Case No. 16-20742

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAWRENCE G. FARBER,
Plaintiff,

v.

CRESTWOOD MIDSTREAM PARTNERS L.P.;
CRESTWOOD MIDSTREAM GP, L.L.C.; ROBERT G. PHILLIPS;
ALVIN BLEDSOE; MICHAEL G. FRANCE; PHILIP D. GETTIG;
WARREN H. GFELLER; DAVID LUMPKINS;
JOHN J. SHERMAN; DAVID WOOD; CRESTWOOD EQUITY
PARTNERS L.P.; CRESTWOOD EQUITY GP L.L.C.; CEQP ST SUB
L.L.C.; MGP GP, L.L.C.; CRESTWOOD MIDSTREAM HOLDINGS
L.P.; CRESTWOOD GAS SERVICES GP, L.L.C.,
Defendants – Appellees,

v.

DAVID G. DUGGAN,
Appellant,

ISAAC ARON,
Individually and on Behalf of All Others Similarly Situated,
Plaintiff – Appellee,

v.

CRESTWOOD MIDSTREAM PARTNERS L.P.;
CRESTWOOD MIDSTREAM GP, L.L.C.; ROBERT G. PHILLIPS;
ALVIN BLEDSOE; MICHAEL G. FRANCE; PHILIP D. GETTIG;
WARREN H. GFELLER; DAVID LUMPKINS;
JOHN J. SHERMAN; DAVID WOOD; CRESTWOOD EQUITY

PARTNERS L.P.; CRESTWOOD EQUITY GP L.L.C.; CEQP ST SUB L.L.C.; MGP GP, L.L.C.; CRESTWOOD MIDSTREAM HOLDINGS L.P.; CRESTWOOD GAS SERVICES GP, L.L.C.,
Defendants – Appellees,

v.

DAVID G. DUGGAN,
Appellant.

On Appeal from the United States District Court for the Southern District of Texas, No. 4:15-CV-1367, Judge Vanessa D. Gilmore

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Opening Brief of Appellant David G. Duggan

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Case No. 16-20742

Lawrence G. Farber,
Plaintiff,

v.

Crestwood Midstream Partners L.P.; Crestwood Midstream GP, L.L.C.; Robert G. Phillips; Alvin Bledsoe; Michael G. France; Philip D. Gettig; Warren H. Gfeller; David Lumpkins; John J. Sherman; David Wood; Crestwood Equity Partners L.P.; Crestwood Equity GP L.L.C.; CEQP ST SUB L.L.C.; MGP GP, L.L.C.; Crestwood Midstream Holdings L.P.; Crestwood Gas Services GP, L.L.C.,
Defendants-Appellees,

v.

David G. Duggan,
Appellant,

Isaac Aron,
Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellee,

v.

Crestwood Midstream Partners L.P.; Crestwood Midstream GP, L.L.C.; Robert G. Phillips; Alvin Bledsoe; Michael G. France; Philip D. Gettig; Warren H. Gfeller; David Lumpkins; John J. Sherman; David Wood; Crestwood Equity Partners L.P.; Crestwood Equity GP L.L.C.; CEQP ST SUB L.L.C.; MGP GP, L.L.C.; Crestwood Midstream Holdings L.P.; Crestwood Gas Services GP, L.L.C.,
Defendants-Appellees,

v.

David G. Duggan,
Appellant.

Certificate of Interested Persons

The undersigned counsel of record certifies, upon information and belief, that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The Bilek Law Firm, L.L.P.

Faruqi & Faruqi, LLP

Monteverde & Associates PC

Crestwood Midstream Partners, L.P.

David G. Duggan has a financial interest in the outcome of this case equivalent to the interests of other unitholder class members and current unitholders of Crestwood Midstream Partners, L.P.

The undersigned counsel is unaware of the financial interest, if any, in the outcome of this case of the following Defendants-Appellees: Crestwood Midstream GP, L.L.C.; Robert G. Phillips; Alvin Bledsoe; Michael G. France; Philip D. Gettig; Warren H. Gfeller; David Lumpkins; John J. Sherman; David Wood; Crestwood Equity Partners L.P.; Crestwood Equity GP L.L.C.; CEQP ST SUB L.L.C.; MGP GP, L.L.C.; Crestwood Midstream Holdings L.P.; Crestwood Gas Services GP, L.L.C.

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel further states, upon information and belief, that the following law firms and/or counsel represent opposing parties in this case:

Defendants-Appellees

Andrews Kurth Kenyon LLP

Barnes & Thornburg LLP

K&L Gates LLP

McGuireWoods LLP

Schiffer Odom Hicks & Johnson PLLC

Vinson & Elkins LLP

Plaintiffs

The Bilek Law Firm LLP

Faruqi & Faruqi, LLP

Monteverde & Associates PC

Further, pursuant to Federal Rule of Appellate Procedure 26.1, David G. Duggan makes the following disclosures: Mr. Duggan is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

Dated: January 4, 2017

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS

/s/ Theodore H. Frank
Theodore H. Frank

Counsel for Objector-Appellant David G. Duggan

Statement Regarding Oral Argument

Duggan requests under Cir. R. 28.2.3 that the Court hear oral argument in his case because it presents significant issues concerning class action cases, and, in particular, whether this Court should split with *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016) (Posner, J.). These issues are meritorious, and have not been authoritatively settled in the Fifth Circuit. Exploration at oral argument would aid this Court's decisional process and benefit the judicial system.

Attorneys with the non-profit Competitive Enterprise Institute's Center for Class Action Fairness are representing Duggan *pro bono* in this appeal. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements. It has won tens of millions of dollars for class members and shareholders, and acclaim from the press and this Court. *See, e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 780, 787 (7th Cir. 2014); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013. The Center for Class Action Fairness has never settled an appeal for a *quid pro quo* payment to the Center, and brings Duggan's appeal in good faith to overturn an unfair settlement.

Duggan's attorneys have previously argued and won landmark appellate rulings improving the fairness of class-action settlement procedure, including *Walgreen*. A favorable resolution in this appeal would provide guidance to district courts in assessing future merger strike suits, and reduce the windfalls achieved by class counsel at the expense of class members.

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Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa, because plaintiff filed suit alleging claims under Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a) and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. ROA.67.[1]

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court issued an Order approving a class action settlement and awarding attorneys' fees and expenses on October 14, 2016, and a Final Judgment that same day. ROA.3553; ROA.3575. As a class member who was bound by the Rule 23 class-action settlement and who filed an objection that was accepted and considered by the district court at the fairness hearing (ROA.3382; ROA.3564), Objector David G. Duggan has standing to appeal the district court's settlement approval without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2003).[2]

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[1] "ROA.xyz" refers to page xyz of the electronic record on appeal. "App. Dkt." refers to docket entries in this Appeal No. 16-20742.

[2] Because of defective and late notice, Duggan's objection was filed after the deadline established by the district court's preliminary approval order. The district court has broad discretion to accept late objections without a formal motion, and no one contends that any party was unfairly prejudiced by the district court's decision to do so here. *See Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988); *Younce v. Barnhart*, 98 F. App'x 305, 306 (5th Cir. 2004); *United States ex rel. Long v. GSDMIdea City, LLC*, 798 F.3d 265, 275-76 (5th Cir. 2015). There is no legitimate dispute that Duggan is a class member. He submitted a declaration under penalty of perjury stating that he was a class member, which is sufficient to prove class membership. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015). Even if the Court considers a

Duggan filed a notice of appeal on November 7, 2016. ROA.3584. The notice of appeal is timely under Fed. R. App. Proc. 4(a)(1).

Statement of the Issues

1. Delaware and the Seventh Circuit hold that, when shareholders sue over mergers and acquisitions, a disclosure-only settlement may only be approved if the disclosures are "plainly material." *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 898 (Del. Ch. 2016); *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718 (7th Cir. 2016). Did the district court err as a matter of law in refusing to apply the *Trulia/Walgreen* standard?

2. This Court holds that a court may not approve a class-action settlement under Rule 23(e) unless there has been a demonstration on the record that the settlement will benefit the class. *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010). Did the district court err as a matter of law when it approved a zero-dollar settlement in which the sole relief provided $575,000 to the attorneys and only supplemental disclosures to the unitholder class, without considering whether those supplemental disclosures were material and therefore beneficial to a reasonable unitholder?

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sworn declaration insufficient, Duggan has provided undisputed evidence of his class membership on appeal (App. Dkt. 513786974 at 33-46), as 28 U.S.C. § 1653 permits. *Cobell v. Salazar*, 679 F.3d 909, 919 & n.7 (D.C. Cir. 2012). *See generally* Section IV below.

3. Did the district court err as a matter of law or abuse its discretion in approving a zero-dollar settlement where the only consideration paid to the unitholder class members in exchange for their release of claims was information regarding bracketing "upside case" and "downside case" projections, even though the proxy already provided the results and details of analyses conducted using those projections as inputs and the base case projection and the supplemental projections were directionally consistent with the disclosed projections?

4. Did the district court err in holding class notice complied with Rule 23 and the due process requirements of the Constitution when the notice on its face provided incorrect deadlines and the settlement administrator admitted in a declaration that it did not comply with the district court's preliminary approval order for timely notice?

Statement of the Case

A. The prevalence of "strike suits" in over 90% of large company mergers.

Over the past ten years, courts' willingness to approve settlements of quickly-filed lawsuits for supplemental disclosures, "broad releases to defendants and six-figure fees for plaintiffs' counsel" has caused "deal litigation to explode in the United States beyond the realm of reason." *In re Trulia, Inc. S'holder Litig.* ("*Trulia*"), 129 A.3d 884, 894 (Del. Ch. 2016). "In 2012, 93% of deals over $100 million and 96% of deals

over $500 million were challenged in shareholder litigation."[3] In 2013, over 97.5 of deals over $100 million were challenged in so-called strike suits.[4]

"Strike suits" and "deal litigation" describe litigation where

> a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs' counsel. Often the suit asks primarily or even exclusively for disclosure of details of the proposed transaction that could, in principle at least, affect shareholder approval of the transaction. But almost all such suits are designed to end—and very quickly too—in a settlement in which class counsel receive fees and the shareholders receive additional disclosures concerning the proposed transaction.

In re Walgreen Co. S'holder Litig. ("*Walgreen*"), 832 F.3d 718, 721 (7th Cir. 2016) (Posner, J.).

These "routine disclosure-only settlements, entered into quickly after ritualized quasi-litigation … plague the M&A landscape." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1067 (Del. Ch. 2015). They rarely provide monetary relief for the class members but, instead, consist solely of supplemental disclosures to the

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[3] Jill E. Fisch, Sean J. Griffith & Steven M. Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 558-59 (2015) ("Fisch").

[4] *Id.* (citing Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2013*, at 1–2 & tbl.A (Moritz Coll. of Law Ctr. for Interdisciplinary Law & Policy Studies, Public Law & Legal Theory Working Paper Series No. 236, 2014), *available at* http://ssrn.com/abstract=2377001, *archived at* http://perma.cc/XP2B-8C8B).

merger proxy statement. *See* Fisch, 93 TEX. L. REV. at 559; *see also* Ann Woolner, Phil Milford & Rodney Yap, *Merger Suits Often Mean Cash for Lawyers, Zero for Investors*, BLOOMBERG (February 16, 2012, 12:59 PM CST), *available at* http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html (noting that 70% of Delaware investor class action suits following mergers and acquisitions in 2010 and 2011 made money only for the plaintiffs' lawyers and not their clients).

This appeal relates to one such suit and settlement.

B. Crestwood Midstream announces merger with Crestwood Equity.

On May 6, 2015, Crestwood Midstream Partners LP ("Crestwood Midstream") announced that it had entered into a definitive merger agreement (called in proxy statements the "Simplification Transaction") with Crestwood Equity Partners LP ("Crestwood Equity"). ROA.3553. As a result of the merger, Crestwood Midstream would become a wholly-owned subsidiary of Crestwood Equity, while Crestwood Midstream unitholders would receive 2.75 units of Crestwood Equity in exchange for each unit they owned of Crestwood Midstream. ROA.3553-3554. Crestwood Equity and Crestwood Midstream are both organized under the laws of the State of Delaware. ROA.70-71.

On June 16, 2015, Crestwood Equity filed a preliminary proxy statement in a Form S-4 Registration Statement with the U.S. Securities and Exchange Commission ("SEC") soliciting unitholder approval for the merger. ROA.3554. The Preliminary Proxy attached the fairness opinion of financial advisor Tudor, Pickering, Holt & Co.

Advisors, LLC; in addition, it provided a detailed summary of Tudor Pickering's analyses using base, upside, and downside case projections, and a table listing the base case inputs, which also had been modified to create the upside and downside case projections used in the analyses. *See* ROA.575-588.

Crestwood Equity filed Amendment No. 1 to the Preliminary Proxy on July 27, 2015, and Crestwood Midstream filed Amendment No. 2 in the Final Proxy, on a Schedule 14A, with the SEC on August 28, 2015. ROA.2662; ROA.297. Excluding attachments, the Final Proxy and Preliminary Proxy include over 150 pages detailing the merger transaction for the shareholders. ROA.297; ROA.562. Together, Amendment Nos. 1 and 2 totaled approximately 425 words. ROA.2696. The amendments primarily related to (i) additional details of the proposed terms for potential strategic transactions that were never consummated; (ii) additional details of the discussion by the Crestwood Equity and Crestwood Midstream boards of the merits of the merger; (iii), additional details of the reasons an offer to purchase Crestwood's natural gas liquids assets was less favorable as compared to the merger; and (iv) the specific amount of fees financial advisor Tudor Pickering would receive in connection with already-disclosed services provided to an entity that merged with Crestwood Midstream in 2013 as well as for specified services provided to Crestwood Midstream's effectively controlling entity in January 2015. *Id.*

Crestwood Midstream scheduled a special meeting of its unitholders to vote on the proposed merger for September 30, 2015. ROA.299.

C. Plaintiffs sue, threaten an injunction to block the merger, and quickly settle for Supplemental Disclosures.

On May 20, 2015, nearly a month before Crestwood filed the Preliminary Proxy and just two weeks after the merger was announced, Crestwood Midstream unitholder Isaac Aron filed suit on behalf of himself and other unitholders of Crestwood Midstream common stock against sixteen individuals and entities. ROA.3554. According to Aron, there was substantial overlap between the Crestwood Midstream and Crestwood Equity boards of directors: Crestwood Midstream GP LLC is the general partner of both entities, and six of Crestwood Midstream's eight board members also serve on the board of Crestwood Equity. ROA.77-78. The two remaining board members serve on Crestwood Midstream's conflicts committee, which screens potential conflicts of interest among the directors. *Id.*

Aron claims that the Preliminary Proxy omitted material information that was required for shareholders to properly evaluate the proposed merger in violation of Section 14(a) of the Securities Exchange Act; Crestwood Midstream directors breached their fiduciary duties in recommending approval of the merger, in particular by authorizing the sale below market value because they sought to maximize the merger's value to Crestwood Equity rather than to Crestwood Midstream's shareholders; and the entity defendants aided and abetted the directors' breach of their fiduciary duty. *See generally* ROA.67-99. Plaintiff filed a motion for preliminary injunction on September 3, 2015, and a motion for a temporary restraining order, expedited preliminary injunction hearing, and preliminary injunction on September 17,

2015. ROA.261; ROA.791. The district court scheduled a hearing to consider these motions for September 23, 2015. Dkt. Min. Entry, Sept. 18, 2015.

On September 22, 2015, on the eve of the hearing, and just a week before the shareholder vote, the parties reached a settlement in principle and entered into a memorandum of understanding ("MOU") setting forth the terms. ROA.1323; ROA.2663. Pursuant to the MOU, on September 23, 2015, Crestwood Midstream filed with the SEC a Form 8-K supplementing its proxy filed on August 28, 2015 (the "Supplemental Disclosures"). ROA.2688. The Supplemental Disclosures consisted solely of two tables with unaudited financial information for the "upside case and downside case projections." ROA.2690-2692. The tables included EBITDA, Distributable Cash Flow, Distributable Cash Flow Per LP Unit, Distributions Per LP Unit, and Growth Capital Expenditures estimates for 2015-2019 for Crestwood Midstream, Crestwood Equity, and Pro Forma Crestwood Equity (*i.e.*, condensed combined projected financial information after giving effect to the merger). *Id.*

Also pursuant to the MOU, Plaintiffs took the deposition of a member of the Crestwood Midstream conflicts committee, a financial advisor to the conflicts committee, and Crestwood Equity's chief financial officer, ROA.2665-2666, and reviewed the minutes from meetings of the Crestwood Midstream board of directors and its conflicts committee approving the merger and final presentations by their financial advisors. ROA.2664. Plaintiffs also reviewed board minutes, banker books, and financial analyses developed by advisors related to the merger that were provided by Crestwood Midstream. *Id.*

D. An overwhelming majority of unitholders approve the merger.

At the September 30, 2015, special meeting, "an overwhelming majority" of Crestwood Midstream unitholder votes were in favor of the merger. ROA.3650.

E. Plaintiffs seek preliminary approval.

On June 15, 2016, plaintiffs moved for preliminary approval of the class action settlement ("Settlement"). ROA.2632. The Settlement covered a non-opt out settlement class defined as:

> Plaintiff and any and all record and beneficial owners of any unit(s) of Crestwood Midstream who held any such unit(s) during the period beginning on and including May 5, 2015 through and including September 30, 2015 (the date of consummation of the Simplification Transaction), including any and all of their respective successors-in-interest, predecessors, legal representatives, trustees, executors, administrators, heirs, assignees, or transferees, immediate and remote, and any person or entity acting for or on behalf of, or claiming under, any of them, and each of them; provided, however, that the Settlement Class shall not include the Intervenors, Defendants and, at all relevant times, the members of Defendants' immediate families, Defendants' legal representatives, heirs, successors, and assigns.

ROA.2672-2673. The only consideration provided to the unitholder class in exchange for the full settlement and release of all settled claims (including all unknown and foreign claims), was defendants' September 23, 2015, filing of the Supplemental Disclosures. ROA.2664. In that regard, the Settlement provides that, "in conjunction with agreeing to the MOU, Crestwood Midstream filed a Form 8-K supplementing the disclosures contained in its definitive proxy statement/materials." The Settlement asserts that both the Supplemental Disclosures and Amendments Nos. 1 and 2 were

caused by plaintiff's lawsuit but does not suggest that the amendments were made in conjunction with the settlement MOU. *Id.* The Settlement further provides that Crestwood Midstream will pay class counsel fees and expenses up to $575,000, as approved by the Court. ROA.2676. Defendants agreed not to oppose the fee application. *Id.*

On June 22, 2016, the district court preliminarily approved the settlement and ordered notice to be sent to reasonably identifiable class members within fourteen business days. ROA.2860. The notice required objections to be filed 21 days before the settlement hearing; though the court scheduled the hearing for October 14, 2016 (ROA.2903), the notice incorrectly told class members that the settlement hearing would be on October 7. ROA.3370 ("Notice"). The settlement administrator admitted to the court that it did not comply with the court's deadline for more than 90% of the notices it sent to the class, and may have even mailed some of the notices after the objection deadline. ROA.3360; ROA.2897-2900. The district court made no effort to follow up on either of these violations of its order, which no one flagged to the court other than obliquely in the settlement administrator's declaration.

F. Duggan receives late notice of the settlement and objects to the settlement; class counsel responds.

Through his broker, Appellant David G. Duggan purchased about $12,200 worth of Crestwood Midstream in 2012, was at all relevant times a unitholder of Crestwood Midstream, and a class member in this case. App. Dkt. 513786974 at 33-46; ROA.3382. There is no dispute that Duggan is a class member, or that he was "reasonably identifiable" through his broker. Duggan objected *pro se* that the

settlement ran afoul of *Trulia* and *Walgreen* and asked the district court to apply those precedents to deny settlement approval, class certification, and attorneys' fee requests. ROA.3382.

Duggan received notice almost two months late, shortly before he was to leave on a two-week European vacation. *Id.* The notice stated that class members had a right to appear at the settlement hearing if they, among other things, filed a written notice of intention to appear, but also stated that the district court would consider properly-served objections if the objector did not appear at the settlement hearing. Notice, ROA.3373. The Notice required proof of class membership "by way of brokerage statement, account statement, or other document evidencing ownership of Crestwood Midstream units." *Id.* Duggan provided proof via written statement under penalty of perjury. He did not file a notice of intent to appear or appear at the settlement hearing. Duggan acknowledged his September 28 objection was a few days late, but asked the district court to find "good cause" given the late notice and his presence out of the country. ROA.3382. (Though the actual deadline for objecting was after Duggan returned from Europe, the Notice incorrectly indicated the deadline was while he was still abroad.) The district court docketed Duggan's objection on October 3. *Id.* Class counsel was in communication with Duggan as early as August 30, but did not notify Duggan until October 5—after he had filed his objection—that the court had rescheduled the October 7 fairness hearing. App. Dkt. 513771677.

Class counsel was given an opportunity to respond in writing to Duggan's objection, though their October 7 filing was after the deadline for filings. *See*

ROA.2897, 2901; ROA.3384. They protested that Duggan did not demonstrate good cause for missing the deadline but did not mention that the notice told him the wrong deadline. They argued the district court should disregard his objection but did not claim he was not a class member, did not claim they were prejudiced by the lateness of the objection, and did not make a formal motion to strike his objection. ROA.3384-3393. Plaintiffs did not dispute that Duggan was a "reasonably identifiable" class member whom the preliminary approval order required to be served notice within fourteen business days. *Id.*

G. The fairness hearing and fee award.

At the October 14 fairness hearing, Duggan, as permitted by the Notice, did not appear. The district court gave class counsel another opportunity to respond to Duggan's objection when it asked counsel to address his objection in their presentation. ROA.3643. Class counsel told the court that Duggan only objected to attorneys' fees and did not object to class certification; and further told the court that *Walgreen* was a case solely about attorneys' fees and was thus contradicted by the Fifth Circuit's attorney-fee jurisprudence. ROA.3643-3645. All of these representations were incorrect. Class counsel informed the district court that the supplemental disclosures of financial projections were "the basis of compensation," and the fee "was agreed as part of the disclosures…. A hundred percent." ROA.3650-3652. Defendants did not concede that the Supplemental Disclosures were material; instead, their counsel noted the "speculative" nature of the disclosed projections and the view

of many deal lawyers that such details "just don't belong in a proxy" because they risk overwhelming shareholders. ROA.3660-3661.

The district court approved the settlement and attorneys' fee request in full. The court noted Duggan's objection, but ruled against it on the merits, refusing to apply *Walgreen* because it was not Fifth Circuit precedent. ROA.3564. The district court did not strike Duggan's objection, and plaintiff did not ask the court to reconsider that decision.

The district court adopted a boilerplate holding that the Notice "is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of Rule 23 of the Federal Rules of Civil Procedure, the requirements of due process, and applicable law, including … the Constitution of the United States." It did not reconcile this finding with the facially incorrect notice, or with the declaration from the settlement administrator admitting that the district court's preliminary approval order had been violated.

H. Duggan's appeal.

Duggan retained counsel and timely appealed. ROA.3584. The day before Thanksgiving, class counsel moved to dismiss the appeal under Fed. R. App. Proc. 27 on a variety of grounds; this Court denied the motion without prejudice on December 22, 2016. App. Dkt. 513810360.

While Duggan appeared *pro se* below, he is represented on appeal *pro bono* by attorneys at the non-profit Competitive Enterprise Institute's Center for Class Action

Fairness. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won 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 Center founder Theodore H. Frank "the leading critic of abusive class action settlements"); Ashby Jones, *A Litigator Fights Class-Action Suits*, WALL ST. J. (Oct. 31, 2011); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the Center's work). The Center has won every appeal it has argued to vindicate shareholder rights in class and derivative actions. *Walgreen*, 832 F.3d 718; *In re BankAmerica Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015); *Robert F. Booth v. Crowley*, 687 F.3d 314 (7th Cir. 2012); *Kazman v. Frontier Oil Corp.*, 398 S.W.3d 377 (Tex. App. 2013).

Summary of the Argument

As noted above, deal litigation has increased over the past ten years to the point that the announcement of nearly every merger of significant value is now followed shortly thereafter by a lawsuit. The suits, which threaten expensive injunctions blocking or delaying the merger, usually settle for only disclosures for shareholders and attorneys' fees for the lawyers. The sudden increase of such shareholder litigation is not because the well-compensated law firms putting together the lengthy and detailed proxy statements have become less competent over the years, but because the *in terrorem* threat of injunction all but guarantees profitable settlement for the plaintiffs' attorneys. Without the benefit of adversarial briefing by the parties—all of whom

want the settlement that they agreed to to be approved—courts have readily approved such settlements without much critical review. As a Delaware court recently noted,

> It is beyond doubt in my view that the dynamics described above, in particular the Court's willingness in the past 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, have caused deal litigation to explode in the United States beyond the realm of reason. In just the past decade, the percentage of transactions of $100 million or more that have triggered stockholder litigation in this country has more than doubled, from 39.3% in 2005 to a peak of 94.9% in 2014.

Trulia, 129 A.3d at 894.

Scholars often describe this deal litigation as "strike suits—meritless claims filed for their nuisance value—by entrepreneurial plaintiffs' attorneys." Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKLEY L.J. 55 (2014). Rather than risk derailment of the merger transaction, "the vast majority of these strike suits settle, settle quickly, and settle on a disclosure-only basis." Koji F. Fukumura and Peter M. Adams, *Update on Corporate Governance Litigation: M&A and Proxy Strike Suits* (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2013_corporate_counselcleseminar/7_2_update_on_corporate_governance.authcheckdam.pdf; *see also* Andrew J. Pincus, *The Trial Lawyer's New Merger Tax,* U.S. Chamber Inst. For Legal Reform (Oct. 2012), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/M_and_A.pdf (observing that "vast majority" of strike suits settle within three months).

Not only do these strike suits provide no monetary relief to class members, but scholars argue that the settlements actually harm corporate shareholders by driving up the cost of the merger transactions, extorting a "transaction tax" in the form of attorneys' fees. *See* Jeffries, 11 BERKELEY L.J. at 108; Joel C. Haims & James J. Beha, II, *Recent Decisions Show Courts Closely Scrutinizing Fee Awards in M&A Litigation Settlements* 1 (2013), *available at* http://media.mofo.com/files/Uploads/Images/130418-In-the-courts.pdf (observing that the majority of such shareholder class and derivative suits that quickly follow almost every significant merger announcement settle quickly, and the payment of attorneys' fees "effectively becomes a tax on M&A transactions") (internal citation omitted).

Courts in which such deal litigation is frequently brought—such as Delaware and New York, as well as the Seventh Circuit—have begun scrutinizing such settlements far more rigorously to combat these judicial ills. *See, e.g.*, *Trulia*, 129 A.3d 884; *Walgreen*, 832 F.3d 718; *In re Allied Healthcare S'holder Litig.*, No. 652188/2011, 2015 N.Y. Misc. LEXIS 3810 (N.Y. Sup. Ct. Oct. 23, 2015). A disclosure-only settlement may only be approved if the disclosures are "plainly material."

> 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, 129 A.3d at 898; *accord Walgreen*, 832 F.3d at 725. Though no federal appellate court to consider the issue has rejected *Trulia* or *Walgreen*, the district court refused to

apply their standard because the Fifth Circuit has not explicitly adopted these standards. ROA.3564. It should do so in this case, and reverse settlement approval.

This Court already recognizes the unfairness of allowing counsel to bargain away absent class members' claims without material relief in exchange, and thus holds that a settlement cannot be approved under Rule 23(e) where "there has been no demonstration on the record below that the settlement will benefit the class in any way." *Katrina Canal Breaches*, 628 F.3d at 195. The settlement here cannot be approved under this standard: There has been no demonstration that the settlement, which provides $0 and meaningless disclosures to the class and $575,000 to class counsel, benefits the class in any material way. The district court's approval was based on an erroneous application of law and cannot be supported. Rather than analyze whether the Settlement benefited the class, the district court analyzed whether it met the multi-factor test of *Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982)—an analysis that, alone, is deficient as a matter of law. *Katrina Canal Breaches*, 628 F.3d at 195. Even under the correct legal standard, the Settlement is deficient because it fails to provide a material benefit to the class.

In a motion, class counsel has argued for the first time on appeal that Duggan does not have standing to appeal, but their argument contradicts *Devlin* and Fifth Circuit precedent. Even if this Court were to, for the first time in this Circuit, hold that an undisputed class member whose objection was fully considered by the district court does not have standing to appeal settlement approval on a Rule 23 argument,

this Court must still reverse because the undisputed evidence is that the class notice failed to meet Rule 23 and constitutional standards.

This Court should apply *Katrina Canal Breaches* in the M&A-suit context and join the Seventh Circuit, Delaware, New York, and other courts turning the tide against merger strike suits. The settlement approval should be reversed under Rule 23(e). The Court should further remand with instructions to consider whether under *Walgreen* to appoint new class counsel under Rule 23(g) or dismiss the case. 832 F.3d at 726.

Standard of Review

Approval of class-action settlements is reviewed for abuse of discretion. *Katrina Canal Breaches*, 628 F.3d at 194. "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (internal quotation marks omitted).

"[A] court abuses its discretion when it makes an error of law;" thus, the Court applies "a *de novo* standard of review to such errors." *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737 (5th Cir. 2003); *Allison v. Citgo Petro. Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) (questions regarding application of the correct legal standard are reviewed *de novo*).

Mixed questions of law and fact also are reviewed *de novo*. *Richards v. Quarterman*, 566 F.3d 553, 561 (5th Cir. 2009); *see also Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1200 n.3 (2d Cir. 1978) (review of district court's materiality holding

relating to a Rule 14a-9(a) disclosure violation is not under "clearly erroneous" standard because application of legal standard to facts is not "finding of fact").

Argument

I. The district court erred by applying an incorrect legal standard to approve the class action settlement.

Duggan argued to the district court that the Settlement should not be approved because, as in *Trulia* and *Walgreen*, the disclosures for which unitholders' claims were released by the Settlement contained no information that a reasonable shareholder would have found material under *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976). ROA.3382-3383. The district court overruled Duggan's objection and approved the proposed settlement and requested award of attorneys' fees and costs. In doing so, the district court erred as a matter of law by failing to evaluate on the record whether the Supplemental Disclosures were plainly material to Crestwood Midstream unitholders. *See Katrina Canal Breaches*, 628 F.3d at 195. The court's failure to apply the correct standard of law was independent error that requires remand. But this Court can go further and find that this settlement is designed to benefit only the attorneys and does not pass muster as a matter of law.

A. Class action settlements present unique conflicts of interest that require judicial scrutiny.

Class-action settlements present unique conflicts of interest that courts have recognized as requiring additional judicial scrutiny. The conflicts arise because, while class counsel and defendants have an incentive to bargain effectively over the overall

size of a settlement, similar incentives do not govern their critical decisions about how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class counsel have an obvious incentive to seek the largest portion possible for themselves, and will accept bargains that are worse for the class if their share is sufficiently increased. Thus, courts have consistently warned against class-action settlements designed to make class counsel the primary beneficiary. *E.g.*, *Walgreen*; *Redman v. RadioShack*, 768 F.3d 622, 629 (7th Cir. 2014); *Pearson*, 772 F.3d at 786-87; *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013); *In re Bluetooth Headset Litig.* ("*Bluetooth*"), 654 F.3d 935, 948 (9th Cir. 2011).

Deal litigation historically has presented a particularly fruitful opportunity for plaintiffs' attorneys to capture six- and seven-figure attorneys' fees without providing commensurate relief to the class. Defendants are eager to obtain a release of claims and settle suits quickly to avoid delaying the shareholder votes necessary to complete proposed transactions, while class attorneys are all too willing to accept a quick settlement and hefty fees in exchange for mere disclosures for the class. Hard-to-value disclosures are used to inflate the apparent relief to the class that defendants are willing to accept because it costs them virtually nothing to add some additional details regarding the proposed transaction to the proxy. *See, e.g.*, *Trulia*, 129 A.3d at 887. While the value of a few extra lines of financial information underlying the extensive disclosures already provided to shareholders is rarely significant, it is easy to see why

the settling parties would be eager to come before the court and claim they have value. And this provides a ready cover for a large fee award.

B. Rule 23(e) prohibits the approval of a settlement that provides no consideration to class members for their release of claims but pays substantial fees to the attorneys.

1. A disclosure-only settlement cannot be approved unless the disclosures are "plainly material."

In face of the precipitous rise of deal litigation in the United States, and in recognition of the incentives discussed above, courts across the country have begun to scrutinize more closely the materiality in so-called disclosure-only class-action settlements before granting approval. Discussing its increasing frustration with settlements providing shareholders with immaterial disclosures, the Delaware Court of Chancery observed:

> But far too often such litigation serves no useful purpose for stockholders. Instead, it 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.

Trulia, 129 A.3d at 892. In *Trulia*, the court rejected a disclosure-only settlement as unfair, holding that because the supplemental disclosures were not material, they did not "provide adequate consideration to warrant the 'give' of providing a release of claims to defendants and their affiliates, in the form submitted or otherwise." *Id.* at 907. The court pronounced, in a passage subsequently adopted by the Seventh Circuit in *Walgreen*, that disclosure-only settlements will 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." *Id.* at 898 (emphasis added in *Walgreen*, 832 F.3d at 725).

> 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.

Id.; *accord Walgreen*, 832 F.3d at 725.

As *Trulia* remarks, in the context of a class-action settlement involving alleged omissions under section 14(a) of the Securities Exchange Act such as this one, the Supplemental Disclosures provided in exchange for the release of claims must be material in order to benefit the shareholder class. Under the standard established by the Supreme Court in *TSC Industries*,

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.... What th[is] standard … contemplate[s] is a showing of a substantial likelihood that, under all the circumstances, *the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder*.

426 U.S. at 449 (emphasis added). *Cf.* Thomas Hazen, 2 *Law of Securities Regulation*, § 9:19 (7th ed. 2016).

Relying on the materiality standard of *TSC Industries*, the Seventh Circuit adopted the reasoning of *Trulia* to reject a disclosure-only settlement in its recent *Walgreen* decision. In an opinion by Judge Richard Posner, the court held: "No class

action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand." *Walgreen*, 832 F.3d at 724. "[T]he class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." *Id.*

Other courts have reached similar results. In *Gordon v. Verizon Communications, Inc.*, the court rejected a disclosure-only class action settlement because, "the Supplemental Disclosures that are included in the Settlement … are so trivial or obviously redundant as to add nothing of material value from a disclosure standpoint." No. 653084/13, 2014 N.Y. Misc. LEXIS 5642, at *7 (NY Sup. Ct. Dec. 19, 2014). "Merely providing additional information—unless the additional information offers a contrary perspective on what has previously been disclosed—does not constitute material disclosure." *Id.* at *6. The court concluded that if it approved the settlement based on the trivial disclosures, "it would be an enabler of an unwarranted divestiture of shareholder rights by virtue of plaintiff's release, as well as a misuse of corporate assets were plaintiff's legal fees to be awarded." *Id.* at *21 (citing *Creative Montessori Learning Centers v. Ashford Gear*, 662 F.3d 913, 918 (7th Cir. 2011)); *see also In re Allied Healthcare S'holder Litig.*, 2015 N.Y. Misc. LEXIS 3810 (rejecting disclosure-only settlement because supplemental disclosures were insignificant).

It is thus incumbent upon district courts to fulfill their fiduciary role to class members by scrutinizing the materiality of the relief provided to class members in deal litigation such as this.

2. The district court erred by failing to determine whether the Supplemental Disclosures were of material benefit to the class, much less "plainly material."

Here, the district court failed to consider whether the Supplemental Disclosures were material and therefore a benefit to the class. The district court skipped the threshold assessment of materiality entirely. Instead, it focused on the multi-factor test of *Parker v. Anderson*, 667 F.2d 1204—without ever determining whether the Supplemental Disclosures were material. ROA.3557. But as this Court has recognized, the multi-factored *Parker* test may be *necessary* for settlement approval, but it is not sufficient. *Katrina Canal Breaches*, 628 F.3d at 195 (rejecting settlement under Rule 23(e) "[w]ithout quarreling" with the district court's conclusion that multi-factor test was satisfied). *See also Pampers*, 724 F.3d at 718 (looking beyond Sixth Circuit's seven-factor test to find settlement unfair when it constitutes "preferential treatment" for class counsel); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (failure to consider "the degree of direct benefit provided to the class" reversible error, though not in Third Circuit's nine-factor test); *Bluetooth*, 654 F.3d at 946 (consideration of eight-factor test "alone not enough to survive appellate review").

Even if a settlement meets the low bar of the *Parker* test, a court cannot approve it under Rule 23(e) where "there has been no demonstration on the record below that the settlement will benefit the class in any way." *Katrina Canal Breaches*, 628 F.3d at 195. "'The court must be assured that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants.'" *Id.* (quoting 4 *Newberg on Class Actions* § 11:46 at 133). *Cf. Walgreen*, 832

F.3d at 724 ("The question the [district court] judge had to answer was not whether the disclosures may have mattered, but whether they *would* be *likely* to matter to a reasonable investor." (emphasis in original)).

Despite recognizing that in § 14(a) cases concerning non-disclosure in proxy statements, "plaintiffs are made whole where the company fully and adequately discloses material facts before the shareholder vote," ROA.3559, the district court never analyzed whether the Supplemental Disclosures were in fact material. Instead, the court recognized that "[d]espite the disclosure of additional financial forecasts, a majority of Midstream shareholders still voted to approve the merger as proposed by Midstream directors." In other words, the information *had no effect* on unitholders' voting decision. Yet the district court considered this a factor in favor of settlement approval because, by settling early, the parties avoided the litigation expense of expert reports and complex financial modeling that would be required to prove that the Crestwood Midstream offer price undervalued the company. ROA.3559-3560.

A later passage further demonstrates the district court's failure to make the critical materiality determination. In assessing the settlement relief in comparison to the likely rewards the class would receive at trial, the district court noted, circularly, that, although unitholders did not obtain any financial award from the settlement, "they were placed in the same position had the disclosures been made in the first place." ROA.3561. This logic says nothing about whether the unitholders *benefited* from the disclosure of information. More damning, the district court noted that because the disclosures were obtained prior to the shareholder vote, the § 14(a) claims

"were rendered moot since the shareholders obtained the *alleged* material information prior to voting." *Id.* (emphasis added). *See also* ROA.3573 ("Plaintiffs' counsel secured financial disclosures that helped the shareholders make an informed vote about the merger."). Such tepid descriptions of the disclosures and lack of substantive analysis cannot support the judgment.[5] *See Walgreen*, 832 F.3d at 724 (district court observation that disclosures "may have mattered" is insufficient because it was "devoid of meaningful explanation of why they may have mattered (let alone why they did matter)").

The court's failure was legal error that independently requires remand at a minimum. This Court can go further, however. As explained in the next section, the Settlement cannot be approved as a matter of law.

II. The district court erred in approving the Settlement based on the Supplemental Disclosures because those disclosures were immaterial as a matter of law.

In the context of Rule 14a-9, which governs disclosure in proxy statements, the Supreme Court holds that an "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making her

[5] The only place in which the district court even arguably referred to the disclosures as material was in an offhand remark later in the order. The court noted that "Plaintiff sought a preliminary injunction and temporary restraining order to stop the shareholder vote until material disclosures took place," and "[b]y quickly consenting to these disclosures, Defendants mooted Plaintiff's claims." ROA.3563. This is insufficient to constitute a legal conclusion as well as inconsistent with the rest of the order. *See Walgreen*, 832 F.3d at 724.

decision].” *TSC Indus.*, 426 U.S. at 449. “Put another way, 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.” *Id.*; *see also Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 214 (5th Cir. 2004) (same). There is “no duty to disclose in the prospectus all information material to the offering, but [there is a duty to disclose] only that material information necessary to make the statements in the prospectus not misleading and that material information specifically required by the security laws to be included.” *Kapps*, 379 F.3d at 212 n.6 (applying *Oxford Asset Mgmt. Ltd. v. Jaharis*, 297 F.3d 1182, 1190 (11th Cir. 2002)). The same is true for proxy statements. “The materiality of an omission in a proxy statement is determined by taking into account all information in the public domain and facts reasonably available to the public to be used by shareholders in interpreting the information in the proxy sent to them.” *Justin Indus., Inc. v. Choctaw Sec., L.P.*, 920 F.2d 262, 267 (5th Cir. 1990).

“Reasonable investors do not want to know everything that could go wrong, without regard to probabilities; that would clutter registration documents and obscure important information. Issuers must winnow things to produce manageable, informative filings.” *Wieglos v. Commonwealth Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989); *TSC Indus.*, 426 U.S. at 449 n.10 (noting “the SEC’s view of the proper balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability”). Accordingly,

"[o]mitted facts are not material simply because they might be helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).[6]

The district court erred in approving the settlement because the Supplemental Disclosures are not material as a matter of law.

A. Disclosure of the "upside case" and "downside case" projections was immaterial as a matter of law because they were directionally consistent with disclosed projections and already incorporated in analyses by the financial advisors and the detailed descriptions of those analyses.

The disclosure of the "upside case" and "downside case" projections for Crestwood Midstream, Crestwood Equity, and Crestwood Equity after giving effect to the merger ("pro forma") was not material as a matter of law.

This is not a case in which unitholders were provided no financial projections; rather, the base case projections had been disclosed, as had the financial advisor's detailed analyses resulting from inputs from the upside case, base case, and downside case projections. More specifically, the Preliminary Proxy informed unitholders that Tudor Pickering had performed analyses using the base, downside, and upside cases for Crestwood Midstream and Crestwood Equity, and it provided detailed results from these analyses. The Preliminary Proxy further informed unitholders that, based

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[6] In discussing the materiality standard in the context of shareholder disclosures, the Fifth Circuit has cited precedent from Delaware courts, which apply a similar materiality standard and adjudicate a significant portion of the nation's deal litigation. *See, e.g.*, *Justin Indus.*, 920 F.2d at 266 n.3; *cf. also Walgreen*, 832 F.3d at 725 (noting need to "heed" Delaware courts that "see many more cases involving large transactions").

on those projections the financial advisors had calculated an implied exchange ratio of 1.432x to 4.179x—compared to the 2.750x exchange ratio provided by the merger—and implied value reference ranges for Crestwood Midstream and Crestwood Equity that unitholders could compare to the merger terms and current market price. ROA.579-581, 583-584. The Preliminary Proxy provided a detailed description of how those figures were calculated, including which financial projections and discount rates the financial advisor had applied to reach specified ranges. *Id.* And the Preliminary Proxy and Definitive Proxy attached the fairness opinion provided by Tudor Pickering to the conflicts committee of the Crestwood Midstream board. *See* ROA.575; ROA.555.

The Preliminary Proxy also provided a chart of line items for the base case financial projections, which were the core figures that had been adjusted for purposes of creating upside and downside case projections. ROA.579. Additionally, the Preliminary Proxy contained a cautionary note that the company did not prepare its financial projections "with a view toward public disclosure" and the projections should not be relied upon as a predictor of future results. ROA.587-588.

Nothing in the Supplemental Disclosures changed the implied exchange ratio, implied value reference ranges, or any other analysis in the Preliminary Proxy. The directional trajectory of the projections in the Supplemental Disclosures is consistent with the disclosed base case projections over time. *See* ROA.587; ROA.2690-2691. This, considered with the extensive disclosures made in the first instance, makes clear that the Supplemental Disclosures did not alter the "total mix" of information that a

reasonable unitholder would consider important in casting her vote with respect to the proposed merger. *See TSC Indus.*, 426 U.S. at 449.

The Delaware Court of Chancery reached a similar conclusion in *In re Baker Hughes Inc. Stockholders Litigation*, C.A. No. 10390-CB (Del. Ch. Oct. 13, 2016) (Transcript) (St. John Decl. Ex. 2). There, the court held that management's free cash flow projections were not material and their disclosure did not alter the total mix of information summarized in the financial advisor's analysis where the additional metrics that were disclosed were directionally consistent with those already disclosed. *Id.* at 67:24-68:16. So too here.

More broadly, courts repeatedly have held that "a board need not disclose specific details of the analysis underlying a financial advisor's opinion." *E.g., In re Micromet, Inc. S'holders Litig.*, C.A. No. 7197-VCP, 2012 Del. Ch. LEXIS 41, at *11 (Del. Ch. Feb. 29, 2012) (internal quotation marks omitted); *Greenthal v. Joyce*, No. 4:16-CV-41, 2016 U.S. Dist. LEXIS 11132, at *14-*19 (S.D. Tex. Jan. 29, 2016) (no § 14(a) violation where proxy failed to disclose "inputs used by [financial advisor] in various analyses" of its fairness opinion); c*f. La. Mun. Police Employees Ret. Sys. v. Cooper Indus. PLC*, No. 12 CV 1750, 2012 U.S. Dist. LEXIS 148542 at *31-*32 (N.D. Ohio Oct. 16, 2012) (granting motion to dismiss because omission of full set of financial projections, including underlying inputs and assumptions, was not material and did not make original information false); *IBEW Local 98 Pension Fund v. Central Vt. Pub. Serv. Corp.*, No. 11-cv-222, 2012 U.S. Dist. LEXIS 36784, at *33-*37 (D. Vt. Mar. 19, 2012) (granting motion to dismiss where plaintiffs sought defendant's full five-year

projections, key inputs, and methodologies pertaining to financial advisor's analysis—"information which many courts have ruled need not be disclosed in the absence of a false or misleading statement"—and where proxy already included a summary and thorough description of financial advisor's analysis concluding merger price was fair).

In *TSC Industries*, the Supreme Court expressed concern that "if the standard of materiality is unnecessarily low, … management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information." 426 U.S. at 448-49. For that reason, a proxy is not required to include financial information merely helpful or cumulative to other information that was provided. . . ." *Globis Partners, L.P. v. Plumtree Software, Inc.*, C.A. No. 1577-VCP, 2007 Del. Ch. LEXIS 169, at *11 (Del. Ch. Nov. 30, 2007) (internal quotation marks omitted). Rather, "[c]ourts have consistently held that the duty of disclosure does not extend to the provision of information so extensive and detailed as to permit stockholders to make an independent determination of fair value or recreate the analysis of a financial advisor." *Malon v. Franklin Fin. Corp.*, No. 3:14CV671, 2014 U.S. Dist. LEXIS 166675, at *19 (E.D. Va. Dec. 2, 2014); *see also Globis Partners*, 2007 Del. Ch. LEXIS 169, at *11.

The Crestwood boards were advised by highly skilled attorneys, and the Preliminary Proxy was a heavily-lawyered document. ROA.565-568. If Plaintiff's claims had merit (and they do not), then through the omission of the upside case and downside case projections one of these counselors has inflicted upon the company, at the very least, the costs of this litigation. Yet Plaintiff offers no explanation as to how

such supposedly obvious omissions occurred, why they were made, or who might be responsible.

Plaintiff has not shown that the Preliminary Proxy fell short in any material fashion, and their quibbles with the omitted metrics that fed into the extensive details of the financial advisor's analyses do not rise to the level of materiality.

B. The immaterial Amendment Nos. 1 and 2 were not provided as consideration for unitholder's release of claims in the settlement and cannot be considered a settlement benefit.

Amendments Nos. 1 and 2 were filed with the SEC prior to the MOU, so prior to any settlement in this case. Although the Settlement states that "certain disclosures" made in Amendment Nos. 1 and 2 "were caused by Plaintiff's filing and prosecution of the Lawsuit," ROA.2664, plaintiff does not claim that the amendments were part of the consideration provided to the class under the terms of the MOU or Settlement (as it does for the Supplemental Disclosures). Instead, they described "the relief obtained" solely as "dissemination of the Supplemental Disclosures." ROA.2937.[7]

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[7] In the section of their Motion for Final Approval of Class Action Settlement, Certification of the Settlement Class, and an Award of Attorneys' Fees and Expenses, in which they argue the Court should grant their $575,000 request for fees and expenses, class counsel vaguely alluded to their efforts causing defendants to include "certain other information that had been omitted from the Preliminary Proxy in the Final Proxy." ROA.2939. Such a vague reference in a footnote, superseded by later representations in court, is insufficient to preserve any argument that Amendment Nos. 1 and 2 are a material benefit to the class that warrants attorneys' fees of $575,000.

Even if class counsel sought to rely on the amendments as a benefit to the unitholder class, they run headlong into the problem that pre-settlement actions do not count as a compensable class benefit that can justify either settlement approval or a fee award. *See Howell v. Mgmt. Assistance, Inc.*, 519 F.3d 83, 91 (S.D.N.Y. 1981) (despite initially finding that "the filing of the lawsuit brought about the supplemental proxy statement which, although perhaps unnecessary, did provide additional information," plaintiff was not a prevailing party and not entitled to fees); *cf. Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (repudiating theory that obtaining voluntary concessions after inception of case makes plaintiff "prevailing party"). This is true even if those changes had been duplicated as relief in the terms of the settlement. *E.g.*, *Pampers*, 724 F.3d at 719; *Staton v. Boeing*, 327 F.3d 938, 961 (9th Cir. 2003); *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 286 (7th Cir. 2002) (it is "the *incremental* benefits" that matter, "not the total benefits" (emphasis in original)). Any benefit of the Amendments Nos. 1 and 2 accrued to the unitholder class regardless of whether the class ever released its claims. Such benefit therefore cannot be consideration justifying either a settlement or a misallocation of settlement benefits to class counsel at the class's expense. *Cf.* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.13, Illustration 2 (2010).

In any event, there is nothing in the record suggesting that the additional information added by Amendments Nos. 1 and 2 was "plainly material" even if they are considered part of the consideration in the settlement for unitholders' release of

claims. On their face, the Amendments provide redundant or immaterial additions. *E.g.*, ROA.2696 (adding fact that "Terms of the additional approximately $1.0 billion commitment [in superseded offer early in negotiations of unconsummated transaction] were not specified"); ROA.2700 (meetings with various committees about the Simplification Transaction included discussions about "the reasons for the Simplification Transaction"); ROA.2701 (noting that Tudor Pickering received $2,150,000 in fees for work already disclosed in Preliminary Proxy for entity that merged with Crestwood Midstream in 2013). *See In re Plains Exploration & Prod. Co. S'holder Litig.*, No. 8090-VCN, 2013 Del. Ch. LEXIS 118, at *37 (Del. Ch. May 9, 2013) (finding no need for additional disclosures regarding financial advisors' interests in and work on behalf of acquirer).

C. The "overwhelming majority" unitholder vote in favor of the merger provides additional dispositive evidence that the Supplemental Disclosures were immaterial.

Class counsel argued that the "very positive" "overwhelming majority" vote in favor of the merger transaction demonstrated the value of the Supplemental Disclosures. ROA.3650. But this is exactly backwards: such a vote demonstrates their immateriality as a matter of law. An "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making her decision]." *TSC Indus.*, 426 U.S. at 449. "Because the purpose of merger disclosure is to inform shareholder voting, it is reasonable to view a supplemental disclosure as meaningful if it changes the way reasonable shareholders vote." *See* Fisch at 575.

Here, just as in *Walgreen*, "it is inconceivable" that the Supplemental Disclosures "either reduced support for the merger by frightening the shareholders or increased that support by giving the shareholders a sense that now they knew everything." 832 F.3d at 723. Indeed, empirical evidence "shows there is little reason to believe that disclosure-only settlements *ever* affect shareholder voting." *Id.* (emphasis in original) (citing Fisch at 582-91); *see also Baker Hughes*, Tr. at 62:15-17 ("where nearly 90 percent of the people that voted, voted in favor of [the deal], … [o]bviously, [the disclosures] didn't have an effect of really tamping down the enthusiasm for this deal"). And there is no reason to believe the Settlement here had any impact: No vocal opponent to the merger arose because of the Supplemental Disclosures; no press coverage breathlessly headlined the "new" information in the supplemental disclosure. Shareholders shrugged it off as an exemplar of the merger tax. The overwhelming vote in favor of the merger confirms that the Supplemental Disclosures had no impact on the merger vote. There is no reason to believe that a Crestwood board wishing unitholders to approve a merger withheld material positive information in support of the merger, and no reason to believe that unitholders desired that officious intermeddlers charging attorney-rates would use litigation to add tweaks to the disclosures to ensure merger approval.

* * *

In short, the Supplemental Disclosures were not material as a matter of law and therefore, the Settlement provided no benefit to shareholder class members. The only beneficiary of the Settlement are the attorneys, and settlement approval must be

reversed. Furthermore, the attorneys' decision to negotiate a self-dealing settlement where they were the only beneficiaries at the expense of the unitholder class demonstrates that they have not adequately represented the class under Fed. R. Civ. Proc. 23(g). On remand, the district court should consider whether under *Walgreen* to appoint new class counsel under Rule 23(g) or dismiss the case. 832 F.3d at 726.

III. The district court erred in awarding class counsel's fee award because the Settlement achieved no material value for the unitholder class members.

This Court should dismiss the action, but if the Court does not do so, the Settlement is unfair unless the fee award is materially decreased—perhaps to $1—because the Settlement has achieved nothing for the unitholders. Under Circuit precedent, a district court may not approve a settlement where it is unclear whether the entire settlement fund will be cannibalized by attorneys' fees and administrative costs. *Katrina Canal Breaches*, 628 F.3d at 196-97. This precedent reflects that a "fundamental focus" in awarding fees under Rule 23(h) "is on the result actually achieved for class members." Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (emphasis added); *accord Redman*, 768 F.3d at 633 ("[I]n determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation."); *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013) ("Plaintiffs attorneys' don't get paid simply for working; they get paid for obtaining results."). Thus, "[t]o fully discharge its duty to

review and approve class action settlement agreements, a district court must assess the reasonableness of the attorneys' fees." *Strong v. BellSouth Telecomm.*, 137 F.3d 844, 849 (5th Cir. 1988). Where a district court abdicates its "responsibility to assess the reasonableness of attorneys' fees," "its approval of the settlement must be reversed on this ground alone." *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980).

Here, it is beyond dispute that the entire monetary settlement will be used to pay attorneys' fees and costs. The only relief the Settlement provides to the class is meaningless Supplemental Disclosures. The disclosures involve financial projections that were used as inputs in analyses that were fully disclosed, moved in the same direction as the disclosed projections over time, and that the Preliminary Proxy cautioned against relying upon. *See* Section II.A, above. Attorneys' fees cannot be awarded for relief that has no value to the class. *See Katrina Canal Breaches*, 628 F.3d at 195-96; *cf. Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999) (refusing to award fees in derivative action where relief was illusory because plaintiffs are "entitled to counsel fees upon a settlement of the action only when the non-monetary, therapeutic benefits obtained are substantial in nature").

In the disclosure-only context, courts have backlashed against the "merger tax" of class counsel fees in settlements providing trivial disclosures. "[T]he class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." *Walgreen*, 832 F.3d at 724; *Trulia*, 129 A.3d at 895 ("non-material supplemental disclosures provide no benefit to stockholders and amount to little more than deal "rents" or "taxes"); *see also In re Riverbed Tech. Inc.*, Consol. C.A. No.

10484-VCG, 2015 WL 5458041, *7 (Del. Ch. Sept. 17, 2015) (decreasing fee request because additional disclosures provided minor tangible benefit); *Acevedo v. Aeroflex Holding Corp.*, C.A. No. 7930-VCL (Del. Ch. Jul. 8, 2015) (Transcript) (St. John Decl. Ex. 1); *Ross-Williams v. Bennett*, No. 11CV1688 slip op. at 33 (Kan. D. Ct. Nov. 22, 2016) (reducing fee award by over $3.5 million because "[a]n unjustifiably high fee award with respect to the minimal relief obtained abuses the trust of shareholders") (St. John Decl. Ex. 3).

Courts have also turned a critical eye on their own practices with respect to such settlements:

> [The] practice of compensating class counsel no matter how meaningless the result is, creates the impression with most objective observers that these actions are brought merely for the purpose of generating legal fees. … The willingness to rubber stamp class action settlements reflects poorly on the profession and on those courts that, from time to time, have approved these settlements.

In re Allied Healthcare S'holder Litig., 2015 N.Y. Misc. LEXIS 3810; *see also Trulia*, 129 A.3d at 894 (calling for a reexamination of court's predisposition toward approving disclosure settlements because its "willingness in the past to approve disclosure settlements … [has] caused deal litigation to explode in the United States beyond the realm of reason.").

Here, the Supplemental Disclosures were not material and provide nothing for the class; the disclosures cannot justify the attorneys' fees shareholders are paying to

obtain them. If the Settlement is to be approved, it can only be so if the attorneys receive substantially less than the $575,000 the district court awarded.

IV. Duggan has standing to appeal.

Plaintiff's motion to dismiss suggests they will argue that *Devlin v. Scardelletti* does not give Duggan standing to appeal. This is wrong. Even if, somehow, this Court imposes additional requirements contrary to *Devlin*'s reasoning, Duggan has the right to appeal the failure of the notice to the class to comply with due process requirements.

A. Duggan satisfies *Devlin*.

Devlin v. Scardelletti held that objecting class members bound by settlement need not formally intervene to be considered "parties" with the power to bring appeals of settlement approvals. 536 U.S. 1 (2002). "What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.* at 10. *Devlin* rejected the idea that such appellate standing for objectors should be limited. "As the longstanding practice of allowing nonnamed class members to object at the fairness hearing demonstrates, the burden of considering the claims of this subset of class members is not onerous." *Id.* at 11. Requiring formal intervention would "only add an additional layer of complexity before the appeal of the settlement approval may finally be heard." *Id.* at 14.

Nevertheless, plaintiffs have contended during this appeal that Duggan does not have appellate standing because he did not intervene. Each of their three justifications for this contradiction of *Devlin* is incorrect.

1. The district court was not required to strike Duggan's objection, and exercised its "broad authority" to accept it without unfair prejudice to class counsel.

Class counsel argues that because Duggan filed his objection after the filing deadline established in the preliminary approval order, he waived the right for this Court to consider the appeal. But every case class counsel cites involves an appeal from a district court decision *striking* a late objection. *E.g.*, *In re Deepwater Horizon*, 739 F.3d 790, 809 (5th Cir. 2014). Though the objection was filed late, the district court exercised its "broad discretion" to "expand filing deadlines" to consider the objection. *United States ex rel. Long v. GSDMIdea City, LLC*, 798 F.3d 265, 275-76 (5th Cir. 2015); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988); *Younce v. Barnhart*, 98 Fed. Appx. 305, 306 (5th Cir. 2004). (As *Rodriguez* and *Younce* demonstrate, there is no requirement in this Circuit of a formal Rule 6(b) motion for the district court to exercise that discretion, even when the deadline is one created by Fed. R. Civ. Proc. 72 rather than by a court order. Rather, the burden is on the opposing party to move to strike the objection, which did not happen here. *Younce*, 98 Fed. Appx. at 306.) There was no "waiver" here; nothing in *Devlin* created a jurisdictional rule forbidding a district court from considering an objection filed after the arbitrary preliminary approval order deadline but before the fairness hearing.

This is especially true here, where notice was late. Indeed, it is common in shareholder settlements for district courts to consider late-filed objections given that, as happened here, notice to reasonably identifiable shareholders is often systematically late and defective because the settlement administrator does not comply with its duty to timely mail notice to individual shareholder/unitholder class members within the time ordered by the court. *E.g., In re Citigroup Sec. Litig.*, No. 07-cv-9901, Dkt. 183 (S.D.N.Y. Jan. 2, 2013); *In re Johnson & Johnson Derivative Litig.*, No. 10-cv-2033, Dkt. 208 (D.N.J. Sep. 25, 2012); *Robert F. Booth Trust v. Crowley*, No. 09-cv-5314, Dkt. 115 (N.D. Ill. July 9, 2010). *Cf. Robert F. Booth Trust v. Crowley*, 687 F.3d 314 (7th Cir. 2012) (Easterbrook, J.) (upholding appeal of late-filing objector against self-dealing Rule 23.1 derivative settlement). Class counsel had a full opportunity to respond to Duggan's objection with a late-filed brief of their own and with argument at the fairness hearing, and suffered no unfair prejudice; they even persuaded the district court to create the circuit split that Duggan appeals here. *Devlin*'s concern about "untimely" objections was simply reflecting the reality that class members *who never objected* in the district court would be deemed to have waived their rights to appeal. 536 U.S. at 13. Duggan's objection, which *was* considered at the district court level, was not "untimely" in the sense *Devlin* discussed, and there was no waiver because the district court, by considering the objection, ratified the expansion of the filing deadline. *GSDMIdea City,* 798 F.3d at 275-76.

No reported decision of an appeals court has ever held there was no jurisdiction over the appeal of an objection that was not stricken and considered on

the merits at the fairness hearing, simply because it was late-filed. Nothing in *Devlin* suggests that this Court should be the first.

2. Duggan proved class membership below, and there is no actual dispute that he is a class member.

Relying on *Feder v. Elec. Data Systems*, class counsel has argued that Duggan waived the right to appeal because he did not provide "the requisite proof of membership in the Settlement Class." But Duggan complied with the Notice in this case, which required proof of class membership "by way of brokerage statement, account statement, or *other document* evidencing ownership of Crestwood Midstream units." ROA.3373. Duggan did provide such proof through a declaration under penalty of perjury, which is sufficient as a matter of law to prove his membership in the class. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) (courts may "allow class members to identify themselves with their own testimony"). As *Mullins* noted, there is "only one type of case in which the testimony of one witness is legally insufficient to prove a fact"—a case for treason. *Id.* In *Feder*, in contrast, the objector failed to provide a statement sworn under penalty of perjury or other proof for his "bare assertions" and "unsupported claim of ownership"; he did not even identify the number of shares he purchased. 248 Fed. Appx. 579, 581 (5th Cir. 2007). (Moreover, *Feder*, unlike this case, was a cash settlement, and there was no evidence the putative-class-member objector had even filed a claim for a share of the proceeds.) The *Feder* objector attorney's *ipse dixit* was not competent evidence like a declaration is. 28 U.S.C. § 1746(2). Class counsel's argument that *only* a brokerage statement would suffice to prove class membership contradicts the notice they drafted in this case: if

they thought that non-shareholders would perjure themselves to object, they could have drafted the notice requirements for objection more restrictively.

Even if, for some reason, this Court does not think Duggan's detailed assertion under penalty of perjury of class membership below was sufficient to demonstrate class membership and standing—a factual issue that was not disputed at the district-court level—the remedy to cure a technical jurisdictional defect at the appellate level is to accept evidence pursuant to 28 U.S.C. § 1653. *Whitmire v. Victus, Ltd.*, 212 F.3d 885, 887-88 (5th Cir. 2000) (citing *D.J. McDuffie Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 146 (5th Cir.1979)). "We have repeatedly noted that § 1653 is to be broadly construed to avoid dismissals of actions on purely 'technical' or 'formal' grounds." *Id.*

Cobell v. Salazar is directly on point. 679 F.3d 909, 919 & n.7 (D.C. Cir. 2012). In that appeal of a class-action settlement, the government alleged for the first time on appeal that the appellant lacked standing to challenge the settlement. *Cobell*, citing § 1653, permitted the appellant to submit a declaration demonstrating standing, and held that the declaration "disposes of that conjecture." Duggan filed a § 1653 declaration on December 6, 2016, if, for some reason, this Court is not persuaded by *Mullins* and wishes to impose proof requirements beyond that given in the late notice to Duggan. App. Dkt. 513786974 at 33-46. *See also McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 654 (7th Cir. 1998) (Easterbrook, J.) (accepting new factual allegations through § 1653 to cure defective notice of removal rather than dismissing for lack of federal jurisdiction). Given *Cobell* and given that class counsel did not contest class

membership below and does not even dispute on appeal that Duggan is a class member, there is no reason *Feder* applies in this case.

3. Nothing in *Devlin* required Duggan to file a "notice of intent to appear" when the notice did not require such a filing.

Relying on a single out-of-circuit case, plaintiffs have argued that Duggan lacks standing because he did not file a notice of intention to appear for a hearing at which he did not intend to appear and was told he need not appear. *In re Integra Realty Res.*, 354 F.3d 1246, 1256 (10th Cir. 2004). *Integra* is incorrect (other circuits disagree,[8] and it contradicts *Devlin*'s reasoning as discussed below), but, more importantly, is it inapplicable in this case where the notice was materially different. Here, the Notice stated that objectors were not required to appear at the settlement hearing, and it is far from clear that objecting class members who did not intend to appear at the settlement hearing were required to file a notice of intention to appear (and why would they?). ROA.3373 (requiring the notice of intention to appear from class members who did wish to appear at the Settlement Hearing). Instead, the Notice

[8] *Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014) (Posner, J.) (motion to dismiss appeal by "absent objector" is "frivolous" under *Devlin*); *Fidel v. Farley*, 534 F.3d 508 (6th Cir. 2008) (allowing appeal of untimely objection by class member who did not appear at fairness hearing); *Weinberger v. Kendrick*, 698 F.2d 61, 69 n.10 (2d Cir. 1982) (objections "should not be disregarded simply because they do not precisely comply with the procedures for the filing of individual objections specified in the notice"). Even in the Tenth Circuit, district courts do not enforce arbitrary appearance requirements. *Rhodes v. Olson Assocs.*, 308 F.R.D. 664, 668 (D. Colo. 2015) (deleting appearance requirement from proposed notice, citing *Newberg on Class Actions* § 13:30 (5th ed.) ("Courts should be cautious of objection formats that unduly chill class members' capacity to object.")).

specifically stated that "[e]ven if you do not appear at the Settlement Hearing, the Court will consider your written submission if it is served and filed in accordance with the foregoing procedures." *Id.* The ambiguity in the notice is properly construed against class counsel as drafter. *Stetson v. Grissom*, 821 F.3d 1157, 1164 (9th Cir. 2016); *cf. also Katrina Canal Breaches*, 628 F.3d at 197-99 (misleading Rule 23(e) notice violates constitutional due process). The only purpose of a notice of an intent to appear is to permit a district court to manage the schedule of the fairness hearing; when the objector is not appearing at the fairness hearing, cluttering the docket with extra paperwork adds no information to the parties or court that the objection by itself does not provide.

Class counsel did not protest the lack of the second piece of paper below, and demonstrate no prejudice. It is undisputed that the district court considered Duggan's objection. From this, the Court may infer that Duggan met the requisite procedures for objecting as set by the district court. *Devlin*, 536 U.S. at 11 ("the power to appeal is limited to those nonnamed class members who have objected during the fairness hearing" without mention of physical presence); *Rodriguez*, 857 F.2d at 277.

Nothing in *Devlin*'s reasoning made physical presence at a hearing critical to standing on appeal. "What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement." *Devlin*, 536 U.S. at 10. Furthermore, another reason behind *Devlin* was to end the need for redundant and wasteful motions to intervene given that objecting class members had the absolute right to intervene. *Id.* at 12-13; *cf. Crawford v. Equifax*

Payment Servs., 201 F.3d 877, 881 (7th Cir. 2000) (reversible error for pre-*Devlin* court to deny intervention to objecting class member) (Easterbrook, J.). It would be pointless to replace one meaningless piece-of-paper requirement with another. And it would be abusive to require an Illinois unitholder with $12,000 in holdings to spend approximately $1,000 to travel to physically appear in Texas court to have his legal arguments heard—especially where, as here, he was given a facially defective notice with the wrong hearing date; where notice was distributed late and Duggan had no time to retain *pro bono* counsel on short notice; where the notice is ambiguous as to that requirement; and where class counsel can identify no unfair prejudice.

B. In the alternative, Duggan and the class were unfairly prejudiced by the facially defective notice and the parties' failure to satisfy due process with adequate notice.

Even if the Court were to agree with plaintiffs' call to impose limitations on *Devlin* unprecedented in this Circuit, Duggan still has the right to appeal the facially constitutionally defective notice in this case, which by itself precludes settlement approval. *Katrina Canal Breaches*, 628 F.3d at 197-99. The district court's finding that the notice was constitutionally satisfactory is clearly erroneous for two reasons.

First, the uncontested evidence is that the settlement administrator violated the court's order, and sent over 45,000 notices, over 90% of the total notices sent, well after the deadline set by the court, and perhaps even after the objection deadline. *Compare* ROA.3360-3361 at ¶ 11 with ROA.2899 at ¶ 9. The district court's finding that notice was timely contradicted what it ordered in the preliminary approval order, and it gave no reasoning for why it believed that notice provided after the objection

deadline was sufficient—or even any indication that the district court understood that this was the evidence presented to it.

There "is no compelling reason that class members should not be given at least 60 days' time frame in which to file objections or appear at a fairness hearing." 3 *Newberg on Class Actions* § 8:16 (5th ed. 2014). A notice received only after or shortly before the objection deadline is insufficient to allow an opportunity for deliberation and action. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *Redman*, 768 F.3d at 637-38; *Hill v. State St. Corp.*, 794 F.3d 227, 230 (1st Cir. 2015).

Second, the uncontested evidence is that the notice provided to the class gave incorrect dates for the objection deadline and appearance at the fairness hearing. *Compare* ROA.3370 with ROA.2903.. Misleading notice is constitutionally deficient as a matter of law. *Katrina Canal Breaches*, 628 F.3d at 197-99. The defect was unfairly prejudicial. Had Duggan known that it was possible to timely file an objection after his return from Europe, he might have been able to do so, but class counsel did not tell him this until a week after he mailed his objection.

Duggan's objection let the court know that notice was late, and the district court had an obligation to investigate why its order had been ignored and whether other class members were adversely affected. Given that class counsel provided a declaration *admitting* that the vast majority of class members receiving *any* notice were adversely affected, the district court abused its discretion in ignoring the evidence before it. By class counsel's argument, settling parties can withhold notice until after the objection deadline, and objecting class members would have no appellate recourse

if a district court disregards their complaint about the lack of notice because they did not file a timely objection. That simply isn't the law. Indeed, class members who have not received proper notice are not bound by a settlement ***release*** even if they haven't objected. *Hecht v. United Collection Bureau,* 691 F.3d 218 (2d Cir. 2012).

The Court need not reach the constitutional issues of due process if it vacates settlement approval under *Trulia* and *Walgreen* and Rule 23(e), but the Constitution and *Katrina Canal Breaches* forbid affirmance of the settlement approval below.

Conclusion

The Court should reverse approval of the Settlement. The Court should further remand with instructions to consider whether under *Walgreen* to appoint new class counsel under Rule 23(g) or to dismiss the case. 832 F.3d at 726. In the alternative, the Court could remand with instructions to reduce the Rule 23(h) award to $1.00 to reflect the *de minimis* relief won for the class. At a minimum, this Court should remand so that the district court evaluates the settlement under the correct "plainly material" standard. Any other result would make Crestwood unitholders worse off and make future shareholders worse off by encouraging similarly abusive strike suits.

Dated: January 4, 2017

Respectfully submitted,

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Addendum of Statutes, Regulations, and Rules

15 U.S.C. § 78n – Proxies

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

…

17 CFR § 240.14a-9 – False or misleading statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

…

28 U.S.C. § 1653

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

28 U.S.C. § 1746

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

…

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

Federal Rule of Civil Procedure 6. Computing and Extending Time.

…

(b) Extending Time.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

…

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

…

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

…

(4) the representative parties will fairly and adequately protect the interests of the class.

…

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

…

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e) …

…

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

…

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

…

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

…

Proof of Service

I hereby certify that on January 4, 2017, I caused to be electronically filed the foregoing Opening Brief with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all who are registered for electronic filing in this matter:

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Certificate of Compliance
with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32.3

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 12,781 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Executed on January 4, 2017.

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