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

---

Reply Brief of Appellant David G. Duggan

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
Theodore H. Frank
Anna St. John
1310 L Street, NW, 7th Floor
Washington, DC 20005
(202) 331-2263

Counsel for Appellant David G. Duggan

Table of Contents

Table of Authorities

Cases

Rules and Statutes

<u>Other Authorities</u>

Summary of the Argument

Plaintiff Aron tries to shoehorn this settlement into the "plainly material" mold established by *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016), and adopted and reinforced by *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718 (7th Cir. 2016). But the district court failed to find the Supplemental Disclosures (*i.e.*, the "upside case and downside case projections" set forth in tables in a Form 8-K filed with the SEC to supplement the proxy statement, ROA.2688) material—much less plainly material—and Aron can point to no evidence in the record showing otherwise. Aron relies on cases where courts found financial projections material because they contradicted or otherwise showed disclosed information to be misleading, but those cases are inapposite: Aron does not (and cannot) allege that the Supplemental Disclosures in fact made or demonstrated the original valuation analyses inaccurate or misleading. Thus, Aron turns to the argument that the Supplemental Disclosures were necessary so unitholders could perform their *own* valuation analyses because, some law review articles have suggested, officers and directors and their hired financial advisors in other cases may manipulate the data. In essence this is an argument that the Supplemental Disclosures gave additional information. But Plaintiff does not allege, much less demonstrate, that the Supplemental Disclosures significantly altered the total mix of information, as is necessary for this Court to find them material under *TSC Indus. v. Northway Inc.*, 426 U.S. 438 (1976), much less "plainly material" under *Walgreen*.

For their part, the defendants (collectively, "Crestwood") deny the materiality of the supplemental disclosures altogether and urge this Court to allow district courts to approve settlements of meritless class actions that result in shareholders releasing their claims in exchange for nothing while class counsel collect six-figure fees. DB5.[1] Even under the best of circumstances, this is impermissible under Rule 23(e) and *In re Katrina Canal Breaches Litigation*, 628 F.3d 185 (5th Cir. 2010). It is especially pernicious here where the putative class comprises unitholders of a defendant, who have received nothing of value but have had the value of their collective investment reduced by the amount of the "merger tax" paid to class counsel, and are thus made worse off by the litigation. Lawsuits that enrich only the plaintiffs' attorneys while imposing the social cost of litigation specifically on the shareholder class the attorneys are supposed to serve, and generally on society and its judiciary, must fail.

Appellees appear to agree that this case is largely meritless. Be that as it may, Rule 23(e) prevents the parties from structuring a class-action settlement in which the attorneys capture the overwhelming fruits of the settlement (here, the $575,000 in attorneys' fees) at the expense of a class that recovers nothing of value. Even if this Court is inclined to approve the settlement, attorneys' fees should be reduced substantially to reflect the value of the litigation.

Aside from the merits, Aron asks the Court to find that Duggan lacks standing because he is not injured by the settlement's release of his claims because those claims are meritless. But this argument confuses jurisdiction with merits. *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89-90 (1998). It also asks the Court to reject the holding of

[1] "OB," "PB," and "DB" refer, respectively, to the opening, plaintiff's and defendants' briefs.

Union Asset Mgmt. v. Dell, Inc. that anyone who is a class member has standing to object to a settlement and appeal its approval. 669 F.3d 632, 638 (5th Cir. 2012). Even if the Court were inclined to disregard this controlling precedent, the economic harm the settlement imposes on Duggan as a unitholder, as well as the settlement's injunction barring unitholders from prosecuting the broad set of released claims, including unknown claims, provides redressable injury sufficient for standing to challenge both settlement approval and attorneys' fees.

Aron's argument that Duggan lacks standing because he filed a late objection and did not comply with the requirements purportedly set forth in the notice also fails. Duggan anticipated this argument in his opening brief, OB39-48, and Aron provides no reasoning or precedent to undermine the refutation, or explain why they have not waived the waiver argument by failing to make the motion to strike that this circuit requires. Even *statutory* deadlines are nonjurisdictional; all the more so the discretion of a district court to set its own schedule. Nor does Aron provide any explanation why class counsel unquestionably failed to comply with the district court's unambiguous preliminary approval order or why they provided facially defective notice, or why the district court's finding that notice was constitutionally adequate wasn't clearly erroneous. OB46-48.[2]

[2] While Aron asserts there is "absence of any evidence" of late notice, DB56, one can infer late notice from the negative pregnant in the record. OB10. At a minimum, the district court committed reversible error by making a conclusory statement about the adequacy of notice without addressing the discrepancy in the only record evidence on the subject. Aron objects that he "informed Duggan of the new" deadline, DB56,

Argument

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

Appellees make unfounded assertions regarding the district court's findings and advocate for erroneous interpretations of precedent.

A. Appellees point to nothing in the district court's opinion showing that it assessed the materiality of the Supplemental Disclosures.

Aron does not contend that the settlement could be approved if the Supplemental Disclosures were not material. Nor does Aron argue that the Court should reject the "plainly material" standard of *Trulia/Walgreen* or that this standard is wrong as a matter of law or policy. Instead, Aron claims that Duggan "ignores various parts of the record where the district court clearly assessed the materiality of the [Supplemental Disclosures] and thereby emulated the *Trulia/Walgreen* analysis." PB18.

Appellees rely on the adverb "clearly" rather than pointing to *any* analysis of materiality. *See* PB18-21; DB4-5. They do not cite a single passage in which the district court found that the Supplemental Disclosures were material or stated that it would approve the settlement because they were material. *Id.* Nor do appellees deny that the district court expressly rejected *Walgreen* as precedent. ROA.3564.

Aron's argument relies heavily on the district court's observations of *Plaintiff's own* arguments of materiality. *See* PB19 (quoting, *e.g.*, district court's comment that "*Plaintiff* sought injunctive relief for material omissions….") (emphasis added). Even if

but he did not do so until after the deadline had passed, or provide any explanation for the sandbagging. OB11.

the district court knew that Aron sought material disclosures, that's hardly dispositive: "A settlement is after all a compromise, reflecting real concessions on all sides." *Granada Invs. v. DWG Corp.*, 962 F.2d 1203, 1206 (6th Cir. 1992). Courts commonly approve settlements that compromise the relief originally sought, and there is no evidence that the district court did not do that here.

This background and the fact that Aron claims to have repeatedly argued about materiality make the absence of a reasoned materiality finding all the more striking. If the district court understood that materiality was essential to lawful approval of the settlement, its tepid endorsement of the Supplemental Disclosures as having "helped the shareholders make an informed vote about the merger" and "benefited the entire class" underscores the district court's legal error. ROA.3569; ROA.3573.

B. *Katrina Canal Breaches* does not support settlement approval.

Aron does not dispute that a class-action settlement can meet all of the *Reed/Parker* factors and still be unfair under Rule 23(e), as this Court unequivocally held in *Katrina Canal Breaches*, 628 F.3d at 195. PB 21. Aron recognizes that a court must "ultimately conclude," after analyzing the *Reed* factors, that "the settlement 'secures an adequate advantage for the class,'" PB21, *i.e.*, simply passing the factor-test is insufficient. But Aron interprets "adequate advantage for the class" erroneously, arguing that the language should be read to require only that a settlement "benefit the class in *some* way." PB22 (emphasis added). That cannot be right; by using "adequate advantage" instead of "any advantage," the Court required that the benefit to the class be more than nominal. In the context of a disclosure-only class-action settlement under

Section 14(a) of the Exchange Act, the only non-nominal release available—the "adequate advantage" to be secured for the class—is disclosure of plainly material information. The Court should apply *Katrina Canal Breaches* to hold the settlement cannot be approved because the district court did not "demonstrate[e] on the record" that "the settlement secure[d] an adequate advantage for the class….." 628 F.3d at 195 (internal quotation marks omitted).

Every class action settlement—nonpecuniary and pecuniary must meet the "fair, reasonable, and adequate" standard of Rule 23(e). *See* PB22. Closer scrutiny is required of nonpecuniary settlements under this standard, however, because "the fairness of a settlement is more difficult to determine when nonpecuniary benefits are provided…." *Granada*, 962 F.2d at 1206.

Plaintiff selectively quotes from three cases to suggest that the most relevant factors to settlement approval are the level of shareholder objection and whether settlement was reached through arm's length negotiation. PB22-23. The only Fifth Circuit case Plaintiff cites for this principle, *Maher v. Zapata Corp.*, recognizes that in any class action, a district court must (1) determine that a settlement is "fair, reasonable, and adequate," (2) "state its reasons for approv[al]," (3) "examine a proposed settlement in light of the objections raised, and" (4) "set forth … a reasoned response" with detail sufficient for an appellate court to conduct a meaningful review. 714 F.3d 436, 455 (5th Cir. 1983). This rigorous standard makes Plaintiff's claim that the district court made a materiality finding all the more dubious.

As Duggan's opening brief explained, arm's length negotiation between the parties in a class action is insufficient to establish settlement fairness: A defendant cares only about the bottom line, while class counsel have an incentive to seek the largest portion of the settlement amount for themselves, at the expense of the class. OB20. Given the significant delay in providing notice to class members, in addition to "the practical realities of class actions," this Court should join the "number of [other] courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (*citing In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981)); *accord Richardson v. L'Oreal, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) ("low objection rate" "proves little"). A settlement unfair on its face does not become fair just because there was one objector instead of ten.

C. Crestwood provides no grounds for creating a circuit split with *Walgreen*.

Crestwood, meanwhile, does not argue that the Supplemental Disclosures were material or that the district court found them so. It does not contend that Aron brought a meritorious complaint that would legitimately survive a motion to dismiss; it does not even contend that this is not an abusive strike suit. Crestwood nevertheless urges the Court to defer to the district court's approval of the settlement on the ground that the settlement provided a "benefit" to the class in the form of "additional information with which to judge the merits of the proposed merger." DB4-5.

If any additional information regarding the merger, no matter how trivial is a shareholder "benefit," then that's *carte blanche* for lawyers to profit at the expense of shareholders with meritless strike suits. Every proxy statement could be longer. Courts have declined to accept the fiction that attorneys are benefiting their putative class clients with illusory relief; thus, *Trulia* and *Walgreen* require disclosures to be more than "additional information" (DB 5), but rather "plainly material." 129 A.3d at 898; 832 F.3d at 725.

Even if this Court were to reject *Trulia* and *Walgreen* and consider immaterial "additional information" the sort of "benefit" meriting settlement approval, there would still be the problem of fairness created by the fee windfall. Corporations faithfully representing shareholders would never *ex ante* choose to pay editors or even lawyers hundreds of thousands of dollars for the copying-and-pasting of a couple of charts of underlying estimates in the Supplemental Disclosures. A disclosure has to be meaningful before it merits the sort of all-too-commonplace fee award made here. Crestwood further argues that if it and other defendants are not allowed to pay off class counsel to get rid of abusive strike suits, defendants—and shareholders—would be subject to expensive litigation and ultimately worse off. DB5. This is an empirical claim that ignores the dynamic effect of court-created incentives. If class counsel can't collect lucrative paychecks for settlements with illusory relief, then they won't file those suits—and strike suits will no longer be brought against more than 97.5% of mergers. Jill E. Fisch, *et al.*, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 561, 582-91 (2015) ("Fisch"). If lawyers can't receive a guaranteed payday for bringing meritless cases, they instead will focus on more meritorious cases rather than subjecting their weakest claims to scrutiny. *Id.*

That's a benefit of Duggan's proposed rule of decision, not a cost. And unlike Crestwood's supposition to the contrary, Duggan's hypothesis has been tested: recent reports show that following *Trulia*, deal litigation is down overall,[3] while there has been "dramatic growth" in federal merger-objection cases, attributed to plaintiff lawyers' efforts to evade the "strong skepticism of disclosure-only settlements" expressed in *Trulia*.[4]

Delaware courts have taken an additional step to limit windfall fees for the purpose of "discouraging baseless litigation": "To justify an allowance of fees the action in which they are sought must have had merit at the time it was filed." *Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966); *see In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1124 (Del. Ch. 2011) (if there is no factual basis for making charges, then "action lacked merit and the plaintiff is entitled to no allowance for fees.").

Previous rulings against similarly abusive rent-seeking provide further evidence of the impact that comes from a change in litigation incentives. In *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013), and *Richardson*, 991 F. Supp. 2d 181, courts rejected $0 settlements of absurd consumer-fraud cases that paid only class counsel. Both times

[3] Daniel Fisher, *M&A Lawsuits Plunge as Delaware Judges Make Them Harder to Settle*, FORBES, Aug. 2, 2016, *available at* http://www.forbes.com/sites/danielfisher/2016/08/02/lawyers-flee-delaware-as-judges-crack-down-on-deal-tax-suits/#326549232319.

[4] Kevin LaCroix, *NERA Economic Consulting: Record Number of Securities Suit Filings in 2016*, THE D&O DIARY, Jan. 23, 2017, *available at* http://www.dandodiary.com/2017/01/articles/securities-litigation/nera-economic-consulting-record-number-securities-suit-filings-2016/.

experienced class counsel walked away from the litigation rather than engage in the game of discovery chicken feared by defendants.

The rejection in *Robert F. Booth Trust v. Crowley* of a settlement of a shareholder-derivative suit over alleged breaches of fiduciary duty relating to the Clayton Act has not produced lengthy litigation and discovery challenging interlocking directorates. 687 F.3d 314 (7th Cir. 2012). Instead, that entire class of rent-seeking litigation has, as best Duggan can tell, vanished from federal and state dockets.

And, precisely on point, if Crestwood were correct, the *Walgreen* class counsel would have responded on remand by serving punishing discovery on the defendants. Instead, they slunk away and dismissed their case without refiling. No. 14-cv-09786 (N.D. Ill. Dec. 8, 2016). As *Crowley* and *Walgreen* demonstrate, when courts say that lawyers don't get paid for bringing class actions that don't help the class, lawyers listen, and don't bring (or at least bring fewer) abusive suits in the first place.

One can sympathize with Crestwood's dilemma of wanting to minimize its costs by settling a meritless strike suit that apparently should not have been brought in the first place. But Crestwood and other corporations and partnerships will be much less likely to have this problem in the future if settlements and fee requests like those here are rejected. Nominal disclosures should receive at most nominal compensation. The way to achieve fewer meritless cases is to penalize class counsel for bringing such litigation, not to reward them for imposing costs on shareholders in the first place.

D. Questions of law and mixed questions of law and fact are reviewed *de novo*.

Aron argues that "deferential clear error review" applies to the district court's materiality determination. PB23; PB17. This is wrong. "Because materiality is a mixed question of law and fact, the standard of review varies, depending upon the particular question we are considering." *Justin Indus. v. Choctaw Secs., L.P.*, 920 F.2d 262, 266 (5th Cir. 1990) (internal citation and quotation marks omitted). The district court's application of the wrong standard of law, *i.e.*, its approval of the settlement without finding materiality of supplemental disclosures, is reviewed *de novo*. *Id.* Appellees don't dispute that an error of law is an abuse of discretion or that Duggan alleges an error of law. Thus, *de novo* review is appropriate. *O'Sullivan v. Countrywide Home Loans*, 319 F.3d 732, 737 (5th Cir. 2003).

II. The Supplemental Disclosures aren't material, must less "plainly material."

As *Trulia* and *Walgreen* hold, information is "plainly material," if it is not "a close call that the supplemental information is material as that term is defined under Delaware law." 129 A.3d at 898; 832 F.3d at 725. Defendants don't even attempt to defend the materiality of the Supplemental Disclosures. DB2. Aron's attempt is unavailing.[5]

[5] Plaintiff's argument that *Trulia* and *Walgreen* did not involve management projections, PB38-39, is entirely beside the point. The question is whether the Supplemental Disclosures meet the "plainly material" standard established to end the "racket" of strike suits that benefit only the lawyers who bring them.

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

Walgreen held that "[d]isclosures are meaningful only if they can be expected to affect the votes of a nontrivial fraction of the shareholders, implying that shareholders found the disclosures informative." 832 F.3d at 723. In reaching this holding, *Walgreen* noted that "recent empirical work … shows that there is little reason to believe that disclosure-only settlements *ever* affect shareholder voting." *Id.* (emphasis in original) (citing Fisch at 561, 582-91). Aron urges this Court to reject the considered approach of *Walgreen* and adopt instead decades-old case law from the Second Circuit that predates the explosive growth in strike suits. PB35-36. This Court should decline such an invitation.

This Court's precedent already allows it to hold as a matter of law that the "overwhelming" vote in favor of the transaction—made after the Supplemental Disclosures—demonstrates the disclosures' immateriality. ROA.3650. Even if the actual effect upon a typical investor is not the "*sole test*"[6] or "necessar[y] impl[ication]"[7] of materiality, it makes little legal or practical sense to refuse to consider the "overwhelming" demonstration by unitholders that the Supplemental Disclosures—which Plaintiff claims "cut against the fairness of the Exchange Ratio" provided in the transaction (PB14)—were irrelevant to their decision to approve the transaction.

Unlike in some cases, the Court needn't speculate whether a reasonable unitholder would find an omission material: It has empirical proof that the unitholders

[6] *Justin Indus.*, 920 F.2d at 268 (emphasis added).

[7] *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981).

yawned at the Supplemental Disclosures when they overwhelmingly approved the merger. This provides clear evidence that investors did not consider the Supplemental Disclosures material, much less plainly material.

It is sound jurisprudence, as *Walgreen* held and this Court's precedent allows, that "the value of nonpecuniary relief in merger settlements [should] be measured by its effect on shareholder voting." Fisch at 560. When a supplemental disclosure has no material effect on shareholders' votes, its only consequence is to create the illusion of relief to rationalize attorneys' fees. This Court should see through this illusion. *Cf. Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (non-pecuniary benefit "must be something more than technical in its consequence").

B. Even without the context of overwhelming shareholder approval, the disclosures were not material.

The parties don't argue that the Supplemental Disclosures show that the 2.75 exchange ratio provided for in the merger is actually unfair, or that the Supplemental Disclosures alter the implied exchange ratios of 1.432x to 4.179x indicated by the contribution analysis, or that unitholders would find that a different range of exchange ratios was more appropriate if they performed their own analyses. They ultimately resort to the argument that unitholders should be able to make their own valuation calculations, but fail to argue that this would have significantly altered the total mix of information. Courts repeatedly have held that information "of the 'tell me more' variety," including management's financial projections, is immaterial, particularly where, as here, there is no demonstration that the disclosed analysis is misleading or incomplete. *Dent v. Ramtron Int'l Corp.*, C.A. No. 7950-VCP, 2014 Del. Ch. LEXIS 110, at *29-*30, *37-*38 (Del. Ch. June 30, 2014).[8]

1. The disclosure of the "upside case" and "downside case" forecasts was not material.

Aron relies solely on the materiality of the Supplemental Disclosures—what it calls the "Withheld Projections," *i.e.*, "the 'upside case' and 'downside case' financial forecasts prepared by Crestwood management" to support the district court's settlement approval. PB14, 23. The justification Aron gives for his claim of materiality is that these financial forecasts "call[ed] the fairness of the 2.750x exchange ratio … into question." PB3; *see also* PB23. As Aron admits, however, the Preliminary Proxy *already* disclosed the valuations for Crestwood Midstream units based on such projections. ROA.369; PB28. Unitholders were informed that the contribution analyses utilizing the base, downside, and upside cases indicated exchange ratios for the merger ranging from 1.432x to 4.179x.[9] ROA.369; OB28-29.

---

[8] Aron's normative argument that federal courts should reject the "too lax" governance of corporate officers and directors provided by Delaware law not only misses the point in this disclosure-centric case but is undermined by Aron's reliance almost exclusively on cases that were decided decades ago and academic literature as well as by the numerous federal courts that follow Delaware law respecting materiality due to its unique expertise and its equivalence with federal law. PB3-4; *see, e.g.*, *Walgreen*, 832 F.3d at 725; *Krieger v. Harris Teeter Supermarkets*, 2013 U.S. Dist. LEXIS 134113, *8 (W.D.N.C. Sept. 18, 2013); *Himmel v. Bucyrus Int'l*, 2014 U.S. Dist. LEXIS 50481, *40 (E.D. Wis. Apr. 11, 2014). And, most importantly, this Circuit's law. OB28 n.6.

[9] Plaintiff claims that the Proxy failed to specify whether the projections constituted the base, upside, or downside case. PB24. However, the Proxy said that there was one set of projections—a base case—that had been adjusted to create an

Plaintiff makes much of the divergence in the respective growth rate of EBITDA in the upside case for Equity and Midstream. PB33. But Aron never explains why this divergence is significant or even argues that it makes the 2.75 exchange ratio unfair or alters the projected implied value range disclosed to unitholders. Nor does Aron disclose that EBITDA has been criticized as a valuation tool because it ignores key factors related to shareholders' return on investment, such as depreciation and amortization. Plaintiff also fails to note that other comparisons show a relatively stable valuation. For example, the ratio between Midstream and Equity's projected distributed cash flow per unit ranges from 2.15 to 4.02 in the base case and 1.81 to 4.05 in the upside case, and ratio between their projected distributions per unit range from 2.08 to 3.09 in the base case and 1.75 and 3.04 in the upside case. *See* ROA.377, ROA.1370. *Cf. Dent*, 2014 Del. Ch. LEXIS 110, at *31-*32 ("other than making the conclusory allegation," plaintiff "failed to explain how disclosing the Company's management projections used in [disclosed analyses] would significantly alter the total mix of information," where the merger consideration was in the valuation ranges implied by the disclosed summaries of financial analyses).

Aron, unsupported by precedent, invents a class of settlements—not coincidentally containing this settlement—for which approval is compelled. But this case in fact involves "disclosure of miscellaneous financial metrics which serve as 'inputs' into a financial advisor's analyses," and "disclosure of projections for financial

upside case and downside case. ROA.369. It would be obvious to a reasonable investor that the financial forecast in the Proxy was the base case.

metrics that are already built into or similar to disclosed projections." PB40. By Plaintiff's own standards, then, the Supplemental Disclosures are not material. *See Dent*, 2014 Del. Ch. LEXIS 110, at *29-*30, *37-*38.

2. Aron's case law is inapposite.

Aron largely relies on platitudes about the need to provide "complete and accurate" valuation information to support its materiality position. PB25-26. This phrase is agreeable enough in the abstract, but means very little without context. A closer look at the cases shows that the "complete and accurate" language targets egregiously misleading half-truths from which insiders profited and omissions that made the disclosed information profoundly misleading—not the mere failure to provide backup data for non-deceptive valuations. *See, e.g.*, *Rubinstein v. Collins*, 20 F.3d 160, 170 (5th Cir. 1994) (insider-trading defendants made optimistic projections "while knowingly concealing adverse, material information" that, once disclosed, resulted in large stock price drop); *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977) ("alleged half-truths" involved, *inter alia*, "failing to reveal that possibly bogus insurance claims had been posted" on loans and that "substantial negative adjustments" had been made in reported asset value and net income); *Smith v. Robbins & Myers, Inc.*, 969 F. Supp. 2d 850, 874 (S.D. Ohio 2013) ("the omitted projections rendered the statements regarding Citi's [discounted flow analysis] misleading"); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 558 (6th Cir. 2001) ("defendants persisted in making favorable predictions and feigning ignorance" of negative legal developments "with actual knowledge that their statements were misleading").

Similarly, cases cited by Plaintiff for the proposition that financial projections are material involve projections that made the disclosed information inaccurate, not those that constituted additional support for already disclosed valuations. *See, e.g.*, *Marx v. Computer Sciences Corp.*, 507 F.2d 485 (9th Cir. 1974) (substantial write-off due to "long standing" troubles was made shortly after announcement of expected net income); *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998) (insider traded on undisclosed expected revenue figures significantly lower than public projections due to budget mistake known to insider); *Folger Adam Co. v. PMI Indus.*, 938 F.2d 1529 (2d Cir. 1991) (future projections that made disclosed financial data inaccurate were material). *See also Marino v. Harkey*, No. D067365, 2016 Cal. App. Unpub. LEXIS 9387, at *14 (Cal. App. Dec. 28, 2016)[10] (expert explained that disclosed inputs and assumptions altered valuation analysis). Here, in contrast, the Supplemental Disclosures did not correct information that was otherwise false or misleading. They simply provided additional data underlying projections that had already been disclosed to Crestwood unitholders. *See 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).

Brown v. Brewer, No. CV 06-3731, 2010 U.S. Dist. LEXIS 60863 (C.D. Cal. June 17, 2010), also misses the mark. *Brewer*'s holding that the undisclosed internal financial projections *might* be material is an outlier, *see* section II.B.3 below, and, in that regard, the court was clear to remark that the facts were "distinguishable" from other cases. *Id.*

[10] California Rule of Court 8.115 precludes citation or reliance on an unpublished decision, making it inappropriate for this Court to give weight to *Marino*.

at *69. Unlike the disclosure of the base case projections and valuation analyses here, the shareholders in *Brewer* were given *no* projected growth rates. *Id.* at *70. *See also Gordon v. Verizon Comms.*, No. 653084/13, 2017 N.Y. Slip Op. 00742 (1st Dep't Feb. 2, 2017) (settlement approval supposedly warranted due to corporate governance reforms and multiple disclosures) (explicitly rejecting *Trulia*).

In short, information can be complete and accurate even when a company doesn't provide exposition of the "numbers behind the numbers," including financial projections. *See Trulia*, 129 A.3d at 900 n.56 (citing with approval cases holding that "disclosure of all projections" and "specific details underlying" fairness opinion not required). The explosive growth in strike suits has its roots in this problem: lawyers looking for a quick buck can always allege that there are more valuation data that could have been disclosed. If Crestwood Midstream had provided the upside case and downside case projections initially, we would likely see a similar lawsuit alleging that the failure to provide the specific adjustments made to the base case to reach those projections was a material omission. The Court can limit this societally wasteful litigation by joining its sister courts in critically examining whether supplemental disclosures are "plainly material." *See* section I.C.

3. Omitted information is not material just because it might have enabled unitholders to perform their own analysis of fair value.

As a fallback position, Aron maintains that the Supplemental Disclosures are material because unitholders needed to be able to perform their own valuation analysis. PB28. But Aron cites no case law to support this position and relies exclusively on normative arguments from academic literature. The reason for the lack of support is found in the Supreme Court's standard for materiality: whether a reasonable investor would view it "as having significantly altered the 'total mix' of information made available." *TSC Indus.*, 426 U.S. at 449. Ironic for someone accusing Duggan's counsel of being "long on ideology and short on law." DB51.

Providing additional data underlying disclosed valuation analyses may *add* to the information made available but doesn't *significantly alter* the mix of information. *Cf. Malon v. Franklin Fin. Corp.*, No. 3:14CV671, 2014 U.S. Dist. LEXIS 166675, at *18-*19 (E.D. Va. Dec. 2, 2014) ("Courts 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."); *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) (proxy is not required to include "financial information merely helpful or cumulative to other information that was provided"); *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000) ("Omitted facts are not material simply because they might be helpful," and do not include "all the financial data they would need if they were making an independent determination of fair value.").

It is thus notable Aron does not dispute that the Supplemental Disclosures were, in fact, used in the analyses disclosed to unitholders. And while Aron claims that financial valuations are inherently subject to uncertainty in the abstract, he does not argue that the valuation range disclosed to unitholders *here* was materially inaccurate, even if he argues the ultimate 2.75 exchange ratio provided in the merger could be "question[ed]." So while the Supplemental Disclosures may have been informative or helpful to unitholders wishing to perform their own analyses, they were not material or necessary. *Cf. Trulia*, 129 A.3d at 900-01 (proxy "need not contain all information underlying the financial advisor's opinion or contained in its report to the board" and "does not need to provide sufficient data to allow the stockholders to perform their own independent valuation").

III. If the settlement approval is to be affirmed, attorneys' fees should be penalized.

Even by Aron's own estimation, this suit was worth very little. *E.g.*, PB9, 15. If the Court adopts a rule permitting the settlement to be approved, circuit precedent and Rule 23(h) require the fees to be materially decreased to more proportionately reflect the Supplemental Disclosures' lack of value—regardless of whether the settlement is structured as a traditional common fund or otherwise. *See* OB36-39; Section I.C. "Tailoring the fee award more closely to case quality would provide more appropriate incentives than paying counsel a nominal fee in every case, no matter how weak." Fisch at 608; *see also Sauer-Danfoss*, 65 A.3d at 1141 (awarding reduced fee of $75,000 for disclosure yielding "minimal benefits"); *cf. Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) ("if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny?") (Easterbrook, J.).

IV. Duggan has standing to appeal settlement approval and the attorneys' fees award.

Aron argues that Duggan does not have standing to appeal because he is not injured by the settlement's release of his claims, because those underlying claims are meritless. PB47. Aron's argument confuses jurisdiction with the merits. *Steel Co*, 523 U.S. at 89-90; *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Board of Trustees v. Elite Erectors*, 212 F.3d 1031, 1038 (7th Cir. 2000) (Easterbrook, J.). By Aron's argument, a court can never dismiss a suit under Rule 12(b)(6) because a party with a deficient claim lacks Article III standing. The district court erroneously released Duggan's claims in violation of Rule 23, and he is entitled to redress that injury on appeal by obtaining reversal of that decision, just as a plaintiff whose complaint is dismissed under Rule 12(b)(6) has appellate standing to reverse that decision, though it would be "speculative" whether the plaintiff would win a trial on that complaint.

Duggan further meets the injury-in-fact requirement because the settlement imposes an injunction barring him from pursuing any future claims related to the litigation—including unknown claims not known or expected to exist. ROA.2670-2674. Even if Plaintiff is correct that the known claims are worthless, that says nothing about the unknown claims included within the broad release. The threat of impending injury, "no matter how small," creates standing, and such "[i]njury need not be certain." *Brandt v. Vill. of Winnetka, Ill.*, 612 F.3d 647, 649 (7th Cir. 2010).

Aron's argument proves too much: given the class certification, under the law of the case, Aron's claims are typical of the class's claims, including Duggan's, and if Duggan does not have standing to resuscitate "worthless" claims, Aron does not have standing to bring them in the first place, and the district court should have dismissed the suit for lack of jurisdiction.

Furthermore and most importantly, under Rule 23(e)(5), there is no separate requirement that appellants demonstrate that they have a meritorious claim because "[a]ny class member has standing to object to a class settlement." *Union Asset Mgmt. v. Dell, Inc.*, 669 F.3d 632, 638 (5th Cir. 2012); *see also Devlin*, 536 U.S. at 6-7 (ability of objecting class member to appeal settlement approval "does not implicate the jurisdiction of the courts under Article III of the Constitution"; class member "has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability"). (There is, of course, no dispute that Duggan is a class member. OB12; OB42-44.) An objector, as a "person who has been accorded a procedural right to protect his concrete interests[,] can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). This right of an objector to raise appellate issues with respect to the broader interests of the shareholder class in the hopes of reversing a judgment and reducing an award of attorneys' fees has been endorsed in the shareholder context multiple times. *E.g.*, *Walgreen*, 832 F.3d 718; *cf. Crowley*, 687 F.3d 314 (permitting Rule 23.1 objector who filed objection late in district court to intervene and exercise appellate rights).

The question of whether Duggan has standing to appeal the fee award independent of his challenge to the settlement approval is closer. Some courts follow a common-sense approach, noting that where a class of shareholders is involved, they stand to lose from every additional dollar that the defendant pays out. As *Kaplan v. Rand* stated, "a shareholder who objects to the payment of a fee from corporate funds in compensation of attorneys who have brought a derivative action … has an interest that is affected by the judgment directing payment of the fee," *i.e.*, an interest "in the financial well-being of the corporation." 192 F.3d 60, 67 (2d Cir. 1999). *See also Zucker v. Westinghouse Elec. Corp.*, 265 F.3d 171, 175 (3d Cir. 1991) (objecting shareholder appealed attorneys' fees without appealing settlement approval); *but cf. In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 949 n.9 (9th Cir. 2011) (leaving question open in non-shareholder case, while agreeing objector had standing to challenge approval of $0 settlement of worthless claim). *Knisley v. Network Assocs.*, 312 F.3d 1123 (9th Cir. 2002), holds that someone without a claim on a common fund cannot challenge a fee award taken from the common fund, but that does not mean that class counsel can shield its fee from appellate scrutiny by failing to establish a common fund.

Aron abandons many arguments he made in a FRAP 27 motion that he previously insisted required summary dismissal of Duggan's appeal. Instead, Aron makes unfortunate *ad hominem* attacks against Duggan's non-profit counsel, the Center for Class Action Fairness ("CCAF"). PB51. Contrary to Aron's smears, CCAF has nothing against disclosure settlements that meet the *Trulia/Walgreen* standard, much less meritorious suits that challenge materially misleading disclosures. CCAF cited its 4-0 record in shareholder settlement appeals (OB14) to show that this appeal was brought in good faith; it never claimed that it has won every single one of its dozens of objections. That Aron thinks it a better use of word-limits to cherry-pick a few cases where CCAF lost (three of which are still on appeal as of February 17, including one, *Blackman v. Gascho*, No. 16-364 (U.S.), where CCAF represents prominent law professor Joshua Blackman and where seventeen state attorneys general filed *amicus* to support *certiorari*) demonstrates the bankruptcy of class counsel's defense of their settlement, and the bad faith of their original appellate motion filed the day before Thanksgiving.

V. Duggan did not waive his right to appeal under *Devlin*.

Duggan addressed Aron's argument that he "waived his right to appeal by filing an untimely and procedurally deficient objection," PB52, in his opening brief and stands by his position. OB39-48. The district court accepted and considered Duggan's objection, and there is no basis to reject this appeal for lack of jurisdiction. *See also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) ("[W]e have made plain that most [statutory] time bars are nonjurisdictional," and Congress must make "clear statement" to overcome that presumption.).

Conclusion

For the foregoing reasons, the Court should reverse approval of the Settlement and 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.

Dated: February 17, 2017

Respectfully submitted,

COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS

/s/ Theodore H. Frank
Theodore H. Frank
Anna St. John
1310 L Street, NW 7th Floor
Washington, DC 20005
(202) 331-2263
Attorneys for Appellant David G. Duggan

Proof of Service

I hereby certify that on February 17, 2017, I caused to be electronically filed the foregoing Reply 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:

Thomas Emerson Bilek
Bilek Law Firm. L.L.P.
Suite 3950
700 Louisiana
Houston, TX 77002-0000
Email: tbilek@bileklaw.com

Kenneth Prager Held
Schiffer Odom Hicks & Johnson, P.L.L.C.
Suite 2650
700 Louisiana Street
Houston, TX 77002
Email: kheld@sohjlaw.com

James Gregory Waller
Andrews Kurth Kenyon LLP
600 Travis Street
Houston, TX 77002
Email: gregwaller@andrewskurth.com

Michael C. Holmes
Vinson & Elkins, L.L.P.
Suite 3700
2001 Ross Avenue
Trammell Crow Center
Dallas, TX 75201-2975
Email: mholmes@velaw.com

Kelly Spragins Sandill
Andrews Kurth Kenyon LLP
Suite 4200
600 Travis Street
Houston, TX 77002
Email: ksandill@andrewskurth.com

James Milligan Wilson Jr.
Faruqi & Faruqi, L.L.P.
26th Floor
685 3rd Avenue
New York, NY 10017
Email: jwilson@faruqilaw.com

I further certify that on February 17, 2017, I caused to be served the foregoing Reply Brief by Federal Express to the following:

Juan E. Monteverde
Faruqi & Faruqi, L.L.P.
685 3rd Avenue
New York, NY 10017

Date: February 17, 2017

/s/ Theodore H. Frank
Theodore H. Frank

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 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Garamond font.

Executed on February 17, 2017.

/s/ Theodore H. Frank
Theodore H. Frank