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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

In re PHARMACYCLICS, INC. SHAREHOLDER LITIGATION	Lead Case No. 115-CV-278055
This Document Relates To: ALL ACTIONS	(Consolidated with Nos. 1-15-CV-278088; 1-15-CV-278215; and 1-15-CV-278260)
	[Assigned to Hon. Peter H. Kirwan, Dept. 1]
	OBJECTION OF SEAN J. GRIFFITH TO PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND EXPENSES AND NOTICE TO APPEAR AT SETTLEMENT HEARING
	Judge: Hon. Peter H. Kirwan Dept.: 1 Date Action Filed: March 13, 2015
	Hearing Date: July 8, 2016 Time: 9:00 a.m.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Professor Sean J. Griffith ("Objector"),[1] by and through his undersigned counsel, respectfully submits this Objection to Plaintiffs' Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses.[2]

Plaintiffs ask this Court to approve a settlement—and to award Plaintiffs' Counsel a $725,000 fee—for launching an arrow and drawing a bullseye where it landed. Plaintiffs came to Court alleging variously that Pharmacyclics' directors suffered conflicts of interest; that CEO Duggan chose AbbVie as a deal partner to protect his employees; and that Defendants locked up the deal through "onerous and unreasonable deal protection devices." *See, e.g.*, Compl. ¶¶ 46, 58, 60; Treppel Compl. ¶ 41.[3] Plaintiffs could make no disclosure claims—at the time, Defendants had yet to file the Recommendation Statement—and never amended their pleadings to make such assertions. Yet Plaintiffs now aver, despite having recovered nothing relevant to their original allegations, that they have nonetheless achieved "via the Supplemental Disclosures ***most of what they hoped to gain by bringing this litigation***. . . ." Pls. Mem. at 8 (emphasis added).

This gives the game away. The Settlement is yet another of the "routine disclosure-only settlements, entered into quickly after ritualized quasi-litigation, that plague the M&A landscape." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1067 (Del. Ch. 2015).[4] Over the last

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[1] In further support of this Objection, Objector relies upon (i) the accompanying Declaration of Sean J. Griffith in Support of Objection to Plaintiffs' Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses (the "Griffith Decl."); and (ii) the accompanying Declaration of Justin Brownstone in Support of Objection to Plaintiffs' Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses (the "Brownstone Decl."). Objectors' proof of stock ownership and *curriculum vitae* are attached as Griffith Decl. Exs. A & B.

[2] All capitalized terms not otherwise defined herein shall have the meanings provided in the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fees and Expenses, filed on June 6, 2016 (hereinafter, "Plaintiffs' Memorandum" or "Pls. Mem.").

[3] "Compl." refers to the complaint in *Evangelista v. Duggan*, Case No. 1-15-CV-278055 (filed March 13, 2015). "Treppel Comp." refers to the complaint in *Treppel v. Duggan*, 1-15-CV-278088 (filed March 13, 2015).

[4] Pharmacyclics was incorporated in Delaware, and Delaware substantive law governs Plaintiffs' claims. *See* Pls.' Mem. at 1-2 n.3.

ten years, the swift settlement of quickly-filed lawsuits for supplemental disclosures, "broad releases to defendants and six-figure fees to plaintiffs' counsel" have caused "deal litigation to explode in the United States beyond the realm of reason." *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 894 (Del. Ch. 2016). In response, courts in Delaware and elsewhere now subject such settlements to greater scrutiny, refusing settlement approval or fee requests where plaintiffs trade immaterial disclosures for overbroad releases. *See* Section II, *infra*. California law likewise requires careful scrutiny of the fairness of a class settlement. Faced with the same facts, this Court is empowered to, and should, draw the same conclusions.

Reviewed in the light of more recent authority—omitted by Plaintiffs—the parties' course of action in this case matches a process now rejected by courts in Delaware, Pharmacyclics' former state of incorporation. The adherence to this ritualized pattern of litigation is made worse by Plaintiffs' promulgation of a notice describing disclosures far more weighty than those achieved by the Settlement. *See* Section III, *infra*.

In fact, the Supplemental Disclosures had no material value to stockholders. Instead, Plaintiffs offered Defendants a broad release in exchange for a "laundry list of minutiae" that, until recently, might have passed muster in Delaware. *See* Section IV, *infra*. Under California or Delaware law, this meager compensation to the Class, supported by limited discovery, that releases Defendants from even unknown or uninvestigated claims, is unfair, unreasonable and inadequate. The Court should not approve the Settlement. *See* Section V, *infra*.

Having achieved so little, Plaintiffs seek a $725,000 fee, supposedly based on "knowledgeable analysis of the appropriate fee for the benefits achieved." Pls. Mem. at 15. In fact, $725,000 is far greater than similar recent awards in California, Delaware and elsewhere. Plaintiffs' request for, and Defendants' acquiescence to, an above-market fee itself casts doubt on the fairness of the Settlement. The Court should reject Plaintiffs' fee request. For the same reasons Plaintiffs advance in support of their request, however, Objector should be granted fees to the extent he has provided value to the Class or the Court. *See* Sections VI-VII, *infra*.

II. DISCLOSURE-ONLY SETTLEMENTS RECEIVE "CONTINUED DISFAVOR"

The Motion should be considered in the context of the dramatic rise in deal litigation between 2005 and 2014, in which the percentage of major M&A transactions subject to stockholder challenge more than doubled, reaching a peak of 94.9% in 2014. Most cases settled, as here, with no monetary consideration flowing to the class. *See* Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015* 2, 4 (Jan. 14, 2016), *available at* http://ssrn.com/abstract=2715890 ("*Takeover Litigation*"). In such litigation, defendants have an "incentiv[e] 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*, 129 A.3d at 892. While the occasional merger dispute generates meaningful economic benefits, "far too often such litigation serves no useful purpose for stockholders" and "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." *Id*. at 891-92.

Between 2014 and 2016, California's sister courts issued a series of decisions subjecting disclosure settlements to greater scrutiny, sometimes rejecting them altogether.[5] These cases culminated in the Delaware Court of Chancery's *Trulia* decision, a 42-page opinion in which Chancellor Bouchard analyzed the perverse incentives leading to the overlitigation of M&A claims. The *Trulia* court weighed the costs and benefits of ubiquitous litigation and announced that disclosure settlements would now be subject to "continued disfavor." *See id*. at 891-99.

The era of easy approval of disclosure settlements waned in Delaware throughout 2015, and is now over. This Court has the same discretion (and duty) to balance the strength of the claims

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[5] *See Trulia*, 129 A.3d at 895-96 nn. 35 & 36 (citing two New York and four Delaware decisions rejecting, or reluctantly approving, disclosure-only settlements); *see also* Decision and Order, *Gordon v. Verizon Commc'ns, Inc.*, 2014 WL 7250212, at **8-9 (N.Y. Sup. Ct. Dec. 19, 2014) (rejecting settlement).

Beyond his academic writing, Objector has contributed to this evolution of the law by, among other activities, filing objections in disclosure settlement cases and providing an *amicus curiae* brief in *Trulia*.

being released in settlement against the settlement consideration, and decline to approve the Settlement for the same reasons. At least one California court, citing *Trulia*, has already refused to even *preliminarily* approve a disclosure settlement, rejecting a release "far too broad in scope" and requiring additional briefing concerning the materiality of settlement. *See* Or. Re: Mot. for Prelim. App. of Class Action Settlement, *Rice v. Barrack*, No. BC575767, at 4 (Cal. Super. Ct.—Los Angeles Cty. Feb. 16, 2016) (the "*Rice* Order").

III. PLAINTIFFS FOLLOW THE DISCLOSURE-ONLY PLAYBOOK FROM *TRULIA*

Days after Defendants announced the Acquisition, Plaintiffs filed the first of four class actions alleging that Defendants consented, based upon their personal conflicts of interest, to a transaction that undervalued the Company, utilizing "unreasonable" deal protection devices to lock up the deal.[6] *See, e.g.*, Stipulation at 1; Compl. ¶¶ 46-52; 53-55, 59; Treppel Compl. ¶ 41.

From filing of the initial complaint on March 13, 2015 to entry into the MOU on April 16, 2015, significant adversarial litigation in this action lasted a mere ***34 days***. Stipulation at 1-2. During that period, Defendants published the Registration Statement and then "self-expedited" the litigation by providing Plaintiffs' Counsel with an undisclosed number of documents—but only for purposes of settlement.[7] Stipulation at 2; Wissbroecker Decl. at ¶ 16.

This settlement-only document production is consistent with Plaintiffs' theme that—despite their initial allegations—the Supplemental Disclosures provided "most of what they hoped to gain by bringing this litigation. . . ." Pls. Mem. at 8. Discovery followed the sue-to-settle strategy described in *Trulia*:

> During discovery, plaintiffs will typically receive copies of board

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[6] *Compare Trulia*, 129 A.3d at 891 ("Today, the public announcement of virtually every transaction involving the acquisition of a public corporation provokes a flurry of class action lawsuits alleging that the target's directors breached their fiduciary duties by agreeing to sell the corporation for an unfair price.").

[7] *Compare Trulia*, 129 A.3d at 892 (Incentive to settle quickly is "so potent that many defendants self-expedite the litigation by volunteering to produce 'core documents' to plaintiffs' counsel, obviating the need for plaintiffs to seek the Court's permission to expedite the proceedings. . . ."). This self-expedition "avoid[s] the only gating mechanism . . . the Court has to screen out frivolous cases and to ensure that its limited resources are used wisely." *Id.*

> presentations made by financial advisors who ultimately opine on the fairness of the transaction from a financial point of view. It is all too common for a plaintiff to identify and obtain supplemental disclosure of a laundry list of minutiae in a financial advisor's board presentation that does not appear in the summary of the advisor's analysis in the proxy materials—summaries that commonly run ten or more single-spaced pages in the first instance. Given that the newly added pieces of information were, by definition, missing from the original proxy, it is not difficult for an advocate to make a superficially persuasive argument that it is better for stockholders to have more information rather than less.

Trulia, 129 A.3d at 894. Shortly after receiving these documents, Plaintiffs withdrew the threat of an injunction, consenting to an MOU that altered no deal terms but required Defendants to make the Supplemental Disclosures. Stipulation at 2. Plaintiffs filed no motions to expedite or for a preliminary injunction. Indeed, Plaintiffs filed more extensive briefing in support of the Settlement than they ever filed in opposition to the Acquisition.

Plaintiffs do not suggest the Acquisition closed on terms substantively different from the day they filed the Complaint. The Supplemental Disclosures dissuaded few, if any, stockholders: approximately ***87%*** of Pharmacyclic's outstanding shares were validly tendered into the transaction. *See* Pharmacyclics, Inc., Form 8-K (May 26, 2015).

Meanwhile, Plaintiffs began to "go through the motions" of confirmatory discovery.[8] At some undisclosed point, Defendants produced an undetermined number of undescribed "additional documents." Stipulation at 3. Plaintiffs then deposed two third-party financial advisors on October 9, 2015 and December 3, 2015, respectively, months after the Acquisition was complete. Wissbroecker Decl. ¶¶ 26, 27. The record reflects no discovery of information personal to the individual Defendants, such as collection of individual emails or Defendant depositions.

Plaintiffs moved for preliminary approval of the Settlement on January 26, 2016,

[8] *See Trulia*, 129 A.3d at n.24 ("'Confirmatory' discovery is discovery taken after an agreement-in-principle to settle a case has been reached. Theoretically, it is an opportunity for plaintiffs' counsel to 'confirm' that the settlement terms are reasonable. . . . In reality, given that plaintiffs' counsel already have resigned themselves to settle on certain terms, confirmatory discovery rarely leads to a renunciation of the proposed settlement and, instead, engenders activity more reflective of 'going through the motions.'").

maintaining that the Supplemental Disclosures ranged over nine different topics. Based on this representation, the Court adopted this description of the Supplemental Disclosures, which Plaintiffs then included in both the Notice and on an informational website.[9]

On or about April 15, 2016, the parties revealed that Plaintiffs oversold the breadth of their achievement: of the initial nine categories, the Supplemental Disclosures addressed only the last three. The Court delayed the approval hearing and required the parties to provide corrective notice. *See* Am. Or. Prelim. Approving Settlement and Providing for Notice, at 1 (Apr. 18, 2016). However, ***the parties left the inaccurate description of the Supplemental Disclosures on the homepage of the Settlement Website.***[10] Thus, any class member visiting the Settlement Website and not confirming it against the underlying documents would receive inaccurate information.

IV. THE SETTLEMENT TRADES IMMATERIAL DISCLOSURES FOR A BROAD RELEASE OF CLAIMS

"The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement." *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 129 (2008), *quoting* 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002). 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*, 168 Cal. App. 4th at 129. While the Court has the discretion to balance the non-exclusive list of factors set forth in *Wershba v. Apple Comp.*, 91 Cal. App. 4th 224 (2001), "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in

[9] *See* http://www.pharmacyclicsshareholderlitigation.com/ (the "Settlement Website").

[10] As of June 15, 2016, the homepage of the Settlement Website continued to assert that "[a]s a direct result of the prosecution of the Actions and the extensive ongoing negotiations between the Settling Parties . . . Pharmacyclics has made additional disclosures concerning the Acquisition" regarding nine categories of disclosures. As late as May 19, 2016, the homepage continued to link to the defunct Notice; sometime between May 19, 2016 and June 15, 2016, the homepage was updated to link to the Amended Notice. A printout of the homepage of the settlement website taken on May 19, 2016 and June 15, 2016 is attached to the Brownstone Decl. as Exhibits A-C.

settlement." *Kullar*, 168 Cal. App. 4th at 130. This analysis resembles the Delaware Court of Chancery's weighing of what shareholders receive in a settlement against what they release to Defendants. *See Trulia*, 129 A.3d at 890-91. In this case, the Settlement exchanges immaterial disclosures for a broad release of claims, some of which were never prosecuted by Plaintiffs.

A. The Supplemental Disclosures Provided No Value to the Class

The Settlement offers no redress for Plaintiffs' initial allegations: the only consideration to stockholders is the Supplemental Disclosures, whose value hinges on their materiality. Delaware directors need only "disclose fully and fairly all ***material information*** within the board's control" when they solicit stockholder action. *Trulia*, 129 A.3d at 899 (emphasis added), *quoting Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). 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*, 129 A.3d at 899. Omitted facts are not material simply because they might be helpful. *See David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *6 (Del. Ch. June 27, 2008).

Defendants do not concede that the Supplemental Disclosures are material, and Plaintiffs offer few specific arguments in this regard. *See* Stipulation at 3-4; Pls.' Mem. at 4-7. This leaves the Court as "essentially a forensic examiner of proxy materials so that it can play devil's advocate in probing the value of the 'get' for stockholders in a proposed disclosure settlement." *Trulia*, 129 A.3d at 894. Closer examination, however, demonstrates that the disclosures amount to "laundry list of minutiae" found to be immaterial under Delaware law. *Trulia*, 129 A.3d at 894.

Data Underlying Management's Financial Projections. Plaintiffs describe the Supplemental Disclosures as "providing stockholders with previously undisclosed ***valuation information***. . . ." concerning management's financial projections, Pls. Mem. at 4 (emphasis added), but the Recommendation Statement already included the management projections on which the Company's financial advisors based their fairness opinions. *See* Rec. State. at 24-25. These values never changed; instead, the Supplemental Disclosures provided information that fed into the projections, such as (i) management reliance on the *Hayes* study; (ii) certain estimates of the probability of clinical success; and (iii) the means by which the Company calculated the division of

revenue between U.S. and outside-the-U.S. sales. *See* Supp. Discl. at 24.

Delaware courts have found similar disclosures regarding underlying minutiae unlikely to be material. *See, e.g., In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *11 (Del. Ch. Feb. 29, 2012) ("management's well-informed projections as to the viability of its drug pipeline" with regard to cancer drug sufficient disclosure; "assumptions underlying these projections" unlikely to be material). Defendant Directors were not obliged to present an "avalanche of trivial information . . . hardly conducive to informed decision-making," particularly where the resulting projections remained unchanged. *Id*. (internal quotation omitted). Plaintiffs' Delaware authority is not to the contrary, but merely stands for the proposition that Defendants must disclose actual management projections relied upon by financial advisors.[11] Plaintiffs cite no cases holding that the miscellaneous assumptions included in the Supplemental Disclosures are material, and they are not.

Additional Data Concerning the Financial Advisors' Analyses. The Supplemental Disclosures relating to the Centerview and J.P. Morgan analyses are no more material. The Recommendation Statement contained over twelve pages summarizing these analyses. Rec. State. at 25-38. The Supplemental Disclosures merely added detail regarding various inputs underlying already-disclosed assumptions. For instance, the Supplemental Disclosures did not alter Centerview's range of discount rates (9% to 11%), but merely added non-specific detail regarding Centerview's process in choosing those rates.[12] Similarly, while Plaintiffs tout the importance of the "specific multiples observed for each of the comparable companies" in the financial advisors'

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[11] *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 202-03 (Del. Ch. 2007) (defendants failed to disclose projections ultimately utilized by financial advisor); *David P. Simonetti Rollover IRA*, 2008 WL 5048692, at *10 (no disclosure claim where management did not disclosure existence of more optimistic projections not relied upon by bankers); *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010) (defendants omitted free cash flow estimates provided to financial advisor and misleadingly described WACC calculations).

[12] The Supplemental Disclosures stated that Centerview "derived [WACC] 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." Supp. Discl. at 33. Similar statements were added with regard to J.P. Morgan's analysis. *See id.* at 39.

comparable companies analyses, these are disclosures that the *Trulia* court found not to be "material or even helpful." *Compare* Pls. Mem. at 6 *with Trulia*, 129 A.3d at 906.

With regard to the advice of a financial advisor, Delaware directors need only disclose a ***fair summary*** of the advisors' work if they rely upon it in making a recommendation. See *In re Pure Resources, Inc. S'holder Litig.*, 808 A.2d 421, 449 (Del Ch. 2002) (emphasis added). This summary must include "an accurate description of the advisor's methodology and key assumptions." *Trulia*, 129 A.3d at 901. "Delaware courts have repeatedly held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion." *Micromet*, 2012 WL 681785, at *11. Nor must the summary provide sufficient data to allow the stockholders to perform their own independent valuation. *See Trulia*, 129 A.3d at 900-01.

Again, Plaintiffs' authority merely stands for the proposition that a financial advisor's valuation analyses, including the DCF and comparable companies analyses, are important valuation metrics. *See* Pls. Mem. at 5-7; Wissbroecker Decl. ¶¶ 46, 50. Plaintiffs cite no cases addressing the specific inputs contained in the Supplemental Disclosures.

B. The Broad Release Gives Up Claims Never Pursued by Plaintiffs.

In exchange for marginal disclosures, Plaintiffs agreed to a release that encompasses far more than "disclosure claims and fiduciary duty claims concerning the sale process. . . ." *Trulia*, 129 A.3d at 898 (release of such claims appropriate only if "the record shows that such claims have been investigated thoroughly"). 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. Stip. ¶ 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. The Released Claims are broader than the settlements rejected in *Trulia*, which at least carved out anti-trust claims, and by the Superior Court for the County of Los Angeles. *Trulia*, 129 A.3d at 890; *Rice* Order at 4 (holding release may not extend beyond "claims relating to the transaction that is the subject of this litigation"). Plaintiffs offer no explanation of how their limited discovery or their independent investigation addressed

causes of action that they never pursued. *See* Wissbroecker Aff. ¶¶53-62.

V. THE SETTLEMENT IS NOT FAIR, REASONABLE, OR ADEQUATE

Plaintiffs' bargain—a broad release of claims for insignificant disclosures—is unfair, unreasonable, and inadequate, and the Court should exercise its fiduciary duty to the class by rejecting it. The Settlement deserves no presumption of fairness, which should not attach where, as here, Plaintiffs abandon claims with little or no investigation (*see* Section V.B, *infra*). The record holds no depositions, documents, or other evidence allowing to the Court to substantiate Plaintiffs' conclusions regarding the strength of the claims that they *did* investigate. *Cf. Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 129, 131-32 (2008) (remanding settlement where sole support for sufficiency of counsel's investigation was "assurance that they had seen what they needed to see"). Even were the presumption warranted, and it is not, it is only *initial* presumption, and the Court should still reject a settlement if it is not independently satisfied that the settlement is reasonable. *See Clark v. Am. Resid. Servs., LLC*, 175 Cal. App. 4th 785, 799-800 (2009). Likewise, the non-exclusive list of factors in *Wershba* do not support approval.

A. Plaintiffs' Claims Are No Weaker Than They Were in March 2015.

Plaintiffs' *volte-face* with regard to the strength of their case lacks credibility. As of March 13, 2015, Plaintiffs asserted breaches of fiduciary duty independent of disclosure claims, including allegations that the Director Defendants "knowingly or recklessly" violated their fiduciary duties and "put their own interests ahead of Pharmacyclics shareholders." *See, e.g.*, Compl. ¶¶ 21, 58. Following a Settlement and with the prospect of a fee, Plaintiffs' counsel now suggests that (a) an injunction is an extraordinary remedy; (b) the Board's conduct may be shielded by the business judgment rule; (c) the Company's exculpatory provision may preclude damages for breach of the duty of care. *See* Wissbroecker Aff. ¶¶ 55-57. These factors were no less true on March 13, 2015 than they are today. The Class, Objector, and the Court can, and should, ask: ***what changed***?

Nothing, beyond the existence of a settlement and the possibility of fees. How, without production of emails or defendant depositions, could aggressive counsel be dissuaded of their earlier allegations? Why would an exculpatory provision based on the duty of care defend against ***knowing***

or reckless conduct, particularly breaches of the duty of loyalty? If these claims ever had merit, Plaintiffs fail to explain what, over the course of the litigation, convinced them their cause was lost. Yet the Class is being asked to release a broad array of rights—not merely claims actually litigated.

B. Plaintiffs' Limited Fact Investigation Does Not Support Approval.

Plaintiffs entered into the MOU following the production of an unspecified number of documents provided only for purposes of settlement. These included board minutes and financial advisor presentations, but not (it seems) Defendant emails. No Defendants testified under oath, yet Plaintiffs seek to release fiduciary duty and securities law claims dependent on a defendants' scienter or intent. Claims of intentional ***director*** malfeasance are proposed to be abandoned on the basis of documents likely drafted by their ***bankers*** (financial presentations) or ***lawyers*** (board minutes). Nor do Plaintiffs aver that they investigated any unlitigated claims subject to the release.

C. The Court Should Take No Comfort from the Silence of the Class.

Even assuming that Professor Griffith and Mr. McPherson are the only objectors, the Court should give this factor little weight. In disclosure settlements, objectors, and particularly represented objectors, are rare. *See Trulia*, 129 A.3d at 893 n.23. Where "the recovery for each class member is small, the paucity of objections may reflect apathy rather than satisfaction." 4 NEWBERG ON CLASS ACTIONS § 13:54 n.7 (5th Ed. 2016), *quoting* Manual for Complex Litigation, Fourth, § 21.62.

Misunderstandings related to the incorrect notice (and still incorrect website) may have likewise deterred objections. Class members may have believed that the Supplemental Disclosures contained far more material information, including, *inter alia*, "potential conflicts of interest of Pharmacyclics directors and executive officers in connection with the Acquisition." *See* Brownstone Decl. at Exs. A & B (Settlement Website). Such disclosures are "particularly significant or exceptional." *See In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1137 & Appx. C (information about CEO conflict particularly significant). Even after *Trulia*, rational stockholders might hesitate to object to such an "exceptional" disclosure.

D. The Skill and Experience of Counsel Should Be Given Little Weight.

Similarly, in the context of near-ubiquitous litigation brought by "lawyers who are regular players in the enterprise" of disclosure settlements, *Trulia*, 129 A.3d at 891-92, the Court should place little emphasis on the experience of counsel. On the other hand, the Court should take into account Plaintiffs' limited discovery, quick settlement, and subsequent error with regard to the Notice.

Put simply, Plaintiffs' limited efforts at litigating this case provide scant basis for confidence that the Settlement does not release potentially valuable claims. *See Trulia*, 129 A.3d at 895 (describing risk that "liability releases that accompany settlements threaten the loss of potentially valuable claims related to the transaction in question or other matters falling within the literal scope of overly broad releases"). Small though the odds may be that these claims someday prove valuable, they outweigh what the Class stands to gain from approval: nothing. The Court should reject the settlement and require Plaintiffs to either litigate or withdraw their action.

VI. PLAINTIFFS' FEE REQUEST IS EXCESSIVE

In consideration for these peppercorn disclosures, Plaintiffs now seek fees far beyond recent awards in this Court and elsewhere: $725,000 in fees and expenses, representing a 2.98 multiplier to their lodestar of $243,102.50 (the "Fee Request"). Pls. Mem. at 15. A quick settlement for immaterial disclosures should not support ***any*** fee, and certainly does not merit a substantial deviation from this Court's current practice, whether or not Defendants acquiesced.

A. Plaintiffs' Fee Request Far Exceeds Recent Awards.

Plaintiffs assert that the Fee Request is based "in part upon a knowledgeable analysis of the appropriate fee for the benefits achieved," (*see* Pls. Mem. at 15), but only cite to settlements approved before 2013. *Id*. at 13-14. To defend their lodestar multiplier, Plaintiffs similarly list authority from consumer class actions or eminent domain litigation—but not disclosure settlements.[13] The Fee Request's unusual size stands out, however, when placed in context.

[13] *See Wershba*, 91 Cal. App. 4th at 231 (consumer class action); *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 22 (2000) (consumer class action); *Glendora Cmty. Redevelopment Agency v.*

In 2016 alone, this Court has rejected a requested 1.83 multiplier in one disclosure-only case, and granted a fee award only fractionally above lodestar in another. *See* Am. Or., *Suprina v. Berkowitz,* Case No. 1-14-CV-272358, at Ex. A 3-4 (Ca. Super. Ct.—Santa Clara Cty. Feb. 29, 2016) (awarding 1.2 lodestar resulting in award of $441,792); Minute Or., *Allen v. Micrel*, No. 1-15-CV-280762, at 4 (Ca. Super. Ct.—Santa Clara Cty. May 20, 2016) (awarding $450,000 of fees in case with $433,113 lodestar). Likewise, the Superior Court for the County of San Mateo awarded only $280,460.29 and refused to apply ***any*** lodestar multiplier in a case where, as here, the supplemental disclosures provided no more than additional information on issues previously addressed. *See* Minute Or., *Saggar v. Woodward,* No. CIV 532534 (Ca. Super. Ct.—San Mateo Cty. Apr. 4, 2016). This is closer to more recent decisions in Delaware[14] and a general decline in fee awards in stockholder litigation.[15]

Plaintiffs claim that the end result of the fee negotiations "reflects both sides' experience as to what is appropriate and fair," Pls. Mem. at 15, but do not explain this deviation from recent settlements. The failure to distinguish, or even identify, similar awards from 2015 and 2016 casts doubt not only on the Fee Request, but the underlying fairness of the Settlement itself.

Demeter, 155 Cal. App. 3d 465, 467 (1984) (settlement after plaintiff abandoned eminent domain proceedings).

[14] *See, e.g.*, *In re Riverbed Techs., Inc. S'holder Litig.*, 2015 WL 5458041, at *7-8 (Del. Ch. Sept. 17, 2015) (rejecting $500,000 fee and expense request, and awarding $329,881.61 for mooted and supplemental disclosures); Or. & Fin. Judg., *In re Vitesse Semiconductor Corp. S'holders Litig*., C. A. No. 10828-VCP, at 10 (Del. Ch. September 29, 2015) (awarding $200,000); Rev. Or. & Fin. Judg., *Lax v. Actuate Corp*., C. A. No. 10467-VCP, at 11 (Del. Ch. Oct. 5, 2015) (awarding $125,000); Or. & Fin. Judg., *In re BTU Int'l, Inc. S'holders Litig.*, C. A. No. 10310-CB, at 8 (Del. Ch. Feb. 18, 2016) (awarding $325,000); Or. & Fin. Judg., *In re NPS Pharms. S'holders Litig*., C. A. No. 10553-VCN, at 9 (Del. Ch. Feb. 18, 2016) (awarding $370,000). Of course, the Delaware Court of Chancery found that post-*Trulia* settlements included plainly material disclosures.

Notably, appropriate fees in disclosure settlements do not scale with the size of the transaction. *See Sauer-Danfoss*, 65 A.3d at 1135.

[15] *See Takeover Litigation* 4 (median M&A settlement award fell from $495,000 in 2012 to $405,000 in 2015).

B. Defendants' Agreement to the Fee Request is Not Binding on the Court.

In determining a fee award, the Court has "an independent right and responsibility to review the attorney fee provision of the settlement agreement and award only so much as it determine[s] reasonable." *Garabedian v. Los Angeles Cellular Tel. Co.*, 118 Cal. App. 4th 123, 128 (2004). This right and responsibility exists even "absent evidence of fraud or collusion in settling on the amount of attorney fees. . . ." *Id.* at 129.

An agreement between Plaintiffs and Defendants (both of whom benefit from Settlement approval) does not approximate theoretical "informed private bargaining" between Plaintiffs and their clients—the Class. The Ninth Circuit has noted that "[a]n attempt to estimate the terms of the contract that ***private plaintiffs*** would have negotiated with their lawyers [] had bargaining occurred at the outset of the case strikes us as entirely illusory and speculative." *Vizcaino v. Microsoft Corp.* 290 F.3d 1043, 1049-50 (9th Cir. 2002) (internal quotation omitted, emphasis added). Even were such speculation possible, the amount *Defendants* are willing to pay would not be relevant. The Court should instead consider whether most stockholders, faced with the reality of almost every merger being subject to quickly-filed and quickly-settled litigation, would encourage the practice by agreeing to fees from the heyday of pre-*Trulia* disclosure settlements.

To the extent that the Court desires to "mimic the market," *see* Pls. Mem. at 12, that market should be informed by current fee awards, not settlements dating from 2012 and before, when the Delaware Court of Chancery remained willing "to approve disclosure settlements of marginal value and to routinely grant broad releases to defendants and six-figure fees to plaintiffs' counsel. . . ." *Trulia*, 129 A.3d at 894. Indeed, Defendants' consent to a fee award far in excess of "market" should give the Court less, not greater, confidence in the Settlement.

Thus, even if the Court finds that the Supplemental Disclosures hold sufficient value to support a settlement—and it should not—they do not justify a windfall to Plaintiffs' Counsel that overshadows other recent awards from this Court. The manifest problems with the settlement process—the failure to properly update the Settlement website; the omission of more recent authority from Plaintiffs' Memorandum—argues for a fee award far ***less*** than load star, if at all.

VII. THE COURT SHOULD AWARD FEES TO OBJECTOR'S COUNSEL

Objectors provided the first adversarial briefing in this action, which may benefit the Class by preserving their rights should any of the Released Claims someday show merit. Moreover, rejection of the outsized fee request will provide a tangible benefit to the Class and to AbbVie. As Plaintiffs point out with regard to the Settlement, "to the extent any former Pharmacyclics shareholders are now AbbVie shareholders, they share in the benefits. . . ." Pls. Mem. at 11.

The same substantial benefit doctrine Plaintiffs cite in support of their Fee Request applies to benefits enjoyed by the Class as a result of an objection. Courts in California and Delaware have even awarded fees to Objectors' counsel based on the benefit provided to the Court, even where the settlement was ultimately approved.[16] *See* Judgment, Final Or., & Decree, *Fogel v. Farmers Group, Inc.*, Case No. BC300142, at 26 (Cal. Super. Ct.—Los Angeles Cty. Dec. 21, 2011) (awarding fees to objectors' counsel based on time "devoted to providing input to the Court on the settlement").

Objector's counsel have represented Objector on a contingency basis, thus far have expended a total of 106 hours on this matter, and anticipate further work and expenses in preparation for the Settlement Hearing. *See* Brownstone Decl. ¶¶ 6-7. While Objectors' Counsel charge rates lower than some associates employed by Plaintiffs' Counsel, Objectors Counsel have nonetheless dedicated significant resources to this litigation. Objector therefore asks the Court for leave to submit papers in support of an award fees and expenses, in an amount to be determined based upon the Court's ultimate decision regarding the Settlement, Objectors' Counsels' final lodestar, and a multiplier to be set at the discretion of the Court.

VIII. CONCLUSION

For the reasons set forth above, the Court should reject the Settlement, deny Plaintiffs their Fee Request, and grant Objector's counsel an award of fees in an amount to be determined.

[16] *See also In re Riverbed Techs., Inc. S'holder Litig.*, 2015 WL 7769861, at *3 (Del. Ch. Dec. 2, 2015) (awarding fees to objector where benefit to class was "the Objector's arguments in opposition to the settlement itself"); *cf. Trulia*, 129 A.3d at 898-99 (court may appoint *amicus curiae*, with fees taxed to party, to evaluate alleged benefits of supplemental disclosures).

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