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NO. H044087

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,
Objector-Intervenor-Appellant.

On Appeal from the Santa Clara County Superior Court,
The Hon. Peter H. Kirwan, Case No. 1-15-CV-278055

REPLY BRIEF OF APPELLANT SEAN J. GRIFFITH

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INTRODUCTION

Appellees don't dispute that disclosure-only settlements in deal litigation plague the litigation landscape and impose a socially wasteful "merger tax." Nor do they dispute that while California law applies to the *procedure* for settlement approval, Delaware applies to the *substantive* issue of the value of the relief, *i.e.*, the Supplemental Disclosures. (*E.g.*, DRB23; PRB17.)[1] Defendants nevertheless contend that the Delaware standard announced in *In re Trulia, Inc. Stockholder Litigation* ("*Trulia*") (Del. Ch. 2016) 129 A.3d 884 should not apply. (DRB26-27.) This is wrong. But it is also not the dispositive question in this appeal because under either California or Delaware law, the superior court erred by approving the settlement and attorneys' fee award where the only "benefits" provided to shareholders—the Supplemental Disclosures—were utterly valueless.[2]

Appellees raise multiple arguments to distract from the question at the heart of this appeal: whether the Supplemental Disclosures were material and thereby provided a material benefit to the shareholder class. Absent materiality, any benefit is illusory, and the settlement cannot be approved as fair, reasonable,

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[1] AOB, PRB, and DRB refer to appellant Griffith's opening brief, the plaintiffs' response brief, and defendants' response brief respectively.

[2] The Supplemental Disclosures (or "Supp. Discl.") are attached as Exhibit C to the Stipulation of Settlement, which is attached as Exhibit 2 to the Declaration of Anna St. John filed with the Motion to Augment the Record (filed July 24, 2018; granted July 25, 2018).

and adequate. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-01; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) Faced with appellant Sean Griffith's detailed demonstration that the Supplemental Disclosures are deficient as a matter of law and common sense, appellees largely ignore that analysis in favor of false *ad hominem* attacks on Griffith, lengthy quotations from the superior court's fairness hearing intended to distract from the court's erroneous conclusions based on its erroneous understanding of the disclosures, and attempts to persuade this Court that the materiality of the settlement relief doesn't matter.

In the mere three paragraphs in which plaintiffs finally do respond to Griffith's substantive analysis, they fail to show that any of the Supplemental Disclosures were necessary to provide shareholders with a "fair summary" of the financial advisors' analyses or were anything more than minutiae that did not alter the "total mix" of information upon which shareholders decided their vote.

While defendants take no position on attorneys' fees, plaintiffs do not dispute that a fee award should be in proportion to the benefit provided to the class by the settlement. Therefore, if the Court affirms settlement approval, it should significantly reduce plaintiffs' fee award to correlate with the nominal settlement benefit.

ARGUMENT

I. Appellees are wrong about the law and the superior court's ruling.

A. Appellees' cherry-picked description of the superior court's analysis fails to rebut its fundamental errors of fact and law.

Both sets of appellees spend substantial pages detailing the superior court's comments and attempting to divine its thought processes at the settlement fairness hearing and in the final approval order. From this, the main line of opposition both appellees present is that the superior court supposedly "carefully considered" the non-exclusive factors set forth in *Dunk*, *supra*, 48 Cal.App.4th 1794, and therefore the court could not have abused its discretion by approving the settlement and awarding attorneys' fees. (*See, e.g.*, PRB14; DRB18.) This argument fails.

While close scrutiny of a settlement is a necessary condition for settlement approval, it is not sufficient. Regardless of how careful the superior court's scrutiny may have been, a decision "that implicitly or explicitly rests on an erroneous reading of the law necessarily is an abuse of discretion." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.) Likewise, conclusions of fact must be supported by substantial evidence, and a decision that rests on facts without such support is an abuse of discretion. (*See In re Charlisse C.* (2008) 45 Cal.4th 145, 159.) Here, the superior court's conclusions fail on both grounds.

Under a generous reading of the court's order, the only instances in which the superior court observed the potential materiality of the benefit to the shareholder class were:

(1) based on a clearly erroneous misunderstanding of the scope of the disclosures (AOB34; *see* 2 CT 380-81); and

(2) erroneous as a matter of law (*see* AOB40-52).

With respect to (1), no one contends that the superior court's description of the Supplemental Disclosures in the final approval order at issue in this appeal (or elsewhere in the record) was accurate. Instead, appellees say the superior court "carefully considered" and "independently analyzed" the settlement terms (*e.g.*, DRB17; PRB3), brushing aside the superior court's indisputably wrong description of the fundamental facts upon which its decision rests. They shamelessly claim the description—contained in nearly an entire paragraph of the final approval order (2 CT 380-81) and based on erroneous briefing by the plaintiffs (*see* 2 CT 361)—was simply a "typo" (DRB17) or "clerical error" (PRB17 n.10).

Further contradicting their claim that the superior court's review was careful and complete, neither appellee disputes that the superior court failed to compare the Supplemental Disclosures to the Recommendation Statement.[3] Without conducting this analysis, the superior court could not determine whether the Supplemental Disclosures in fact provided any material information in addition to what Pharmacyclics had already disclosed. (*See Trulia*

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[3] The superior court was well aware of the Recommendation Statement but nevertheless failed to perform this analysis. (*See, e.g.*, 2 CT 381; 2 CT 379.) California Rule of Court 8.252 expressly contemplates reviewing courts taking judicial notice in these circumstances. (*See* Griffith's Motion for Judicial Notice; *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265.)

129 A.3d at 894.) Nor do appellees dispute that such a step is "surely necessary to determine whether the Supplemental Disclosures altered the 'total mix' of information provided to the class." (*See* AOB53.) (For this reason, the Recommendation Statement is relevant as a comparison point for the Supplemental Disclosures, to show what information was previously disclosed to shareholders. No one is proffering information from the Recommendation Statement for the truth in this appeal. (*Contra* Pls.' Opp. to Griffith's Mot. For Judicial Notice.)) Appellees' cherry-picking from the proceedings cannot hide the court's errors.

With respect to (2), the superior court found that "the Supplemental Disclosures did not remedy any misleading or inaccurate information in the original proxy and did not change the analyses, but simply provided additional information which helped inform the shareholders prior to the vote." (2 CT 384; *see also* 2 CT 383 ("supplemental disclosures did not ultimately change or modify the valuations set forth in the original proxy statement").) From this, the superior court further noted that the Supplemental Disclosures "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)." (2 CT 383.) In other words, the information was at best helpful in allowing stockholders to perform their *own valuation assessment*. The superior court thus committed factual and legal error. Factually, the court misunderstood the content of the Supplemental Disclosures. (*See supra*.) As a matter of law, "[o]mitted facts are not material simply because they might be

helpful." (*Skeen v. Jo-Ann Stores, Inc.* (Del. 2000) 750 A.2d 1170, 1174; *see also* AOB40-42.). Instead, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." (*TSC Industries, Inc. v. Northway, Inc.* (1976) 426 U.S. 438, 449.) "Helpful" information that confirms what stockholders already know does not alter that "total mix."

Appellees are thus wrong that the superior court's decision should be affirmed due to its purportedly careful analysis. The superior court failed to properly analyze the settlement benefit and demonstrably misunderstood its scope. These errors require reversal or, at a minimum, remand for a proper analysis.

B. Regardless of whether *Trulia* applies, the settlement cannot survive review under California or Delaware law.

Plaintiffs agree with Griffith that Delaware substantive law applies to the question of whether defendants were required to make the Supplemental Disclosures—in other words, if those disclosures were material. (PRB17; 1 CT 48:28, 49:20-23.) Before Objector appeared, they maintained that that "[i]t is a well-established principle that shareholders are entitled to be fully informed of all material facts pertaining to transactions that require their approval," and cited Delaware decisions in support of their view that the "information disclosed in the Supplemental Disclosures is material and important to shareholders." (1 CT 48.) (Of course, they made this admission in their motion for final approval of the settlement, where they failed to even cite *Trulia*. (*See id.*))

While defendants similarly don't object to the application of Delaware substantive law, they take the odd position that *Trulia* should not apply even though the Delaware Chancery Court had issued the decision months before the superior court approved the settlement at issue in this case. (DRB31-32.) They argue that even if this Court adopts *Trulia*, the Court should refrain from applying its holding here and instead apply the Delaware standard that previously existed. But courts are tasked with reviewing the fairness and reasonableness of class action settlements, and they do so according to the law existing at the time of their review in order to best protect class members. (*See Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 981-82.) In any event, as plaintiffs point out, *Trulia* did not announce a new standard but rather announced that the court would increase its scrutiny of the existing materiality standard of *TSC Industries, supra*, 129 A.3d at p. 899. This scrutiny is entirely consistent with existing California law. (*See infra*.) If the settlement benefit is immaterial and provides only nominal relief to class members, the settlement should be rejected no matter which state's law the court applies.

Defendants do not rebut Griffith's position that the Supplemental Disclosures are immaterial and, in fact, defendants have steadfastly refused to acknowledge that they are material. (*See* Stip. of Settlement at p. 5.) To nevertheless salvage the settlement, defendants try to wriggle out of the *Trulia* box by further claiming that California procedural law does not require a finding that the benefit to the class is material. This, too, is wrong. Notably, they cite no supporting authority for this novel proposition. California courts must

determine that the benefit to the class is reasonable (*Kullar*, *supra*, 168 Cal.App.4th at p. 129), as defendants acknowledge (DRB23), and, as a matter of law, a benefit that is immaterial or illusory is not reasonable. (*Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 651-52.) Trial courts in California have followed this blueprint, rejecting settlements providing immaterial relief and expressly invoking *Trulia*'s materiality standard in cases involving Delaware companies. (*See* Furbush, *Silicon Valley Court Signals Increased Scrutiny of Disclosure-Only Settlements of Merger Objection Litigation* (Oct. 9, 2017)[4] (citing *Drulias v. 1st Century Bancshares*, Case No. 16-CV-294673, and *Anderson v. Alexza Pharmaceuticals*, No. 16-CV-295357).)

To determine whether the Supplemental Disclosures meet the standard for settlement approval, we thus look to Delaware substantive law and, in particular, the plainly material standard of *Trulia*. But even under California law, this Settlement cannot stand: A settlement is not fair or reasonable and therefore may not be approved where the class members release their claims in exchange for illusory or immaterial benefits such as the Supplemental Disclosures here.[5] (*Duran*, *supra*, 1 Cal.App.5th at pp. 651-52; *Dunk*, *supra*, 48 Cal.App.4th at 1800-01 (stating fair, adequate, and reasonable standard).)

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[4] *Available at* https://www.pillsburylaw.com/en/news-and-insights/trulia-standard-gains-traction.html.

[5] Plaintiffs-appellees are wrong that "[t]here is no dispute that Judge Kirwin properly applied California law." (PRB13.) Griffith stated clearly that "as a matter of law and regardless of whether this Court fully adopts *Trulia*'s reasoning, the settlement here should not have been approved because it is not

C. The Supplemental Disclosures are not material, much less "plainly material."

Appellees fail to counter Griffith's showing that the Supplemental Disclosures are not material, much less "plainly material." And they make no effort whatsoever to rebut the systemic abuse wrought by disclosure-only settlements that Griffith detailed in his opening brief. Yet they ask this Court to reject a standard that has demonstrably helped reduce merger-tax litigation in those courts that have adopted it. (*See* AOB12-13, 15-16.) Appellees would have California courts continue to approve settlements of meritless strike suits in exchange for nominal benefits, a state of affairs that benefits both appellees but comes at the expense of shareholders. It will increase the burden on California courts and taxpayers from unscrupulous forum-shopping plaintiffs' attorneys looking for easy approval of meritless suits. The status quo allows plaintiffs' attorneys to use shareholder class members' claims to collect six-figure attorneys' fees in public company mergers, while defendants can buy claim releases through quick and relatively cheap settlements to prevent delays in the transaction. Meanwhile, class members are left with nothing. "The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." (*In re Walgreen Stockholder Litigation* (7th Cir. 2016) 832 F.3d 718, 724.)

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fair or reasonable"—a standard applicable under both California and Delaware law. (*See* AOB14; *see also* AOB36.)

1. The shareholder vote provides dispositive evidence that the Supplemental Disclosures were not material.

Appellees repeatedly cite the superior court's statement that, "[w]hile there is no evidence that the original proxy statement was misleading in terms of the fairness analysis," the "additional information" in the Supplemental Disclosures "was important in assisting the shareholders in deciding how to vote in this particular case." (*See* DRB27-28 (quoting 2 CT 383); PRB22 (same).) But "[d]isclosures are meaningful only if they can be expected to affect the votes of a nontrivial fraction of the shareholders." (*Walgreen*, *supra*, 832 F.3d at p. 723 (citing *TSC Industries*, *supra*, 426 U.S. at p. 449).) Under longstanding U.S. Supreme Court precedent, this means that "the omitted fact [must] have assumed actual significance in the deliberations of the reasonable shareholder." (*TSC Industries*, *supra*, 426 U.S. at p. 449; *see also Trulia*, *supra*, 129 A.3d at p. 899.) "[R]recent empirical work … shows that there is little reason to believe that disclosure-only settlements *ever* affect shareholder voting." (*Walgreen*, *supra*, 832 F.3d at p. 723 (emphasis in original) (citing Jill E. Fisch, et al. (2015) *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557, 561, 582-91).)

Unlike in some cases, the Court needn't speculate whether a reasonable shareholder would find an omission material: the shareholder yawn that greeted the Supplemental Disclosures, and the overwhelmingly approval of the merger (*see* DRB7; 1 CT 111), is empirical proof that shareholders did not consider the Supplemental Disclosures material, much less plainly material. When a

supplemental disclosure has no material effect on shareholders' votes, its only consequence is to create the illusion of relief to rationalize attorneys' fees. This Court should see through this illusion. (*Cf. Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 396 (non-pecuniary benefit "must be something more than technical in its consequence" (quoting *Bosch v. Meeker Cooperative Light & Power Association* (Minn. 1960) 101 N.W.2d 423, 425-27)).)

2. Plaintiffs' attempt to show the disclosures' materiality falls flat.

Griffith provided painstakingly detailed analysis of each of the Supplemental Disclosures. (*See* AOB19-28, 43-52.) Defendants don't claim the Supplemental Disclosures were material, and plaintiffs' feeble attempt to show their materiality fails.

First, in wrongly claiming that "[t]here is no dispute" on certain general points, plaintiffs rely exclusively on unpublished and pre-*Trulia* decisions with individualized facts that don't support their position. (PRB17.) For example, *Zirn v. VLI Corp.* (Del. 1996) 681 A.2d 1050, 1053, involved a partial disclosure that left shareholders with an unduly bleak impression of the company's prospects for reinstatement of a critical patent such that it was materially misleading and thus "impeded the stockholders' ability to make an informed decision as to the merits" of the proposed transaction. The disclosures here did not impose any remotely comparable burden on Pharmacyclics stockholders. As another example, and in contrast to this case, *In re Netsmart Technologies, Inc. Shareholders Litigation* (Del. Ch. 2007) 924 A.2d 171, 202, involved disclosures of

projections that excluded two entire years of financial information from the relevant period analyzed by the company's financial advisor. *Maric Capital Master Fund v. PLATO Learning, Inc.* (Del. Ch. 2010) 11 A.3d 1175 involved a transaction where the proxy misleadingly stated that discount rates used to conduct a discounted cash flow (DCF) analysis were based upon a weighted average cost of capital (WACC) analysis when, in fact, the WACC generated a different set of rates. *Maric* does not require every element of a DCF to be disclosed, but holds that, if an element is disclosed, the description of that disclosed element must be accurate. "Because the proxy statement spoke on this subject, there was a duty to do so in a non-misleading fashion." (*Id.* at p. 1177.) The superior court here did not find that any information disclosed to shareholders was inaccurate, or that the Supplemental Disclosures remedied a material omission in the Recommendation Statement. (2 CT 383.)

Plaintiffs also misleadingly state that "information developed and/or relied on by corporate insiders concerning a company's financial prospects is material" and "information disclosing the key assumptions underlying a banker's fairness analysis is material." (PRB17.) The actual legal standard is that directors must provide a "fair summary" to shareholders. (AOB43-44 (citing cases).) "The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions." (*Trulia*, *supra*, 129 A.3d at p. 901.) In that respect, plaintiffs-appellees are correct that "information that amounts to mere 'minutiae' is not material." (PRB17.)

Second, in response to Griffith's detailed showing that none of the information contained in the Supplemental Disclosures is material, plaintiffs respond with only some high-level generalities for three categories of disclosures. (PRB18-20.)

i. Comparable Companies and Comparable Transactions Analyses Performed by J.P. Morgan and Centerview (Supp. Discl. ¶¶ 3-18; AOB19-22, 45-49)

Plaintiffs essentially concede that the only information the Supplemental Disclosures provided with respect to the public company multiples analyses was the company-by-company itemization of multiples that underlay the summary of results disclosed to shareholders and the company or transaction excluded as an outlier. (PRB20 & n.14 (using euphemisms "actual metrics" and "concrete financials").) The case law overwhelmingly rejects that this sort of minutiae is material. *Trulia* held that individual company multiples are "trivialities" and found disclosure of such multiples was not only immaterial, but not even helpful. (*Trulia*, *supra*, 129 A.2d at p. 905.) Plaintiffs try to distinguish *Trulia* by claiming that there, unlike here, there was no argument "that the disclosure of the individual multiples provided shareholders concrete and reliable information to conclude that the bankers' inputs were unreasonably low and their market analyses undervalued the Company." (PRB25.) But in *Trulia*, plaintiffs did argue that the individual multiples were necessary to show the analysis was purportedly "less robust" than portrayed and further argued that EBITDA exit multiples were important disclosures because they did not

correlate with the different EBITDA growth rates of the merging companies and their peers. (129 A.2d at pp. 905, 907.)

Just as in *Trulia*, a closer examination shows that plaintiffs' alleged concerns that supposedly could be alleviated by disclosing the individualized company multiples don't bear out here. Contrary to plaintiffs' claims, the summary of the financial advisors' analyses *already* "allowed stockholders to compare Pharmacyclics and the Merger to these other companies and transactions" and *already* "demonstrate[ed] that Pharmacyclics ranked high compared to its peers" (PRB20); indeed, that was the whole point of the analysis and was self-evident from the results summarized in the Recommendation Statement. In particular, the Recommendation Statement showed that the $261.25 per share merger value exceeded each of the per share equity value ranges that Centerview and J.P. Morgan calculated from their public company multiples analyses. (*See* Rec. Stat. at p. 33 (showing Centerview calculated value ranges of $125.10 to $196.70, $152.80 to $224.70, and $183.30 to $231.70); *id.* at 38 (showing J.P. Morgan calculated value ranges of $163.00 to $230.00, $188.00 to $234.00, and $202.00 to $236.00).) (Notably, while plaintiffs assert that shareholders "could" "conclude or argue" that the financial advisors' analyses undervalued Pharmacyclics, plaintiffs themselves don't argue that point. (PRB21.) Rather, they were satisfied that the offer price was in the range of reasonableness. (1 CT 69:2-3; RT 6:1-13, 7:18-24.))

Even if plaintiffs (and the superior court) are right that some shareholders might have wanted to perform their own analysis, that doesn't

make the raw figures material. Here, that's especially true because shareholders had ready access to the data. (*See* AOB45-46.) Plaintiffs snark that Griffith's observation that the multiples they claim are material were readily available from public sources should not be credited because he "does not provide any evidence that the specific multiples here were publicly available … somewhere else in the universe." (PRB20 n.15.) But, the Recommendation Statement itself expressly stated that the multiples were "*based on publicly available information [the financial advisor] obtained from SEC filings*." (Rec. Stat. at p. 32 (emphasis added).) As Griffith explained in his opening briefs, the multiples are simply enterprise value/expected revenue and price-to-earnings ratios ("P/E," or "EPS," *i.e.*, earnings per share, as termed in the Recommendation Statement and Supplemental Disclosures). Plaintiffs cannot avoid the obvious: these figures are among the mostly widely available information for publicly traded stocks. (*See* AOB46 n.7.) As a matter of general public knowledge, the expected per-share price, enterprise value, and expected revenues are widely and publicly available, not only by referring to the financials reported in SEC filings but also on financial industry websites. For example, one can readily find public companies' enterprise value, expected revenues, and expected EPS by entering a stock symbol on sites such as Yahoo! Finance and reviewing the "Statistics" and "Analysis" pages. (*See, e.g.*, https://finance.yahoo.com/quote/ALXN/analysis?p=ALXN (reporting estimated earnings, revenues, and EPS for Alexion Pharmaceuticals, Inc.); https://finance.yahoo.com/quote/VRTX/analysis?p=VRTX (same for Vertex

Pharmaceuticals).) Because the Recommendation Statement disclosed the list of companies from which the financial analysts determined the range of multiples they used to compare the per-share value of the merger consideration, any interested shareholder could readily replicate the analysis without the Supplemental Disclosures. (*See Trulia*, *supra*, 129 A. 3d at p. 906-07 (individual company multiples already publicly available are not "even helpful," much less material).)

ii. Management's Financial Projections (Supp. Discl. ¶ 2; AOB27-28, 51-52)

Plaintiffs claim the Supplemental Disclosures regarding management's financial projections "provided reliable information that shareholders could use to conclude, or argue, that the financial projections used to justify the $261.25 tender offer price were in fact too low." (PRB18.) But they provide no support for this claim or discussion of why or how their claim is true. Plaintiffs don't dispute that the Recommendation Statement already told shareholders that the projections contained assumptions and risk adjustments and were inherently uncertain such that stockholders should not rely on them. (AOB51-52.) Nor do plaintiffs dispute that the projections were in fact uncertain and should not be relied upon by investors. Nor do plaintiffs provide any case finding vague underlying assumptions such as those set forth in the Supplemental Disclosures material. Griffith, on the other hand, cited *Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc.* (2010) 180 Cal.App.4th 1542 and *In re Micromet, Inc. Shareholders Litigation* (Del. Ch. Feb. 29, 2012, C.A. No. 7197-VCP) 2012 WL

681785 in support of the lack of materiality of assumptions underlying financial projections. (*Compare* PRB18 *with* AOB52.)

Vague descriptions of assumptions that underlie projections that no one contends are reliable or should be used to make voting decisions cannot be material to a shareholder's decision on how to vote.

iii. Discounted Cash Flow (DCF) Analyses by Centerview and J.P. Morgan (Supp. Disc. ¶¶ 8, 16-18; AOB22-27, 49-51)

Similarly without support or explanation, plaintiffs claim that the Supplemental Disclosures provided "key assumptions underlying" the financial advisors' DCF valuations. (PRB18.) The only case plaintiffs cite, *Doft & Co. v. Travelocity.com Inc.* (Del. Ch. May 20, 2004, No. 19734) 2004 WL 1152338 does not analyze the materiality of assumptions underlying a DCF analysis but instead notes the lack of reliability that can exist in the particular data at issue there. (PRB18.) In reality, the Supplemental Disclosures provided a handful of explanatory phrases that did not change any conclusions, correct any material misrepresentation or omission, or otherwise alter the "total mix" of information already provided to shareholders in the Recommendation Statement. (AOB22-27, 49-51.) Plaintiffs' footnote thirteen seems to concede this fact, describing the Supplemental Disclosures as "explain[ing]" information *already* disclosed to shareholders and only "disclos[ing]" minutiae behind other *already*-disclosed information. (PRB19 n.13.)

Just as in *Bushansky v. Remy International, Inc.*, plaintiffs' argument that "extraneous details" underlying the DCF analysis are material must be rejected because those details "do not contribute to a fair summary and do not add value for stockholders." ((S.D. Ind. 2017) 262 F. Supp. 3d 742, 750 (quoting *Trulia*, *supra*, 129 A.3d at pp. 900-01).) "Plaintiffs' argument—the supplemental disclosures were material because they enabled shareholders to independently prepare a discounted cash flow analysis—is without merit because '[a] fair summary does not require disclosure of sufficient data to allow stockholders to perform their own valuation.'" (*Id.* (quoting *Trulia*, *supra*, 129 A.3d at p. 901).) Plaintiffs point to nothing in the Supplemental Disclosures that "addresse[d] a plainly material misrepresentation or omission that would likely matter to a reasonable shareholder." (*See id.*)

* * *

Plaintiffs' discussion of the cases cited by Griffith similarly fails to support their argument that the Supplemental Disclosures provided any material benefit to the class. The distinctions they draw are incorrect or irrelevant.

First, plaintiffs point to only a single distinction between this case and *Bushansky*: the *Bushansky* plaintiffs' argument that the information "gave greater context, a complete picture" of the financial advisor work, while plaintiffs here argue that the disclosures provided shareholders concrete information on which they could reach independent conclusions about the value of the merger. (PRB25.) But *Bushanksy* expressly *rejected* plaintiffs' argument that information

that allows shareholders to perform their own valuation exercises is material. (*Bushanksy*, *supra*, 262 F. Supp. 3d at p. 750.) Echoing *Trulia*, the court in *Bushansky* further emphasized, with respect to the comparable company and transaction analyses that, as here, the Recommendation Statement made clear that the underlying enterprise values and price-earnings ratios were publicly available and "the additional figures do not alter the mean and median figures provided" to shareholders. (*Id.* at pp. 751-52.)

Plaintiffs' attempt to distinguish *Pipefitters* similarly fails. Plaintiffs *concede* that in order to recover attorneys' fees for obtaining an actual benefit to shareholders, they must show that '"disclosure of the additional information was of sufficient import to serve as a tipping point for a reasonable investor's decisionmaking process."' (PRB25 (quoting *Pipefitters*, *supra*, 180 Cal.App.4th at pp. 1553).) In other words, the court must ask, "Was there a substantial likelihood that the newly disclosed information would cause a reasonable investor to behave differently, such as by changing his or her vote?" (*Pipefitters*, *supra*, 180 Cal.App.4th at p. 1553.) Applying the "total mix" standard, the court in *Pipefitters* concluded that the additional disclosures did not "significantly alter[] the total mix of information available to … shareholders who were called upon to vote upon the acquisition." (*Id.* at 1553-54.) There is no hint that the Supplemental Disclosures here meet that standard.

Plaintiffs' other distinctions are similarly irrelevant. Plaintiffs note that the defendants in *Pipefitters* disputed the importance of the disclosures, while the defendants here do not. (PRB26.) But defendants have never agreed that the

Supplemental Disclosures are material. (Stipulation of Settlement at p. 5.) They have merely refrained from disputing certain of Plaintiff's positions in order to receive a release of claims. Plaintiffs' final distinction—that there was no argument in *Pipefitters* that the additional information led shareholders "to conclude that the projections were too low, the banker's valuations were inadequate, and the $261.25 tender offer price was unattractive"—misses the point. (PRB26.) Clearly, the Supplemental Disclosures did not provide information by which stockholders concluded that the tender offer price was unattractive, because the vast majority of stockholders approved the transaction, and the plaintiffs themselves agreed to drop any claims regarding inadequate price in the settlement. Griffith has detailed at length why the Supplemental Disclosures failed to offer a material benefit to shareholders, as plaintiffs continue to cling to these superficial claims without engaging Griffith's demonstration to the contrary.

Plaintiffs' attempt to distinguish Griffith's cases as involving "*omissions*, not affirmative disclosures" mistakes a difference in procedural posture for legal substance.[6] (PRB26.) *Globis*, *Micromet*, *Cogent*, and *OPENLANE* all granted motions to dismiss or denied motions for a preliminary injunction based upon

[6] Plaintiffs also overstate Griffith's position in an apparent attempt to make his arguments seem unreasonable. Griffith doesn't argue that "additional financial information is immaterial as a matter of law under all factual circumstances." (*E.g.*, PRB27.) Instead, his arguments focus on the specific disclosures made to shareholders here and whether the Supplemental Disclosures altered the "total mix" of information.

a plaintiff's allegation that a proxy omitted material information. Here, plaintiffs alleged that the proxy omitted similar information but—because the parties settled—the question before the superior court was the materiality of the disclosure of previously omitted information. As *Trulia* discusses, pre-merger motions for preliminary injunctions and post-merger settlements are subject to the same analysis for materiality. (*See* 129 A.3d at pp. 896, 898-99.) Thus, because the omission of "the identity and financial metrics of the underlying transactions [in a comparable companies and precedent transactions analysis]" (*In re OPENLANE Inc.* (Del. Ch. Sept. 30, 2011, No. 6849-VCN) 2011 WL 4599662, at *14), were not sufficiently material to support a motion for preliminary injunction in *OPENLANE*, the disclosure of the same data would not have supported a settlement either. Moreover, plaintiffs fail to meet their own standard that they derive from these cases because they do not "articulate a specific reason" here necessitating the Supplemental Disclosures in response to Griffith's showing that none of them altered the "total mix" of information so as to influence shareholders voting. (*Cf.* PRB26.)

Plaintiffs further claim, with no support, that the situation here is different because the Supplemental Disclosures provided "concrete facts" and "specific financial data" that was "inconsistent with and significantly differed from the previously disclosed information." (PRB27-28.) This assertion is demonstrably false. Of their two examples, the "fact that the projections were risk-adjusted" (PRB27) was disclosed in the Registration Statement. The Registration Statement disclosed that the board had decided "on a risk-adjusted

basis," *i.e.*, the risk-adjusted projections, that a merger could "deliver better value" to shareholders under certain specified conditions (Rec. Stat. p. 18) and further disclosed that "the projections necessarily are based on numerous assumptions, many of which are beyond our control and difficult to predict" (*id.* at p. 26). And, with respect to their second example, "the actual metrics of peer companies" are both superfluous minutia and were readily available to any shareholder who wanted to analyze them. (*See supra* Section I.C.i; AOB45-49.)

D. The superior court erred by concluding that the Settlement could be approved despite a broad release of claims never pursued by plaintiffs.

Appellees don't dispute that a "release of unknown claims is appropriate only if 'the record shows that such claims have been investigated sufficiently.'" (AOB54 (quoting *Trulia*, *supra*, 129 A.3d at p. 898).) And neither set of appellees challenges Griffith's demonstration that plaintiffs' "investigation" here failed to exceed that criticized in *Trulia* as too cursory for the release of unknown claims to be appropriate. Appellees don't point to a single item of discovery beyond that identified by Griffith in his opening brief, and they side-stepped the superior court's question on this point at the fairness hearing. (*See* RT 5:8-7:17.) *Trulia* described such superficial and expedited "confirmatory" discovery as simply "going through the motions" rather than part of an actual probe of "the strengths and weaknesses of the claims relative to the consideration for the proposed settlement." (129 A.3d at p. 893 n.24.) That describes the process here, too.

Without any real discovery to cite as justifying the overbroad release, appellees rely on two arguments.[7] First, they claim that releasing unknown claims that were not asserted in the action is just common practice. (PRB32 n.24; DRB30.) Second, they claim that despite having not taken sufficient discovery, it should be objecting shareholders' burden to identify what discovery they should have taken. That can't be right. Even if there are no viable damages claims, plaintiffs did not investigate adequately enough to justify a *full* release of all claims—known and unknown—related to the subject matter of the case. (*See Trulia*, *supra*, 129 A.3d at 893-94, 896; *cf. Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 405, 409 (describing "significant amounts of discovery" relevant in that and related case) (cited at DRB20).) This was a drive-by settlement expedited to benefit everyone but the

[7] Plaintiffs cite a release from an entirely different settlement in their brief. (PRB29 n.22 (quoting Stipulation of Settlement in *Halliday v. The Gymboree Corp.*, Case No. CGC-10-504544, 1 CT 294).) The release of claims in the settlement at issue in this case encompasses "all known and Unknown Claims" "against any Released Person that have been, could have been or in the future can or might be asserted" by any plaintiff or class member "whether arising under state, federal, foreign, statutory, common law or regulatory law … that relates to, is in connection with, or are based upon or otherwise concern in any manner, directly or indirectly: (i) the claims or allegations in the Actions; (ii) the Acquisition, any agreements related to the Acquisition and the transactions contemplated therein; (iii) any compensation, consideration or other payments made to any Released Person in connection with the Acquisition; (iv) any disclosures or alleged failure to disclose, with or without scienter, with respect to the Acquisition …; and (v) any alleged aiding and abetting of the foregoing," excluding claims for appraisal. (Stipulation of Settlement ¶ 1.15.)

shareholders, and this point is reinforced by the cursory "confirmatory discovery" process.

At base, the problem is that described in *Walgreen*: Here we have a class action settlement that "yields fees for class counsel and nothing for the class." (832 F.3d at p. 724.) It is "no better than a racket." (*Id.*) Having obtained nothing from the settlement, the class should not be called upon to give up anything either. Instead, the settlement "should be dismissed out of hand." (*Id.*) If there truly are no even potentially viable or valuable claims, why were defendants willing to pay such substantial attorneys' fees in exchange for the release, and why should the full value of the settlement be recovered by counsel?

Plaintiffs' citation to *In re Activision Blizzard, Inc. Stockholder Litigation* (Del. Ch. 2015) 124 A.3d 1025 in support of the release here (PRB29) ignores the facts of that case. The *Activision* court held that "a settlement can release claims of negligible value to achieve a settlement that provides reasonable consideration for meaningful claims" in the context of an agreement that provided an implied value of $173.25 million to Activision stockholders. (124 A.3d at pp. 1044, 1067.) That court specifically described the process that led to the negotiated release as falling "at the opposite end of the spectrum from the routine disclosure-only settlements, entered into quickly after ritualized quasi-litigation, that plague the M & A landscape." (*Id.* at 1067.) The decision does not support this overbroad release of known and unknown claims in exchange for virtually nothing.

II. If the settlement approval is to be affirmed, attorneys' fees should be significantly reduced.

Plaintiffs assert that they are entitled to the half-million dollar award of attorneys' fees and costs because it "is consistent with, if not modest," compared to the fees awarded in other cases. (PRB34.) But plaintiffs concede that any fee award must be closely tethered to the actual result of the litigation. (PRB33; *Pipefitters*, *supra*, 180 Cal.App.4th at p. 1551.) And they do not challenge the cases cited by Griffith establishing that supplemental disclosures that provide only immaterial information to shareholders are not a benefit and cannot support any fee award, much less a half million dollars. (*See* AOB55-56.) Whether their fee award can be maintained on appeal, then, depends on whether the Supplemental Disclosures were material.[8]

Tellingly, plaintiffs rely exclusively on decisions that predate *Trulia* and the increased scrutiny that courts have begun applying to strike-suit settlements in recent years. (PRB34 n.27.) The fact that other courts—in other cases involving different facts and unopposed fee motions and issued before courts recognized the need to provide a more critical assessment—have awarded higher amounts is irrelevant to the present case.[9] The only benefit allegedly

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[8] Plaintiffs state that Griffith "mischaracterize[ed]" the Supplemental Disclosures but fails to identify any item that he purportedly mischaracterized. (PRB33.)

[9] Plaintiffs criticize Griffith for "seek[ing] a fee award for himself, despite the fact that his objection was unsuccessful." (PRB33 n.26.) As an initial matter, while the objection was overruled, it was at least arguably successful in part. The trial court awarded Plaintiffs fees and expenses of $509,158.62, rather than the $750,000 requested. Moreover, following the objection in this case, the

provided to shareholders by the settlement is the information in the Supplemental Disclosures. Accordingly, for purposes of determining fees, the issue is whether that "benefit" can justify the plaintiffs' fee award. It cannot. (*See supra* Section I.) Instead, because the Supplemental Disclosures provided no benefit to the class, the fees should be materially reduced, perhaps even to $1.

III. Griffith has standing to appeal the settlement approval and attorneys' fee award.

Plaintiffs argue that Griffith lacks standing to appeal because he is not injured by the settlement's release of claims because those underlying claims are meritless. (PRB10.) Plaintiffs' argument confuses jurisdiction with the merits. (*Steel Co. v. Citizens for a Better Environment* (1998) 523 U.S. 83, 89-90; *Bell v. Hood* (1946) 327 U.S. 678, 682-83.) Were plaintiff's argument correct, a court could never dismiss a suit for failure to state a claim because a party with a deficient claim would also lack standing. The superior court erroneously subjected Griffith to a release as part of a settlement that is not fair, reasonable, nor adequate, and he is entitled to redress that injury on appeal by obtaining reversal of that decision, just as a plaintiff whose complaint is dismissed by sustained

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court below began to apply the *Trulia* standard to subsequent disclosure settlements. (AOB38-39.)

Nonetheless, Griffith does not suggest that a fee request following an unsuccessful appeal is likely to be fruitful. His request preserves his right to seek fees if he does achieve a benefit for the class through a successful appeal. (AOB58.)

demurrer has appellate standing to reverse that decision, though it would be "speculative" whether the plaintiff would win a trial on that complaint.

Griffith meets the "concrete and actual" injury requirement because the settlement imposes an injunction barring him from pursuing any claims, known or unknown, that were or could have been brought in the litigation. (Stipulation of Settlement ¶ 1.15.) Even if plaintiffs are correct that the known claims are worthless, that says nothing about the unknown claims included within the broad release. The threat of impending injury, "no matter how small," creates standing, and such "[i]njury need not be certain." (*Brandt v. Vill. Of Winnetka, Ill.* (7th Cir. 2010) 612 F.3d 647, 649; *see also In re Jasmine S.* (2007) 153 Cal.App.4th 835, 842 (California "standard … is equivalent to the federal 'injury in fact' test…").) When faced with an identical argument about the Article III standing of an objector to a worthless settlement of meritless claims, the Seventh Circuit had no qualms in finding appellate standing and throwing out the settlement. (*In re Subway Footlong Mktg. & Sales Litig.* (7th Cir. 2017) 869 F.3d 551, 555.)

Further, plaintiffs' argument proves too much. Plaintiffs alleged that their claims are typical of the class's claims, including Griffith's, and if Griffith does not have standing to resuscitate "worthless" claims, plaintiffs do not have standing to bring them in the first place, and the superior court should have dismissed the suit for lack of jurisdiction.

IV. Appellees' *ad hominem* attacks are misleading and irrelevant.

Apparently seeking to distract from the legal merits, both plaintiffs and defendants attack Professor Griffith with the scurrilous and inaccurate charge of being a "professional[]" "objector." (*E.g.*, DRB12; PRB1.) This pejorative term usually applies to those objectors who file "almost invariably groundless objections," which result in "delay [of] the provision of relief to class members" for the purpose of extracting payment from class counsel. (*See* PRB1 (quoting *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 272-73).) Griffith engages in no such practice.[10] Indeed, so-called "professional objectors" of the type plaintiffs describe tend not to challenge the disclosure-settlement racket because they possess no leverage. They cannot harvest fees by threatening to

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[10] Nor does his counsel, Theodore H. Frank or the Center for Class Action Fairness, engage in such bad-faith litigation tactics. Plaintiffs' extra-record statement to the contrary is patently false. (*See Edwards v. Nat'l Milk Producers Federation* (N.D. Cal. Dec. 9, 2016) No. 11-cv-04766-JSW, Dkt. 464-1; *Pearson v. Target* (7th Cir. 2018) 893 F.3d 930 (CCAF initiated litigation to require objectors to disgorge their ill-gotten gains to the class).) Plaintiffs' citation to *Lonardo v. Travelers Indem. Co.* (N.D. Ohio 2010) 706 F. Supp. 2d 766 is misleading. There, the court stated that it "is convinced that Mr. Frank's goals are policy-oriented as opposed to economic and self-serving." (*Id.* at 804.) And while the district court criticized a policy-based argument as supposedly "short on law," Mr. Frank and the organization he founded and leads ultimately was successful in the U.S. Courts of Appeal for the Seventh and Ninth Circuits on that same argument. (*See In re Bluetooth Headset Prod. Liab. Litig.* (9th Cir. 2011) 654 F.3d 935 (agreeing that reversionary clauses are a problematic sign of self-dealing); *Pearson v. NBTY, Inc.* (7th Cir. 2014) 772 F.3d 778 (same).) (*See also* AOB35 (describing mission and successes of the Center for Class Action Fairness); *cf. also Frank v. Gaos* (argued in Supreme Court, Oct. 31, 2018) No. 17-961.)

delay the payment of consideration to the class when, as here, there is no monetary consideration, and the class receives the valueless supplemental disclosures before the settlement is submitted for preliminary approval.

In contrast to such objectors, Professor Griffith has pursued good-faith objections and has appeared as *amicus curiae*, successfully advocating against hollow settlements, and in favor of increased settlement benefits and stronger protections for shareholder class members. (*See, e.g.*, *Griffith v. Quality Distribution, Inc.* (Fla. Dist. Ct. App. July 13, 2018) No. 2D17-3160, -- So.3d --, 2018 WL 3403537; *Stein v. Blankfein* (Del. Ch. Oct. 24, 2018) No. 2017-0354-SG, 2018 WL 5733671; *Trulia*, *supra*, 129 A.3d 884.) There is no dispute that he is a class member or that he followed the proper procedures for filing an objection and appeal. (*See* PRB8.) His success has come from meritorious legal arguments made in response to abusive settlements and attorneys' fee requests that he rightfully objects to as a class member.[11]

CONCLUSION

Settlement approval should be reversed. If the Court affirms settlement approval, the award of attorneys' fees should be materially decreased. If the

[11] Plaintiffs' counsel's suggestion that they pursue only meritorious litigation "favorably cited in *Trulia*" (PRB10 n.4) ignores their history of engaging in the type of disclosure-only settlement criticized in *Trulia*. (*See, e.g. In re Transatlantic Holdings, Inc. Shareholder Litig.* (Del. Ch. Mar. 8, 2013) 2013 WL 1191738 (rejecting disclosure settlement); *In re Sauer-Danfoss Inc. Shareholder Litig.* (Del. Ch. 2011) 65 A.3d 1116 (crediting only one of twelve disclosures and awarding 1/10 of requested fees).)

Court reverses settlement approval or decreases the award of attorneys' fees, Griffith respectfully requests an award of attorneys' fees.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CALIFORNIA RULE OF COURT 8.204

I, Anna St. John, appellate counsel to Sean J. Griffith, certify that the foregoing brief complies with the length limits permitted by California Rule of Court 8.204(c). The brief is 7,325 words, excluding the portions exempted by Rule 8.204(c)(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 December 10, 2018.

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