Case No. D067365

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH DISTRICT, DIVISION ONE

In Re:

LEAP WIRELESS INTERNATIONAL, INC.
SHAREHOLDER LITIGATION

—

ANAND L. DANIELL,

Objector and Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
(SUPER. CT. NO. 37-2013-00058491-CU-BT-CTL)
HON. JOEL WOHLFEIL, PRESIDING.

REPLY BRIEF FOR THE APPELLANT

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Objector and Appellant
in propria persona

<u>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</u>

Pursuant to California Rules of Court, Rule 8.208, Petitioner **ANAND L. DANIELL** does hereby certify that he knows of no entity that has an ownership interest of 10% or more in any of the parties to this proceeding that must be listed pursuant to California Rules of Court, Rule 8.208(e)(1) or (2), and that he knows of no other person or entity that has a financial interest in the outcome of the proceeding that the judges of this Court should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

/s/ Anand L. Daniell

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Dated: August 12, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES OF COURT:

APPELLANT'S CONTENTIONS ON APPEAL

Appellant's argument is that the trial court rubberstamped the settlement in this case instead of objectively evaluating it vis-à-vis the asserted claims, "as required by *Kullar [v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116]." (Op. Br., at 11.) A proper evaluation would have revealed the settlement is the product of a "merger tax" case. (*Ibid.*)[1]

"Merger tax" litigation is a serious problem. Statistics compiled by Cornerstone Research (and cited with approval in *Trulia*) show that over 90% of merger and acquisition transactions in 2013 alone were targeted by lawsuits and cost companies millions. (*Id.,* at 7, *citing* Koumrian, Olga, *Shareholder Litigation Involving Mergers and Acquisitions: Review of 2013 M&A Litigation,* Cornerstone Research, at p. 2.)

The claims asserted here are not distinguishable in any respect from the claims asserted in every other "merger tax" case. (Op. Br., at 11.)

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[1] "Merger tax" case is a colloquial term used by commentators and courts to describe a ***nuisance*** lawsuit filed in the wake of M&A transaction announcement. (*City Trading Fund v. Nye,* No. 651668-2014, at p. 22 (New York Sup. Ct., filed Jan. 9, 2015).) Of course, not all cases challenging M&A transactions are "merger tax" cases; a few have merit. Only ***nuisance*** suits, however, are referred to as "merger tax" cases.

The objective in a "merger tax" case is to obtain a "disclosure settlement" which yields no monetary compensation to shareholders but nevertheless generates attorneys' fees. As explained in *Trulia,* in a "disclosure settlement … the sole ***or predominant*** consideration provided to stockholders in exchange for releasing their claims is the dissemination of one or more disclosures to supplement the proxy materials distributed for the purpose of soliciting stockholder approval for the for a proposed transaction." (*In re Trulia, Inc. Stockholder Litig.* (Del. Ch. 2016) 129 A.3d 884, 891 n. 15 (emphasis added).)

Included in the definition of "disclosure settlement" is a settlement that "in addition to supplemental disclosures, includes an insubstantial component of other non-monetary consideration, such as a minor modification to a deal protection measure." (*Ibid.*)

Appellant further argued the trial court's decision to approve the settlement in this case was an abuse of discretion "[e]ven assuming the trial court had no clue what a 'merger tax' case was." (Op. Br., at 12.) The settlement provided no meaningful benefit to shareholders:

> "In light of Delaware law and precedent and the procedural history of this case, the trial court should have seen this case for what it obviously was – frivolous, and an effort by lawyers who are regular players in the enterprise of routinely filing hastily drafted shareholder complaints to leverage the threat of an injunction and generate fees. More to the point, the court should have protected the class from these lawyers out of its fiduciary obligation to the class. [¶] It did not. Instead, it rewarded the attorneys in this case with a nearly $1 million fee award and attempted to justify a non-opt out settlement in which ***the class, in exchange for nothing, gave up everything*** – *i.e.,* a global release." (*Id.,* pp. 13-14 (emphasis added).)

The supplemental disclosures in this case were of no value to shareholders, Appellant argued, because they were "of the type Delaware courts have found immaterial and unhelpful, even in cases where an expert has opined approvingly." (*Id.,* at 14, citing *Trulia, supra,* at p. 37 n. 79; see also *In re Sauer-Danfoss, Inc. S'holders Litig.,* 65 A.3d 1116, 1133 (Del. Ch. 2011) [holding immaterial a "quibble with the substance of a banker's opinion"].) Appellant also cited an empirical analysis of shareholder voting patterns conducted by various law professors (and approved by the *Trulia* court), which convincingly demonstrated that supplemental disclosures in all but exceptional cases are of no value to shareholders. (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, 558 (2015) ["[w]e find no significant evidence that disclosure-only settlements affect shareholder voting"].)

Finally, Appellant argued that "[j]ust because securities lawyers modified a deal protection device, it does not necessarily follow that they acted in good faith or that shareholders were provided something of value." (Op. Br., at 15.) And the trial court abused its discretion by certifying a non-opt out settlement. (Op. Br., pp. 17-18.)

REPLY

I. CERTIFICATION OF A NON-OPT OUT SETTLEMENT WAS IMPROPER

Respondents do ***not*** dispute the contention that the circumstances relevant in determining whether a non-opt out settlement should be certified are those that exist ***at the time of the certification hearing.*** Nor do Respondents argue that there was something left to enjoin at the time of the certification hearing in this case. Indeed, they cannot. The merger this case was brought to enjoin was consummated long before the certification hearing.

Nevertheless, Respondents' argue the trial court nevertheless had the "discretion" to certify the non-opt out "disclosure settlement" in this case.

No court has "discretion" to apply a law or rule of civil procedure in a manner that violates a constitutional right.

Without question, the right to sue is ***constitutional.*** The trial court violated Appellant's constitutional right to opt out and sue by invoking a federal rule that allows certification of non-opt out settlements under limited circumstances (Fed. R. Civ. P. 23(b)(1)(A), (b)(1)(B), & (b)(2)), at a time those circumstances did not exist, ***as Respondents concede.*** If there was any authority for this, AT&T's attorneys would have more to cite in its brief than unreported California trial court orders. (AT&T Br., pp. 9-10.)

II. THE TRIAL COURT ABUSED ITS DISCRETION IN THIS "MERGER TAX" CASE BY APPROVING A "DISCLOSURE SETTLEMENT" THAT WAS OF NO VALUE TO SHAREHOLDERS

None of the Respondents dispute the statistics compiled by Cornerstone Research and cited approvingly in *Trulia.* Nor do they seriously argue that the claims in this case are somehow different from those typically asserted in abusive "merger tax" cases. Rather, they heap praise on the "disclosure settlement" approved by the trial court.

Plaintiffs state that "[h]ere, the disclosures included the previously omitted fact that when performing its valuation analyses, Lazard assigned zero value to [Leap's] net operating loss carryforwards (NOLs)." (Plaintiffs' Br., at 11.) In addition, "the disclosures included previously omitted forecasts prepared by Leap and given to Leap's Board and its advisors for the years 2013 through 2017, as well as for 2018 and 2019 for certain projections," (*id.,* at 12), and "previously omitted … Enterprise Value/EBITDA multiples." (*Id.,* at 13.)

Building on these statements, Plaintiffs argue the disclosures here are distinguishable from the ones in the *Trulia* disclosure settlement. "The disclosures here were ***previously omitted, non-public information*** that directly affected shareholders' ability to assess the value of their stock (NOLs, projections) where the disclosures in *Trulia* were information that was already disclosed or publicly available." (*Id.,* at 20 (emphasis added).) Plaintiffs go on to argue that deal modifications in the settlement were also of value because they facilitated a topping bid:

> "AT&T agreed to give up certain contractual rights it enjoyed under the Merger Agreement and the Voting Agreement that previously encumbered the Board's ability to pursue topping acquisition proposals from other potential buyers." (Plaintiffs' Br., at 1.)

Plaintiffs also raise the following argument:

> "To the extent [Appellant] is suggesting that the trial court did not have sufficient information to determine if the [s]ettlement was fair, adequate, and reasonable – the record amply supports the trial court's decision. To the extent he is suggesting the trial court was required to do something more here and independently evaluate the merits of this case – no law supports this position, including *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, a case relied on by Daniell. To the extent he is suggesting that the trial court had no choice but to find this a frivolous settlement as criticized in *Trulia* – this case is no *Trulia."* (*Ibid.*)

Indeed, Plaintiffs fixate on *Kullar,* devoting several pages of their brief to the argument that *"Kullar* does not require anything more" than what they did below. (*Id.,* pp. 15-17.)

A. Plaintiffs' Attorneys Did Not, As They Were Required To Under *Kullar,* Provide the Merger Agreement, Voting Agreement, or Proxy Statement To the Trial Court

A trial court in a class action has a "fiduciary duty to have before it sufficient information to determine if the settlement was fair, adequate, and reasonable." (*Kullar, supra,* 168 Cal. App. 4th, at 131.) This duty arises from the court's "fiduciary responsibility as the guardian[] of the rights of the absentee class members." (*Id.,* at 129.)

"A trial court may not finally approve a settlement agreement until ***provided with sufficient information***." (*Id*., at 133.)

Of course, no non-frivolous argument can be made that the burden of providing information to the trial court can be foisted onto an objector, or that it rests with anyone other than class counsel. The trial court's fiduciary responsibility exists whether or not an objector appears. And in most cases, an objector does not appear.

The information class counsel must provide a trial court before the court rules on a settlement includes "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Ibid.* (emphasis added).)

Kullar is instructive as to what constitutes "basic information." "[B]asic information" is "data … that will enable the court to make an independent assessment of the adequacy of the settlement terms." (*Id.,* at 132.) *Kullar* was a class action on behalf of Foot Locker employees alleging violations of the Labor Code. Thus, "Foot Locker's payroll data" was cited by the *Kullar* court as an example of basic information that could have been provided in that case, inasmuch as this data was "relevant to the quantification of the claims being settled." (*Ibid.*)

The "basic information" Plaintiffs' attorneys should have provided in this case: the Merger Agreement; Voting Agreement; and Proxy Statement. No non-frivolous argument can be made that these documents were not of central importance to the trial court's duties under *Kullar*. The Merger and Voting Agreements formed the basis of the merger from which this case arose. In addition, the gravamen of the claims in this case was insufficient disclosure of information on the merger. The Proxy Statement was the primary vehicle through which Leap Wireless provided shareholders information on the merger.

Utilizing sophistry and semantics, Respondents misleadingly argue:

> "*Kullar* does not stand for the proposition that a trial court must independently evaluate the merits of a case in a settlement context. *Kullar* stands for the opposite. The Court of Appeal expressly noted that the trial 'court may and undoubtedly should continue to place reliance on the competence and integrity of

counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement.'" (Plaintiffs' Br., pp. 16-17.)

This argument disregards the statement in *Kullar* that ***"data*** must be provided that will make an independent assessment of the adequacy of the settlement terms." (*Kullar, supra,* 168 Cal. App. 4th, at 132.) Moreover, the quote Plaintiffs lift from *Kullar* is wildly out of context:

> "The court may and undoubtedly should continue to place reliance on the competence and integrity of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement. ***But the court must also receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed."*** (*Id.,* at 133.)

Thus, if *Kullar* stands for any proposition, it is that as to basic information relevant to the claims being settled, a trial court may ***not*** rely solely on the representations or reputation of counsel.

Here, Plaintiffs' attorneys should have provided the Merger Agreement, Voting Agreement, and Proxy Statement to the trial court.[2]

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[2] In the interest of candor to the Court, Appellant acknowledges he did not raise the "sufficient information" point in his Opening Brief. In light of that, it is unclear why Plaintiffs argue it as they do. Indeed, Plaintiffs' arguments are truly astonishing since their omission of the Merger Agreement, Voting Agreement, and Proxy Statement violates *Kullar* to its core. And it is clear the documents were withheld below to obfuscate their lies – some of them made under penalty of perjury – that: ***(1)*** the "supplemental disclosures" in this case consisted of "previously omitted" information, and ***(2)*** AT&T had "rights" under the Merger and Voting Agreements from which it agreed to "forbear."

Whatever Plaintiffs' reasons may be for not responding to the arguments Appellant actually raised in his Opening Brief, and instead doubling down in this Court on their knowingly false statements to trial court, Appellant has every right to respond by way of this Reply Brief to the ill-considered contentions that Plaintiffs raise in their brief.

B. The Supplemental Disclosures Consisted Entirely of Previously Disclosed – and Thus, Immaterial – Information

Appellant contended in his Opening Brief that the supplemental disclosures in this case were "immaterial" under cases such as *Trulia* and *Sauer,* and thus, not sufficient as settlement consideration. In the process of responding to this contention, Plaintiffs characterize Leap Wireless' supplemental disclosures as follows:

(1) "the previously omitted fact that when performing its valuation analyses, Lazard assigned zero value to [Leap Wireless'] net operating loss carryforwards (NOLs)," (Plaintiffs' Br., at 11);

(2) "previously omitted forecasts … for the years 2013 through 2017, as well as for 2018 and 2019 for certain projections," (*ibid.*); ***and***

(3) "previously omitted … Enterprise Value/EBITDA multiples." (*Id.,* at 13.)

Plaintiffs stress the supplemental disclosures in this case consist of "previously omitted" information. (See *id.,* at 20 ["disclosures here were previously omitted, non-public information"].) The reason for this emphasis is obvious. A disclosure can be "material" – *i.e.,* sufficient as settlement consideration – only if it "significantly alter[s] the 'total mix' of information made available." (*Trulia, supra,* 129 A.3d, at 899, citing *Arnold v. Soc'y for Sav. Bancorp, Inc.,* 650 A.2d 1270, 1277 (Del. 1994).)

Previously disclosed information cannot alter the "total mix." because it is already in the "mix." (*Ibid.*)

All of the information Plaintiffs characterize as "previously omitted" was previously disclosed. The supplemental disclosures in this case, therefore, were "immaterial" under *Trulia,* and not sufficient as settlement consideration.

Leap Wireless previously represented in Section 5.1(q) of the Merger Agreement that it "had unused net operating losses of not less than $2,400,000,000, and, except as may result from the Merger, the use of such net operating losses is not subject to any limitation pursuant to Section 382 of the [Internal Revenue] Code." (Request for Judicial Notice ("R.J.N.") Ex. "2" [Merger Agreement], at p. 24.) This was also disclosed on the Proxy Statement inasmuch as the Merger Agreement was annexed to it. (*See* R.J.N. Ex. "6" [Proxy Statement], at 126.)

In addition, every reasonable investor knows that all a net operating loss (or "NOL") can do after it is incurred is serve as a tax deduction. (*See* 26 U.S.C. § 172 [providing for NOL tax deduction].) Since an NOL can do no more than provide a dollar-for-dollar reduction of ***future*** taxable income, it is a valuable asset for a corporation only in the event that it actually generates taxable income – *i.e.,* becomes profitable. Every reasonable investor also knows that in the event of a merger or other "ownership change," a corporation's ability to use an NOL as a tax deduction is limited. (*See* 26 U.S.C. § 382.) This is public law; and here, this was additional disclosed in the Merger Agreement.

In light of Leap Wireless' prior representation in the Merger Agreement as to its NOLs, and what is generally known about NOLs, the supplemental disclosure that Leap Wireless' NOLs were of "zero value" or could provide "incremental value" (1 C.T. 80-81) adds nothing to the "total mix." (*Trulia, supra,* 129 A.3d, at 899.) At most, the disclosure suggests a belief on the part of Lazard, already evident in its approval of the merger, that Leap Wireless will not be profitable anytime soon so as to be in a position to take advantage of its NOLs. This suggestion is not sufficiently material to serve as settlement consideration.

The other supplemental disclosures – *i.e.,* "forecasts … for the years 2013 through 2017, as well as for 2018 and 2019 for certain projections," (Plaintiffs' Br., at 11), and "Enterprise Value/EBITDA multiples" (*id.,* at 13) – also do little more than restate information that was previously disclosed and already within investors' knowledge. Indeed, Plaintiffs' statements that financial forecasts from 2013 onward and Enterprise Value/EBITDA multiples were both "previously omitted" are bald-faced lies. ***Financial projections for 2013 onward were included in the Proxy Statement.*** (R.J.N. Ex. 6 [Proxy Statement], at 58.) So were Enterprise Value/EBITDA multiples. (*Id.,* pp. 52-53.)

C. There Were No "Deal Modifications"

Plaintiffs argue that the disclosure settlement in this case is of additional value to shareholders because "AT&T agreed to give up certain contractual rights it enjoyed under the Merger Agreement and the Voting Agreement that previously encumbered the Board's ability to pursue topping acquisition proposals from other potential buyers." (Plaintiffs' Br., at 1.) Neither the Plaintiffs' nor AT&T's attorneys describe in their briefs what AT&T's "contractual rights" were. In the trial court, however, Plaintiffs' attorney David T. Wissbroecker stated that AT&T "agreed to forbear from asserting its rights to prevent termination of the Voting Agreement if a change of recommendation is made." (1 C.T. 156 [Wissbroecker Decl. ¶ 7].) Mr. Wissbroecker also stated that AT&T agreed "to forbear from asserting its right to prevent a change of recommendation by Leap under Sections 6.2(f)(ii)(A), (B), (C), and (E) of the Merger Agreement." (*Ibid.*)

The Voting and Merger Agreements show that Mr. Wissbroecker willfully lied.

Nothing in the Voting Agreement made a Change of Recommendation (a term defined in section 6.2(f) of the Merger Agreement) a triggering condition of the Voting Agreement's termination clause. In fact, the Voting Agreement did not even use the term "Change of Recommendation." Also, even if a Change of Recommendation could have been construed as a trigger of a terminating condition in the Voting Agreement, the text of the termination clause made plain that the Agreement terminated "automatically" on triggering of ***any*** terminating condition:

> "This letter agreement and all obligations of the parties hereunder shall ***automatically*** terminate upon the earlier of (a) the Effective Time, (b) the termination of the Merger Agreement in accordance with its terms, and (c) the effectiveness of any amendment, modification, supplement to, or waiver under the Merger Agreement, which amendment, modification, supplement, or waiver would (1) reduce the amount or change the form or composition of the Per Share Merger Consideration payable in the Merger, (2) extend the Termination Date (other than pursuant to Section 8.2(a) of the Merger Agreement), or (3) materially and adversely impact any Stockholder in its capacity as such; provided, however, that (i) paragraphs 11, 12, 13, and 16 hereof shall survive any such termination and (ii) such termination shall not relieve any party of any obligation for any breach of this letter agreement occurring prior to such termination." (R.J.N. Ex. 3 [Voting Agreement], at p. 3 [¶7] (emphasis added).)

To put it bluntly, Mr. Wissbroecker ***perjured himself*** by stating that AT&T had "rights to prevent termination of the Voting Agreement if a change of recommendation is made." (1 C.T. 156 [Wissbroecker Decl. ¶ 7].)

Similarly, he ***perjured himself*** by stating that AT&T had a "right to prevent a change of recommendation by Leap." (*Ibid.*) The Merger Agreement ***expressly authorized*** Leap Wireless (referred to in the Agreement as "the Company") to make a Change of Recommendation:

> "Notwithstanding anything to the contrary set forth in this Agreement, prior to the time the Requisite Company Vote is obtained, the board of directors of ***the Company may withhold, withdraw, qualify or modify the Company Recommendation or approve, recommend or otherwise declare advisable any Superior Proposal*** made after the date of this Agreement that was not solicited, initiated, encouraged or facilitated in breach of this Agreement, if the board of directors of the Company determines in good faith, after consultation with outside counsel and an independent financial advisor of nationally recognized reputation, that (i) such offer constitutes a Superior Proposal or (ii) a material development or change in circumstances occurs or arises after the date of this Agreement that was not known by nor was reasonably foreseeable to the board of directors of the Company as of the date of this Agreement and is materially more favorable to the recurring financial condition of the Company and its Subsidiaries, taken as a whole, other than (A) developments or changes in the industries in which the Company and its Subsidiaries operate, (B) changes in the market price or trading volume of the Shares, (C) the timing of any Regulatory Approval, (D) an Acquisition Proposal or (E) the fact that, in and of itself, the Company exceeds internal or published projections (an 'Intervening Event') and (iii) the Company determines in good faith, after consultation with outside counsel and an independent financial advisor of nationally recognized reputation, that such action is necessary in order for the directors to comply with their fiduciary duties under applicable Law (a 'Change of Recommendation')." (R.J.N. Ex. 2 [Merger Agreement], at 32 [§6.2(f)](emphasis added)

To be sure, AT&T had rights under the Merger Agreement to notice that Leap Wireless' board was considering making a Change of Recommendation and to "propose revisions to the Merger Agreement," which the board was obligated to consider and negotiate in good faith. As AT&T described this right in the Form 8-K it filed:

> "[P]rior to any Change of Recommendation (as defined in the Merger Agreement) by the Leap Board, AT&T will have the right for at least 4 business days (3 business days for subsequent related notices) following notice that management of Leap intends to

> recommend a Change of Recommendation, to propose revisions to the Merger Agreement and the Leap Board must negotiate in good faith and consider such revised terms prior to making a determination to change its recommendation. Even if the Leap Board changes its recommendation, Leap must continue to submit the Merger Agreement to a vote of its stockholders." (R.J.N. Ex. 1 [AT&T Form 8-K], at 3.)

But this right was not, nor was it equivalent to, a right on the part of AT&T to "prevent" anything. The Merger Agreement repeatedly used the term "prevent." If AT&T's right was, or was equivalent to, a right to "prevent," the Merger Agreement would have contained language that Leap Wireless' board is "prevented" from making a Change of Recommendation upon proposal of revisions by AT&T. It did not.

Indeed, AT&T's right to notice and propose revisions cannot even reasonably be construed as a right to "impair" or "delay" (terms also used in the Agreement). Again, the Merger Agreement ***expressly authorized*** Leap Wireless' board to change its recommendation, even ***after*** AT&T proposed revisions. And the Agreement did not require Leap Wireless' board to wait any period of time before it made a change, nor did it grant AT&T any discretion to impede a change by claiming its proposed revisions were not considered or negotiated in good faith.

Since AT&T did not actually have "rights" under the Voting Agreements to "prevent" its termination or, under the Merger Agreement, to "prevent" a Change of Recommendation, AT&T could not possibly have entered into an agreement to "forbear" from exercising these "rights." By extension, there could not possibly have been a deal modification. Plaintiffs' representations as to this point, including Mr. Wissbroecker's statements made under penalty of perjury, are simply false.

D. There Was Never Any Chance That a "Topping Bid" Would Materialize

The Merger Agreement contained an illegally high termination fee – $71,245,000; approximately 6% of the approximately $1.2 billion acquisition price – payable to AT&T by Leap Wireless in the event of a Change of Recommendation by Leap Wireless. (R.J.N. Ex. 2 [Merger Agreement], at 43 & 44 [§§8.4(a)(ii) & 8.5(b)].) As explained in the operative complaint, the termination fee ***itself*** was a "strong deterrent" to competing bids. (1 C.T. 19 [Complaint ¶ 67]; *see also* Complaint ¶ 68 ["termination fee serve[d] as a tax upon competing bidders"].)

In addition to the termination fee, Leap Wireless filed a Form 8-K stating that AT&T would only "forbear" on changes of recommendation "under Sections 6.2(f)(ii)(A), (B), (C), and (E) of the merger agreement." (1 C.T. 79.)

Section 6.2(f)(ii) of the Merger Agreement also included "(D) Acquisition Proposal" in its list of Events that could lead to a Change of Recommendation, which was conspicuously omitted from Leap Wireless' statement:

> "(A) developments or changes in the industries in which the Company and its Subsidiaries operate, (B) changes in the market price or trading volume of the Shares, (C) the timing of any Regulatory Approval, ***(D) an Acquisition Proposal*** or (E) the fact that, in and of itself, the Company exceeds internal or published projections (an 'Intervening Event')." (R.J.N. Ex. 2 [Merger Agreement], at 32 [§6.2(f)(ii)](emphasis added).)

Under the Merger Agreement, an "Acquisition Proposal" included a "Superior Proposal." (R.J.N. Ex. 2, at 32 [Merger Agreement § 6.2(d)].) Thus, the true meaning of Leap Wireless' statement in its Form 8-K was that AT&T would not exercise its "right" to "prevent" a Change of Recommendation ***unless*** there was a topping bid.

Of course, AT&T never actually had "rights" under the Merger or Voting Agreements to prevent a Change of Recommendation. So, distilled to its essence, Leap Wireless' statement was a veiled threat, directed at anyone considering bidding on Leap Wireless.

This was why a topping bid never materialized: the illegally high termination fee together with Leap Wireless' statement created an ***in terrorem*** effect and ***ensured*** a topping bid would ***never*** be made.

The most infuriating part about this is that Mr. Wissbroecker knew in light of the termination fee and Leap Wireless' statement that a topping bid would ***never*** be made. Indeed, he is in a uniquely weak position to claim he did not know. He is a partner at Robbins, Geller, Rudman & Dowd LLP – a firm that went to an egomaniacal extreme in this case to argue its experience in the field of M&A litigation is so extensive that the merger cases it initiates cannot be characterized as "merger tax" litigation regardless of its abusiveness. (Plaintiffs' Br., pp. 17-19.) Not only that, he is the Robbins Geller partner who billed the most hours on this case. (1 C.T. 187.)

Despite ***knowing*** a topping bid would not be made, Mr. Wissbroecker argued that one could materialize. And in the process of arguing this, he ***perjured himself*** by making statements that AT&T had "rights" under the Voting Agreement to "prevent termination," had a "right" under the Merger Agreement to "prevent" a Change of Recommendation, and entered into an agreement to forbear from exercising these "rights."

Mr. Wissbroecker should be referred to the District Attorney for the County of San Diego, so that the District Attorney may decide whether Mr. Wissbroecker should be criminally prosecuted for perjury. (Pen. Code § 118.)

E. The Judgment Should Be Reversed With Directions Not To Dismiss the Case Until Further Proceedings Are Conducted On the Unexplored Merger Termination Fee Claim

Plaintiffs state in their brief that Appellant "does not argue that plaintiffs had a viable claim for monetary damages." (Plaintiffs' Br., at 14 n. 6.) This is disingenuous. Plaintiffs' attorneys know that there is a viable monetary claim in this case, and it arises from Leap Wireless' board's acquiescence to an excessive merger termination fee.

There is no bright line rule as to what constitutes an excessive termination fee. Generally, however, the upper end as to what is allowable under Delaware law is four percent. (See, *e.g., In re Dollar Thrifty Shareholder Litig.,* C.A. Cons. No. 5458 (Del. Ch. 2010) [upholding 3.9% termination fee]; *In re Toys 'R' Us, Inc. Shareholder Litig.,* 877 A.2d 975 (Del. Ch. 2005) [upholding 3.75% termination fee]; but see, *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.,* 1999 Del. Ch. LEXIS 202, at *5 [termination fee of 6.3% is outside of the range of reasonableness].)

The termination fee here – $71,245,000 – which would have been triggered by termination of the deal in the event of a topping bid, was 6% of the purchase price. This is outside the generally allowable range.

To be sure, Delaware has an exculpation provision, section 102(b)(7), under which liability can be avoided unless it can be shown that directors consciously disregarded shareholder interests. But this case is being litigated in California, where Delaware's exculpation law does nto apply. (Cf. *Neubauer v. Goldfarb* (2003) 108 Cal. App. 4th 47, 57 [waiver of corporate directors' fiduciary duties "is against public policy"].)

Moreover, there is a colorable argument that Leap Wireless' board consciously disregarded shareholder interests in negotiating the merger.

Once again, AT&T never had any "rights" under the Merger Agreement to "prevent" a Change of Recommendation. Leap Wireless, a party to the Merger Agreement, knew this. Nevertheless, Leap Wireless made a statement on the Form 8-K containing its "corrective disclosures" implying that AT&T did have a "right" to "prevent" a Change of Recommendation, and AT&T would not waive this "right" in the event of an "Acquisition Proposal" (which, under the Merger Agreement, included a Superior Proposal). Leap Wireless' board, knew this statement in Leap's Form 8-K was blatantly false, yet it stood by and said nothing.

Deterring potential buyers by signaling to them that they will be "prevented" from successfully making a topping bid, and/or standing by and saying nothing in light of this blatantly false statement, shows conscious disregard for shareholder interests.

So even assuming Delaware's exculpation provision does apply in California, the shareholder class in this case may be entitled to monetary damages for Leap Wireless' board's acquiescence to an unlawfully high merger termination fee.

This claim was never explored in the trial court. Plaintiffs' attorneys knew about the merger termination fee claim. As noted, they discussed in the operative complaint that the termination fee ***itself*** was a "strong deterrent" to competing bids. (1 C.T. 19 [Complaint ¶ 67]; *see also* Complaint ¶ 68 ["termination fee serve[d] as a tax upon competing bidders"].)

Nevertheless, they willfully disregarded the claim in order to secure an approximately $1 million fee award.

The claim should be explored on remand.

CONCLUSION

Mr. Wissbroecker should be referred to the District Attorney for the County of San Diego, so that the District Attorney may decide whether Mr. Wissbroecker should be criminally prosecuted for perjury. (Pen. Code § 118.)

The final order and judgment in this case should be reversed and remanded with directions not to dismiss this case until further proceedings are conducted on the still unexplored merger termination fee claim.

Respectfully submitted.

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Dated: August 12, 2016

Objector and Appellant in propria persona

CERTIFICATE OF WORD COUNT

The text of this brief consists of 5,154 words as counted by the word-count feature on the word processor utilized to generate this brief.

/s/ Anand L. Daniell

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PROOF OF SERVICE

I, **THOMAS PAUL STURTZ,** on personal knowledge do declare as follows, and if called upon as a witness, could and would competently testify that:

I am 18 years of age or older and not a party to this matter, I am a resident of the County of Orange, in which County the service declared herein is made, and I reside at 12601 Flower St., No. 6, Garden Grove, California 92840.

On **August 12, 2016,** I served the following:

REPLY BRIEF FOR THE APPELLANT

by placing true copies thereof in sealed envelopes and by depositing said envelopes with the UNITED STATES POSTAL SERVICE, addressed as follows:

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Hon. Joel R. Wohlfeil
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, HALL OF JUSTICE
330 West Broadway, Dept. C-73
San Diego, California 92101
Trial Court

In addition, I served one copy of the aforementioned Opening Brief for the Appellant on the Supreme Court of California by sending a copy thereof to the Supreme Court of California's electronic notification address.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 12th day of August, 2016, at Irvine, California.

/s/
THOMAS PAUL STURTZ
Declarant