consulting with a retained financial expert, investigating and analyzing Defendants' disclosures and seeking full disclosures from Defendants, and negotiating for the disclosure of all material information. He addressed several obstacles that could have prevented Plaintiffs from obtaining any monetary settlement or injunctive relief, including the fact that injunctions are an "extraordinary remedy," the Board of Directors' conduct might have been "shielded from substantive judicial scrutiny by the 'business judgment rule,' " and the Pharmacyclics' certification of incorporation includes an exculpatory provision shielding the board members from liability for monetary damages based on a breach of the duty of care. Ultimately, Plaintiffs' counsel considered the various issues and risks, and determined the proposed settlement was fair and reasonable under the circumstances.

Oddo's declaration addressed the portion of the proposed settlement dealing with attorneys' fees and costs. He determined the lodestar calculation and expenses for the

work performed by his firm, making reductions where appropriate in the "exercise of 'billing judgment' "; he contended the requested amount was reasonable and necessary "for the effective and efficient prosecution and resolution of litigation." The lodestar amount for his firm's work was $108,433.75, with an additional $13,228.05 in expenses.[6]

C. Griffith's Objection to Settlement

Prior to the hearing on Plaintiffs' motion, Griffith, a Pharmacyclics shareholder during the relevant period, filed an objection to the motion for final approval of the class action settlement, contending the proposed settlement traded immaterial supplemental disclosures for an overly broad release of claims, resulting in an unfair, unreasonable, and inadequate settlement of the shareholders' class action claims under both California and Delaware law. Relying primarily on the Delaware case *In re Trulia, Inc. Stockholder Litigation* (Del. Ch. 2016) 129 A.3d 884 (*Trulia*), Griffith asked the trial court to subject this "disclosure-only" settlement to greater scrutiny and reject the trade of "immaterial disclosures" for an "overbroad release[]." He cited the short period between the filing of the complaints and MOU, the undisclosed number of documents produced by Defendants, and the lack of information "personal to the individual Defendants," arguing the *Trulia* court rejected similar discovery efforts. Moreover, he took the position that the three categories of supplemental disclosures Defendants agreed to provide amounted to a " 'laundry list of minutiae' found to be immaterial under Delaware law," insufficient to support the agreed-upon broad release.[7] Ultimately, Griffith contended that the

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[6] Plaintiffs' memorandum of points and authorities in support of the motion for approval indicates a total lodestar amount of $243,102.50 in attorneys' fees, and $22,953.62 in costs. In his supporting declaration, Wissbroecker references an "accompanying Settlement Brief" addressing the reasonableness of the fee request. That brief is not included as part of the record on appeal. Griffith did not dispute this amount in the trial court; as discussed, *post*, he argued the amount was not reasonable under the circumstances.

[7] In his objection, Griffith argued that Plaintiffs included an erroneous description of the Supplemental Disclosures on the homepage of the class action settlement website through mid-June 2015. In response, Plaintiffs confirmed the website was properly

settlement put the class in no better a position than it was in when the complaints were filed, that the Plaintiffs did not undertake sufficient investigation to determine whether the proposed release was appropriate, and that the trial court should give little weight to the lack of objectors to the settlement and to the experience of the involved attorneys.

Griffith further argued the negotiated amount of attorneys' fees and costs was excessive, both relative to the amount of time and effort expended by Plaintiffs' counsel, and to the amount awarded in similar cases in California and Delaware. In particular, he argued the multiplier the parties applied to the lodestar, 2.98, was much greater than courts were allowing in 2015 and 2016. Rather than approve the parties' negotiated fee award, Griffith asked the trial court to grant his attorneys an award of fees in an amount to be determined.

In support of his contentions, Griffith provided two declarations: his own, confirming his status as a Pharmacyclics' shareholder and attaching his *curriculum vitae*; and that of one of his attorneys, providing printouts from the Pharmacyclics Shareholder Litigation website on three separate dates, and detailing the attorney and paralegal time that had been expended on Griffith's behalf thus far in the matter. Neither of these declarations contradicted any of the factual statements made in the declarations supplied by Plaintiffs in support of the motion to approve the settlement.

D. Plaintiffs' Response to Objection

Plaintiffs filed a response to Griffith's objection, arguing the *Trulia* holding was not applicable to the case at bar, as *Trulia* addressed a specific problem not present in the Pharmacyclics acquisition, specifically, the problem of plaintiffs' law firms who did not want to engage in long-term litigation giving up potential damages claims without investigation, and settling for immaterial disclosures. Plaintiffs contended their attorneys

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updated with the amended notice, but also included an inaccurate summary, not required by court order, which they later corrected. Griffith does not raise this notice issue on appeal.

were known to pursue viable claims for monetary damages; they investigated and analyzed the potential claims in the case, consulted with an expert, and concluded the monetary claims were not viable. Moreover, Plaintiffs argued the Supplemental Disclosures were material under the facts of the case.

To buttress their claim of materiality, Plaintiffs submitted the declaration of Matthew R. Morris, an economic damages and valuation expert, retained by Plaintiffs to "identify information that provided important insight into the valuation of Pharmacyclics, a financial assessment of the Transaction, and an understanding of the work performed by J.P. Morgan and Centerview. These efforts were aimed at ensuring there was a sufficient quantity and quality of disclosed information necessary for shareholders to evaluate the Transaction's financial merit(s)." Morris opined that the additional information disclosed in the Supplemental Disclosures that was not included in the Recommendation Statement, "was both important in evaluating the sufficiency of the Transaction Consideration and understanding the work performed by J.P. Morgan and Centerview in their role as the Financial Advisors." He concluded, "this information reflected a significant improvement in the quality and quantity of information available to Pharmacyclics' shareholders in making an informed decision to support or oppose the Transaction," and claimed the Supplemental Disclosures "represented a substantial benefit" to shareholders in evaluating the transaction and proposed consideration.

In reaching this conclusion, Morris described the information either included or lacking in the Recommendation Statement, provided the text of the Supplemental Disclosures, or a brief summary thereof, and explained how the information was important. He did so by organizing the Supplemental Disclosures into four categories: "i. Information relating to the *Selected Public Companies Analyses* performed by J.P. Morgan and Centerview; [¶] ii. Information relating to the *Precedent Transactions Analyses* performed by J.P. Morgan and Centerview; [¶] iii. Information relating to the *Discounted Cash Flow Analyses* performed by J.P. Morgan and Centerview; and

[¶] iv. Information relating to the financial projections provided by management and relied upon by J.P. Morgan and Centerview in their analyses."

Regarding the Selected Public Companies' Analysis provide by both Centerview and J.P. Morgan, Morris opined that the complete omission of certain information, as well as the incomplete information in other areas, "painted a misleading picture" of the advisors' analysis, suggesting they undervalued the stock at $261.25 per share; the Supplemental Disclosures provided "empirical data and context" that would allow the shareholders to reject the advisors' valuation as too low. Similarly, the advisors' method of presentation pertaining to their Precedent Transaction Analyses, wherein they did not include individual peer multiples or detailed benchmarking information "obscured important information and trends, remedied by the Supplemental Disclosures," which showed that the financial advisors selected valuation multiples towards the low end of the range as opposed to the higher end, and did not evidence the upward trend in multiples for transactions in the biopharmaceutical industry.

In reporting the advisors' Discounted Cash Flow Analyses, Morris declared the Recommendation Statement disclosed the advisors used "significantly faster" perpetuity decline rates for Pharmacyclics' revenues outside the United States than were typical in similar companies, without explanation; the Supplemental Disclosures revealed the advisors used those rates to account for the future expiration of certain patents, which Pharmacyclics' management believed would lead to increased competition from generics. Knowing the basis of the steep decline rates allowed shareholders to evaluate the tender offer relative to rates more aligned with industry standards. Finally, regarding the financial projections for Pharmacyclics relied on by the advisors, Morris opined that the Supplemental Disclosures revealed that management risk-adjusted the projections, information not included in the Recommendation Statement. This new information allowed shareholders to conclude that the projections in the Recommendation Statement "were likely half (or less) of what they were on an un-risk adjusted basis," thus giving

shareholders "concrete evidence" that their shares might be worth more than the tender offer.

E. Fairness Hearing and Ruling

The trial court held the fairness hearing in July 2016, at which attorneys for Plaintiffs, Defendants, and Griffith each presented argument and answered questions posed by the court. At the outset, the court specified it had reviewed all materials presented by the parties and was seeking assurance that the Plaintiffs' claims were fully investigated before being deemed unviable. The court also ensured it was considering what the actual benefit to the unrepresented class members would be if it approved the settlement.

Plaintiffs' counsel detailed the process by which he and his colleagues investigated and evaluated the claims, noting they served document requests and negotiated a voluntary production on an expedited basis because of the timing of the tender offer; ultimately they determined they could not "make a case for [the tender offer] being outside the range of fairness," and could not find that members of the board of directors had conflicts or were acting in bad faith. Counsel indicated the original basis for filing the lawsuits was a concern, based on publicly available information, regarding the amount of money the members of the board of directors would make from the acquisition, and the potential motive for malfeasance to make the deal work. The lawsuits allowed counsel to undertake discovery that indicated that "potential for self-interest" did not have an "impact on the process." Defendant's counsel added that the tender offer was 39 percent over the price Pharmacyclics was trading at before the announced merger, and 62 percent over the price in the 30 days preceding the announcement. While Plaintiffs initially believed another company made a higher bid for Pharmacyclics, discovery revealed that was not the case. Defendants' counsel also addressed the shortened timeline present as a result of the tender offer, versus a merger agreement that affords more time for discovery. Griffith's attorney argued the

investigation undertaken before entering into the settlement agreement was akin to the type of investigation rejected in several Delaware cases, including *Trulia*.

Regarding the Supplemental Disclosures, the trial court questioned whether a reasonable shareholder would understand the benefit received from the new information, as articulated by Morris in his declaration. Plaintiffs' counsel suggested investors in pharmaceutical companies have a better understanding of what the companies are doing, as there is more transparency due to the regulatory process governing such companies. He opined that the risk associated with the company's ability to obtain approval for, and then market, the pharmaceutical is particularly important to such investors, as is information regarding the potential for generic competitors and other overlapping products, and information about the valuation of the company as a whole. Defendants' attorney confirmed the Supplemental Disclosures added additional information about risk-adjustments. Griffith's attorney, on the other hand, argued the Supplemental Disclosure included information similar to that provided in other cases, including *Trulia*, wherein the courts found the new information was not material and did not benefit the shareholders. However, the attorney confirmed Griffith was not contending that there existed a viable claim for monetary damages for the class members; rather he alleged the option value of having some other plaintiff come forward with a viable damages action in the future exceeded the value of the new information exchanged for the release of those potential claims.

At the end of the hearing, the trial court provided its initial impression that, while the Supplemental Disclosures did not alter or change the ultimate vote, they did provide valuable information to the shareholders not included in the Recommendation Statement, as supported by Morris's declaration. However, the court questioned whether the information was so significant as to support the application of a three time multiplier to the attorneys' fees lodestar amount. The court took the matter under submission, stating it would "reflect further and review the cases" cited by Griffith before issuing an order.

Shortly after the fairness hearing, the trial court issued its order after hearing approving the settlement insofar as it exchanged the release of Plaintiffs' claims in exchange for the Supplemental Disclosures. Citing relevant California legal authority, the court set forth the factors it was required to consider in exercising its discretion to approve the class action settlement. The court found that the Supplemental Disclosures represented material information that "allowed [shareholders] to make an informed decision whether to tender their shares in the Acquisition or seek statutory appraisal of their shares." In doing so, the trial court stated the Supplemental Disclosures included eight categories of information, seemingly referencing the categories included in the February 2016 notice of settlement of the class action, rather than the amended notice issued in April 2016, which reduced the categories of information to three.

After summarizing each party's pleadings and arguments, the court found that, "[w]hile the information in the supplemental disclosures did not ultimately change or modify the valuations set forth in the [Recommendation Statement], the Court is satisfied that it provided material information going directly to each Class member's ability to assess the value of the Company and the future of its sole marketed product (IMBRUVICA)." In particular, the court found relevant the information about management's risk adjustment of the projections for IMBRUVICA, and the information suggesting the offer price of $261.25 might be low. Although there was no evidence the Recommendation Statement was "misleading," "this additional information was important in assisting the shareholders in deciding how to vote in this particular case involving a pharmaceutical company with one marketed product." The trial court further found there was sufficient investigation and analysis of Plaintiffs' claims to find there was "no viable claim for monetary damages." Mindful of its duty to review and analyze each settlement on its own facts, the court determined, "Plaintiffs are shareholders in a pharmaceutical company with really one marketed product. It is not unreasonable to assume that many of the shareholders have some experience and/or expertise in the

pharmaceutical industry and would find information about the projections for the viability and value of the product (IMBRUVICA) to be important in connection with their decision on how to vote. The Court also finds the particular facts of this case to be distinguishable from the *Trulia* case relied upon by [Griffith].”

The trial court reduced the amount of attorneys’ fees and expenses awarded to Plaintiffs’ counsel from $725,000,[8] to $509,158.62, representing $486,205 in fees and $22,953.62 in costs. In doing so, the trial court determined a multiplier of two to the original lodestar of $243,102.50 was appropriate, with the lodestar reflecting 470.70 hours of attorney time.[9] “In assessing the reasonableness of the fee request, the Court acknowledges that while the information set forth in the Supplemental Disclosures had some tangible benefit to the voting shareholders, it was not so significant as to warrant a multiplier of three to the lodestar amount. Put another way, the Supplemental Disclosures did not remedy any misleading or inaccurate information in the [Recommendation Statement] and did not change the analyses, but simply provided additional information which helped inform the shareholders prior to the vote.”

After receiving the trial court’s written order, the parties stipulated that Griffith could file a complaint in intervention for the purposes of precluding any argument that he lacks standing to appeal. The trial court accepted the stipulation, and Griffith filed his complaint in September 2016. In October 2016, the trial court entered judgment approving the settlement and overruling the objections of Griffith and McPherson,

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[8] In its order, the trial court states Plaintiffs’ counsel sought $750,000 in attorneys’ fees and costs; this appears to be a typographical error, as the pleadings reflecting the terms of the settlement, and Plaintiffs’ moving documents, all indicate the agreement was for $725,000.

[9] In addition to the declaration of Wissbroecker and Oddo, the trial court also considered declarations from Evan Smith and Shane Rowley in evaluating the request for attorneys’ fees. These declarations are not part of the record on appeal.

finding the settlement to be, "in all respects, fair, reasonable and adequate to each of the Settling Parties . . . ."

Griffith timely noticed his appeal of the judgment, appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). (Cal. Rules of Court, rule 8.104(a)(1).)

II. Discussion

A. Griffith's Request for Judicial Notice

Griffith asks this court to take judicial notice of the Recommendation Statement. Like trial courts, appellate courts have authority to take judicial notice of matters properly subject to judicial notice. (Evid. Code, § 459.)[10] While this court can take judicial notice of matters that were not presented to the trial court, we generally will not do so absent "exceptional circumstances," given that we ordinarily look only to the record made in the trial court. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.) Here, the trial court did not take judicial notice of the Recommendation Statement or otherwise receive it into evidence. Griffith does not cite any exceptional circumstances that would require us to deviate from the general rule. We therefore deny the request for judicial notice.

There is no dispute the trial court did not take judicial notice of the Recommendation Statement. Nor is there any indication in the record that the trial court received the Recommendation Statement into evidence. All parties referenced the Recommendation Statement in the pleadings filed with the trial court in advance of it approving the settlement. Yet none of the parties, including Griffith, objected to the fact

[10] There is a dispute as to whether the Recommendation Statement is the proper subject of judicial notice under Evidence Code section 452, subdivisions (c) and/or (h). We need not resolve this issue, given our ruling that Griffith has not shown "exceptional circumstances" justifying our consideration of the Recommendation Statement.

the trial court did not have the Recommendation Statement in evidence at the time of the hearing to approve the settlement.

The declaration of Matthew R. Morris, filed with the trial court on July 8, 2016, contained a detailed description of the relevant information included in the Recommendation Statement, as well as the additional information provided in the Supplemental Disclosures, which are part of the record on appeal. Griffith did not object to the accuracy of Morris's description of the Recommendation Statement, or to the description provided by Plaintiffs' counsel in the pleadings submitted in support of the settlement. It is these descriptions that the trial court relied on to evaluate whether the Supplemental Disclosures provided any added value to the shareholder class. As Griffith did not raise any concerns in this regard to the trial court, and has not provided any explanation for his failure to do so, we find no exceptional circumstances exist that would require us to now take judicial notice of the Recommendation Statement.

B. Griffith's Standing to Appeal

Plaintiffs argue Griffith does not have standing to appeal the judgment approving the class action settlement, arguing Griffith does not have any " 'immediate, pecuniary, [or] substantial' injuries from the judgment. . . ." Plaintiffs base this claim primarily on their contention that Griffith is an academic, critical of so-called disclosure-only settlements, with only an "ideological" interest in overturning the subject settlement. Griffith disagrees, arguing the settlement bars him from pursuing any known or unknown claims that were or could have been brought in the subject litigation.

The trial court granted Griffith's request to intervene, making him a party to the action, and thus giving him "a clear path to challenge" the judgment on appeal. (*Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 273 (*Hernandez*); *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 820-821 (*Carter*) [a class member may object or intervene to argue a general release obtained in settlement of a class action suit is too broad, and, if unsatisfied with the trial court result, appeal].) The

legal authority cited by Plaintiffs does not hold otherwise; while it stands for the general proposition that a party must suffer an immediate, pecuniary, and substantial injury from a judgment in order to have standing to appeal it is not specifically on point, i.e., it does not address the situation here where an undisputed shareholder party in a class action settlement has allegedly "ideological" interests in overturning the settlement. (*In re Tabacco Cases I* (2010) 186 Cal.App.4th 42, 53; *In re Jasmine S.* (2007) 153 Cal.App.4th 835, 841-842) While Griffith may have other interests in setting aside this settlement, he is a shareholder and class member, who objected and intervened in the trial court, and has standing to appeal on the basis he believes the release is too broad relative to the benefit allegedly received by the class.

C. The Trial Court Did Not Abuse Its Discretion in Approving the Settlement

1. General Legal Principles

We begin with the fundamental principle of appellate procedure that a trial court judgment is generally presumed to be correct; the burden is on appellant to demonstrate reversible error based on the record presented on appeal. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609 (*Jameson*).) " 'In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. "[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented." ' [Citation.]" (*Id*. at p. 609.)

We review the trial court's approval of the class action settlement for abuse of discretion. (*Carter*, *supra*, 224 Cal.App.4th at p. 819; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), disapproved on other grounds by *Hernandez*, *supra*, 4 Cal.5th 260; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802 (*Dunk*).) "In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the

risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801, 56 Cal.Rptr.2d 483; [Citation].) The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801.) Consistent with our standard of review on appeal, we do not reweigh these factors or substitute our notions of fairness for those of the trial court. (*Ibid.*)" (*Wershba*, at pp. 244-245.) "We make no independent determination whether the settlement terms are 'fair, adequate and reasonable,' but only determine whether the trial court acted within its discretion. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 127-128, 85 Cal.Rptr.3d 20 (*Kullar*))." (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 798, fn. omitted (*Clark*).)

While the trial court has broad discretion in approving class action settlements, it must exercise that discretion with an eye towards protecting the rights of absent class members who will be bound by the settlement. (*Wershba*, *supra*, 91 Cal.App.4th at p. 245; *Dunk*, *supra*, 48 Cal.App.4th at p. 1801.) "The court must therefore scrutinize the proposed settlement agreement to the extent necessary to ' "reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." ' ([*Dunk*, at p. 1801.])" (*Wershba*, at p. 245.) Generally, the proponent of the settlement bears the burden to show it is fair and reasonable. (*Ibid.*) However, a presumption of fairness exists where "(1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." (*Dunk*, at p. 1802; accord *Carter*, *supra*, 224

Cal.App.4th at p. 820; *Wershba*, at p. 245.) Where the presumption applies, or where the proponents of the settlement sufficiently establish fairness absent the presumption, the objector bears the burden to rebut it. (*Carter*, at p. 820; *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1165-1166 (*7-Eleven*); *Dunk*, *supra*, 48 Cal.App.4th at p. 1800.) The presumption of fairness does not alleviate the trial court's duty to "employ [the relevant factors] to evaluate independently the fairness of a proposed settlement." (*Clark*, *supra*, 175 Cal.App.4th at p. 801.)

In approving a class action settlement, the trial court must determine whether the consideration received by the class in exchange for a release of the class's claims is "reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) However, "[d]ue regard should be given to what is otherwise a private consensual agreement between the parties. The inquiry 'must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.' [Citation.] 'Ultimately, the [trial] court's determination is nothing more than "an amalgam of delicate balancing, gross approximations and rough justice." [Citation.]' [Citation.]" (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801.)

2. Application of Delaware Law to Analysis

All parties agree the trial court was required to apply California law to the procedural question of the standards for approval of a class action settlement. Citing Corporations Code section 2116,[11] Griffith contends this court must apply Delaware law

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[11] "The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders, creditors, receiver, liquidator or trustee in bankruptcy for the making of unauthorized dividends, purchase of shares or distribution of assets or false certificates, reports or public notices or other violation of official duty according to any applicable laws of the state or place of incorporation or organization, whether

in the substantive question of whether the Supplemental Disclosures were material—specifically the ruling in *Trulia*. The *Trulia* case disapproved what it referred to as disclosure settlements unless, among other circumstances, the supplemental disclosures required by the settlement "address a plainly material misrepresentation or omission." (*Trulia*, *supra*, 129 A.3d at p. 898.) In this context, "[i]nformation is material 'if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.' In other words, information is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alter[s] the "total mix" of information made available.' " (*Id*. at p. 899, fns. omitted.)

Plaintiffs and Defendants argue *Trulia* is not controlling law in California, such that the trial court did not have to consider whether the disclosures were material under Delaware law.[12] Certainly, the caselaw Griffith cites in support of this contention is not factually on point, in that neither case concerns the trial court's evaluation of a motion to approve a class action settlement. In *Central Laborers' Pension Fund v. McAfee, Inc.* (2017) 17 Cal.App.5th 292, 346, involving a shareholder class action suit stemming from

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committed or done in this state or elsewhere. Such liability may be enforced in the courts of this state." (Corp. Code, § 2116.)

[12] At trial, neither Plaintiffs nor Defendants argued against the trial court applying Delaware law in ruling on Plaintiffs' motion to approve the settlement. In fact, in their pleadings filed in support of the motion to approve the settlement, Plaintiffs themselves cited Delaware law, "for the proposition that the specific information disclosed in the Supplemental Disclosures is material and important to shareholders." Plaintiffs did not argue *Trulia* did not apply because it came out of a Delaware court; they argued it did not apply due to factual distinctions. Similarly, Defendants never specifically objected to the trial court considering Delaware law in ruling on the motion to approve the settlement; they argued *Trulia* reflected a change in the law occurring after the parties entered into the settlement, and that the trial court did not have to find that the Supplemental Disclosures were material to approve the settlement. As there was no opposition to the trial court considering Delaware law in this regard, Plaintiffs and Defendants arguably waived any contention that the trial court erred in considering *Trulia* in issuing its ruling. (See *Baxter v. State Teachers' Retirement System* (2017) 18 Cal.App.5th 340, 378 (*Baxter*).)

the acquisition of one Delaware incorporated company by another, this court found that California law, not Delaware law, applies to determine whether the matter was a civil action at law, subject to the right of the parties to have a jury trial, versus an equitable action. " '[C]ourts generally enforce the substantive rights created by the laws of other jurisdictions, [but] the procedural matters are governed by the law of the forum.' [Citation.]" (*Ibid.*) By comparison, in *Villari v. Mozilo* (2012) 208 Cal.App.4th 1470, 1477, fn. 8, the Second District Court of Appeal determined Delaware law applied to the substantive matter of reviewing a judgment of dismissal in a shareholder derivative action to determine whether plaintiff failed to adequately allege causes of action.

Here, we need not decide whether California trial courts generally must apply the materiality requirement of *Trulia* in evaluating settlements of shareholder class action lawsuits involving a company incorporated in Delaware. While the trial court did consider the *Trulia* decision in approving the settlement, it did so under the construct of California law; it did not rule that Delaware law applied in the matter. Under California law, in exercising its discretion to approve a class action settlement, the trial court can consider all "relevant factors," including, but not limited to, those enumerated in *Dunk*. (*Wershba*, *supra*, 91 Cal.App.4th at pp. 244-245; *Dunk*, *supra*, 48 Cal.App.4th at p. 1801.) Given the trial court's duty to exercise its discretion with an eye towards protecting the rights of absent class members, determine that the settlement is " ' "fair, reasonable and adequate to all concerned" ' " (*Wershba*, at p. 245; *Dunk*, at p. 1801), and ensure the class received sufficient consideration in exchange for the release of claims (*Kullar*, *supra*, 168 Cal.App.4th at p. 129), the trial court did not abuse its discretion by considering whether the Supplemental Disclosures provided the class a material benefit, as described in *Trulia* and other cases, in determining whether to approve the settlement under California law. Moreover, as discussed in more detail, *post*, even if the trial court was required to apply Delaware law, the evidence contained in the record on appeal

supports the finding that the Supplemental Disclosures provided the shareholder class material information omitted from prior disclosures.

3. Trial Court Did Not Err in its Evaluation of the Supplemental Disclosures

Griffith claims that the trial court failed to compare the Recommendation Statement to the Supplemental Disclosures, citing to several pages of the court's July 2016 order after hearing which purportedly reflect this failure. Nowhere in the trial court's decision does the court indicate it failed to compare the two disclosures. While there is no dispute the trial court did not have a complete copy of the Recommendation Statement at the time it prepared its decision, neither Griffith, nor either of the other parties, objected to the court issuing a ruling on that basis. Moreover, as already discussed, Morris's declaration provided detailed discussion about the information included, or missing, from the Recommendation Statement. Griffith did not argue in the trial court, and does not contend on appeal, that Morris provided inaccurate information about the contents of the Recommendation Statement to the trial court. To the extent Griffith believed the trial court had insufficient information to rule on the motion, he should have brought that issue to the attention of the court. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184; see *Baxter*, *supra*, 18 Cal.App.5th at p. 378.) While the trial court did not have the opportunity to undertake a side-by-side comparison of the Recommendation Statement and Supplemental Disclosures akin to the type undertaken by the Delaware court in *Trulia*, it had sufficient evidence to properly consider the differences between the two to evaluate whether the latter provided additional material information to the shareholder class.[13]

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[13] In his reply brief, Griffith suggests *Trulia* stands for the proposition that the trial court must conduct its own detailed comparison of the initial and supplemental disclosures. The Delaware court's opinion does not contain such a specific requirement; rather, in the portion of the ruling cited by Griffith, the court expresses concern that, in evaluating a class action stockholder settlement, the trial court must often take on a role akin to a forensic examiner to probe the value of a settlement for stockholders. (*Trulia*,

Griffith notes the trial court's written order after hearing approving the settlement references eight categories of additional information included in the Supplemental Disclosures, suggesting the trial court incorrectly relied on the original proposed notice of settlement of the class action, filed in February 2016, rather than the amended notice, filed in April 2016, which reduced the categories of additional information provided to three: the financial projections of Pharmacyclics for calendar years 2015-2028, and how those projections were calculated; the fairness opinion of Centerview, "including its Selected Comparable Public Company Analysis, Selected Precedent Transactions Analysis, and Discounted Cash Flow Analysis"; and, the fairness opinion of J.P. Morgan, "including its Public Trading Analysis Implied Equity for Pharmacyclics, Selected Transaction Analysis, and Discounted Cash Flow Analysis." Nothing in the remainder of the court's written order, or in the court's statements on the record at the fairness hearing, suggests the court relied on the six non-existent categories of information in evaluating the request for approval of the settlement, or Griffith's objection. As Griffith concedes in Appellant's Opening Brief, Plaintiffs' moving pleadings discuss only the three categories of information included in the amended notice of settlement, including the declaration filed by Morris, which compares the Recommendation Statement to the Supplemental Disclosures. Similarly, Griffith's objection confirmed that the amended notice of settlement included only three categories of information; he discusses only those three categories.

We presume the trial court was aware of its own orders and considered only the three categories of information listed in the amended notice of settlement, and argued by the parties at the hearing, in approving the settlement. (See Evid. Code, § 664 [presumption that "official duty has been regularly performed"].) However, even if the

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supra, 129 A.3d at p. 894.) As discussed, *post*, under California law we find the trial court here had sufficient information to undertake the required analysis despite the fact Griffith and the other parties did not put the Recommendation Statement into evidence.

trial court believed there were additional categories of information included in the Supplemental Disclosures, it only addressed the three of those categories listed in the amended notice in issuing its order. In particular, the court indicated it relied on Morris's declaration, which addressed only the three categories of information included in the amended notice of settlement. To the extent the trial court considered the original notice of settlement, rather than the amended notice, it was not a prejudicial error, given there is no evidence the court relied on the first six categories of the original notice in approving the settlement, and thus is not a basis for reversal. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107-1109.)

We now turn to whether the trial court abused its discretion in approving the settlement, wherein Plaintiffs received the Supplemental Disclosures in exchange for a release of their known and unknown claims against Defendants. Griffith contends the trial court did abuse its discretion, arguing the Supplemental Disclosures did not meet the materiality requirement of *Trulia*. In *Trulia*, the Delaware Court of Chancery[14] warned, "practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the Supplemental Disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently. In using the term 'plainly material,' I mean that it should not be a close call that the supplemental information is material as that term is defined under Delaware law." (*Trulia*, *supra*, 129 A.3d at p. 898, fn. omitted.) "Delaware has adopted the standard of materiality used under the federal securities laws. Information is material

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[14] "The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity." (Del. Code Ann. tit. 10, § 341.) "The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State." (Del. Code Ann. tit. 10, § 342.)

'if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.'[15] In other words, information is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alter[s] the "total mix" of information made available.' [Citation.]" (*Id*. at p. 899, fn. omitted.) Regarding advice received by the board of a directors from a financial advisor, Delaware law provides that stockholders are "entitled to receive . . . 'a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely.' " (*Id*. at p. 900, fn. omitted.) The summary need not contain all of the information the financial advisor relied on, nor does it have to give the stockholders sufficient information to perform their own independent valuation of the proposed acquisition; it should contain "an accurate description of the advisor's methodology and key assumptions." (*Id*. at p. 901, fn. omitted.)[16]

In *Trulia*, the court raised a concern that the posture of the case as a settlement versus a fully litigated resolution put the judge in the position of having to "become essentially a forensic examiner of proxy materials so that it can play devil's advocate in probing the value of the 'get' for stockholders in a proposed disclosure settlement," noting that in a litigated action, the defendants, "armed with the help of their financial advisors, would be quick to contextualize the omissions and point out why the missing

[15] "*Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del.1985) (adopting materiality standard of *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976))." (*Trulia*, *supra*, 129 A.3d at p. 899, fn. 50.)

[16] In Appellant's Opening Brief, Griffith posits that the law requires that a disclosure contain both positive and negative information about the acquisition in order to be considered "material." He cites two law review articles, one of which Griffith co-authored (Jill E. Fisch et. al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform* (2015) 93 Tex. L.Rev. 557, 575 (hereafter Fisch)), to support the contention, without citing any corresponding California or Delaware legal authority; we are not aware of any such requirement in the law applicable to the instant matter.

details are immaterial (and may even be unhelpful) given the summary of the advisor's analysis already disclosed in the proxy. In the settlement context, however, it falls to law-trained judges to attempt to perform this function, however crudely, as best they can." (*Trulia*, *supra*, 129 A.3d at p. 894.) Here, the trial court was not without the assistance of a financial expert in evaluating whether the Supplemental Disclosures provided material information to the shareholders—Plaintiffs provided Morris's declaration, which the trial court considered in its analysis, noting the detail Morris provided regarding the value of the Supplemental Disclosures to the shareholders. Griffith did not object to the trial court doing so, nor did he provide contradictory testimony from his own expert.[17]

Morris's declaration serves as substantial evidence to support the trial court's finding that the Supplemental Disclosures "provided material information going directly to each Class member's ability to assess the value of [Pharmacyclics] and the future of [IMBRUVICA]."[18] Morris identified areas in which the Supplemental Disclosures

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[17] At the fairness hearing, Griffith's attorney noted Plaintiffs provided Morris's declaration in reply to Griffith's objection, rather than as part of the initial motion to approve the settlement. When the attorney suggested he would have provided a detailed response to Morris's declaration had it been provided with the initial motion, the trial court pointed out that the attorney could have submitted a declaration, or a request for leave to file a supplemental declaration, which the attorney did not do. Nor did the attorney seek a continuance of the hearing to do so, or otherwise object to the trial court proceeding with the fairness hearing.

[18] In making its findings, it is not clear if the trial court presumed the fairness of the settlement under *Dunk* and *Wershba*. The trial court cited both cases in its July 21, 2016 order after the final fairness hearing, noting these cases create a presumption of fairness if certain criterion are met. The trial court never explicitly stated that it applied the presumption in approving the settlement. We need not consider whether the court applied the presumption or did so properly; the evidence produced by Plaintiffs at trial and included in the record on appeal supports the trial court's finding that the Supplemental Disclosures provided material information to the shareholders, and that the settlement was fair and reasonable. Thus, even without application of the presumption, the burden would have shifted to Griffith to rebut the showing of fairness.

provided information not included in the Recommendation Statement, and explained why the missing information was material to the shareholders. He concluded that the Recommendation Statement omitted or provided incomplete information which, once included in the Supplemental Disclosures, revealed the financial advisor's potential undervaluation of Pharmacyclics' stock value. The Recommendation Statement did not include explanation for the advisors' use of faster decline rates than were typical; the Supplemental Disclosures showed that the advisors used those rates based on the assumption certain patents would expire, leading to competition from generics. The Recommendation Statement also lacked information about the risk-adjustment management used in making the financial projections the advisors relied on in their analyses, information that, once included in the Supplemental Disclosures, could further suggest to shareholders that the evaluations undervalued the stock. The Morris declaration, including his description of the Recommendation Statement, and the Supplemental Disclosures, provides substantial evidence to support the implied finding that the summary of the financial advisor's substantive work included in the Recommendation Statement did not include "an accurate description of the advisor's methodology and key assumptions." (*Trulia*, *supra*, 129 A.3d at p. 901, fn. omitted.)

Griffith believes the Recommendation Statement included a fair summary of Centerview and J.P. Morgan's analysis, such that the information provided in the Supplemental Disclosures added only "extraneous 'arcane' minutiae" that essentially substituted a "fair summary" with "prolix 'density' while sacrificing actual clarity." In *Trulia*, the Delaware court concluded a list of data underlying the financial advisor's analysis was not material where the initial disclosures already included a fair summary of that analysis. (*Trulia*, *supra*, 129 A.3d at pp. 900-901.) The court compared the initial disclosures to the supplemental disclosures, and determined much of the information was

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(*Carter*, *supra*, 224 Cal.App.4th at p. 820; *7-Eleven*, *supra*, 85 Cal.App.4th at pp. 1165-1166; *Dunk*, *supra*, 48 Cal.App.4th at p. 1800.)

already provided in the initial disclosure, and that the initial disclosure fairly summarized the advisor's methodology and assumptions. (*Id*. at pp. 902-907.) It is clear the Delaware trial court undertook a side-by-side comparison of the initial and supplemental disclosures, given its citation to specific pages from each in its ruling. The Delaware court also received an expert declaration in support of the request to approve the settlement in *Trulia*; the court's opinion provides limited discussion of what information that expert included in his declaration, but to note that in one regard the court found the expert failed to explain why new information contained in the additional disclosures at issue in *Trulia* either undermined the financial advisor's opinion or was "otherwise informative" based on statements made by the financial advisor indicating their analysis was "not strictly quantitative in nature." (*Id.* at p. 905, fn. 79.)

By comparison, in the instant matter, neither Griffith nor the other parties introduced the Recommendation Statement into evidence for the fairness hearing. Rather, Plaintiffs provided Morris's declaration, which specified information both included in, and, more importantly, missing from, the Recommendation Statement relevant to the trial court's evaluation of the fairness of the proposed settlement. The ruling in *Trulia* does not provide sufficient information about the expert's declaration provided in that case to determine whether it would have sufficed to support the Delaware court's analysis of the disclosures had the court not had both the initial and supplemental disclosures before it at the time of its analysis.

While Griffith argues the information contained in the Supplemental Disclosures was not material, he does not cite to evidence in the record on appeal contradicting Morris's opinion. As already indicated, Griffith did not object to Morris's description of the Recommendation Statement, nor did he object to the trial court proceeding without having a copy of the Recommendation Statement in evidence. Moreover, he did not provide contradictory evidence to rebut Morris's testimony and opinion that the Supplemental Disclosures provided material information to the class. Unlike the

circumstances in *Trulia*, where the Delaware court found much of the allegedly material information from the supplemental disclosures was already provided in the initial disclosure, here Morris declared there was material information missing from the Recommendation Statement that was later provided in the Supplemental Disclosures. Morris's declaration also provided information about the Recommendation Statement from which the trial court could reasonably find that statement did not include a fair summary of the financial advisors' key assumptions and methodology, which was not the case in *Trulia*. The trial court had information required for it to make an "independent assessment of the adequacy of the settlement terms" (*Kullar*, *supra*, 168 Cal.App.4th at p. 132), despite the fact that the Recommendation Statement was not in evidence. This distinguishes the matter before us from other cases cited by Griffith where such information was lacking. (See *Clark*, *supra*, 175 Cal.App.4th at pp. 801-803 [record before trial court did not contain information required for it to independently evaluate the fairness of a proposed settlement]; *Kullar*, *supra*, 168 Cal.App.4th at p. 131 [trial court erred by not considering data exchanged during the course of mediation which was necessary to evaluate sufficiency of settlement].)

Griffith maintains the information in the Supplemental Disclosures, even if new, does not meet the requirement for materiality because there is not a "substantial likelihood that the newly disclosed information would [have] cause[d] a reasonable investor to behave differently, such as by changing his or her vote[.]" (Citing *Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc.* (2010) 180 Cal.App.4th 1542, 1553.) He does not cite any evidence in the record on appeal to support this claim. He suggests the fact the "vast majority of stockholders approved the transaction, and the plaintiffs themselves agreed to drop any claims regarding the adequate price in the settlement," confirms the Supplemental Disclosures "did not provide information by which stockholders concluded that the tender offer price was unattractive . . . ."

Griffith also references an opinion out of the Seventh Circuit of the United States Court of Appeals, in which the court found "little reason to believe that disclosure-only settlements *ever* affect shareholder voting," by referencing the law review article co-authored by Griffith. (*In re Walgreen Co. Stockholder Litigation* (7th Cir. 2016) 832 F.3d 718, 723 (*Walgreen*), citing Fisch, *supra*, 93 Tex. L.Rev. at pp. 561, 582-591.) In *Walgreen*, the Court of Appeals found the substance of six supplemental disclosures at issue to be "trivial" and "worthless," finding the information was readily available or discernable to shareholders without the supplemental disclosures, either through common sense, or because of the previously provided disclosures, and/or that there was no indication the supplemental information could have had an effect on the subject transaction. (*Walgreen*, at pp. 722-723.) The court determined, "It is not to be believed that had it not been for those disclosures, not 97 percent of the shareholders would have voted for the reorganization but 100 percent or 99 percent or 98 percent," revealing it made a direct correlation between the nature of the information in the supplemental disclosures and likelihood the information would affect the shareholder's vote. (*Id*. at p. 724.) Notably, the appellate court's opinion reveals the trial court approved the *Walgreen* settlement without the benefit of an expert. (*Ibid*. ["[The district judge] remarked that 'in the future, especially if there are issues like this [financial issues concerning a $15 billion transaction], hearing from someone who's not a lawyer who could explain to me that [the supplemental disclosures] mattered would have been very, very helpful.' "].)

In contrast, here the evidence, notably an expert's declaration, supported the trial court's finding that the Supplemental Disclosures provided material information to the shareholders, allowing them to "make an informed decision whether to tender their shares in the Acquisition or seek statutory appraisal of their shares." To the extent the trial court believed that had it not been for the Supplemental Disclosures more than 87 percent of

the outstanding shares would have been tendered into the acquisition, substantial evidence supports that finding.

Griffith's position regarding the effect of the Supplemental Disclosures on the shareholder vote is akin to that rejected by the Fourth District Court of Appeal in *Dunk*, wherein they found "[t]he objectors' 'proof' [that the proposed settlement was valueless because only a small percentage of the class would benefit] was composed of a combination of their common sense, reference to the expert testimony in [a similar Federal class action lawsuit] and experiences in other cases." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1804, fn. omitted.) The *Dunk* court ruled, "[t]his is not the type of rebuttal that would merit an appellate court overturning the trial court's finding." (*Ibid*., fn. omitted.) The same is true here. Given the state of the evidence before us, we see no basis to determine the trial court abused its discretion in finding that the Supplemental Disclosures provided material information to the shareholders.

4. The Release Was Not Overly Broad in Relation to the Benefit Received by the Class

The trial court did not expressly find, in its order approving the settlement, that the Supplemental Disclosures served as appropriate consideration for the release of claims negotiated by the parties. However, by approving the settlement, the trial court implicitly made such a finding. (See *Kullar*, *supra*, 168 Cal.App.4th at p. 129.) Relying primarily on the *Trulia* opinion, Griffith argues the trial court abused its discretion in doing so, contending there was inadequate evidence Plaintiffs' counsel conducted sufficient investigation to support the broad release imposed on the shareholder class by the settlement.

In *Trulia*, the Delaware court determined not only that the additional disclosures were not material, they were not "even helpful to Trulia's stockholders, and thus the proposed settlement does not afford them any meaningful consideration to warrant providing a release of claims to the defendants." (*Trulia*, *supra*, 129 A.3d at p. 887.) In

rejecting the settlement, it described the discovery undertaken prior to the fairness hearing as follows: "In this case, . . . discovery was limited to the production of less than 3,000 pages of documents and the taking of three depositions, two of which were taken before the parties agreed in principle to settle and one of which was a 'confirmatory' deposition taken thereafter.[19]" (*Id*. at p. 893, fn. omitted.)

In *In re Sauer-Danfoss Inc. Shareholders Litigation* (Del. Ch. 2011) 65 A.3d 1116 (*Sauer-Danfoss*), also cited by Griffith, the Delaware court, in evaluating a request for attorneys' fees in a mooted shareholder lawsuit, found that one of twelve supplemental disclosures was material, but then determined the plaintiffs' counsel deserved a lower amount of attorneys' fees. "When an entrepreneurial plaintiffs' firm engages in adversarial discovery, obtains documents from third parties, pursues motions to compel, and litigates merits-oriented issues, they are likely representing the interests of the class. [Citations.] By contrast, '[i]f cases are filed, sit idle for extended periods of time, and then settle or are dismissed without evidence of any action by the plaintiffs' attorneys, the claim could be made that these cases amount to little more than a sale [or an attempted sale] of a release of all potential claims in litigation.' [Citation.]" (*Id*. at p. 1139.) Counsel in *Sauer-Danfoss* "conducted no adversarial discovery and obtained only the standard package of documents that defendants routinely provide to facilitate a disclosure-only settlement. Then they bargained for insubstantial disclosures. The absence of effort and the interest in settlement reinforces the appropriateness of a low award . . . ." (*Ibid*.) Griffith asks this court to equate the efforts of Plaintiffs' counsel to

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[19] " 'Confirmatory' discovery is discovery taken after an agreement-in-principle to settle a case has been reached. Theoretically, it is an opportunity for plaintiffs' counsel to 'confirm' that the settlement terms are reasonable—that is, to probe further the strengths and weaknesses of the claims relative to the consideration for the proposed settlement. In reality, given that plaintiffs' counsel already have resigned themselves to settle on certain terms, confirmatory discovery rarely leads to a renunciation of the proposed settlement and, instead, engenders activity more reflective of 'going through the motions.' [Citations.]" (*Trulia*, *supra*, 129 A.3d at p. 887, fn. 24.)

those in *Trulia* and *Sauer-Danfoss*, and to find that the amount of investigation and discovery into Plaintiffs' claims was insufficient to justify the release negotiated in the settlement. We decline to do so.

First, the trial court here did not find the Supplemental Disclosures to be immaterial or insubstantial, as did the courts in *Trulia* and *Sauer-Danfoss*. The court described the additional information as "material . . . going directly to each Class member's ability to assess the value of the Company and its sole marketed product . . ." and "important in assisting the shareholders in deciding how to vote in this particular case involving a pharmaceutical company with one marketed product." While the court did find the additional information was "not so significant as to warrant a multiplier of three to the lodestar amount" in evaluating the negotiated amount of attorneys' fees, it did not discount the information's value as the *Trulia* and *Sauer-Danfoss* courts did.

Second, there are factual differences between the investigation conducted by the Plaintiffs here, and those in *Trulia* and *Sauer-Danfoss*. The plaintiffs in *Sauer-Danfoss* "did not seek any relief or otherwise try to litigate" after filing their complaints; "[i]nstead, they waited for a transactional development that might provide a basis for settlement." (*Sauer-Danfoss*, *supra*, 65 A.3d at p. 1120.) Approximately three months after filing the lawsuits, the parties began discussing settlement. "They entered into a confidentiality agreement, and the defendants agreed to produce some 2,000 pages of non-public documents. The package included the standard categories of documents that defendants routinely produce to facilitate a disclosure-only settlement: minutes; financial presentations; and communications between the Special Committee and Danfoss. The plaintiffs never filed any document requests or interrogatories, never took any depositions, and never engaged in anything resembling traditional, adversarial discovery. The transmittal and receipt of the standard package marked the only 'discovery' that took place in the litigation." (*Id*. at p. 1121.) As the companies involved ultimately decided not to proceed with the tender offer, the shareholder lawsuits became moot, leaving only

the question of whether the plaintiffs' counsel could obtain an award of attorneys' fees. (*Id*. at p. 1123.) The opinion in *Sauer-Danfoss* does not suggest the plaintiffs took any depositions or provided any information about the time or effort the attorneys spent investigating or negotiating before the matter became moot.

In *Trulia*, more than two months after filing the lawsuits, "plaintiffs reviewed documents produced by defendants and deposed one director of Trulia . . . and a banker from J.P. Morgan Securities LLC, Trulia's financial advisor in the transaction." (*Trulia*, *supra*, 129 A.3d at pp. 888-889.) The Delaware court does not specify how the plaintiffs came to obtain these additional documents, or what investigatory efforts they undertook leading to the depositions. Nor does the opinion indicate what investigation the plaintiffs undertook after reviewing the defendants' documents prior to entering into the settlement with defendants. The plaintiffs did take a confirmatory deposition of another Trulia director after the stockholders voted to approve the subject transaction. The parties to the litigation then entered into a settlement stipulation, which included "an extremely broad release encompassing, among other things, 'Unknown Claims'[20] and claims 'arising under federal, state, foreign, statutory, regulatory, common law or other law or rule' held by any member of the proposed class relating in any conceivable way to the transaction." (*Id*. at p. 889, fn. omitted.) None of the shareholders objected to the proposed settlement. Rather, the court granted Griffith's request to appear as *amicus curiae* to brief certain issues requested by the court. (*Id*. at p. 890.) The plaintiffs also briefed those issues; in addition they provided an affidavit from an expert addressing some but not all of the

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[20] " 'Unknown Claims' were defined as 'any claim that a releasing person does not know or suspect exists in his, her or its favor at the time of the release of the Released Claims as against the Released Persons, and at the time of Defendants' release of Plaintiffs, each and all Class Members, and all Plaintiffs' counsel from all claims as set forth in Paragraph 9, including without limitation those claims which, if known, might have affected the decision to enter into the Settlement.' [Citation.]" (*Trulia*, *supra*, 129 A.3d at p. 889, fn. 4.)

court's concerns. (*Ibid*.) The Delaware court determined the supplemental disclosures provided by the defendants in exchange for the plaintiffs' release of claims were not material and thus did not provide adequate consideration for the release. (*Id*. at p. 907.) Although the court discussed the nature of the plaintiffs' discovery leading to the settlement, and the general nature of discovery in disclosure-only settlements, it did not rest its ruling on any flaws in the plaintiffs' investigation of the claims.

Here, the trial court received evidence regarding Plaintiffs' counsel's efforts to investigate the claims prior to entering into the settlement agreement. Plaintiffs filed their complaints in mid-March 2015. Counsel reviewed the Recommendation Statement with a retained financial expert and determined there were issues with the disclosures. Because the tender offer was set to expire mid-April 2015, Plaintiffs' counsel immediately began negotiating with Defendants' counsel in an effort to obtain additional documents voluntarily on an expedited basis; Defendants produced such documents on April 1, 2015, including minutes from Pharmacyclics' Board meetings and presentations from the Board's financial advisors. After reviewing the documents with a retained financial expert, counsel determined the offer price was in the range of reasonableness, making it difficult to obtain monetary benefits; even if the offer was low, counsel found no evidence of malfeasance by the Board, such that counsel elected to pursue additional disclosures to assist shareholders in making a fully-informed decision about the tender offer. Notably, at the time they filed the complaints, Plaintiffs believed Johnson & Johnson had made a higher bid than AbbVie to acquire Pharmacyclics; after conducting discovery, they realized that was not the case. On April 3, 2015, Plaintiffs' counsel demanded additional disclosures from Defendants, including the financial projections prepared by management and the financial analyses of J.P. Morgan and Centerview. Defendants' responded shortly thereafter, leading to the discussions that resulted in the MOU and settlement agreement. At trial, counsel confirmed the information obtained in the settlement was not in the public domain. The evidence before the trial court showed

Plaintiffs' counsel took immediate action following the filing of the complaints and conducted discovery and investigation appropriate to analyze the fairness of the proposed settlement. Nothing in the record reveals an abuse of trial court's discretion in regard to its finding that counsel undertook "sufficient investigation and analysis of the breach of fiduciary claim to conclude that there was no viable claim for monetary damages."

Moreover, the record reflects the trial court's evaluation of other appropriate factors in determining there was sufficient consideration for the release at issue in this matter. (See *Wershba*, *supra*, 91 Cal.App.4th at pp. 244-245; *Dunk*, *supra*, 48 Cal.App.4th at p. 1801.) At the outset of the hearing, the court indicated its intent to obtain additional information to ensure the matter was fully investigated. The court also understood its duty to scrutinize the settlement to ensure an actual benefit to the unrepresented class members. The court questioned Plaintiffs' counsel about the ability of the reasonable shareholder to understand the benefit received from the Supplemental Disclosures; counsel provided information about the general level of sophistication of investors in pharmaceutical companies.

At the hearing, Griffith confirmed he was not contending that a viable claim for monetary damages existed; rather his concern was the broad nature of the release relative to the expedited nature of the investigation and discovery conducted. Defendants' attorney gave the court information about the expedited nature of tender offers versus the more commonly litigated merger agreement, noting that Defendants had incentive to resolve any discovery or investigation issues early, as the advantage of a tender offer is to minimize risk that the acquisition will be affected by changes in the financial markets, or other changes in the business that would cause one of the parties to the transaction not to want to go forward. The court had before it information about obstacles facing Plaintiffs in obtaining monetary or injunctive relief, as Wissbroecker's declaration addressed the fact that injunctions are an "extraordinary remedy," the board of directors' conduct might have been "shielded from substantive judicial scrutiny by the 'business judgment rule,' "

and the Pharmacyclics' certification of incorporation included an exculpatory provision shielding the board members from liability for monetary damages based on a breach of the duty of care. The trial court was free to engage in the balancing and weighing of factors based on the circumstances of the case (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801); Griffith has not shown that it abused its discretion in doing so.

5. Conclusion

It is clear from his pleadings that Griffith asks this court to engage in broad conclusions about the appropriateness of disclosure-only shareholder class action settlements in California by adopting the analysis of the Delaware Court of Chancery in *Trulia*.[21] Because of the procedural and evidentiary posture of the instant matter, we need not address the application of Delaware law at this time, as we are limited to the evidence presented by the parties in the trial court, and the record designated by the parties on appeal. We thus make no comment regarding best practices in disclosure-only settlements or whether Delaware standards should apply to these cases in California courts.[22] Rather, we hold that the trial court in the instant action did not abuse its discretion in approving the subject settlement, and affirm the judgment accordingly.

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[21] After this appeal was fully briefed, Griffith brought to our attention a recent opinion out of this court, *Drulias v. 1st Century Bancshares, Inc.* (2018) 30 Cal.App.5th 696 (*Drulias*). Griffith cited the underlying trial court action in *Drulias* in both his opening and reply briefs, offering it as an example of a California trial court that has adopted the reasoning of *Trulia*; the trial court declined to approve a stipulated class action settlement on the grounds the supplemental disclosures were not plainly material. (*Id*. at p. 701.) Our opinion in *Drulias* does not address the propriety of disclosure-only settlements; it concerns the enforceability in California of a forum selection bylaw adopted by a Delaware corporation without stockholder consent. (*Id*. at p. 699.) In finding such a bylaw to be enforceable, we referenced *Trulia* for the proposition that almost every public announcement of an acquisition transaction provokes class action lawsuits. (*Id*. at p. 709, citing *Trulia*, *supra*, 129 A.3d at p. 891.) We did not otherwise adopt the reasoning of *Trulia*, or make any additional rulings that would affect the outcome of the appeal here.

[22] As we are not determining whether the trial court was required to apply the *Trulia* standard, we will similarly not address Defendants' argument that *Trulia* should

D. Attorneys' Fees Order

Under the terms of the proposed settlement agreement, Defendants agreed to pay Plaintiffs' counsel $725,000 for attorneys' fees and expenses. The trial court reduced the award to $486,205 in attorneys' fees and $22,953.62 in costs and expenses. Griffith alleges the trial court abused its discretion when it allowed Plaintiffs to recover even the reduced amount of fees, given what he believes was the limited benefit obtained to the class via the settlement.

"[T]he fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award. [Citation.] We review the determination using an abuse of discretion standard. [Citation.]" (*Dunk*, *supra*, 48 Cal.App.4th at p. 1809.) The " 'lodestar' " or " 'touchstone' " method is one approach a trial court may use in evaluating fees in a class action settlement; under this method, " 'the court calculates base amounts from a compilation of time spent and reasonable hourly compensation of each attorney and then may adjust the base amounts in light of various factors. [Citations.]' [Citation.][23] To withstand scrutiny on appeal when this method is used, the record need only show the court awarded fees using that approach. [Citation.]" (*Id*. at p. 1810; *Wershba*, *supra*, 91 Cal.App.4th at p. 254.) The trial court is not required to make specific findings reflecting its calculations; we infer all findings in favor of the prevailing parties. (*Wershba*, at p. 254.)

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not apply because the opinion had not yet been issued at the time the parties entered the settlement agreement.

[23] "Some of those factors, relevant to this case, are: '(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; [and] (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award . . . .' (*Serrano v. Priest* [(1977) 20 Cal.3d 25] at p. 49, 141 Cal.Rptr. 315, 569 P.2d 1303 [*Serrano*].)" (*Dunk*, *supra*, 48 Cal.App.4th at p. 1810, fn. 21.)

The record indicates the trial court applied the lodestar approach. Although their declarations are not part of the record on appeal, there is no dispute the trial court reviewed declarations from Plaintiffs' counsel regarding the amount of time spent prosecuting the consolidated cases and the attorneys' respective hourly rates, resulting in the lodestar of $243,102.50. We presume the trial court's order to be correct; Griffith bears the burden of demonstrating the trial court's error based on the record. (*Jameson*, *supra,* 5 Cal.5th at p. 609.) Where any matter could have been presented to the trial court that would have authorized the order under review, we will presume it was presented; Griffith has the burden of providing an adequate record, and his failure to do so on a given issue requires that the issue be resolved against him. (*Ibid*.)

At the final fairness hearing, the trial court indicated it would not "automatically apply a multiplier of three," as proposed in the settlement agreement, "[b]ecause this is not a case where the change [in information provided by the Supplemental Disclosures] was so dramatic, and the change was so significant," that it would justify such a multiplier. In its written order approving the settlement, the trial court confirmed its duty to consider the overall benefit to the class in assessing the reasonableness of the fee request, as well as its independent right and responsibility to review the request; the record reflects it undertook such a review, looking at the "facts and circumstances" of the case. Given that an experienced judicial officer is the best judge of the value of attorney services rendered in his or her court, the record reflects the proper application of the lodestar approach, and there is nothing in the record revealing the trial court's evaluation to be "clearly wrong," we find no abuse of discretion and affirm the attorneys' fees order. (*Serrano*, *supra*, 20 Cal.3d at p. 49; *Wershba*, *supra*, 91 Cal.App.4th at p. 255.)

III. DISPOSITION

The Final Judgment filed October 31, 2016, is affirmed.

Greenwood, P.J.

WE CONCUR:

Premo, J.

Elia, J.