NO. H044087

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Anthony Evangelista, et al.,
Plaintiffs and Respondents,

v.

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

Sean J. Griffith,
Objector-Appellant.

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

OPENING BRIEF OF APPELLANT SEAN J. GRIFFITH

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL 6th APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: H044087
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 36034 NAME: Anna St. John FIRM NAME: Competitive Enterprise Institute STREET ADDRESS: 1310 L Street NW, 7th Floor CITY: Washington STATE: DC ZIP CODE: 20005 TELEPHONE NO.: (917) 327-2392 FAX NO.: E-MAIL ADDRESS: anna.stjohn@cei.org ATTORNEY FOR (*name*): Sean J. Griffith	SUPERIOR COURT CASE NUMBER: 1-15-CV-278055
APPELLANT/ PETITIONER: Sean J. Griffith RESPONDENT/ REAL PARTY IN INTEREST: Anthony Evangelista, et al.; Robert W. Duggan, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Sean J. Griffith

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 7/30/2018

Anna St. John
(TYPE OR PRINT NAME)

Anna St John
(SIGNATURE OF APPELLANT OR ATTORNEY)

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STATEMENT OF APPEALABILITY

This appeal arises from a class action filed in the unlimited civil division of the Superior Court of California, County of Santa Clara alleging self-dealing and breach of fiduciary duty. The complaints consolidated in the action sought injunctive relief. (1 CT 18; 1 CT 167.) On July 21, 2016, over the objection of class member Sean J. Griffith, the superior court entered an order approving the settlement of the class action. On September 7, 2016, the superior court entered a stipulation and order permitting Griffith to intervene, whereby Griffith was made a party to the action pursuant to Code of Civil Procedure § 387(a). (2 CT 391.) On September 15, 2016, Griffith timely appealed to this Court from the July 21, 2016, order. (2 CT 397.) On November 2, 2016, the notice of entry of the Superior Court's final judgment dated October 27, 2016, was filed. (2 CT 410.) On December 12, 2016, Griffith filed a timely amended notice of appeal with respect to the final judgment. (2 CT 420.)

STANDARD OF REVIEW

A superior court's decision to approve a class action settlement is reviewed for abuse of discretion. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128.) A decision "that implicitly or explicitly relies on an erroneous reading of the law necessarily is an abuse of discretion." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.) Conclusions of law are reviewed *de*

novo. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.) Conclusions of fact are reviewed to determine if they are supported by substantial evidence. (*Id.*)

INTRODUCTION

This shareholder class action arising out of the acquisition of defendant Pharmacyclics, Inc. by defendant AbbVie, Inc. ended the same way the vast majority of such suits—filed for nearly every merger above a certain size—ends: supplemental disclosures providing only extraneous information for shareholders, a broad release of claims for defendants, and six-figure fees for the plaintiffs' lawyers. (*See* Korsmo & Myers, *The Structure of Stockholder Litigation: When do the Merits Matter?* (2014) 75 Ohio St. L.J. 829.) The misshapen incentives that give rise to these settlements are not hard to see, as the Delaware Court of Chancery stated in its seminal *Trulia* decision:

> It is beyond doubt in my view that … 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.

(*In re Trulia, Inc. Stockholder Litigation* (Del. Ch. 2016) 129 A.3d 884, 894 (hereafter *Trulia*).)

Such deal litigation is often referred to as "strike suits—meritless claims filed for their nuisance value—by entrepreneurial plaintiffs' attorneys" or simply as a merger "tax." (Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals* (2014) 11 Berkeley Bus. L.J. 55, 56 (hereafter Jeffries).) Even if a suit may be meritless, the overwhelming majority of these strike suits settle—quickly and on a disclosure-only basis. (Erickson, *The Gatekeepers of Shareholder Litigation* (2017) 70 Okla. L.Rev. 237, 254-255 (hereafter Erickson).) Not only do these strike suits provide no monetary relief to class members, but scholars argue that the settlements actually harm their putative beneficiaries—the shareholders—by driving up the cost of the merger transactions, extorting a "transaction tax" in the form of attorneys' fees. (*See id.* at p. 255; Jeffries, *supra*, 11 Berkeley Bus. L.J. at p. 108; Haims & Beha, *Recent Decisions Show Courts Closely Scrutinizing Fee Awards in M&A Litigation Settlements* (2013) 1.[1])

The settlement at issue here is one such disclosure-only settlement. From the filing of the initial complaint on March 13, 2015—mere days after the announcement of AbbVie's acquisition of Pharmacyclics—to entry into a memorandum of understanding regarding settlement, adversarial litigation in this action lasted only 34 days. (1 CT 254-255.)

The momentum behind the dramatic increase in deal litigation was temporarily stymied in 2016 by the Delaware Court of Chancery's decision in

[1] *Available at* http://media.mofo.com/files/Uploads/Images/130418-In-the-courts.pdf.

Trulia. *Trulia* marked a sea change in Delaware's approach to settlements of deal litigation, announcing that disclosure-only settlements would be subject to "continued disfavor." (129 A.3d at p. 898.) Post-*Trulia*, the number of strike suits has dropped significantly in Delaware, but it has remained robust in other jurisdictions that have not adopted a similarly close scrutiny of settlements that tend to benefit only the class attorneys. (*See* Erickson, *supra*, 70 Okla. L.Rev. at p. 257; Cadwalader, Client & Friends Memo, *2017 Year in Review: Corporate Governance Litigation & Regulation* (Jan. 9, 2018) 2-3 (hereafter Cadwalader).[2]) As expressed by one prominent academic, "It would be disappointing if merger objection suits were expelled from Delaware only to a safe haven" in other courts. (Coffee, *What's Really Happening in Securities Litigation? A Tale of Two Bars* (Mar. 14, 2018) N.Y.L.J.[3]).

Because Pharmacyclics was incorporated in Delaware, Delaware's tight restrictions on what constitutes "material" information in disclosures to shareholders apply in this case; on this, plaintiffs agree. (*See* Section II.A.) Procedurally, California law already requires trial courts to scrutinize the consideration provided by the settlement and reject any settlement that provides immaterial or illusory relief. (*See id.*) It would be consistent with existing law and

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[2] *Available at* https://www.cadwalader.com/resources/clients-friends-memos/2017-year-in-review-corporate-governance-litigation--regulation#_ftnref6.

[3] *Available at* https://www.law.com/newyorklawjournal/2018/03/14/whats-really-happening-in-securities-litigation-a-tale-of-two-bars/.

prudent public policy for this Court also to adopt the "continued disfavor" referenced in *Trulia* to disclosure-only settlements such as the one at issue here.

As this background suggests, as a matter of law and regardless of whether this Court fully adopts *Trulia*'s reasoning, the settlement here should not have been approved because it is not fair or reasonable. The supplemental disclosures provided the shareholder class with no new material information and thus provided no incremental value to shareholders. And that was the only relief provided, even though the complaints alleged self-dealing and breach of fiduciary duty claims and no disclosure-related claims. In return for the valueless disclosures, class members gave defendants a broad release that even included unknown and uninvestigated claims, after plaintiffs' counsel conducted only a surface-level investigation. Plaintiffs' attorneys, in contrast, did not fare so poorly; they recovered over $509,000 in fees and expenses. (2 CT 384-385.) The superior court, for its part, failed to properly scrutinize the settlement and approved the settlement and accompanying fees by relying on an inaccurate understanding of the supplemental disclosures that overstated what they provide to shareholders, citing six purported disclosures that were not actually provided to the class. (2 CT 380-381; Section II.B.) This latter error independently merits remand, but this Court can go farther and reverse settlement approval. If the Court affirms settlement approval, the award of attorneys' fees should be materially decreased.

STATEMENT OF FACTS

A. Deal litigation is filed in the vast majority of mergers without proper legal standards disfavoring disclosure-only settlements.

Deal litigation—shareholder actions challenging public company mergers—exploded in this decade: "In 2012, 93% of deals over $100 million and 96% of deals over $500 million were challenged in shareholder litigation." (Fisch, Griffith & Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform* (2015) 93 Tex. L.Rev. 557, 558-59 (hereafter Fisch).) Settlements of these actions—like the settlement at issue in this appeal—rarely provide monetary relief for the class members but, instead, usually consist solely of supplemental amendments to the merger proxy statement. (*See id.* at p. 559; *see also* Woolner, *et al.*, *Merger Suits Often Mean Cash for Lawyers, Zero for Investors* (Feb. 16, 2012) Bloomberg[4] (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).)

Jurisdiction-specific figures show that the attorneys filing these lawsuits respond to legal incentives. Following *Trulia*, "[o]nly 9% of merger transactions valued at over $100 million were challenged in Delaware in the first ten months of 2017, compared to 34% in 2016 and 60% in 2015." (*See* Cadwalader, *supra*, at pp. 2-3.) Nationwide, however, the overall percentage of lawsuits remains robust, with 85% of all such public merger transactions facing litigation in the

[4] *Available at* http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals.html.

first ten months of 2017. These figures show that plaintiffs are not ceasing the practice but rather shopping for jurisdictions that will not show the "disfavor" toward disclosure-only suits brought about by *Trulia* and its progeny. (*See id.* (noting shift of disclosure litigation to federal courts and state courts outside Delaware).)

B. AbbVie and Pharmacyclics announce acquisition, and plaintiff shareholders file a class action within days.

This appeal arises out of a transaction announced by AbbVie and Pharmacyclics on March 4, 2015, in which AbbVie, through a wholly owned subsidiary (collectively "AbbVie"), would acquire all of the outstanding shares of Pharmacyclics, a Delaware corporation, for $261.25 per share. (1 CT 2:10-12.) Pharmacyclics shareholders would receive their choice of either cash, AbbVie common stock, or a combination of the two. (1 CT 9:13-14.) Days later, on March 13, 2015, a plaintiff filed the first of four total class actions against Pharmacyclics, AbbVie, and members of Pharmacyclics's board of directors. (1 CT 1.) These suits—all filed between March 13, 2015, and March 18, 2015, and later consolidated by the superior court—alleged that Pharmacyclics's directors suffered conflicts of interest, that Pharmacyclics's CEO chose AbbVie as a deal partner to protect his employees, and that Pharmacyclics defendants breached their fiduciary duties to the shareholder class and agreed to a transaction that undervalued the Company, locking up the deal through "onerous and unreasonable deal protection devices." (*See, e.g.*, 1 CT 15-18; 1 CT 164-167.) At the time plaintiffs filed their complaints, defendants had not yet filed a

Recommendation Statement with the U.S. Securities and Exchange Commission ("SEC"); plaintiffs made no disclosure claims and never amended their pleadings to make such claims.

C. Pharmacyclics files a Recommendation Statement with the SEC.

On March 23, 2015, Pharmacyclics filed with the SEC a Solicitation and Recommendation Statement on Schedule 14D-9 (the "Recommendation Statement" or "Rec. Stat.") containing its board's recommendation of the acquisition. The Recommendation Statement was nearly fifty pages in length, not including additional annexed materials, describing the background of the Acquisition, the process leading to the agreement to sell Pharmacyclics to AbbVie, and Pharmacyclics's financial projections and the financial analyses performed by Pharmacyclics's financial advisors Centerview Partners LLC ("Centerview") and J.P. Morgan Securities LLC ("J.P. Morgan") in support of their fairness opinion. (1 CT 68; *see generally* Recommendation Statement, attached as Exhibit A to the Declaration of Anna St. John filed with Griffith's Motion for Judicial Notice on July 13, 2018.)

D. The settling parties execute a memorandum of understanding; class members get supplemental disclosures, and class attorneys get a six-figure fee.

On April 16, 2015—barely a month after plaintiffs filed the initial complaint—the settling parties executed a memorandum of understanding ("MOU") of a settlement that altered no deal terms but required Pharmacyclics to make supplemental disclosures to its shareholders. (Stipulation of Settlement

3 (attached as Exhibit 2 to the Declaration of Anna St. John filed with the Motion to Augment the Record on July 24, 2018).) Defendants expedited the litigation by providing to plaintiffs' counsel for settlement purposes only certain confidential documents that were prepared in connection with the acquisition such as board minutes and financial advisor presentations as "confirmatory" discovery as well as an undetermined number of "additional documents" at an undisclosed point in time. They also took depositions of two financial advisors. (*Id.* at p. 4.) The record reflects no discovery of information personal to the individual defendants, such as collection of individual emails or defendant depositions.

E. Pharmacyclics files Supplemental Disclosures with the SEC.

On April 17, 2015, and pursuant to the MOU, Pharmacyclics filed supplemental disclosures on SEC Schedule 14D-9 (the "Supplemental Disclosures" or "Supp. Discl.," attached as Exhibit C to the Stipulation of Settlement). (Stipulation of Settlement 4, 9.) The Supplemental Disclosures addressed three topics, by plaintiffs' admission: (1) financial analyses performed by Centerview, (2) financial analyses performed by J.P. Morgan, and (3) financial projections provided by management for years 2015-2028. (2 CT 370; 1 CT 51-54.)

1. Financial Analyses Performed by J.P. Morgan and Centerview (Supp. Discl. ¶¶ 3-18)[5]

Centerview's Selected Comparable Public Company Analysis (Supp. Discl. ¶ 3). The Recommendation Statement explained that Centerview had compared certain financial information of Pharmacyclics to corresponding data for a list of ten publicly traded biopharmaceutical companies that Centerview deemed comparable to Pharmacyclics. (Rec. Stat. at p. 32.) The Recommendation Statement described the analysis that Centerview undertook using publicly available information, disclosed the sources of that information, and noted that multiples above a specified threshold were excluded as outliers. The Recommendation Statement included a summary of results showing the median, 75th percentile, and 25th percentile multiples for enterprise value (calculated as the equity value plus the book value of debt less cash equivalents)/revenue expected for 2016 and 2017, and price-to-earnings ratio, or "P/E," expected for 2017 (*i.e.,* share price to estimated earnings per share ("EPS")). (*Id.* at pp. 32-33.)

The only additional information the Supplemental Disclosures provided regarding this analysis was a company-by-company itemization of the individual multiples used in the analysis and excluded as outliers. (Supp. Discl. ¶ 3.)

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[5] Supplemental Disclosures ¶¶ 1, 9, and 10 corrected immaterial typos; Supplemental Disclosure ¶ 19 addressed this stockholder litigation; and Supplemental Disclosures ¶ 20 stated the filing date for an amendment to Pharmacyclics's 2014 Annual Report. Because these disclosures are on their face immaterial and the plaintiffs did not contend otherwise, Griffith does not discuss them further.

J.P. Morgan's Public Trading Multiples Analysis (Supp. Discl. ¶¶ 11-13). As with Centerview's analysis, the Recommendation Statement disclosed the list of publicly traded companies that J.P. Morgan selected to compare with Pharmacyclics with respect to selected financial data. (Rec. Stat. at p. 38.) The Recommendation Statement noted that J.P. Morgan had obtained the relevant multiples from specified public sources and described how J.P. Morgan calculated (1) the multiple of firm value to estimated revenue ("FV/Revenue") for 2016 and 2017, and (2) expected P/E for 2017 and then selected a multiple reference range to produce an implied value per share range. (*Id.*)

The only information added by the Supplemental Disclosures was a company-by-company itemization of the individual multiples used in the analysis and excluded as outliers and a note stating that multiples above a certain threshold were excluded as outliers. (Supp. Discl. ¶¶ 11, 12.) (The Supplemental Disclosures also made a non-substantive edit changing "Based on this" to "Based on the above". (Supp. Discl. ¶ 13.))

Precedent Transactions Analyses (Supp. Discl. ¶¶ 4-7, 14-15). Centerview and J.P. Morgan selected the same fourteen transactions involving biopharmaceutical companies for their respective precedent transactions analyses, and the Recommendation Statement listed the date of the transactions, the target, and the acquirer. (Rec. Stat. at pp. 33, 39.) The Recommendation Statement also disclosed the methodologies used by the financial advisors. With respect to Centerview, it detailed how, using publicly available information, Centerview calculated the enterprise value implied for each target company

based on the consideration payable in each selected transaction as a multiple of the target company's next-twelve months ("NTM") estimated revenues at the time of the transaction announcement. The Recommendation Statement set forth the results of Centerview's analysis in a table showing the "transaction value/NTM revenue" multiples of the target companies at the median, 75th percentile, and 25th percentile. (*Id.* at p. 34.) The Recommendation Statement noted that transactions having a multiple greater than 30x were excluded from the results as outliers. It also described how Centerview applied the results to Pharmacyclics's estimated NTM revenue, based on specified estimates for IMBRUVICA product revenue, to reach a per share equity value range of $89.20 to $158.30 that it then compared to the $261.25 per share merger consideration. (*Id.*)

The only additional information the Supplemental Disclosures provided was a company-by-company itemization of the individual multiples used in the analysis and excluded as outliers. The other three columns in the table added by the Supplemental Disclosures are identical to the table that it replaced in the Recommendation Statement. (*Compare* Rec. Stat. at p. 33 *with* Supp. Discl. ¶ 6.) The Supplemental Disclosures also moved a paragraph from below the table to above the table, but the text remained identical other than the addition of the phrase "as reflected below" and deletion of the phrase "These transactions were:" (*Compare* Rec. Stat. at p. 34 *with* Supp. Discl. ¶¶ 4-5, 7.)

For J.P. Morgan's methodology, the Recommendation Statement described how, also using publicly available information, J.P. Morgan examined

the selected transactions with respect to the firm value implied for the target company as a multiple of the target company's two-year forward estimated revenues at the time of the transaction announcement ("two-year forward FV/revenue"). The Recommendation Statement disclosed the resulting high and low two-year forward FV/revenue multiples and the multiple range that J.P. Morgan applied to Pharmacyclics data to produce the implied value per share range that it compared to the merger consideration. (Rec. Stat. at p. 39.) The only additional information the Supplemental Disclosures provided was a company-by-company itemization of the individual two-year forward FV/revenue multiples used in the analysis and excluded as outliers. The other three columns in the table added by the Supplemental Disclosures are identical to the table set forth in the Recommendation Statement. (Supp Discl. ¶ 15.) (The Supplemental Disclosures also added the non-substantive phrase "in this section." (Supp. Discl. ¶ 14.))

Discounted Cash Flow Analyses (Supp. Discl. ¶¶ 8, 16-18). The Recommendation Statement provided a detailed description of what a discounted cash flow ("DCF") analysis is and how both Centerview and J.P. Morgan undertook their respective analyses. (Rec. Stat. at pp. 34, 39-40.) It also disclosed the range of implied fully diluted equity values per share of Pharmacyclics resulting from the financial advisors' analyses, to compare to the merger consideration. (*Id.*) The Supplemental Disclosures did not change the description of the analyses or the results; instead, it added a few details about certain metrics that each financial advisor had deemed relevant "in its

professional judgment and experience," and the general sources of certain inputs for the analyses, such as "guidance from Pharmacyclics management" and "based on information Centerview obtained from SEC filings, FactSet Research Systems and other Wall Street research." (Supp. Discl. ¶¶ 8, 18.) The Supplemental Disclosures also set out the individual publicly-traded development-state biopharmaceutical companies and their public firm values that the two advisors had used, among other factors, in valuing Pharmacyclics' pipeline at $750 million and determining the range of implied fully diluted equity values per share that they disclosed in the Recommendation Statement. (Supp. Discl. ¶¶ 8, 17; Rec. Stat. at pp. 34, 40.)

With respect to Centerview, the chart below shows the text added by the Supplemental Disclosures in bold:

Rec. Stat. at p. 34	**Supp. Discl. ¶ 8**
"Centerview performed a discounted cash flow analysis of Pharmacyclics based on the Pharmacyclics forecasts. A discounted cash flow analysis is a traditional valuation methodology used to derive a valuation of an asset by calculating the 'present value' of estimated future cash flows of the asset. '*Present value*' refers to the current value of future cash flows or amounts and is obtained by discounting those future cash flows or amounts by a discount rate that takes into account macroeconomic assumptions and estimates of risk, the opportunity cost of capital, expected returns and other	"Centerview performed a discounted cash flow analysis of Pharmacyclics based on the Pharmacyclics forecasts. A discounted cash flow analysis is a traditional valuation methodology used to derive a valuation of an asset by calculating the 'present value' of estimated future cash flows of the asset. 'Present value' refers to the current value of future cash flows or amounts and is obtained by discounting those future cash flows or amounts by a discount rate that takes into account macroeconomic assumptions and estimates of risk, the opportunity cost of capital, expected returns and other appropriate factors. Centerview calculated a range of illustrative enterprise values for Pharmacyclics by (a) discounting to present value as of March 31, 2015, using

appropriate factors. Centerview calculated a range of illustrative enterprise values for Pharmacyclics by (a) discounting to present value as of March 31, 2015, using discount rates ranging from 9% to 11% (reflecting Centerview's analysis of Pharmacyclics' weighted average cost of capital), using the mid-year convention: (i) the forecasted fully-taxed unlevered free cash flows of Pharmacyclics during the period beginning on April 1, 2015 and ending on December 31, 2028 calculated based on the Pharmacyclics forecasts (excluding expenditures for non-IMBRUVICA (ibrutinib) pipeline programs) and (ii) a range of illustrative terminal values of Pharmacyclics as of December 31, 2028 calculated by Centerview applying to Pharmacyclics' fully-taxed unlevered free cash flows for the terminal year perpetuity growth decline ranging from 70% to 90% for fully-taxed unlevered free cash flows in the U.S. and decline ranging from 30% to 70% for fully-taxed unlevered free cash flows outside of the United States, respectively and (b) adding to the foregoing results (i) $750 million, representing the estimated value of Pharmacyclics' non-IMBRUVICA (ibrutinib) pipeline programs (calculated based on the approximate median enterprise value of select publicly-traded development-stage biopharmaceutical	discount rates ranging from 9% to 11% (reflecting Centerview's analysis of Pharmacyclics' weighted average cost of capital, **derived using the Capital Asset Pricing Model, taking into account certain metrics that Centerview deemed relevant in its professional judgment and experience, including target capital structure, levered and unlevered betas for the companies listed in the Selected Comparable Public Company Analysis described above, tax rates, the market risk and size premia and yields for U.S. treasury notes),** using the mid-year convention: (i) the forecasted fully-taxed unlevered free cash flows of Pharmacyclics during the period beginning on April 1, 2015 and ending on December 31, 2028 calculated based on the Pharmacyclics forecasts (excluding expenditures for non-IMBRUVICA (ibrutinib) pipeline programs) and (ii) a range of illustrative terminal values of Pharmacyclics as of December 31, 2028 calculated by Centerview applying to Pharmacyclics' fully-taxed unlevered free cash flows for the terminal year perpetuity growth decline ranging from 70% to 90% for fully-taxed unlevered free cash flows in the U.S. and decline ranging from 30% to 70% for fully-taxed unlevered free cash flows outside of the United States, respectively **(in each case to account for the fact that the expiry of Pharmacyclics' patents would lead to increased competition from generics according to Pharmacyclics management)** and (b) adding to the foregoing results (i) $750 million, representing the estimated value of Pharmacyclics' non-IMBRUVICA (ibrutinib) pipeline programs, calculated based on **guidance from**

companies) and (ii) Pharmacyclics' estimated net cash balance of $850 million as of March 31, 2015, as provided by management of Pharmacyclics. Centerview divided the result of the foregoing calculations by Pharmacyclics' fully diluted outstanding Pharmacyclics shares, calculated as described above, to derive an implied per share equity value range of approximately $195.00 to $223.00 per share. Centerview compared this range to the per share equity value of the merger consideration of $261.25."	**Pharmacyclics' management and** the approximate median enterprise value of select publicly-traded development-stage biopharmaceutical companies **(based on information Centerview obtained from SEC filings, FactSet Research Systems and other Wall Street research):** **[Itemized list of selected companies and their firm values]** and (ii) Pharmacyclics' estimated net cash balance of $850 million as of March 31, 2015, as provided by management of Pharmacyclics. Centerview divided the result of the foregoing calculations by Pharmacyclics' fully diluted outstanding Pharmacyclics shares, calculated as described above, to derive an implied share equity value range of approximately $195.00 to $223.00 per share. Centerview compared this range to the per share equity value of the merger consideration of $261.25."

With respect to J.P. Morgan, paragraph 16 of the Supplemental Disclosures simply changed the phrase "and certain other one-time cash expenses" to "and a one-time cash repayment expense of approximately $134 million to [business partner] Janssen." The Recommendation Statement elsewhere informed shareholders that Pharmacyclics's operating income estimate included "a one-time $134 million payment due to Janssen upon a change of control regarding research and development costs for [pharmaceutical product] IMBRUVICA (ibrutinib) advanced by Janssen…." (Rec. Stat. at pp. 27, 28.)

The chart below shows the remaining additions by the Supplemental Disclosures with respect to the J.P. Morgan analysis in bold:

Rec. Stat. at p. 40	**Supp. Discl. ¶¶ 17-18**
"J.P. Morgan calculated the present value of unlevered free cash flows that Pharmacyclics is expected to generate during the remainder of 2015 and calendar years 2016 through 2028 based upon financial projections prepared by the management of Pharmacyclics. J.P. Morgan also calculated a range of terminal values for Pharmacyclics at December 31, 2028 by applying perpetual growth decline rates ranging from 70% to 90% for unlevered free cash flows in the United States, and perpetual growth decline rates ranging from 30% to 70% for unlevered free cash flows outside of the United States, respectively to the unlevered free cash flows of Pharmacyclics during 2028. The unlevered free cash flows and the range of terminal values were then discounted to present values using a discount rate range of 8.5% to 10.5%, which was chosen by J.P. Morgan based upon an analysis of the weighted average cost of capital of Pharmacyclics. The present value of the unlevered free cash flows and the range of terminal values were then adjusted by adding $750 million, representing the estimated value of non-IMBRUVICA (ibrutinib) pipeline programs (calculated based upon guidance	"J.P. Morgan calculated the present value of unlevered free cash flows that Pharmacyclics is expected to generate during the remainder of 2015 and calendar years 2016 through 2028 based upon financial projections prepared by the management of Pharmacyclics. J.P. Morgan also calculated a range of terminal values for Pharmacyclics at December 31, 2028 by applying perpetual growth decline rates**, which were chosen based upon guidance of management of Pharmacyclics to reflect the declining value of Pharmacyclics' patent portfolio,** ranging from 70% to 90% for unlevered free cash flows in the United States, and perpetual growth decline rates ranging from 30% to 70% for unlevered free cash flows outside of the United States, respectively**,** to the unlevered free cash flows of Pharmacyclics during 2028. The unlevered free cash flows and the range of terminal values were then discounted to present values using a discount rate range of 8.5% to 10.5%, which was chosen by J.P. Morgan based upon an analysis of the weighted average cost of capital of Pharmacyclics**, derived using the Capital Asset Pricing Model, taking into account certain metrics that J.P. Morgan deemed relevant in its professional judgment and experience, including long-term U.S. treasury bond yield, levered and unlevered betas for selected companies and the equity risk premium, in addition to target capital structure and the estimated cost of debt and tax rate**.

of management of Pharmacyclics and J.P. Morgan's analysis of selected publicly-traded development-state biopharmaceutical companies) and estimated net cash balance of $850 million as of March 31, 2015, as provided by management of Pharmacyclics, to indicate a range of implied fully diluted equity values per share of Pharmacyclics of $191.00 and $219.00, as compared to the merger consideration of $261.25 per share."	The present value of the unlevered free cash flows and the range of terminal values were then adjusted by adding $750 million, representing the estimated value of non-IMBRUVICA (ibrutinib) pipeline programs **as of March 3, 2015,** calculated based upon guidance of management of Pharmacyclics and J.P. Morgan's analysis of selected publicly-traded development-state biopharmaceutical companies **(based on information J.P. Morgan obtained from SEC filings, FactSet Research Systems and other Wall Street research):** **[Itemized list of selected companies and their firm value]** **The present value of unlevered free cash flows and the range of terminal values were also adjusted by adding an** estimated net cash balance of $850 million as of March 31, 2015, as provided by management of Pharmacyclics, to indicate**, based on the foregoing analysis,** a range of implied fully diluted equity values per share of Pharmacyclics of $191.00 and $219.00, as compared to the merger consideration of $261.25 per share."

2. Management's Financial Projections (Supp. Discl. ¶ 2)

The Supplemental Disclosures also provided information about the estimated financial projections provided by Pharmacyclics management for 2015-2028.

The Recommendation Statement provided a table presenting management's financial projections on which the company's financial advisors based their fairness opinions—including projections for total worldwide

IMBRUVICA (ibrutinib) product revenue, total revenue to Pharmacyclics, adjusted operating income, net income, unlevered free cash flow, and stock based compensation with footnoted descriptions of what was included in projections. (Rec. Stat. at p. 27.) The Recommendation Statement further disclosed that Pharmacyclics "view[ed] the projections as non-material because of the inherent risks and uncertainties associated with such long range projections," noted that the projections were prepared "in the context of the business, economic, regulatory, market and financial conditions that existed" at the time they were prepared and had not been updated to account for any subsequent change in conditions, and cautioned shareholders not to rely on the projections in making their decision as to whether to tender their shares in the offer. (*Id.* at pp. 26-27.)

The Supplemental Disclosures did not change any of the projection values. Instead, they provided additional background information and inputs that fed into the projections, such as (i) management's use of the "Hays Study" to risk-adjust its estimated projections; (ii) certain estimates of the probability of clinical success; and (iii) the means by which Pharmacyclics calculated the division of revenue between U.S. and non-U.S. sales. (Supp. Discl. ¶ 2.)

F. Pharmacyclics shareholders approve the merger.

Approximately 87% Pharmacyclics outstanding shares were validly tendered into the Acquisition. (1 CT 111.)

G. The parties execute the Settlement and seek preliminary approval.

The parties executed the Settlement on January 22, 2016. Plaintiffs moved for preliminary approval of the Settlement by the superior court. The Settlement covers a non-opt-out settlement class certified under section 382 of the California Code of Civil Procedure and California Rule of Court 3.769, defined to include all owners of Pharmacyclics stock during the period March 4, 2015 (the date the Acquisition was announced) to May 26, 2015 (the date the Acquisition closed), excluding defendants and their immediate families, entities controlled by a defendant, and officers of Pharmacyclics. (Stipulation of Settlement §§ 1.3, 2.2.) The only consideration provided to the class in exchange for the full release of all known and unknown claims that could have been asserted in the actions and relate in any manner to the acquisition is Pharmacyclics' filing of the Supplemental Disclosures. Defendants do not concede that the Supplemental Disclosures were material. (*Id.* at p. 5.) The Settlement provides that Pharmacyclics will pay class counsel fees and expenses up to $725,000, as approved by the court. (*Id.* § 5.1.)

H. The superior court grants preliminary approval and approves an amended class notice following plaintiffs' inaccurate description of the Supplemental Disclosures.

The superior court granted plaintiffs' motion for preliminary approval of the Settlement and certified the settlement class on February 19, 2016 . (2 CT 379; 1 CT 21.)

On April 18, 2016, the superior court entered an amended order preliminarily approving the settlement and approving an amended form of class

notice. (1 CT 20.) This amended order was necessary because, initially, plaintiffs erroneously claimed, and the notice erroneously stated, that the Supplemental Disclosures disclosed the following nine categories of information, when, in fact, they addressed only the last three:

> (i) potential conflicts of interest of Pharmacyclics directors and executive officers in connection with the Acquisition;
>
> (ii) the reasons for Pharmacyclics Board of Directors' recommendation of the Acquisition;
>
> (iii) the background of the Acquisition, including why the Board of Directors believed that combining with a larger company might be the most effective way to maximize value to Pharmacyclics shareholders;
>
> (iv) discussions Pharmacyclics and its financial advisors had with other potential bidders or strategic partners;
>
> (v) Pharmacyclics's Board of Directors' consideration of strategic alternatives for Pharmacyclics, including partnerships with other participants in the pharmaceuticals industry, strategic licensing transactions and possible mergers with other pharmaceutical companies;
>
> (vi) the effect of the Acquisition on options held by Pharmacyclics directors and executives;

(vii) the financial projections of Pharmacyclics for calendar years 2015-2018, and how those projections were calculated;

(viii) the fairness opinion of Centerview, one of the financial advisors to the Pharmacyclics Board, including its Selected Comparable Public Company Analysis, Selected Precedent Transactions Analysis, and Discounted Cash Flow Analysis; and

(ix) the fairness opinion of J.P. Morgan, Pharmacyclics' financial advisor, including its Public Trading Analysis Implied Equity Value for Pharmacyclics, Selected Transaction Analysis, and Discounted Cash Flow Analysis.

(2 CT 361; *cf.* 2 CT 370 (amended notice listing only latter three categories).)

I. Plaintiffs move for final approval of the Settlement.

In the motion for final approval of the Settlement, plaintiffs relied only on the narrower set of three disclosures and did not claim that the Supplemental Disclosures addressed the first six categories of information. The only "substantial benefits" they cited in their motion were the disclosures regarding Pharmacyclics's financial projections for calendar years 2015-2028 and assumptions that Centerview and J.P. Morgan used in their valuation analyses. (1 CT 51:21-23, 52:14-15.)

Plaintiffs relied on Delaware substantive law to support their argument that the Supplemental Disclosures were material: "Since Pharmacyclics was incorporated in Delaware, it is Delaware substantive law which governs

Plaintiffs' claims." (1 CT 48:28, 49:20-23 (also quoting Cal. Corp. Code § 2116).) Despite acknowledging that Delaware law controls, plaintiffs did not mention *Trulia* even once in their motion, though they relied on over a dozen older cases from Delaware courts.

Plaintiffs requested an award of attorneys' fees and expenses of $725,000. (1 CT 62:28.)

J. Class member Sean J. Griffith objects.

Professor Sean J. Griffith, a settlement class member, submitted a timely objection to the Settlement and request for attorneys' fees. (1 CT 102.) He objected that the Settlement was not fair, reasonable, or adequate and should not be approved, nor should the Court grant plaintiffs' request for attorneys' fees. He argued that plaintiffs unfairly traded a broad release of claims that even included claims never pursued in exchange for a "laundry list of minutiae" from defendants that provided no value to the class, while plaintiffs' counsel claimed, and defendants acquiesced to, an above-market fee. Griffith argued that such disclosure-only settlements are subject to "continued disfavor," and should be subject to greater scrutiny by the court. He argued that the Supplemental Disclosures did not provide any additional "valuation information" by Pharmacyclics' management as plaintiffs claimed, but simply provided the underlying information that fed into the management projections on which Pharmacyclics' financial advisors based their fairness opinions and, as such, were not material and provided no benefit to the class. (*Id.*)

K. In reply, plaintiffs file a declaration from a purported financial expert.

With their reply in support of settlement approval, plaintiffs filed the declaration of Matthew R. Morris. Morris opined that the Supplemental Disclosures "represented a substantial benefit" to Pharmacyclics stockholders. (2 CT 329.) Morris addressed the value purportedly provided to Pharmacyclics shareholders by the same three types of information in the Supplemental Disclosures that plaintiffs cited in their motion for final approval: the analyses performed by J.P. Morgan, the analyses performed by Centerview, and the financial projections provided by management to these financial advisors. (2 CT 333.) He claimed that the information "was important in evaluating the sufficiency of the Transaction Consideration and understanding the work performed by J.P. Morgan and Centerview in their roles as the Financial Advisors." (2 CT 332.)

L. The court holds a fairness hearing and approves the Settlement.

Following a fairness hearing, the superior court approved the Settlement and awarded attorneys' fees and expenses of $509,158.62 over Griffith's objection. (2 CT 377.) The superior court acknowledged that "the information in the supplemental disclosures did not ultimately change or modify the valuations set forth in the original proxy statement" and "there is no evidence that the original proxy statement was misleading in terms of the fairness analysis." (2 CT 383.) "Put another way," the superior court stated, "the Supplemental Disclosures did not remedy any misleading or inaccurate

information in the original proxy and did not change the analyses, but simply provided additional information which helped inform the shareholders prior to the vote." (2 CT 384.)

The superior court adopted the inaccurate description of the Supplemental Disclosures initially advanced by plaintiffs. The court stated that the Supplemental Disclosures

> disclosed: (1) potential conflicts of interest of Pharmacyclics directors and executive officers in connection with the Acquisition; (2) reasons for the Board's recommendation of the Acquisition; (3) the background of the Acquisition and why it would maximize value to the shareholders; (4) discussions Pharmacyclics had with its financial advisors and other potential bidders or strategic partners; (5) the Board's consideration of strategic alternatives for Pharmacyclics including partnership with other participants in the industry; (6) financial projections for the calendar year; (7) the effect of the Acquisition on options held by Pharmacyclics directors and executives; (8) the financial analysis underling the fairness opinions of J.P. Morgan and Centerview.

(2 CT 380-381; *see also* 1 CT 111:22, 112:1-3.)

Relying on this false understanding, the superior court found that "[b]y making these Supplemental Disclosures, the Defendants agreed to provide material information sought in the Actions to Pharmacyclics's shareholders and thus allowed them to make an informed decision whether to tender their shares in the Acquisition or seek statutory appraisal of their shares." (2 CT 381.)

M. The superior court issues final judgment, and Griffith intervened and filed a timely appeal.

On September 7, 2016, the superior court entered a stipulation and order permitting Griffith to intervene, whereby Griffith was made a party to the action pursuant to Code of Civil Procedure § 387(a). (2 CT 391.) The superior court entered final judgment on October 31, 2016. (2 CT 405.) Griffith filed a timely notice of appeal as to the order approving the settlement (2 CT 397), and a timely amended notice of appeal as to the final judgment (2 CT 420).

PRELIMINARY STATEMENT

Attorneys with the Center for Class Action Fairness ("CCAF" or the "Center")), which became part of the non-profit Competitive Enterprise Institute on October 1, 2015, bring Griffith's appeal. The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won more than $100 million for class members. (Estes, *Critics hit law firms' bills after class-action lawsuits* (Dec. 17, 2016) Boston Globe; *see also, e.g.*, Liptak, *When Lawyers Cut Their Clients Out of the Deal* (Aug. 13, 2013) N.Y. TIMES, at p. A12 (calling Center attorney Theodore H. Frank "the leading critic of abusive class action settlements"); Jones, *A Litigator Fights Class-Action Suits* (Oct. 31, 2011) WALL ST. J.; *Pearson v. NBTY, Inc.* (7th Cir. 2014) 772 F.3d 778, 787 (praising the Center's work); *In re Classmates.com Consol. Litig.* (W.D. Wash. Jun. 15, 2012, No. 09-cv-0045) 2012 WL 3854501, at *11 (same)). This appeal is brought in good faith to protect class members in this and future class actions against unfair and abusive settlements.

ARGUMENT

California law applies to the procedural question of the standards for approval of settlement of a class action. Because Pharmacyclics is a Delaware corporation, California courts apply Delaware law to the substantive corporate law question of whether the supplemental disclosures are material. (*See* Cal. Corp. Code § 2116 ("The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders … according to any applicable laws of the state or place of incorporation …. Such liability may be enforced in the courts of this state."); *Villari v. Mozilo* (2012) 208 Cal.App.4th 1470, 1477 n.8 (internal affairs doctrine requires court to apply Delaware law to disputes between stockholders and entities incorporated in Delaware); *Central Laborers' Pension Fund v. McAfee, Inc.* (2017) 17 Cal.App.5th 292, 346 ("courts generally enforce the substantive rights created by the laws of other jurisdictions, but the procedural matters are governed by the law of the forum" (cleaned up)); *see also* 1 CT 48:28, 49:20-23.)

I. Disclosure-only settlements are disfavored and subject to close judicial scrutiny to combat the recognized incentive problem of class-action settlements.

Unlike settlements in bilateral civil litigation, class-action settlements require court approval. "The court must determine whether the settlement is fair, adequate, and reasonable. The purpose of the requirement is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801 (cleaned up); *see also Kullar*, *supra*, 168

Cal.App.4th 116, 129-30.) This is because "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of the unnamed class members who by definition are not present during the negotiations." (*In re Dry Max Pampers Litig.* (6th Cir. 2013) 724 F.3d 713, 715.) "The court has a fiduciary responsibility as guardians of the rights of absentee class members when deciding whether to approve a settlement agreement." (*Kullar*, *supra*, 168 Cal. App. 4th 116, 129, *quoting* 4 Newberg on Class Actions § 11.41 (4th ed. 2002).)

There should be no presumption in favor of settlement approval: Generally, "[t]he proponents of a settlement bear the burden of proving its fairness." (*True v. Am. Honda Co.* (C.D. Cal. 2010) 749 F. Supp. 2d 1052, 1080 (citing 4 Newberg on Class Actions § 11:42 (4th ed. 2009)); *see also Clark v. Am. Residential Servs.* (2009) 175 Cal.App.4th 785, 801 ("question[ing]" any presumption of fairness).). The need for an additional layer of review during which the court acts as a fiduciary of the class arises from the self-interested incentives inherent in class actions. (*Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th at pp. 1800-01). It is insufficient that the settlement happened to be at "arm's length" without express collusion between settling parties; because of the danger of conflicts of interest, third parties must monitor the reasonableness of the settlement as well. (*In re Bluetooth Headset Prods. Liab. Litig.* (9th Cir. 2011) 654 F.3d 935.) Defendants have an "incentive[] to settle quickly in order to mitigate the considerable expense of litigation and the distraction it entails, to achieve closing certainty, and to obtain broad releases as a form of

'deal insurance.'" (*Trulia*, *supra*, 129 A.3d at p. 892.) Plaintiffs' counsel, meanwhile, have an incentive to collect as much of the monetary relief for themselves as they can, and every dollar they take for themselves is a dollar that does not go to the class.

These incentives are behind the dramatic increase in deal litigation described above. The Delaware Court of Chancery described in *Trulia* how "far too often [deal] 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*, *supra*, 129 A.3d at pp. 892-93.)

Indeed, the Court of Appeal, Fourth District, even presaged *Trulia* by rebuffing one shareholder's assertion that securing esoteric, marginal, additional disclosures (relating to financial projections) amounted to a substantial benefit. (*Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc.* (2010) 180 Cal.App.4th 1542, 1551-54 (hereafter *Pipefitters*).) The "continued disfavor" that Delaware applies to disclosure-only settlements has spread to other courts, including the lower court in California that approved the present settlement. (*See, e.g.*, *In re Walgreen Co. Stockholder Litig.* (7th Cir. 2016) 832 F.3d 718; Furbush, *Silicon Valley Court Signals Increased Scrutiny of Disclosure-Only Settlements of Merger Objection Litigation* (Oct. 9, 2017) (hereafter Furbush) (citing *Drulias v. 1st Century Bancshares*, Case No. 16CV294673, and *Anderson v. Alexza Pharmaceuticals*, No.

16-CV-295357)).[6] California courts have found the reasoning of *Trulia* "to be compelling" and refused to approve disclosure-only settlements on their merits and so as to avoid encouraging forum shopping of strike suits in California. (Furbush.) The Seventh Circuit likewise noted that "[t]he type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end." (*Walgreen*, 832 F.3d at 724.) Most recently, a Florida appellate court adopted the *Trulia* and *Walgreen* standard. (*Griffith v. Quality Distribution, Inc.* (Fla. Dist. Ct. App. Jul. 13, 2018, No. 2D17-3160) --So. 3d--, 2018 WL 3403537.)

As the ongoing effort to stamp out meritless disclosure suits shows, the vitality of the class-action mechanism depends on zealous scrutiny by the judiciary and the application of doctrinal tests that properly align the incentives of class counsel with those of the vulnerable, absent class members whose claims they settle away. (*Laffitte v. Robert Half Int'l* (2016) 1 Cal.5th 480, 511 (Liu., J., concurring).) The superior court's scrutiny was insufficient and, as a result, the court overlooked the minimal benefit provided by the Supplemental Disclosures that should have resulted in settlement disapproval. This Court has the discretion and duty to find the Supplemental Disclosures immaterial and the release unduly broad in light of the minimal investigation by counsel and the misalignment between it and the claims alleged, and reverse approval of the Settlement—whether or not it expressly adopts *Trulia*'s reasoning.

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

II. The superior court abused its discretion and erred as a matter of law by approving the "disclosure settlement."

In approving a settlement, the Court must "independently satisfy[] itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar*, *supra*, 168 Cal.App.4th at p. 129.) While the Court has discretion to balance the non-exclusive list of factors set forth in *Wershba v. Apple Comp.* (2001) 91 Cal.App.4th 224, "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar*, *supra*, 168 Cal.App.4th at p. 130; *see also Clark*, *supra*, 175 Cal.App.4th. at p. 800 (same).) A court may not approve a class-action settlement "without independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable…." (*Kullar*, *supra*, 168 Cal.App.4th at p. 129.) For example, it is error for a superior court to rely on immaterial and illusory injunctive relief in approving a class settlement. (*Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 651-52.)

This analysis is consistent with *Trulia*'s exhortation that courts must weigh what shareholders receive in a settlement against what they release to defendants. (129 A.3d at pp. 890-91.) Under *Trulia*, disclosure settlements are met with "disfavor" "unless the supplemental disclosures address a *plainly material* misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure

claims and fiduciary duty claims concerning the sale process," if those claims were sufficiently investigated. (*Id.* at p. 898 (emphasis added).)

A. The superior court erred in approving the Settlement based on its conclusion that the Supplemental Disclosures provided any value to the class; those disclosures are immaterial as a matter of law.

The materiality of the disclosures is critical to determining whether the relief has value to a shareholder. Delaware has adopted the U.S. Supreme Court's standard for materiality of disclosures set forth in *TSC Industries, Inc. v. Northway, Inc.*: an "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in [making her decision]." ((1976) 426 U.S. 438, 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.*) A disclosure is material only if it presents "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." (*Trulia*, *supra*, 129 A.3d at p. 899.)

"Omitted facts are not material simply because they might be helpful." (*Skeen v. Jo-Ann Stores, Inc.* (Del. 2000) 750 A.2d 1170, 1174). Because the defendant corporation already has an incentive to produce positive information in order to win shareholder approval of the merger, the question is whether the supplemental disclosures contained negative information that would have resulted in the court issuing a preliminary injunction to stall or prevent the merger or shareholders refusing to approve the transaction. (*See* Fisch, *supra*, 93

Tex. L.Rev. at p. 575; *see also* Easterbrook & Fischel, *Mandatory Disclosure and the Protection of Investors* (1984) 70 Va. L.Rev. 669, 683 (without disclosure, "[i]nvestors would assume the worst, because, they would reason that if the firm had anything good to say for itself it would do so").) A material disclosure must contain "new *negative* information" that would have a "negative impact on shareholder voting in favor of the merger." (*See* Fisch, *supra*, 93 Tex. L.Rev. at pp. 575-76.)

The superior court expressed only tepid support for the materiality of the Supplemental Disclosures and, in fact, found that "the Supplemental Disclosures did not remedy any misleading or inaccurate information in the original proxy and did not change the analyses, but simply provided additional information which helped inform the shareholders prior to the vote." (2 CT 384.) As a matter of law, that level of "tell me more" settlement "benefit" is inadequate grounds for settlement approval. Not only does the supposedly beneficial information not cast doubt upon management's previous recommendation, the superior court essentially found that plaintiffs' suit had no merit from its inception. To discourage baseless litigation, Delaware law does not permit class counsel to obtain any settlement fee where the plaintiffs' underlying claims lack merit. (*In re Sauer-Danfoss Inc. S'holders Litig.* (Del Ch. Ct. 2011) 65 A.3d 1116, 1123, 1127 (hereafter *Sauer-Danfoss*); *Allied Artists Pictures Corp. v. Baron* (Del. 1980) 413 A.2d 876, 879.). Federal and California law agree on this point. (*Braude v. Automobile Club of S. Cal.* (1986) 178 Cal. App. 3d 994, 1009; *see also Zucker v. Westinghouse Elec. Corp.* (3d Cir. 2001) 265 F.3d 171, 176-

77; *In re Oracle Sec. Litig.* (N.D. Cal. 1994) 852 F. Supp. 1437, 1445 (Walker, J.)). Thus, the parties' Settlement with its negotiated $725,000 fee should have been rejected.

An examination of the Supplemental Disclosures confirms that they added only extraneous "arcane" minutiae that is insufficient as a matter of law to support the Settlement. (*Pipefitters*, *supra*, 180 Cal.App.4th at p. 1554.) If anything, many of the Supplemental Disclosures affirmatively harmed class members by substituting "a fair summary" with prolix "density" while sacrificing actual clarity. (*Id.*)

1. Data Underlying the Financial Advisors' Analyses

The superior court erred by finding that the disclosure of additional data concerning the financial advisors' analyses was material. While shareholders are entitled to receive a fair summary of the substantive work performed by the financial advisors on whose advice the board relied for its recommendation as to how to vote on a merger, a "fair summary" is just that: a summary. "The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions." (*Trulia*, *supra*, 129 A.3d at p. 901.) Thus, the focus is on providing an accurate description of the advisor's "basic valuation exercises …, the key assumptions that they used in performing them, and the range of values that were thereby generated." (*In re Pure Resources, Inc. Shareholder Litig.* (Del. Ch. 2002) 808 A.2d 421, 449 (hereafter *Pure Resources*)); *see also Globis Partners, L.P. v. Plumtree Software,*

Inc. (Del. Ch. Nov. 30, 2007, C.A. No. 1577-VCP) 2007 WL 4292024, at *11 (hereafter *Globis*) (merging company is not required to include "financial information merely helpful or cumulative to other information that was provided …." (internal quotation marks omitted)).)

"A fair summary does not require disclosure of sufficient data to allow stockholders to perform their own valuation." (*Trulia*, *supra*, 129 A.2d at p. 904; *see also Globis*, *supra*, 2007 WL 4292024, at *11 (same).) "[E]xtraneous details do not contribute to a fair summary and do not add value for stockholders" and thus are not material. (*Trulia*, *supra*, 129 A.2d at pp. 900-01.) "Delaware courts have repeatedly held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion." (*In re Micromet, Inc. S'holders Litig.* (Del. Ch. Feb. 29, 2012, C.A. No. 7197-VCP) 2012 WL 681785, at *11; *see also In re Cogent, Inc. S'holder Litig.* (Del. Ch. 2010) 7 A.3d 487, 511 (rejecting requests for additional disclosures because shareholders are entitled to a fair summary but not minutiae).) Otherwise, the amount of information may become overwhelming and dilute or hide critical information in a sea of data. (*Micromet*, 2012 WL 681785, at *11 ("bury[ing] the shareholders in an avalanche of trivial information … is hardly conducive to informed decisionmaking").)

Here, the Recommendation Statement contained twelve pages summarizing the fairness opinions and underlying analyses provided to Pharmacyclics's board by Centerview and J.P. Morgan. (Rec. Stat. at pp. 28-41.) The information added in the Supplemental Disclosures did not alter the "total

mix" of information but rather provided extraneous details that did not add value for shareholders.

i. Public Company Multiples Analyses (Supplemental Disclosures ¶¶ 3, 11-13)

The only information the Supplemental Disclosures added regarding Centerview's selected comparable public company analysis was a company-by-company itemization of the multiples that underlay the results already disclosed. (*See supra*; Supp. Discl. ¶ 3.) The Supplemental Disclosures provided similarly minimal information with respect to the public trading multiples analysis by J.P. Morgan: a company-by-company itemization of the multiples that underlay the summary of results, plus a note that multiples above a certain threshold were excluded as outliers. (*Id.* ¶ 11.)

Plaintiffs did not claim that the Supplemental Disclosures altered the analyses or the results disclosed to shareholders. Plaintiffs' expert opined that the lack of individual multiples "inhibited [stockholders from] comparing Pharmacyclics against its specific peers, other than in the total aggregate" (2 CT 334), and opined that the individual multiples enabled shareholders to calculate the revenue growth rates on their own to examine Pharmacyclics' expected revenue growth and question whether the advisors selected low multiples (2 CT 335). First, this is disingenuous, as shareholders can readily determine revenue multiples and P/E ratios for the public companies on their own from publicly

available information.[7] Second, even if one accepts this as true, that doesn't make the Supplemental Disclosures material. In fact, *Trulia* addressed this sort of company-by-company multiple directly, and held that it is not necessary for stockholders to have access to the individual data so as to be able to perform their own analysis. (*Trulia*, *supra*, 129 A.3d at p. 904 (selected public trading analysis).) Individual multiples are not "material or … even helpful"; instead, they are "trivialities … not helpful" to stockholders. (*Id.* at pp. 905-06.)

A federal district court reached a similar conclusion in *Bushansky v. Remy Int'l, Inc.* (S.D. Ind. 2017) 262 F. Supp. 3d 742, 751-52. As with the Recommendation Statement here, the definitive proxy in *Bushansky* "list[ed] the names of the nineteen companies, the median and mean figures for the peer samples" and described the information reviewed by UBS Securities. The supplemental disclosures provided "individual multiples for each of the nineteen companies UBS Securities compared to [the target], as well as figures underlying six merger transactions examined by UBS Securities." (*Id.* at p. 751.) The court held that "because the individual multiples are publicly available and do not alter the mean and median figures provided by UBS Securities, … the

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[7] *See* Folger, *How do I calculate the P/E ratio of a company?* (April 16, 2018) Investopedia, *available at* https://www.investopedia.com/ask/answers/070314/how-do-i-calculate-pe-ratio-company.asp; *Enterprise Value (EV)*, Investopedia, *available at* https://www.investopedia.com/terms/e/enterprisevalue.asp (describing how to calculate enterprise value from data in 10-K Statement filed with the SEC).

additional information [is] immaterial because it fails to alter the total mix of available information." (*Id.* at p. 752.)

So, too, here. The Recommendation Statement disclosed to shareholders that the multiples upon which both Centerview and J.P. Morgan's analyses were based were public. The Recommendation Statement also provided a summary of results that did not change. (Rec. Stat. at pp. 32, 38.) While plaintiffs' expert apparently disagreed with how the financial advisors conducted and applied the results of their analysis, fairness opinions are just that: opinions. And the Recommendation Statement provided a "fair summary" of those opinions, informing shareholders that the summaries were not "a complete description of the financial analyses performed or factors considered by, and underlying opinion," and "the assumptions and estimates used in, and the results derived from, the financial analyses are inherently subject to substantial uncertainty." (Rec. Stat. at pp. 31-32; *see also id.* at p. 37.)

With respect to the specific multiples excluded as outliers, the Recommendation Statement had already informed shareholders that "[c]ompanies which had a revenue multiple greater than 30x or an EPS multiple greater than 50x were excluded" from Centerview's analysis. (Rec. Stat. at p. 33.) In any event, the revelation that a financial advisor did not consider multiples for certain of the companies listed "could not reasonably have been expected to significantly alter the total mix of information" (*Trulia*, *supra*, 129 A.3d at p. 904.)

ii. Selected Precedent Transactions Analyses (Supplemental Disclosures ¶¶ 4-7, 14-15)

Other than a handful of superfluous stylistic edits that no one contends are material, the *only* information added by the Supplemental Disclosures with respect to the selected precedent transactions analyses are the individual multiples for the transactions that Centerview and J.P. Morgan used in their analyses. The other three columns in the table added by paragraphs 6 and 15 of the Supplemental Disclosures are identical to the tables on pages 33 and 39 of the Recommendation Statement, which list the date, target, and acquirer for the fourteen transactions considered by each financial advisor.

Plaintiffs did not claim that the Supplemental Disclosures altered the analyses or the resulting data disclosed to shareholders. Plaintiffs' expert opined that the lack of individual multiples "prevent[ed] investors from evaluating the market valuation trends over time." (2 CT 337.) Again, however, the standard is not whether enough data has been disclosed to enable shareholders to perform their own fairness analysis or whether another financial advisor might have selected different data for his own analysis. (*Trulia*, *supra*, 129 A.2d at p. 904; *accord Pipefitters*, *supra*, 180 Cal.App.4th at pp. 1553-54.)

As noted above, *Trulia* involved similar supplemental disclosures of the individual multiples for selected transactions and that some of the multiples were not publicly available and therefore not considered in the analysis. The court held that "[t]he addition of the individual multiples and the revelation that some were not publicly available could not reasonably have been expected to

significantly alter the total mix of information." (129 A.3d at p. 904.) Just as in *Trulia* and *Pipefitters*, the Recommendation Statement here fairly summarized the methodology and assumptions that Centerview and J.P. Morgan used in conducting their respective analyses to extrapolate a range of per share values for Pharmacyclics stock. (*See In re OPENLANE, Inc.* (Del. Ch. Sept. 30, 2011, C.A. No. 6849-VC) 2011 WL 4599662, at *14 (explanation of methodology and resulting midrange of multiples sufficient to provide a "fair summary").) "A reasonable investor would expect disclosure of the multiples most likely to be achieved, and by providing the midrange" in the case of Centerview and the full range in the case of J.P. Morgan (for the same set of transactions), along with the range applied by both, the Recommendation Statement did that. (*Id.*) "Providing details of all the underlying transactions analyzed would likely inundate the reader and dilute the impact of the disclosure." (*Id.*) In any event, the disclosures were superfluous because a shareholder interested conducting her own analysis could do so by obtaining the underlying data herself from public sources.

iii. Discounted Cash Flow Analyses (Supplemental Disclosures ¶¶ 8, 17-18)

The details regarding the financial advisors' discounted cash flow ("DCF") analysis did not alter the total mix of information available to stockholders and fall far short of the "plainly material" standard as well. (*Pipefitters*, *supra*, 180 Cal.App.4th at 1553.) The Recommendation Statement already contained detailed discussion of Centerview and J.P. Morgan's DCF

analysis, the inputs used in the analysis, including the discount and decline rate ranges, and the valuation arrived at by both advisors—and the valuation did not change. (Rec. Stat. at pp. 34, 40.) The Supplemental Disclosures added details regarding how the discount rates used in Centerview's analysis of enterprise values for Pharmacyclics—which shareholders were told reflected Centerview's analysis of Pharmacyclics' weighted average cost of capital—were derived. But this and the note that Centerview and J.P. Morgan used the Capital Asset Pricing Model and took into account metrics "deemed relevant in its professional judgment and experience" added virtually nothing to shareholders' understanding. (Supp. Discl. ¶¶ 8, 17; *Pipefitters*, *supra*, 180 Cal.App.4th at p. 1553 & n.2 (additional information regarding how investment advisor "selected the discount rates and terminal multiplier" in DCF analysis is not material.) Further indicating the lack of materiality, the Supplemental Disclosures noted that the discount rates were "derived"—not incorporated wholesale—from the model and that the list of metrics was non-inclusive and based on metrics the advisors deemed relevant. (Supp. Discl. ¶¶ 8, 17.) So long as shareholders were provided with material information relied upon in a DCF, they still can apply their own assumptions about discount rates or growth rates, and the like, to test the validity of the conclusion reached by financial advisors.

While plaintiffs' expert took issue with *why* the financial advisors used certain decline rates in their DCF analyses, he did not challenge that the Recommendation Statement provided an accurate description of the advisor's "basic valuation exercises …, the key assumptions they used in performing

them, and the range of values that were thereby generated." (*Pure Resources*, *supra*, 808 A.2d at p. 449.) He noted that the Supplemental Disclosures informed shareholders that the decline rates were determined by management, but the Recommendation Statement already informed them that the financial advisors relied on financial analyses, forecasts, and projections provided by Pharmacyclics management. (Rec. Stat. at pp. 30, 37.) And the specific publicly traded firm values used in Centerview and J.P. Morgan's analyses are properly analogized to the individual multiples that are extraneous to any fair summary. Again, omitted facts are not material simply because they might be helpful. (*Skeen*, *supra*, 750 A.2d at p. 1174.)

2. Data Underlying Management's Financial Projections (Supplemental Disclosure ¶ 2)

It is undisputed that the Supplemental Disclosures did not "change or modify" management's financial projections (or any other valuations) set forth in the Recommendation Statement. (2 CT 383.) Plaintiffs' own expert describes the relevant disclosure as only "provid[ing] insight into the individual inputs used to calculate unlevered free cash flow" and, in particular, that management made calculations based on the Hays Study and risk-adjusted financial projections for 2015-2018. (2 CT 342.) But the Recommendation Statement already disclosed that the Pharmacyclics board had decided "on a risk-adjusted basis," that a merger could "deliver better value" to shareholders under certain specified conditions. (Rec. Stat. p. 18.) The Recommendation Statement further disclosed that "the projections necessarily are based on numerous assumptions,

many of which are beyond our control and difficult to predict," (*id.* at p. 26; *see also id.* at p. 28.) It also cautioned that because of "the uncertainties inherent in our projections, stockholders are cautioned not to place undue, if any, reliance on the projections." (*Id.* at p. 27.)

Courts have found similar disclosures regarding underlying assumptions unlikely to be material. In *Pipefitters*, the court found that where a proxy statement already disclosed detailed financial projections for two years, projections for additional years did not provide a substantial benefit because shareholders already had substantial estimated earnings data and, in any event, such projections "can be wildly flawed." (180 Cal.App.4th at p. 1552.) *Micromet* likewise addressed "management's well-informed projections as to the viability of its drug pipeline" with regard to a cancer drug as sufficient disclosure and held that "assumptions underlying these projections" are unlikely to be material. (2012 WL 681785, at *11.) Pharmacyclics was not obliged to present an "avalanche of trivial information … hardly conductive to informed decision-making," particularly where the resulting projections remained unchanged. (*Id.*)

In short, disclosure of additional "inputs" for management's financial projects was not material because it didn't change the "total mix" of information available.

B. The superior court did not independently analyze the Settlement; its analysis was deficient as a matter of law.

The superior court's analysis that the Supplemental Disclosures are material was facially deficient. The court based its conclusion that the

Supplemental Disclosures provided a benefit to the shareholder class on a fundamental misunderstanding of what they actually provided, citing six purported disclosures that were not actually provided to the class. (*See supra* at p. 34.) The court apparently did not compare the Supplemental Disclosures to the Recommendation Statement to analyze their materiality—a step surely necessary to determine whether the Supplemental Disclosures altered the "total mix" of information provided to the class. (Indeed, the settling parties did not even put the Recommendation Statement formally before the superior court. (*See* Motion for Judicial Notice; *Kullar*, 168 Cal.App.4th at 120 ("the court bears the ultimate responsibility to ensure the reasonableness of the settlement terms).) There cannot be an "analytical gap" between the record and the reasons given for approving a settlement. (*Shane Group v. Blue Cross Blue Shield of Mich.* (6th Cir. 2016) 825 F.3d 299, 310; *see also Clark, supra*, 175 Cal.App.4th at p. 803.)

Because the superior court failed to properly analyze the settlement benefit, and demonstrably misunderstood its scope, at a minimum, this Court should vacate and remand for the superior court to conduct a proper analysis.

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

The breadth of the release further underscores the superior court's error in approving the Settlement. A settlement may be approved only if the release of claims is "narrowly circumscribed to encompass nothing more than the disclosure claims and fiduciary duty claims concerning the sale process, if the

record shows that such claims have been investigated sufficiently." (*Trulia*, *supra*, 129 A.3d at p. 898.) In exchange for the marginal disclosures here, however, plaintiffs agreed to a release that encompasses far more than "disclosure claims and fiduciary duty claims concerning the sale process …." (*Id.*) Approval of the Settlement will forever bar the class from bringing, among other things, any claims relating, "directly or indirectly" to the Acquisition, any compensation made to defendants, or other "Released Persons," or any aiding and abetting claims. (Stipulation of Settlement ¶ 1.15.) This includes "Unknown Claims" and claims, such as those arising under federal securities law, never pursued in this action. (*Id.* ¶¶ 1.15, 1.18, 4.1.)

This release of unknown claims is appropriate only if "the record shows that such claims have been investigated sufficiently." (*Trulia*, *supra*, 129 A.3d at p. 898.) Plaintiffs have the burden to demonstrate, and have not demonstrated, a sufficient investigation to the release here. While plaintiffs have not shared the full scope of their "investigation," what they have shared bears a strong resemblance to the one criticized in *Trulia*:

> In this case, for example, no motions were decided (not even a motion to expedite), and discovery was limited to the production of less than 3,000 pages of documents and the taking of three depositions, two of which were taken before the parties agreed in principle to settle and one of which was a "confirmatory" deposition taken thereafter.

(129 A.2d at p. 893.)

Here, the record reflects that plaintiffs entered into the MOU following the production of an unspecified number of documents provided only for purposes of settlement, such as board minutes and financial advisor presentations, *i.e.*, "the standard package of documents that defendants routinely provide to facilitate a disclosure-only settlement." (*Sauer-Danfoss*, *supra*, 65 A.3d 1116, 1139.) There appears to have been no production of defendants' emails and no defendant depositions. Put simply, plaintiffs abandoned their claims of *director* malfeasance on the basis of documents drafted by bankers (financial presentations) or lawyers (board minutes) and two depositions of bankers. (1 CT 68:20-25, 70:11-16.) This investigation is far too limited to support the broad release the Settlement imposes upon the class.

At base, the superior court erred by failing to ensure that the settlement relief and the settlement release corresponded to the allegations of the complaint. (Cox, *How Understanding the Nature of Corporate Norms Can Prevent Their Destruction by Settlements* (2016) 66 Duke L.J. 501.)

III. The superior court abused its discretion in awarding class counsel excessive fees because the Settlement achieved no value for the shareholder class.

The superior court approved a settlement, negotiated by class counsel, in which the attorneys were awarded over a half-million dollars and the class received additional data inputs of virtually no value. The Settlement should have been rejected because the relief is valueless as a matter of law and certainly is insufficient to justify the broad release of claims. But even if the Court holds

that the Settlement is fair, the attorneys' fee award should be materially decreased—perhaps to $1—because the Settlement has achieved virtually nothing for the shareholders. (*See Sauer-Danfoss*, *supra*, 65 A.3d 1116, 1128 ("Remedying an immaterial omission through supplemental disclosure does not benefit stockholders and will not support a fee award.").)

"Because of the potential for fraud, collusion, or unfairness, thorough judicial review of fee applications is required in all class action settlements," with courts acting "as a 'fiduciary' for the protection of absent class members whose rights may not have been given due regard by the negotiating parties." (*In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 555 (cleaned up).) The court should not award fees "merely because the litigation produced some change, however ephemeral or peripheral. Unless there are actual and concrete litigation benefits, the supposed beneficiaries," here, the shareholders, "may legitimately complain that they should not be involuntarily saddled with costs which are out-of-proportion to their perceived benefit." *Pipefitters*, 180 Cal.App.4th at p. 1551. Thus, the central consideration is that a fee award is commensurate with the degree of benefit obtained by the class as a result of the litigation. (*Redman v. RadioShack Corp.* (7th Cir. 2014) 768 F.3d 622, 633.) "The ultimate goal is the award of a 'reasonable' fee." (*See Consumer Privacy Cases*, *supra*, 175 Cal.App.4th at 557 (cleaned up).) This reflects the principle that "[a]n attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method …. Plaintiffs attorneys don't get paid simply for

working; they get paid for obtaining results." (*In re HP Inkjet Printer Litig.* (9th Cir. 2013) 716 F.3d 1173, 1182.)

Under either a lodestar or percentage-of-benefit approach, the award of $509,158.62 fee and cost award—representing a multiple of 2.0x class counsel's lodestar of $243,102.50 for fees—is excessive, even if this Court finds that the Supplemental Disclosures are sufficiently material to support settlement approval. (*See* 2 CT 384-385.) Given the limited benefit obtained for the class, "counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class," and it thus is "appropriate for the court to decrease the fee award." (*In re Baby Prods. Antitrust Litig.* (3d Cir. 2013) 708 F.3d 163, 173 n.9, 178; *see also*, *supra*, at p. 43 (citing cases); *In re Riverbed Tech. Inc. Stockholders Litig.* (Del. Ch. Sept. 17, 2015, C.A. No. 10484-VCG) 2015 WL 5458041, *7-*8 (decreasing fees because additional disclosures provided minor tangible benefit).)

With class counsel awarded more than twice their lodestar, "the class is being asked to 'settle,' yet Class Counsel [is recovering] fees as if it had won the case outright." (*Sobel v. Hertz* (D. Nev. June 27, 2011, No. 3:06-cv-00545) 2011 WL 2559565, at *14.) Such a result serves to fuel the "merger tax" of class counsel fees in settlements providing only trivial disclosures and thus encourages the filing of more disclosure-only suits that benefit the settling parties at the expense of the shareholder class.

IV. Griffith's counsel should be awarded attorneys' fees if his arguments are successful in whole or part in this appeal.

Objectors who provide a benefit to the class are entitled to an award of attorneys' fees. (*See Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 400, *disapproved on other grounds by Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.) If Griffith's arguments in this appeal are successful in whole or part, he respectfully requests an award of attorneys' fees for his attorneys' work in the superior court and on appeal, with leave to file papers in support of an award of fees and expenses in an amount to be determined by the superior court on remand based upon the Court's ultimate decision.

CONCLUSION

Settlement approval should be reversed. If the Court affirms settlement approval, the award of attorneys' fees should be materially decreased. If the Court reverses settlement approval or decreases the award of attorneys' fees, Griffith respectfully requests an award of attorneys' fees.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CALIFORNIA RULE OF COURT 8.204

I, Anna St. John, appellate counsel to Sean J. Griffith, certify that the foregoing brief complies with the length limits permitted by California Rule of Court 8.204(c). The brief is 12,226 words, excluding the portions exempted by Rule 8.204(c)(3), based on the word count of the word processing system used to prepare the brief. The brief's type size and type face comply with Rule 8.204(b).

Executed on July 30, 2018.

Anna St. John